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## THE GROUP DANGERS OF RACE-BASED CONSPIRACIES

*Catherine E. Smith\**

Most lawyers, judges, and members of the legal academy are well versed in the underlying rationales for criminal conspiracy law—that punishing a conspiracy as a separate crime “protect[s] society from the dangers of concerted criminal activity” and the greater “threat to social order.”<sup>1</sup> While this “group dangers” rationale thrives in criminal conspiracy law, its absence from the interpretation of one of the most important civil rights statutes has led to the immunization of race-based intracorporate conspiracies. Designed to punish racially motivated conspirators who use the power of collective action to deprive individuals of their civil rights, 42 U.S.C. § 1985(3) has been gutted by federal courts. The outcome in *Dickerson v. Alachua County Commission*<sup>2</sup> is illustrative.

On March 3, 1994, Alachua County Corrections Center guards on Shift I (11:00 P.M. to 7:30 A.M.) discovered inmate Richard Meissner had escaped from the new \$28 million facility.<sup>3</sup> Accused of the stabbing death of a University of Florida student and the attempted murder of her roommate, Meissner’s escape was a public relations nightmare for Alachua County and the Florida Department

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1. *United States v. Feola*, 420 U.S. 671, 693–94 (1975); *see also Callanan v. United States*, 364 U.S. 587, 593 (1961) (“This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts.”).

2. 200 F.3d 761 (11th Cir. 2000).

3. *Id.* at 763. Although Meissner’s absence was discovered during Shift I (11:00 PM to 7:30 AM), the escape occurred at 9:50 PM during Shift III (3:00 PM to 11:00 PM). *Id.*

of Corrections.<sup>4</sup> Meissner was apprehended after a nation-wide manhunt, but questions on how he escaped remained.<sup>5</sup> After completion of an internal investigation, the African-American male supervisor for Shift I, Lieutenant Alfred Dickerson, and three African-American guards were demoted; none of whom were on duty at the time of the escape.<sup>6</sup> Lieutenant Steve Roberts, the white supervising officer on duty at the time of the escape who violated orders by failing to close the recreation door through which Meissner escaped, received a written reprimand.<sup>7</sup>

In 1998, a federal jury found that, in an attempt to make them the scapegoats for the prison escape, Dickerson and his subordinates were the victims of a racially-motivated conspiracy by white correctional officers in violation of § 1985(3).<sup>8</sup> However, Dickerson's vindication was short-lived; in 2000, a federal appeals court struck down the judgment against Alachua County.<sup>9</sup> In reliance upon the intracorporate conspiracy doctrine, the Eleventh Circuit Court of Appeals held that the defendants did not engage in an actionable civil conspiracy.<sup>10</sup> A doctrine from antitrust law, the intracorporate conspiracy doctrine holds that a corporation's employees cannot conspire with each other or with the corporation because the acts of agents of the corporation are attributed to the corporation itself.<sup>11</sup> The corporation, its officers, and its employees are one person—not "two or more persons" as required by § 1985(3) and most other conspiracy provisions.<sup>12</sup> The court immunized Alachua County and

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4. *See Racing Fans Warned of Jail Escapee*, MIAMI HERALD, Mar. 18, 1994, at 2BR; *see also* Patricia Walsh, *Accused Killer of Miramar Student Remains at Large*, MIAMI HERALD, Mar. 7, 1994, at 2BR.

5. *Escaped Inmate Captured Near Gainesville*, PALM BEACH POST, Mar. 31, 1994, at A20. *See Dickerson*, 200 F.3d at 763-64.

6. *Dickerson*, 200 F.3d at 764.

7. *Id.*

8. *Id.* at 764-65. Dickerson alleged that investigating officer Lieutenant Krider knew about the escape plan in advance but failed to file an incident report, and investigating officer Lieutenant King breached his supervisory responsibility by failing to fully staff the section of the jail where the recreation yard was located. *Id.* at 764.

9. *Id.* at 770.

10. *Id.* at 768 ("[T]he County jail and its employees are considered to constitute a single legal entity that cannot conspire with itself."). For further analysis of 42 U.S.C. § 1985(3) and the intracorporate conspiracy doctrine, *see generally* Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129 (2004).

11. *Dickerson*, 200 F.3d at 767; *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952) ("A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.").

12. Smith, *supra* note 10, at 145. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 12.4(c) (4th ed. 2003); *but see* MODEL PENAL CODE § 5.03 (1) (adopting a unilateral approach

the individual conspirators from egregious acts of racial discrimination because “the county jail and its employees are considered a single entity that cannot conspire with itself.”<sup>13</sup>

Despite the powerful threat that racist collective action poses to individuals and society, the majority of § 1985(3) cases are subject to dismissal because of the majority of federal circuits’ misguided application of the intracorporate conspiracy doctrine, a legal fiction that does not belong in civil rights law.

This article argues that just as federal courts recognize the group dangers of criminal conspiracies, they should recognize the special group dangers of race-based conspiracies, and hold racist corporate officers accountable for racially motivated intracorporate conspiracies under § 1985(3).<sup>14</sup> If the defendants in *Dickerson* had been found guilty of the most basic federal criminal conspiracy, such as conspiring to defraud the government, they would have been sentenced accordingly because the majority of circuits reject the application of the intracorporate conspiracy doctrine to criminal conspiracies.<sup>15</sup> The federal courts do not immunize intracorporate criminal conspiracies because “the action by an incorporated collection of individuals creates the ‘group danger’ at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose.”<sup>16</sup>

Federal courts should reject the application of the intracorporate conspiracy doctrine to § 1985(3) conspiracies and enforce the original congressional intent to combat the group dangers inherent in collective action. But more importantly, these courts should recognize what social psychologists now know about group behavior and how it fuels conspiratorial action and facilitates racially discriminatory conduct. We know far more today than the 1871 Congress knew about the dangers of collective action. Common sense no longer serves as the sole basis to treat collective action differently than individual action.

In the last five decades, social psychologists have confirmed that individuals act differently in groups than when they act alone.<sup>17</sup> Most

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by stating “[a] person is guilty of conspiracy with another person if . . . he agrees with such other person or persons.”).

13. *Dickerson*, 200 F.3d at 768.

14. See 42 U.S.C. § 1985(3) (2006).

15. Smith, *supra* note 10, at 148.

16. *United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1992) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981)). See generally Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989).

17. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1312 (2003) (“Advances in psychology over the past thirty years have demonstrated that groups cultivate a special social identity. This identity often encourages risky behavior, leads

strikingly, social psychologists now understand that group behavior is often driven primarily by the individual's continual quest for positive self-esteem.<sup>18</sup> This is true for any group-based distinction—members of group A and members of group B, runners and non-runners, lawyers and lay people, managers and employees, Republicans and Democrats.<sup>19</sup> But, as this article will explain, more salient social categories, such as race, fuel even more aggressive and more intense group dynamics. Race-based conspiracies pose unique risks to society that are different than both unilateral individual acts of racial discrimination and non-race-based conspiracies.<sup>20</sup>

This article merges social psychologists' explanation of group behavior with the social category of race<sup>21</sup>—a salient social distinction driven by historical, societal and political realities—to demonstrate the unique dangers posed by race-based conspiracies. Actors do not engage in discriminatory conduct solely because of animus against “out groups”; they discriminate, at least in part, to elevate the status of their own group and themselves. In short, racial discrimination is as much an exercise of in-group favoritism as it is an exercise of out-group derision, and both racial in-group favoritism and out-group derision lead to a number of, what I describe as, “racialized group dynamics” that increase the chance that the conspiracy will occur and reduce the likelihood that individual conspirators will withdraw. Federal courts should resurrect § 1985(3) to combat the group dangers of race-based conspiracies and reject the intracorporate conspiracy doctrine as a vehicle to immunize intracorporate race-based conspiracies.<sup>22</sup>

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individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers.”).

18. For a discussion and examples of this process, see Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. (forthcoming 2007).

19. John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 15 (Henri Tajfel ed. 1982) (“A social group can be defined as two or more individuals who share a common social identification of themselves, or which is nearly the same thing, perceive themselves to be members of the same social category.”); see also Michael A. Hogg & John C. Turner, *Intergroup Behaviour, Self-Stereotyping and the Salience of Social Categories*, 26 BRIT. J. SOC. PSYCHOL. 325, 326 (1987).

20. This statement is not meant to imply that racial discrimination by one individual against another person or groups of persons is less important than a group of people who discriminate, but that they present different challenges.

21. See Michael Omi & Harold Winant, *Racial Formations*, in RACE, CLASS AND GENDER IN THE UNITED STATES 16 (2d ed., St. Martin's Press 1992) (“The meaning of race is defined and contested throughout society, in both collective action and personal practice.”).

22. Viewing § 1985(3) as a tool to combat the dangers of race-based conspiracies could also lead to changes to § 1985(3)'s injury requirement and the expansion of § 1985(3)'s class coverage. While the statute's coverage of racially-motivated

Part I offers a brief historical summary of § 1985(3) and explains that although the group dangers rationale thrives in judicial interpretations of criminal conspiracy law, it is ignored in the realm of race-based civil conspiracy law.<sup>23</sup> Part A explains that Congress enacted the conspiratorial provision of the Ku Klux Klan Act of 1871 (now § 1985(3)) to punish individuals who engage in collective action to deprive blacks and Republicans of their federal rights. The 42nd Congress acted with specific experience and knowledge of the special dangers that conspiracies posed; indeed, the group dangers rationale had already begun to take root in criminal conspiracy law at that time.<sup>24</sup> Section B briefly explains criminal conspiracy law and the prevalence of the group dangers rationale in federal and state criminal conspiracy laws. The section concludes by examining § 1985(3)'s prima facie elements and demonstrating that in its thirty years of jurisprudential development (after 100 years of dormancy) courts have ignored the unique dangers of race-based conspiracies and applied the intracorporate conspiracy doctrine, which completely flies in the face of § 1985(3)'s purpose.<sup>25</sup>

Part II demonstrates why this law is necessary and is a powerful tool to combat this unique form of racial discrimination. This section relies upon current social psychology literature and group behavior research. It explains social identity theory and the social construction of race. These theories and studies have never been paired to analyze these kinds of conspiracies. When paired together, these two complex forces result in what I call "racial identification."<sup>26</sup> Part II is divided into two sections. Part A explains social identity, the cognitive process that makes group dynamics possible—how group behavior is influenced by individuals who use group membership as a way to bolster their own self-image. It is the constant quest for a positive self-image by individuals via what social psychologists call "social identification" that generates group dynamics.<sup>27</sup> Part B explains the power of race as a social construct that invokes in individuals a multitude of ideas, beliefs and racial manifestations that make the social identification process easier and more efficient. When social identity and the social construction of race intersect, individuals engage in racial identification. In other words, racial identification

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conspiracies is well settled, coverage of conspiracies against other groups, like gays and lesbians or persons with disabilities, is not. *See generally* Devin S. Schindler, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88 (1985).

23. *See infra* notes 28–68 and accompanying text.

24. *See infra* notes 28–37 and accompanying text.

25. *See infra* notes 42–48 and accompanying text.

26. *See infra* notes 107–121 and accompanying text.

27. *See infra* notes 79–90 and accompanying text.

occurs when an individual cognitively places himself in a racial in-group and others in a racial out-group, immediately tapping into a “constellation of manifestations” that accompanies the social construction of race.

Part III offers a unique way to view racial discrimination, not simply as out-group derision, but also as in-group favoritism which is characterized by three racialized group dynamics—racial loyalty, racial persuasion, and racial conformity—that pose unique dangers to society that do not exist in unilateral acts of discrimination and in non-race-based conspiracies.<sup>28</sup> Again, I divide this part into two sections. Section A offers a definition and theoretical explanation of how these racialized dynamics operate and supports my theory with both social psychology studies and real-life events. In short, racial identifiers are loyal to members of their race, persuaded by members of their race, and attempt to conform to a (perceived) racialized group norm. Section B explains that racial identification occurs in every race-based conspiracy. The racial identification and resulting racialized group dynamics of race-based conspiracies pose special dangers to society and individuals because racial loyalty, racial persuasion, and racial conformity create a particularly virulent form of racist acts. It increases the chances that a race-based conspiracy will form and that the objectives of a racially motivated conspiracy will be achieved. Furthermore, racial identification also reduces the chances that a conspirator will withdraw from the conspiracy.<sup>29</sup> The social science literature undermines the theory behind the immunity of intracorporate conspiracies. To support this article’s contention that the intracorporate conspiracy doctrine has no relevance to § 1985(3) jurisprudence, this section concludes with a theoretical description of how racial loyalty, racial conformity, and racial persuasion increased the likelihood that the object of the racially motivated conspiracy would occur in *Dickerson v. Alachua County Commission*.<sup>30</sup>

## I. THE GROUP DANGERS RATIONALE AND SECTION 1985(3)

### A. *The 1871 Congress Charts a Course*

The 1871 Congress, concerned at least in part with the dangers of collective action, enacted the race-based civil conspiratorial provision that became § 1985(3).<sup>31</sup> This section will briefly explain the violent history that led to the enactment of the Civil Rights Act of

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28. See *infra* notes 122–144 and accompanying text.

29. See *infra* notes 145–151 and accompanying text.

30. See *infra* notes 152–175 and accompanying text.

31. See Smith, *supra* note 10, at 161-168.

1871 and how the group dangers rationale from criminal conspiracy law influenced the 1871 Congress' inclusion of the race-based civil conspiracy provision that became § 1985(3).

Despite the mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments, newly freed slaves faced a violent response to Reconstruction shortly after the end of the Civil War. Blacks and Republicans in the Southern states were terrorized by the Ku Klux Klan and their sympathizers.<sup>32</sup> White Southerners turned to collective action to quash any semblance of black emancipation, and local law enforcement and state governments were active participants in the countless conspiracies, chose to ignore them, or were incapable of stopping them.<sup>33</sup> There were conspiracies within and between Klan dens, and widespread collusion among Klan members and their sympathizers in law enforcement, the courts, and other institutions.<sup>34</sup> With no end in sight, President Grant asked the 42nd Congress to pass legislation to stop the pandemic violence in the Southern states.<sup>35</sup> In response, Congress enacted the Civil Rights Act of 1871, also known as "The Ku Klux Klan Act."<sup>36</sup> The Act, a comprehensive legislative scheme to eradicate racial and political violence that terrorized blacks and Republicans, included both a criminal conspiratorial provision and several civil conspiratorial provisions, one of which ultimately became § 1985(3).<sup>37</sup> The civil conspiratorial provision that became § 1985(3) prohibited conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."<sup>38</sup>

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32. See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 983-4 (2002).

33. See *Monroe v. Pape*, 365 U.S. 167, 174 (1961); Smith, *supra* note 10, at 163-64; JEAN EDWARD SMITH, GRANT 544-45 (Simon & Schuster 2001).

34. See Smith, *supra* note 10, at 164.

35. See *Monroe*, 365 U.S. at 172-73; WILLIAM S. MCFEELY, GRANT 369 (Easton Press 1981).

36. *Monroe*, 365 U.S. at 172-73; MCFEELY, *supra* note 35, at 369 ("With this somewhat tepid but indispensable call for action, Congress on April 20 passed a strong measure, called the Ku Klux Klan Act, designed to enforce the Fourteenth Amendment."); SMITH, *supra* note 33, at 545 ("Known as the Ku Klux Klan bill, the legislation represented an unprecedented peacetime extension of national authority.").

37. See Smith, *supra* note 10, at 137-40. Congress also attempted to eradicate the influence of the Ku Klux Klan and its allies in government by authorizing criminal and civil remedies against persons acting under color of law to deprive a person of the "rights, privileges, or immunities secured by the Constitution." *Monroe*, 365 U.S. at 170.

38. 42 U.S.C. § 1985(3) (2006); see also *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370-71 (1979). Section 2 of the 1871 Act's criminal counterpart was struck down as unconstitutional and eventually repealed by Congress. See *United States v. Harris*, 106 U.S. 629 (1882).



The use of conspiracy provisions to combat the dangers of collective activity was not novel. As early as 1844, courts had articulated the special dangers of conspiracies as an underpinning of criminal conspiracy law in the United States. For example, in *State v. Burnham*, in which defendants issued fraudulent insurance policies in an attempt to influence the election of an insurance company's board of directors,<sup>39</sup> the court stated:

Combinations against law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design, is not easy, and to detect and punish them is often extremely difficult. . . . An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression.<sup>40</sup>

The Congressional debates on the Civil Rights Act of 1871 and the civil conspiratorial provisions of the Act are replete with similar language. One of the sponsors of the 1871 Act stated that the civil conspiratorial provision was to "provide for the punishment of any combination or conspiracy to deprive a citizen . . . of the laws of the United States and of the Constitution thereof."<sup>41</sup> Yet oddly enough, while the group dangers rationale has developed into a tenacious theme in criminal conspiracy law, the rationale has disappeared from § 1985(3)'s legal landscape.

*B. The Group Dangers Rationale Proliferates in Criminal Conspiracy Law and Disappears from § 1985(3) Law*

The group dangers rationale is the primary support for criminal conspiracy law in the United States today. To meet the elements of a criminal conspiracy the prosecution must prove: (1) an agreement between two or more persons to commit the crime; (2) the individual voluntarily and intentionally joined in the agreement; (3) at the time joining the agreement, the individual knew the purpose of the agreement; and (4) that while the agreement was in effect, one or more of the persons did an overt act to carry out the agreement.<sup>42</sup> Federal criminal law and the majority of state criminal laws punish a

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39. 15 N.H. 396, 400 (1844).

40. *Id.* at 401-02.

41. CONG. GLOBE, 42d Cong., 1st Sess. 382 (1871) (statement of Rep. Shellabarger).

42. See *United States v. Kern*, 12 F.3d 122, 125 (8th Cir. 1993); LAFAVE, *supra* note 12, § 12.2.

conspiracy as a crime, separate and apart from the criminal objective of the conspiracy.<sup>43</sup> In other words, the underlying crime need not be completed for the conspirators to be convicted of conspiracy.<sup>44</sup> The essence of the crime of conspiracy is the agreement.<sup>45</sup>

Most courts rely on the “special dangers” rationale in support of the crime of conspiracy.<sup>46</sup> “The heart of this rationale lies in the fact—or at least the assumption—that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.”<sup>47</sup> Two or more individuals who form a

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43. See *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) [hereinafter *Developments*]; Kathleen F. Brickey, *White Collar Crime: Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 443 (1983); LAFAVE, *supra* note 12, § 12.1, at 620 (“The crime of conspiracy . . . exists in virtually all jurisdictions.”). There is some movement away from the traditional features of conspiracy law. See generally Katyal, *supra* note 17.

44. For example, two or more persons who agree to rob a bank may be convicted of the crime of conspiracy, even if they do not commit the robbery. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (explaining that the essence of a conspiracy is “an agreement to commit an unlawful act” which is a “distinct evil” that “may . . . be punished whether or not the substantive crime ensues”) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975) and *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

45. Brickey, *supra* note 43, at 431 (“As the essence of conspiracy is an agreement, conspiracy requires a plurality of actors.”).

46. See *United States v. Feola*, 420 U.S. 671, 693 (1975) (discussing the value of protecting society from “the dangers of concerted criminal activity”); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (stating that “[f]or two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character.”); Brickey, *supra* note 43, at 439 (“[T]he foundation of conspiracy doctrine is ‘group danger.’ Conspiracy is punishable because of the belief that when an unlawful enterprise is undertaken by a group of individuals, the joint nature of the undertaking increases the risk of successful achievement of the unlawful object of the agreement.”). The intervention rationale—that law enforcement must have the flexibility to stop the conspiracy in its tracks before the actual objective is achieved—is not as prevalent as the group dangers rationale. See Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1179–82 (1982).

47. *Developments*, *supra* note 43, at 923–24. In *Callanan v. United States* the Court explained the “special dangers” of conspiracies:

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy

“partnership in crime” pose a greater threat to the public than an individual acting alone.<sup>48</sup> Jurists and commentators argue that collective action both increases the probability that the goal of the conspiracy will be achieved and reduces the chance that a criminal actor will change his mind once he enters into an agreement with his associates to commit a crime.<sup>49</sup> The individual conspirators are less likely to back out of the plan because of the encouragement or fear of co-conspirators, or because of a sense of loyalty to the group.<sup>50</sup> In addition, conspirators may accumulate resources and divide the labor, making it easier to facilitate their crimes.<sup>51</sup> While these are well settled notions in criminal law, these group dangers principles are absent from the federal case law of § 1985(3).<sup>52</sup>

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generates is not confined to the substantive offense which is the immediate aim of the enterprise.

364 U.S. 587, 593–94 (1961); see also *Jimenez Recio*, 537 U.S. at 274.

48. *Krulwitch v. United States*, 336 U.S. 440, 448–49 (1948) (Jackson, J., concurring) (“[T]o unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.”).

49. The criminal conspiracy is considered more likely to occur because it “decreases the probability that the individuals involved will depart from their path of criminality.” *Jimenez Recio*, 537 U.S. at 275 (quoting *Callanan*, 364 U.S. at 593–94, citations omitted); see also *Developments*, *supra* note 43, at 923–25.

50. *Developments*, *supra* note 43, at 924 (“[T]he encouragement and moral support of the group strengthens the perseverance of each member.”); Thomas J. Leach, *Civil Conspiracy: What’s the Use?*, 54 U. MIAMI L. REV. 1, 28 (1999) (“[A]s a result of fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her criminal plans than if she were acting alone.”) (quoting JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 394–95 (2d ed. 1995)).

51. *Callanan*, 364 U.S. at 593–94. Both the early intervention and “special dangers” rationales that support recognizing conspiracy as a separate crime have generated significant debate and criticism. See *Krulwitch*, 336 U.S. at 445–46 (Jackson, J., concurring) (disparaging the “growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself . . . constitut[ing] a serious threat to fairness in our administration of justice”); *Developments*, *supra* note 43, at 922 (“[T]he flexibility and formlessness—both procedural and substantive—which account for the effectiveness of conspiracy as a tool of enforcement also create a serious danger of unfairness to the defendant, and have consequently evoked widespread criticism from judicial and law-review commentators.”).

52. The group dangers rationale in conspiracy law is not without its critics. See *Katyal*, *supra* note 17, at 1309 (“For more than 50 years, these questions have prompted a series of critiques of conspiracy law. The major scholarly articles have alleged the doctrine ‘unnecessary’ and stated that the ‘assumed dangers from conspiracy . . . have never been verified empirically.’ And such views have successfully permeated the criminal law.”) (quoting Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973) and Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959)). Most of the criticisms of criminal conspiracy law do not apply to a § 1985(3) conspiracy because § 1985(3) requires proof of an injury. See *Griffin v. Breckenridge*, 403 U.S. 88, 102–03 (1971).

C. *Federal Courts Ignore the Group Dangers Rationale under § 1985(3) and Embrace the Intracorporate Conspiracy Doctrine*

In 1971, after more than 100 years of dormancy as a result of judicial hostility to civil rights laws, the Supreme Court delineated the *prima facie* elements of a §1985(3) case.<sup>53</sup> The *Griffin* Court required that the plaintiff prove: (1) a conspiracy of two or more persons; (2) who are motivated by some racial or class-based, invidiously discriminatory animus; (3) to deprive the plaintiff of the equal enjoyment of rights secured by the law to all; (4) which results in injury to the plaintiff's person, property or a deprivation of a right or privilege of citizenship;<sup>54</sup> and (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy.<sup>55</sup>

Although *Griffin* revived the race-based civil conspiracy provision, it offered no group dangers rationale as reason to punish race-based conspiracies.<sup>56</sup> This oversight is replicated in the majority of federal opinions today and sets the foundation for the misguided application of the intracorporate conspiracy doctrine to § 1985(3) cases. Within a year after the *Griffin* Court resurrected § 1985(3), the federal courts struck another staggering blow by applying the intracorporate conspiracy doctrine to § 1985(3) cases.<sup>57</sup> The intracorporate conspiracy doctrine, a legal fiction developed in antitrust law, shields corporations from liability for internal conspiracies. Under the doctrine, a corporation's employees cannot conspire with each other or with the corporation because the acts of the agents of the corporation are attributed to the corporation itself.<sup>58</sup> This legal fiction views the corporation, its officers and its employees as one person, and therefore, such internal agreements do not meet

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53. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993); *Griffin*, 403 U.S. at 102-03. For an intriguing analysis of case outcomes resulting from political power struggles on the Supreme Court, see Melissa Sullivan, *The Supreme Court: Competing for Control of the Juvenile Death Penalty* (May 18, 2006) (unpublished student article, University of Denver, Sturm College of Law) (on file with author).

54. *Griffin*, 403 U.S. at 102-03. To prove a conspiracy between two or more persons, the plaintiff must show that the conspirators planned to inflict injury on the plaintiff, who, in fact, suffered injury to his or her person, property or a right granted to a United States citizen. See *Green v. Benden*, 281 F.3d 661, 665-66 (7th Cir. 2002).

55. *Bray*, 506 U.S. at 267; *Green*, 281 F.3d at 665.

56. See generally *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

57. See *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (applying the intracorporate conspiracy doctrine to § 1985(3) cases); see also *Smith*, *supra* note 10, at 146-48.

58. *Dickerson v. Alachua County Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952); *Smith*, *supra* note 10, at 145.

the “two or more persons” plurality requirement of conspiracy law.<sup>59</sup> A majority of federal circuits apply the intracorporate conspiracy doctrine to § 1985(3) conspiracies, despite the very different objectives of antitrust and civil rights laws.<sup>60</sup>

The primary objective of antitrust law is to foster competition in the marketplace by ensuring independent economic decisions by corporations.<sup>61</sup> When two or more corporations agree (or conspire) to unreasonably restrain trade, they are subject to liability under § 1 of the Sherman Act because they “reduce[] the diverse directions in which economic power is aimed [and] suddenly increase[] the economic power moving in one . . . direction.”<sup>62</sup> However, intracorporate agreements do not restrain trade, but foster competition because they allow the corporate employees, agents, and officers the flexibility to strategize and coordinate efforts to compete in the marketplace against other corporations.<sup>63</sup> “[I]t is perfectly plain that an internal ‘agreement’ to implement a single, unitary firm’s policies does not raise the antitrust dangers that § 1 was designed to police.”<sup>64</sup> Therefore, applying the intracorporate conspiracy doctrine to immunize intracorporate agreements from antitrust liability makes sense.<sup>65</sup> The conversations and strategies of corporate officers within a single corporation do not hamper competition in the marketplace, but foster it as long as it does not escalate into monopolistic conduct prohibited under other provisions of the Sherman Act.<sup>66</sup> However, this line of reasoning is not

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59. *Dickerson*, 200 F.3d at 767; *Nelson Radio & Supply Co.*, 200 F.2d at 914; *Smith*, *supra* note 10, at 148–50.

60. *See Smith*, *supra* note 10, at 132 & n.14 (“The majority of federal courts have extended the intracorporate conspiracy doctrine to 1985(3), essentially immunizing corporate and government entities from § 1985(3) liability for internal agreements to engage in racial discrimination.”); Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 27 (1996).

61. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4–5 (1958); *Smith*, *supra* note 10, at 152.

62. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *see also* 15 U.S.C. § 1 (2000 & Supp. 2005); James M. Steinberg, *The Long Awaited Death Knell of the Intraenterprise Doctrine*, 30 VILL. L. REV. 521, 525–27 (1985).

63. *See Steinberg*, *supra* note 62, at 561 (discussing how the majority’s holding in *Copperweld* “provide[d] the advantage of furthering the Sherman Act’s procompetitive goal while fitting contemporary modes of business organizations within its unilateral/concerted conduct distinction.”).

64. *Copperweld Corp.*, 467 U.S. at 769.

65. *See id.*; *Smith*, *supra* note 10, at 158–60.

66. *See Copperweld Corp.*, 467 U.S. at 768–69. For an argument that some race-based conduct of the majority amounts to monopolistic conduct, *see Michelle Adams, Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002).

applicable when the intracorporate agreements shift to conversations or strategies to violate criminal laws or civil rights laws.<sup>67</sup>

As for criminal conspiracy law, federal courts have rejected the application of the intracorporate conspiracy doctrine to intracorporate criminal conspiracies. For example, in *United States v. Hartley*,<sup>68</sup> two corporate officers were indicted for engaging in a criminal conspiracy to defraud the government.<sup>69</sup> They invoked the intracorporate conspiracy doctrine in an attempt to shield themselves from liability.<sup>70</sup> The Eleventh Circuit Court of Appeals (the same circuit that decided *Dickerson*) held that the intracorporate conspiracy doctrine was not applicable to criminal conspiracy law because “the action by an incorporated collection of individuals creates the ‘group danger’ at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose.”<sup>71</sup> Inexplicably, the same circuits unwilling to immunize intracorporate criminal conspiracies allow corporate actors to harness the power of collective action to engage in racial discrimination under § 1985(3).<sup>72</sup>

The federal courts’ immunization of racially motivated internal agreements ignores the statute’s original purpose and what we now know about the dangers of collective action. Although the group dangers rationale was an underpinning of the Congressional enactment of § 1985(3), common sense no longer serves as the sole basis to do so. Today, we know far more than the 1871 Congress did about the dangers of collective action. In the last five decades, social psychologists have confirmed that individuals act differently in groups than when they act alone and that group activity presents unique dangers. And those risks are all the more dangerous when the collective activity is based on race. This knowledge creates further incentive to resurrect the powerful remedy that § 1985(3) offers.

## II. TWO COMPLEX SYSTEMS—SOCIAL IDENTITY AND THE SOCIAL CONSTRUCTION OF RACE

Absent from the case law on race-based conspiracies is an acknowledgment of the ways in which individuals behave differently when they cognitively select group membership, particularly when the selected group category is racially oriented. Part A of this section

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67. See Smith, *supra* note 10, at 160–65.

68. 678 F.2d 961 (11th Cir. 1982).

69. *Id.* at 965.

70. *Id.* at 968.

71. See *id.* at 970 (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981)).

72. See Smith, *supra* note 10, at 159–66.

explains how behavior is influenced when individuals identify along group lines. Individuals who place themselves in a group attribute negative qualities to the out-group and also attribute positive qualities and characteristics to their in-group, so that they can bolster their own self-image by virtue of membership in the group. The constant quest to garner a positive self-image ultimately leads to group dynamics. Part B of this section explains that the positive qualities and characteristics that are attributed to the in-group (or reciprocal negative characteristics attributed to the out-group) do not occur in the abstract when the category is race. In these situations, the individual engages in what I call, "racial identification," and unlike other more benign groups, an individual taps into a multitude of socially constructed racial ideas, beliefs and stereotypes.

A. *The Social Identity Theory: The Quest for Positive Self-Esteem*

American social psychologists, consistent with American culture's central theme of individualism, have traditionally focused on the individual's psychological process in an attempt to understand human interaction and collective life.<sup>73</sup> In the early 1970s, however, Henri Tajfel and other European social psychologists began to document ways in which groups influenced individuals and, in some situations, how groups possessed characteristics distinct from the characteristics of the individuals who comprised them.<sup>74</sup> Over the

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73. Don Operario & Susan T. Fiske, *Integrating Social Identity and Social Cognition: A Framework for Bridging Diverse Perspectives*, in SOCIAL IDENTITY AND SOCIAL COGNITION 26, 29 (Dominic Abrams & Michael A. Hogg eds., 1999) ("In the United States in particular, researchers with a strong individual-level orientation emerged as the vanguard of social psychology's theory building. Their ideological focus on individuals resonated with North American cultural sentiment, and the cognitive approach predominated in North American social psychology laboratories and journals.").

74. See *id.* at 29, 40–41; Kenneth L. Bettenhausen, *Five Years of Groups Research: What We Have Learned and What Needs to be Addressed*, 17 J. MGMT. 345, 347 (1991) ("Besides being a reality of social existence, groups exert an enormous influence on their members."); Katyal, *supra* note 17, at 1316 ("A wide body of psychological research over the last century reveals that people tend to act differently in groups than they do as individuals."); Adams, *supra* note 66, at 1093 ("Thus, social science scholarship has recognized that discriminatory behaviors are not just the result of personal, individual cognitive-process distortions, but are a problem of collective action."). These group behaviors have been explained by a number of different theories. See Operario & Fiske, *supra* note 73, at 40–41; See also JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 14–29 (1999).

past two decades, Social Identity Theory (SIT) has emerged as a leading explanation for intra- and inter-group dynamics.<sup>75</sup>

According to social identity theorists, every person has a “self-concept,” a cognitive structure comprised of two subsystems, the personal identity and the social identity.<sup>76</sup> The personal identity subsystem influences an individual’s personal qualities; “it usually denote[s] specific attributes of the individual feelings of competence, bodily attributes, ways of relating to others, psychological characteristics, intellectual concerns, [and] personal tastes.”<sup>77</sup> The social identity subsystem regulates an individual’s interaction and behavior in group situations.<sup>78</sup> Social identity is an individual’s awareness of group membership and reflects the values placed upon group membership.<sup>79</sup> The personal identity and social identity subsystems can operate independently or in varying degrees of cooperation.<sup>80</sup> The subjective experience the self-concept projects at

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75. SIDANIUS & PRATTO, *supra* note 74, at 19 (“This general theory has now become the most influential theory of intergroup relations among social psychologists.”); Margaret Wetherell, *Group Conflict and the Social Psychology of Racism*, in SOCIAL PSYCHOLOGY: IDENTITIES, GROUPS AND SOCIAL ISSUES 175, 216 (Margaret Wetherell ed., 1996) (“Social identity theory is perhaps the best known attempt to explain the social psychological basis of group conflict.”); Bettenhausen, *supra* note 74, at 347 (“Social identity theory . . . provides the foundation for much of the newest and more innovative research dealing with group formation and group members’ self-definitions.”); see Operario & Fiske, *supra* note 73, at 40–41 (“Social identity metatheory describes intergroup relations as the product of basic social cognition principles operating with the context of intergroup dynamics.”); see also Adams, *supra* note 66, at 1100 (“Social identity theory has had a tremendous impact on the way in which social psychologists evaluate intergroup relations, and it has strongly influenced the recent resurgence of interest and research in group processes in a variety of areas.”).

76. Turner, *supra* note 19, at 18–19.

77. *Id.* at 18; Hedy Brown, *Themes in Experimental Research on Groups from the 1930s to the 1990s*, in SOCIAL PSYCHOLOGY: IDENTITIES, GROUPS AND SOCIAL ISSUES 9, 33 (Margaret Wetherell ed., 1996) (“In many situations we react to others in terms of our identity as a unique individual with a particular personality, known likes and dislikes, skills and talents, attitudes and opinions. This definition of ourselves in terms of our personal characteristics can continue into group situation and may be particularly salient when we strongly disagree with a group.”).

78. Turner, *supra* note 19, at 15.

79. *Id.* at 18 (“This concept of social identity is descended from Tajfel’s definition of it as ‘the individual’s knowledge that he belongs to certain social groups together with some emotional and value significance to him of the group membership.’”).

80. In some situations a person’s self-image may be completely based on his or her personal identity, at some times it may be completely based on his or her social identity, and at other times the self-image is based on some configuration that includes both personal identity and social identity. Therefore, when two or more individuals interact, interpersonal or inter-group behavior has two theoretical extremes. At one extreme, intra- and inter-group behavior is determined by the interpersonal relationships of each individual, without being affected by the social



any given time is the individual's self-image.<sup>81</sup> Furthermore, these subsystems and cognitive processes do not operate in isolation but within the context of the individual's social structures and the groups with which the individual identifies.<sup>82</sup>

The central premise of social identity theory is that group behavior is influenced by individuals who seek to use group membership as a way to bolster their own self-image. "In this process, a person's self-esteem becomes linked to the group's successes and failures."<sup>83</sup> Mere membership in a group does not equate to social identification; social identities are cognitively selected by the individual.<sup>84</sup> Unfortunately, social psychologists do not know at what point a person's social identity is "switched on," but once operational it assesses the individual's environment and social

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groups to which he or she belongs. *See id.* at 19; Adams, *supra* note 66, at 1100 ("Tajfel did not argue that an individual's social identity forms the totality of a person's self-conception; rather, an individual's self-conception is complex and multifaceted."). At the opposite extreme, intra- and inter-group behavior is determined by an individual's memberships in many social groups or categories, without being affected by interpersonal relationships. Turner, *supra* note 19, at 20; Brown, *supra* note 77, at 33 (explaining that each person has a personal identity, but "in groups there are also new identity possibilities—we can perceive ourselves as a member of a social group and as someone with the characteristics of that group."); Marilyn Brewer, *The Social Self: On Being the Same and Different at the Same Time*, in INTERGROUP RELATIONS, 245, 246 (Michael A. Hogg & Dominic Abrams eds., 2001) ("Social identity entails 'a shift towards the perception of self as an interchangeable exemplar of some social category and away from the perception of self as a unique person.'") (quoting TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY (1987)).

81. Turner, *supra* note 19, at 18–19 ("By analogy with an orchestra we can think of its musical technology and basic instrumentation as the cognitive structures and the actual sounds it makes as the varying self-image."); Brewer, *supra* note 80, at 246 ("Personal identity is the individuated self—those characteristics that differentiate one individual from others within a given social context. Social identities are categorizations of the self into more inclusive social units that depersonalize the self-concept, where I becomes we.") (emphasis omitted).

82. Operario & Fiske, *supra* note 73, at 40–41; Michael Hogg, *Social Identity and Misuse of Power*, 70 BROOK. L. REV. 1239, 1241–1243 (2005).

83. Katyal, *supra* note 17, at 1316–17.

84. Brewer, *supra* note 80, at 247.

Social identity should not be equated with membership in a group or social category. Membership may be voluntary or imposed, but social identities are chosen. Individuals may recognize that they belong to any number of social groups without adopting those classifications as social identities. Social identities are selected from the various bases for self-categorization available to an individual at a particular time. And specific social identities may be activated at some times and not at others.

*Id.*

context and “makes group behavior possible,” including powerful group dynamics.<sup>85</sup>

### 1. Social Categorization and Comparisons

The social identity process begins with social categorization, in which the individual “perceive[s], define[s] or recognize[s]” himself and others “as members of distinct social groups.”<sup>86</sup> The individual chooses specific “social categories” with which he identifies and places himself, and those with a similar identity, into the in-group. Those who do not fall in the social category are placed into the out-group.<sup>87</sup> Through social categorization, an individual forms his social identity.<sup>88</sup> Social categorizations are not one-dimensional or static, but multi-dimensional—they shift depending on the social and environmental context and situation.<sup>89</sup>

Once social categorization occurs, the individual then engages in “social comparison” in which the individual compares the in-group and out-group.<sup>90</sup> Through social comparison, the individual seeks to attain a positive self-evaluation from his membership in the in-group, in comparison with the membership of others in the out-group.<sup>91</sup> To bolster his own self-esteem and self-image, the individual attributes positive values to, or favors, the in-group.<sup>92</sup>

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85. Turner, *supra* note 19, at 21 (“Social identity is the cognitive mechanism that makes group behavior possible.”).

86. *See id.* at 17. The social categorization can be a new group that an individual has never encountered, such as team members for a pick-up basketball game or a pre-existing self-category, such as race, ethnicity or sex. *See* Michael A. Hogg & John C. Turner, *Intergroup Behaviour, Self-Stereotyping and the Salience of Social Categories*, 26 BRIT. J. SOC. PSYCHOL. 325, 326 (1987).

87. Turner, *supra* note 19, at 18 (“Social categorizations define a person by systematically including them within some, and excluding them from other related categories. They state at the same time what a person is and is not.”).

88. *Id.* at 17-18 (noting social identification is “the process of locating oneself, or another person, within a system of social categorizations, or, as a noun, to any social categorization used by a person to define him- or herself and others”); *see also id.* at 17 (“Social categorizations are discontinuous divisions of the social world into distinct classes or categories.”).

89. *See id.* at 17-18.

90. *See* Adams, *supra* note 66, at 1101 (“Social comparison was the ability to discern among groups differences that are grounded in social reality (e.g., differences in status, economic attainment or skin color).”).

91. Brown, *supra* note 77, at 34.

92. A simple, but common experience that can be explained by racial identification is the frustration or odd curiosity people experience when they cannot identify another person’s race or ethnicity. This experience inspires a host of questions by the person seeking the information about the racially ambiguous person, such as, “what is she?” or “where is he from?” This quest for information could be explained as innocent curiosity, but it can also be explained via social identity. For an individual who engages in social identification, the inability of the individual to place the person in a

In order to attain a positive self-image, the individual will identify a host of stereotypes of an exemplar in each group and attribute *all* in-group members, and himself, with more positive characteristics and *all* out-group members with more negative characteristics.<sup>93</sup> “[I]ngroup favoritism can be seen as the sine qua non of a person’s ‘social identity’ because ‘positive connotations of ingroup membership become positive connotations of self.’”<sup>94</sup> And of major significance, the salience of groups is more prevalent in situations in which there is inter-group conflict, and in large groups like race, sex and nationality.<sup>95</sup>

## 2. Group Dynamics

Social categorization and social comparison, even in the absence of societal influences, set the stage for group dynamics to occur because the individual shifts his thoughts and behavior to mirror

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racial category interferes with social categorization and social comparison. See Adams, *supra* note 66, at 1100. The person cannot place the racially ambiguous person into a group in order to engage in a social comparison that fuels his/her own positive self-image. Another example is the frustration that some people who identify with one race experience when they encounter people who identify as bi-racial or multi-ethnic, like the mixed reaction to Tiger Woods identifying himself as Cablinasian. See Jay Nordlinger, *Hunting for Tiger: Everyone Wants a Piece of Him*, NATIONAL REVIEW, Sept. 16, 2002, at 38. For an interesting discussion about Tiger Woods and race in America, see Robert Chang, *Who’s Afraid of Tiger Woods?*, 19 CHICANO-LATINO L. REV. 223 (1998). The inability of the individual to place the person in a group interferes with the individual’s social categorization. They cannot place the person in a group in order to make social comparisons that fuel their self-image. This may also explain the often negative or incredulous response by individuals and society when bi-racial or multi-ethnic individuals refuse to identify as one race or the other. See *Godby v. Montgomery County Bd. of Educ.*, 996 F. Supp. 1390, 1411-12 (M.D. Ala. 1998) (applying the intracorporate conspiracy doctrine to dismiss the § 1985(3) claim of a bi-racial girl forced to classify herself as either black or white in order to run for homecoming queen because all of the individual conspirators worked for the same corporation, the Montgomery County Board of Education).

93. Hogg, *supra* note 82, at 1241 (“People cognitively represent human groups and social categories in terms of *prototypes*—fuzzy sets of attributes that define and evaluate one category and distinguish it from other categories in a specific context.”).

94. Adams, *supra* note 66, at 1102; Hogg, *supra* note 82, at 1242 (“Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.”).

95. Turner, *supra* note 19, at 19-22 (“Research on intergroup relations . . . naturally tends to favor the Social Identification model, since its subject matter is large-scale social category memberships such as nationality, class, sex, race or religion.”); Brown, *supra* note 77, at 33-34 (“The transition from personal identity to social identity is clearest when considering large-scale groupings but Tajfel and Turner argue that it also applies in small face-to-face groups, even in the notional groups developed in the laboratory.”).

what he perceives to be in-group norms.<sup>96</sup> Studies have shown that “minimal group” identities, such as placing individuals into Group A and Group B, are sufficient to “switch-on” an individual’s social identity processes and create group dynamics.<sup>97</sup> Even individuals placed in groups in which there were no previous personal relationships engaged in in-group favoritism and out-group derision.<sup>98</sup>

Decades before the social identity theory developed, social psychologists documented how group identities spawned intense group dynamics. One famous study by Sherif and Sherif in the late 1940s and early 1950s called “The Summer Camp Experiments” highlighted such dynamics.<sup>99</sup>

A team of researchers observed dozens of white, American, middle-class boys, ages 11-12, in a two-week camp.<sup>100</sup> First, the boys were permitted to make friendships, engage in activities, and select roommates on their own.<sup>101</sup> After several days of open interaction, the boys were split into two groups that were strategically planned to cut across the pre-existing friendship patterns that had developed. The two groups were then isolated from one another and required to

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96. Brown, *supra* note 77, at 35 (“Turner calls this ‘referent informational influence’ meaning ‘influence which occurs as people adjust their sense of identity, their thoughts and their behaviors to match the collectively defined attributes of their social groups.’”).

97. Wetherell, *supra* note 75, at 210; Turner, *supra* note 19, at 23–24. In one study, participants distributed money amongst themselves. In some settings, group membership was not obvious; in other settings the membership was delineated. In settings in which participants were unaware of their group membership, they discriminated in favor of themselves and against both in-group and out-group members. However, in settings in which participants were aware of their own and other participants’ group memberships, the participants were more altruistic towards in-group members and more discriminatory towards out-group members. Turner, *supra* note 19, at 20–21; *see also* Katyal, *supra* note 17, at 1320–21; Deborah J. Terry, Michael A. Hogg & Katherine M. White, *Attitude-Behavior Relations: Social Identity and Group Membership*, in ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLES OF NORMS AND GROUP MEMBERSHIP 67, 76 (Deborah J. Terry & Michael A. Hogg eds., 1982) (“When social identity is salient, depersonalization occurs, such that a person’s feelings and actions should be guided more by group prototypes and norms than by personal factors. An opposite pattern is expected when personal identity is salient—shifts toward this end of the continuum means that personal factors should have the strongest impact on feelings and behaviors.”).

98. Wetherell, *supra* note 75, at 210.

99. *Id.* at 204–05.

100. *Id.* The boys did not know that they were a social experiment. The researchers played the roles of camp counselors, team leaders, and support staff.

101. At this stage, the boys’ friendships are viewed as interpersonal behavior, in which they pick friends based on their own personal likes and dislikes or as individuals, as opposed to members of a group. *See id.* at 208–09.

work together on different activities in their new groups.<sup>102</sup> Within a short time period, the boys' affiliations and preferences changed to their new in-group members. Each group developed "norms of behavior, jokes, secret codes, and preferred places" and team names.<sup>103</sup> Eventually, the two groups were placed in competitive situations against each other.<sup>104</sup> The researchers observed that the boys' conduct shifted into overt group hostility, discrimination and aggression toward the other group, including name calling and stereotyping; the group members over-estimated in-group successes and down played and belittled out-group achievements; and "in group loyalty, solidarity and cooperation was at its height."<sup>105</sup>

The Summer Camp Experiments demonstrated that boys who had selected friendships based on their own individual personalities completely shifted into outright hostility and a host of group dynamics in competition against their own friends, in favor of their in-group simply by virtue of group identification. Social identity theory offers an explanation for why and how these dynamics occur.<sup>106</sup>

Individuals act differently in groups, than they would as individuals, to bolster the image of their group and their own self-esteem. These young boys, in the height of competition, no longer identified their former friends as allies, but viewed them as "the other" members of the out-group. As socially identifying individuals, the boys were loyal to their in-group, persuaded by in-group members and sought to conform to a (perceived) group norm because of social categorization and the quest for positive self-esteem.<sup>107</sup> These powerful dynamics existed in a homogenous setting in which race was not a defining group characteristic.

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102. *Id.* at 205.

103. *Id.*

104. In the competitive stage, the boys fell into inter-group behavior. *Id.*

105. *Id.* at 205-07; see also Katyal, *supra* note 17, at 1320. In the final stage, the groups were required to work together on projects that both groups found desirable and that could only be achieved by both working together cooperatively, such as a problem with the camp's water supply. Wetherell, *supra* note 75, at 207. Over time, the inter-group hostility subsided, returning to something similar to the first stage, but group allegiances still remained important. *Id.*

106. The social identity process is one of the most comprehensive explanations for a wide range of dynamics that are unique to intra- and inter-group relations, such as group loyalty, group persuasion and conformity, and group polarization. See Michael A. Hogg & Dominic Abrams, *Social Identity and Social Cognition: Historical Background and Current Trends*, in *SOCIAL IDENTITY AND SOCIAL COGNITION* 1, 11 (Dominic Abrams & Michael A. Hogg eds., 1999); see also Turner, *supra* note 19, at 29-33.

107. Katyal, *supra* note 17, at 1312.

While simply placing individuals in Group A and Group B may trigger social identification, in a real world context, social, historical and political contexts have significant influence on a person's social identity.<sup>108</sup> The multitude of explicit and implicit messages the individual has received over the course of a lifetime influence the individual's perception of groups.<sup>109</sup> The person's "very conception of self changes to partake of the common attributes of an historically originated, socially determined and culturally and situationally constructed social group."<sup>110</sup> And race is a dominant social construction.<sup>111</sup>

*B. Racial Identification: The Power of Race as the Social Category*

As many social psychologists observe, it is one thing to study intergroup relations in a sterile context, and yet another to apply these concepts in the real world, to groups that are "often characterized by long-standing relations of dominance and oppression where one group has been consistently in a position to maintain power, control resources and enforce inequalities."<sup>112</sup> Race,

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108. Wetherell, *supra* note 75, at 191 ("Tajfel argued that cognitively and perceptually, group labels like 'black', 'white', 'English', 'Afro-Caribbean', 'Australian' operate like the 'A' and 'B' attached to the lines except that in the social world, values and social histories are also attached.").

109. *Id.* at 207 ("Real life intergroup situations as those characteristic of racism involve, as Sherif and Sherif were quick to acknowledge, many more layers of complexity, including power, structural inequities in access to resources, and histories of contact and dominance.").

110. Turner, *supra* note 19, at 33; Hogg, *supra* note 82, at 1242 ("Social-identity effects occur when, in a particular context, a specific social categorization becomes the salient basis for social perception and self-conception."); see Omi & Winant, *supra* note 21, at 16 (St. Martin's Press 2d ed. 1992) ("The meaning of race is defined and contested throughout society, in both collective action and personal practice."). Omi & Winant call the process by which social, economic, and political forces determine the significance of race and affect racial meaning as "racial formation." *Id.*

111. See Omi & Winant, *supra* note 21, at 14-16; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 62 (1994); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239 (1994). For race construction of whiteness, see generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997); BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* (1998); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Martha R. Mahoney, *Segregation, Whiteness and Transformation*, 143 U. PA. L. REV. 1659 (1995) [hereinafter Mahoney, *Segregation*]; Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003).

112. Wetherell, *supra* note 75, at 214.

as a dominant social construction, is not parallel to more benign categories, such as group A and group B, runner and non-runner, or book club member and nonmember. Instead, race is a fluid concept that has powerful historical, political and social associations that attach to it. Although social psychologists view the in-group versus out-group distinctions along racial lines as merely one of endless possible categories of social identification, what I will call "racial identification" is quite distinct from more run of the mill identity groupings. It occurs only when an individual cognitively places himself in a racial in-group and others in a racial out-group, drawing upon centuries of social meanings that only racial categories can invoke.

Omi and Winant explain that the term "black" emerged as an all-encompassing description of enslaved Africans.<sup>113</sup> The Africans "whose specific identity was Ibo, Yoruba, Fulani, etc., were rendered 'black' by an ideology of exploitation based on racial logic—the establishment and maintenance of a 'color line.'"<sup>114</sup> European settlers, the beneficiaries of slave labor, ultimately adopted their own identity of "white."<sup>115</sup> By the end of the seventeenth century, the terms black and white were operational as descriptions of those who would exercise power and control and those who would be overpowered and controlled.<sup>116</sup> The Thirteenth, Fourteenth, and Fifteenth Amendments and the Reconstruction statutes, like the Civil Rights Act of 1871, were the beginning efforts to alter the formal idea that blacks were inferior to whites. But the rule of law alone could not force change in the hearts and minds of most white Southerners and the ideologies and beliefs constructed around whiteness and blackness. Freedom for blacks threatened the systems upon which white Americans thrived and benefited politically,

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113. See Omi & Winant, *supra* note 21, at 17-18; see also A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 10-17 (1996) (discussing, in part, theories of why the notions of inferiority began but stating that there is no clear explanation of "whether the precept of black inferiority preceded or followed the institution of slavery"). The first Africans to arrive in Virginia in 1619 were indentured servants like many Native Americans and poor whites. *Id.* at 18.

114. Omi and Winant, *supra* note 21, at 17-18.

115. *Id.*

116. The power differential between blacks and whites was justified on what Leon Higginbotham, Jr. called "the precept of inferiority." HIGGINBOTHAM, JR., *supra* note 113, at 9. "[T]he precept that African Americans were, in some immutable way, inferior became a powerful principle around which all white colonists, even those who did not own slaves, could begin to foster a common identity and forge a united community." *Id.* at 12.

economically and psychologically.<sup>117</sup> The construction of race, even at that time, was linked to self-esteem and group status.<sup>118</sup> “Jefferson Davis had said without compunction that the ‘lower race of human beings’ that made up the ‘slave population of the South elevates every white man in our community.’”<sup>119</sup>

Color and racial distinctions have been socially constructed at both the individual and institutional level to establish and maintain hierarchical systems of power, dominance, subordination, privilege, social stratification and to justify violence.<sup>120</sup>

The social construction of race is accompanied by a “constellation of manifestations”<sup>121</sup> that are used to justify bias and discrimination in favor of, or against, individuals because of their membership in certain racial groups.<sup>122</sup> This list is not intended to be exhaustive, but itemizes merely a few ways in which race manifests itself.

117. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 209 (2001) (“Aggression and insecurities . . . were not the only psychological needs driving Southern whites after the war’s end. Freedom for slaves elevated the status of African Americans, but in the minds of Southern whites that freedom implicitly lowered the status of all whites in society.”); WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 11 (1987) (“Slavery was the linchpin of Southern self-esteem . . .”); KENNETH MILTON STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 32–33 (1956) (explaining how even Whites who did not own slaves defended it because it limited economic competition and offered “concrete evidence of membership in a superior caste”).

118. W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 700 (1962) (explaining how poor whites benefited from the “psychological wage” of whiteness because “they were given public deference and titles of courtesy because they were white”).

119. WADE, *supra* note 117, at 11.

120. Mahoney, *Segregation*, *supra* note 111, at 1659 (In America, “[t]he concept of race has no natural truth, no core content or meaning other than those meanings created in a social system of white privilege and racist domination.”); Rogers M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 710 (2003) (“I view racial classifications fundamentally as invented labels embraced by political actors to help assign different statuses to different populations, generally for purposes of economic exploitation and consolidation of group power.”).

121. Thanks to Marty Katz for this term. For an in-depth explanation of racial mechanics, including racial schema, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1506 (2005). See also Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1258-76 (1998).

122. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 192 (1954) (“The stereotype acts both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking.”); Wetherell, *supra* note 75, at 189 (noting stereotypes are “statements which denigrate out-groups or are used to glorify the in-group”).



1. Racial stereotyping, in which negative or positive beliefs are associated with different racial groups.<sup>123</sup>
2. Fostering the perception of zero-sum competition for limited resources, in which individuals view their racial group as threatened by a loss of resources because of the perceived gains of another racial group.<sup>124</sup>
3. Racial scape-goating, in which individual group members blame other racial groups for the reason why they and other members of their group have lost resources.<sup>125</sup>
4. Fostering racial superiority/inferiority complexes, in which, based on group membership alone, an individual perceives self and others within his or her racial group as superior to members of other groups.<sup>126</sup>
5. Racial entitlement, in which by virtue of membership in a racial group, an individual believes that he or she is entitled to certain benefits and/or privileges in society.<sup>127</sup>

Racial identification is a common occurrence. For example, most blacks have experienced comments directed at them by white speakers (and other races) like, “you don’t act black.”<sup>128</sup> In that moment, a white speaker racially identifies with white people and has placed himself within the category of white people, and is making a social comparison based on a host of socially constructed racial stereotypes associated with members of the out-group, black people. The failure of the black person to act a certain way interferes with the socially-constructed racial stereotypes that the white person has in his mind about the way that black people act and the way that white people act.<sup>129</sup> And more often than not, the white person makes

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123. ALLPORT, *supra* note 122, at 191 (“Whether favorable or unfavorable, a stereotype is an exaggerated belief associated with a category. Its function is to justify (rationalize) our conduct in relation to that category . . . . A stereotype is not identical with a category; it is rather a fixed idea that accompanies the category.”) (emphasis omitted); Wetherell, *supra* note 75, at 189 (“A stereotype associates traits or attributes with groups of people.”). For a laundry list of stereotypes of different groups, see *id.* at 192–202.

124. Wetherell, *supra* note 75, at 192; see SIDANIUS & PRATTO, *supra* note 74, at 18.

125. See ALLPORT, *supra* note 122, at 244 (explaining the origins and meaning of the term “scapegoat”).

126. See A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7–67 (1996). See generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1701 (1993).

127. See generally Harris, *supra* note 126.

128. A similar example is: “You are very articulate.” For additional examples, see Smith, *supra* note 18.

129. See Richard Morin, *The Price of Acting White*, WASH. POST, June 5, 2005, at B5.

the statement as if it is a compliment to the black person. This implies that the individual is making negative associations with black people, as the out-group (i.e., blacks do not speak proper English, blacks do not dress professionally, blacks are not well educated) and positive associations with white people and self, as the in-group (whites speak proper English, whites dress professionally, whites are well educated), thereby serving to serve to bolster the white self-image and self-esteem.<sup>130</sup>

Unlike social identification on the basis of more benign groups, racial identification arms identifiers with a unique “constellation of manifestations” that exacerbate in-group favoritism and out-group derision. Through the process of racial identification, racialized group dynamics are generated as explained in the following section.

### III. RACIALIZED GROUP DYNAMICS CREATE SPECIAL GROUP DANGERS

This section will explain the racialized group dynamics generated by racial identification—racial loyalty, racial persuasion and racial conformity. As detailed in Section II, when racial identification occurs, the individual automatically taps into a constellation of manifestations that accompany notions of race. These manifestations spark the individual’s social comparisons and bolster his perceptions of the racial in-group and the racial out-group.

#### A. *Racial Identification*

When racial identification—the convergence of social identity and racial construction—occurs, the individual is loyal to his racial group and its members, is persuaded by his racial group’s (perceived) values and beliefs, and conforms his behavior to an identifiable racial group norm.<sup>131</sup> While these dynamics may occur even if the individual is not consciously aware of his or her behavior, they are exacerbated by those motivated by racial animus (as are race-based conspirators under § 1985(3)).<sup>132</sup> Racial identifiers do not act based solely on out-group derision. They also act because positive images of the in-group equal positive images of self.

Once again, in reliance on social psychologists’ work, I offer the following theoretical explanation of the racialized group dynamics of

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130. See, e.g., Turner, *supra* note 19, at 18.

131. Marilyn B. Brewer, *Ingroup Identification and Intergroup Conflict: When Does Ingroup Love Become Outgroup Hate?*, in SOCIAL IDENTITY, INTERGROUP CONFLICT, AND CONFLICT RESOLUTION 20-21 (Richard D. Ashmore et al. eds., 2001).

132. For explanations of how unconscious bias operates, see Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745-49 (2005); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment*, 38 HARV. C.R.-C.L. L. REV. 91, 95-99 (2003); Linda Krieger, *supra* note 121, at 1258-1276.

racial loyalty, racial persuasion, and racial conformity. I begin each section with a factual scenario to demonstrate the ways in which individuals may engage in racial loyalty, racial persuasion and racial conformity without intending to do so. These racialized group dynamics, in every race-based conspiracy, pose unique risks to society because they increase the chances that the conspirators will achieve their objectives and decrease the likelihood that individual conspirators will withdraw from the conspiracy.

1. Racial Loyalty—When a racially identifying individual benefits members of her own race because of positive associations with her racial group.

Mary, a white woman who is a partner at a law firm is reviewing law students' resumes for summer employment. She has narrowed her selection to two similar resumes. The name at the top of one of the resumes is Sarah Fisher. Mary assumes that Sarah is white. The name at the top of the other resume is Tanya Washington. Tanya's resume indicates that she is a member of the Black Law Students Association. Mary assumes that Tanya is black. Although Tanya has a higher G.P.A. than Sarah, Mary grants Sarah a job interview because she believes that Sarah will be a "better fit" in the firm culture.<sup>133</sup>

As discussed earlier, through the process of social comparison, the socially identifying individual seeks and attains a positive self-image from his identity with the in-group in comparison with the out-group.<sup>134</sup> The individual attributes positive values to, or favors, the in-group because it enhances the individual's self-concept as a member of that group.<sup>135</sup> Through this process, the individual does not necessarily seek to harm the out-group, but seeks to benefit the in-group, creating a form of group loyalty.<sup>136</sup> When an individual

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133. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 7-12 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873> (finding job applicants with black-sounding names were far less likely to get a job interview than similarly qualified white-sounding names); see also Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1284-85 (2005).

134. Brown, *supra* note 77, at 34.

135. Turner, *supra* note 19, at 24; Adams, *supra* note 66, at 1102 ("[I]n group favoritism can be seen as the sine qua non of a person's 'social identity' because 'positive connotations of ingroup membership become positive connotations of self.'" (quoting Hogg & Abrams, *supra* note 106, at 7, 10).

136. See Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 J. PERSONALITY & SOC. PSYCHOL. 585, 587 (2004).

engages in racial identification, the group attraction and positive association for the racial in-group creates racial loyalty, or *when a racially identifying individual benefits members of her own race because of positive associations with her racial group*.<sup>137</sup> For example, a white person who racially identifies with being a member of the white race will attribute positive values to members of the white race in order to attain a positive self-image. The person will also identify non-whites, such as a black people, as racial out-group members and attribute more negative values to them.<sup>138</sup> But the values associated with membership in the corresponding racial groups are not in the abstract, nor associated with more benign categories, like group A and group B or runner and non-runner. The white individual may tap into the constellation of manifestations that accompany race that fuel what values or beliefs he associates with white people and those he associates with black people.<sup>139</sup>

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Consistent with social identity and self-categorization theories, people's sense of who they are, their *identity*, is partly shaped by the social groups to which they belong. When people identify highly with their group, they see themselves primarily as group members. In contrast, when group identification is weak or absent, people view themselves primarily as unique individuals.

*Id.* (citations omitted); *see also* Brewer, *supra* note 131, at 17, 26; Adams, *supra* note 66, at 1104 ("Several studies suggest that the need to assist ingroup members motivates actors more than the desire to harm outgroup members.").

137. *See e.g.* Turner, *supra* note 19; Adams, *supra* note 66, at 1102; *see also* Van Vugt & Hart, *supra* note 136, at 586-87; John F. Dovidio & Samuel L. Gaertner, *Affirmative Action, Unintentional Racial Biases, and Intergroup Relations*, in INTERGROUP RELATIONS 146, 148 (Michael A. Hogg & Dominic Abrams eds., Taylor & Francis 2001). As expected, racial loyalty manifests itself in the most extreme hate groups, in which whites who choose to associate with blacks or people of color are considered "race-traitors." *The Turner Diaries*, written by neo-Nazi and National Alliance leader William Pierce, provides a fictional account of a race war. One section describes the "Day of the Rope," which is the day that white supremacists hang white people who have betrayed their race by associating with or helping people of color and Jews. Their bodies have signs attached to them that say "I defiled my race" or "I betrayed my race." ANDREW MACDONALD, *THE TURNER DIARIES* 160-69 (The National Alliance 2d ed. 1980) (1978). The race-traitor is viewed among white supremacists as worse than blacks or people of color because they are disloyal to the white race.

138. Brewer, *supra* note 131, at 17, 27; Adams, *supra* note 66, at 1104. This is the nature of social identity and group dynamics: the in-group may discriminate against a member of the out-group to make a distinction between itself and the members of the other group.

139. *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004):

There is also increasing recognition of the natural human tendency to categorize information and engage in generalizations, of which stereotyping is a part, as a means of processing the huge amount of information confronting individuals on a daily basis; these unconscious processes can lead to biased perceptions and decision-making even in the absence of conscious animus or prejudice against any particular group.

Some studies are illustrative of how racial loyalty operates. In one study, white North American college students are shown a videotape discussion between two men, in which one of the men shoves or pushes the other. Four versions of videos were a part of the study.<sup>140</sup> In one of the videos, the man doing the shoving is white and the recipient of the shove is black. In another video, the man doing the shoving is black and the recipient is white; in the other two videos, both men are black or both men are white. The students interpreted the shove according to race (and gender). They were more likely to define the black actors as “violent” and the white actors as “fooling around.”<sup>141</sup> Explaining this outcome via racial identification, the white students attribute more positive associations to members of their own race, (i.e., the white person shoving) and more negative associations to members of the out-group (i.e. the black person shoving). The outcome may not be surprising to most people because of the prevalence of the stereotype of black males as violent or prone to criminality. But the analysis does not end there. The students’ attribution of the shoving along racial lines is not simply about the negative stereotype of black men, but also about loyalty to whiteness. It is easy to understand the more negative association with the out-group: that the black person is violent. But there is something else taking place that is being overlooked by courts and race theorists, something perhaps more insidious than negative stereotyping. By offering a more positive stereotype of the white men as “fooling around,” the student exhibits racial loyalty—he attributes the more positive stereotype of the white person as “fooling around,” to avoid attributing negative characteristics to white people and himself, but also to bolster his image of the white race and himself in comparison to black men.<sup>142</sup>

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*Id.*

140. Wetherell, *supra* note 75, at 192. See generally Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590 (1976).

141. Wetherell, *supra* note 75, at 192. See generally Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) (describing the racist image of the bad black man); see also Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS. U. L.J. 1261, 1269 (2004) (“In the realm of racialized self-defense claims, as articulated largely by Whites against people of color, the common tendency is to draw on prevailing social norms situating Black men, in particular, as overly violent, dangerous and possessing super-human strength.”).

142. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995) (discussing a study in which school-age children rated the behavior of a child poking another child of a different race and finding that “the race of the actor

In another study on admissions decisions, white decision makers evaluated poorly qualified, moderately qualified and highly qualified candidates. The applications had pictures of the candidates attached, which identified the applicants' races. Decision makers rated poorly qualified black and white applicants equally; decision makers showed some bias when they evaluated the moderately qualified white applicants, rating white applicant slightly higher than comparable blacks. And while decision makers evaluated highly qualified black applicants positively, they judged white applicants with the same credentials even better.<sup>143</sup> Once again, the white decision maker is making an assessment of the candidates on the basis of membership in the white race and their own image as members of the white race. To make the black applicant equal to or better than the white applicant would devalue the self-image of the racially identifying decision maker.

Racial loyalty goes beyond discrimination against the "other." The white decision maker did not reject the black applicant solely because the candidate is black or because of the negative associations that are affiliated with membership in the black race—i.e., the black candidate will not be a good student. The white decision maker also attributes positive values to the white candidate and himself. Such loyalty to other white people is necessary to continue to bolster the "self."<sup>144</sup> Depending on the degree of racial identification, the benefits can range from positive thoughts, feelings and emotions directed toward the racial in-group member, to the allocation of resources and benefits.<sup>145</sup> The pre-existing negative associations on the basis of race make the process easier, the loyalty more intense and the resulting conduct from it more justifiable on the part of the actor.

In the previous vignette about law firm hiring decision, Sarah may be considered a better "fit" by Mary because she will be articulate, dress professionally, laugh at off-color jokes made by other lawyers, and make clients comfortable. It is assumed, implicitly or otherwise, that these things may not necessarily be true of Tanya. The positive associations attributed to membership in the white

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had a significant impact on the manner in which [the school-age children] categorized [the poking child's] actions").

143. Dovidio & Gaertner, *supra* note 137, at 146, 149–50; *see also* Hart, *supra* note 132 at 748, (explaining a similar study with similar outcome).

144. Adams, *supra* note 66, at 1102 ("Ingroup favoritism can be seen as the sine qua non of a person's 'social identity' because 'positive connotations of ingroup membership become positive connotations of self.'").

145. Van Vugt & Hart, *supra* note 136, at 586–87; Dovidio & Gaertner, *supra* note 137, at 148 ("In addition, whereas aversive racists may be very guarded about behaving in anti-Black ways, their biases may be more likely unintentionally manifested in pro-White behaviors (i.e., ingroup favoritism rather than outgroup derogation).").

racial group, based on pre-existing stereotypes, beliefs, or other manifestations that accompany race, intensifies the racial loyalty to other whites as Mary reinforces the positive image of white people and her own self-image.<sup>146</sup> Sarah will fit in, just as Mary does, at least along racial lines.

2. Racial Persuasion—When a racially identifying individual invests the viewpoints, beliefs, and actions of members of his racial group with heightened validity.

Kate, Bob, Frank and Mike, employees of a resort, are responsible for organizing a party for a college fraternity. Kate, Bob and Mike are white; Frank is black. During discussions of the logistics of the party, Frank suggests that they book one of several local bands in the area. No one outright rejects Frank's suggestion, but the group continues to make other suggestions about entertainment, food and drinks. Approximately 20 minutes after Frank's suggestion, Bob says "I know, let's get a local band to perform." Kate responds by saying, "That is a great idea." Mike exclaims, "Yeah, one of my cousins plays for a really popular group in town, I can ask him if they are available." Frank is perplexed because he is certain that he made the same suggestion earlier.<sup>147</sup>

Individuals engaged in social identification believe that their in-group members are more correct, more trustworthy and fairer than out-group members.<sup>148</sup> Furthermore, the perceived distinctions between the in-group and out-group will be exaggerated, while the distinctions between in-group members will be minimized.<sup>149</sup> Because

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146. See generally John F. Dovidio & Samuel L. Gaertner, *The Effects of Race, Status, and Ability on Helping Behavior*, 44 SOC. PSYCHOL. Q. 192 (1981) (discussing a study in which whites evaluated high ability blacks as less competent than themselves while acknowledging the greater competence of high ability whites).

147. The factual scenario could also operate in a similar way if Kate had made the suggestion and the men engaged in social identification on the basis of gender. See Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL., 48-59 (1990).

148. See Dominic Abrams, Margaret Wetherell, Sandra Cochrane, Michael A. Hogg & John C. Turner, *Knowing What to Think by Knowing Who You Are: Self-categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCHOL. 97, 109 (1990) ("Thus, in our Asch paradigm experiment, in-group members may be seen as more correct, while out-group members are seen as less likely to be correct, when group membership is salient."); Daan van Knippenberg, *Social Identity and Persuasion: Reconsidering the Role of Group Membership*, in SOCIAL IDENTITY AND SOCIAL COGNITION, 315, 317-18 (Dominic Abrams & Michael A. Hogg eds., Blackwell 2000); see also Katyal, *supra* note 17, at 1321-22.

149. Turner, *supra* note 19, at 28 ("[A]s category memberships become salient, there will be a tendency to exaggerate the differences on criterial dimensions between

of the positive associations, such as being more fair or trustworthy, attributed to the in-group, members of the in-group are more persuasive sources of beliefs and viewpoints in comparison to views of members of out-groups.<sup>150</sup> Therefore, when racial identification occurs, a second dynamic follows: *racial persuasion*, or when a racially identifying individual invests the viewpoints, beliefs and actions of members of his racial group with heightened validity.<sup>151</sup>

Studies on helping behavior are useful to understand racial persuasion and how it may create discriminatory behavior. In one study, white bystanders were more likely to help black victims in emergency situations when they were the only bystander, than when other white bystanders were present.<sup>152</sup> White bystanders who believed that they were the *only* witness were as likely to help black victims as they were white victims.<sup>153</sup> However, when other white bystanders were present, whites were less likely to aid the black victim—in fact, the white bystanders “helped the black victims half as often as they helped the white victim.”<sup>154</sup> White bystanders, willing to help the black victim when they were alone, changed their

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individuals falling into distinct categories, and to minimize these differences within each of these categories”). Operario & Fiske observe that:

Cognitive processes exacerbate the perception of group boundaries, such as the ‘metacontrast’ principle, which is the tendency of individuals to minimize the perceived variance among members of the same group and maximize the variance between members of different groups. The outgroup homogeneity effect soon takes hold, blurring distinctions among outgroup members.

Operario & Fiske, *supra* note 73, at 43.

150. Abrams et al., *supra* note 148, at 99 (“[I]nformation is more influential when it has come from consistent in-group members than from other sources.”); Brown, *supra* note 77, at 34 (noting that social identity theorists suggest “[s]ome people . . . become less relevant sources of information and social pressure. For example, if you are a Catholic in a society where there is conflict between Catholics and Protestants, the latter’s definition of social and political reality will not be so persuasive as the definitions of your own side.”); *see also* Abrams et al., *supra* note 148, at 116–17; van Knippenberg, *supra* note 148, at 317–18; Michael A. Hogg & John C. Turner, *Intergroup Behavior, Self-stereotyping and the Salience of Social Categories*, 26 *BRIT. J. SOC. PSYCHOL.* 325, 326–27 (1987); Katyal, *supra* note 17, at 1321–22. *See generally* Diane Mackie & Sarah Queller, *The Impact of Group Membership on Persuasion: Revisiting “Who Says What to Whom With What Effect?”*, in *ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLES OF NORMS AND GROUP MEMBERSHIP* 135 (Deborah J. Terry & Michael A. Hogg eds., 1982).

151. *See, e.g.*, Abrams et al., *supra* note 148, at 99 (“[I]nformation is more influential when it has come from consistent in-group members than from other sources.”); Brown, *supra* note 77, at 34; Abrams et al., *supra* note 148, at 97, 109; Mackie & Queller, *supra* note 150, at 135.

152. *See* Dovidio & Gaertner, *supra* note 137, at 149; Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behavior*, 35 *J. PERSONALITY & SOC. PSYCHOL.* 691, 691 (1977).

153. *Id.*

154. *Id.*



behavior when other whites were present. The authors of the study explained that in isolated situations the socially acceptable behavior is well-defined, (i.e., help the victim) and the white bystanders did not discriminate, but went to the aid of the victim. However, when the situation was more ambiguous and the witness could rationalize inaction, the white bystander was more likely to discriminate against the black victim.<sup>155</sup> Analyzing this change in behavior from the perspective of racial identification and the group dynamic of racial persuasion offers an additional explanation for the white bystanders' altered behavior. The white bystander as an individual, even if it is assumed that the individual had some preconceived stereotype about the black victim, went to the black victim's aid. However, when other whites were present, the decision to act was no longer simply about the black victim, but was also influenced by the racially identifying white bystander's racial persuasion. The individual is persuaded by the behavior—the inaction—of the other white bystanders because she perceives it to be the more appropriate or correct conduct. And not only is the white bystander persuaded by the behavior of other white bystanders, she engages in racially conforming behavior by failing to help the black victim, a third group dynamic that is explained next.

In the second vignette, the white employees, Kate, Bob and Mike, are compelled by Bob's suggestion to get a local band, even though Frank, the black employee, earlier made an identical suggestion. Kate and Mike were more compelled by Bob's suggestion because, as a result of racial persuasion, they believe that Bob's opinion, as a racial in-group member, is more trustworthy or more credible than Frank's, a racial out-group member.

3. Racial Conformity—When a racially identifying individual conforms to the perceived norms of the racial group.

Kris and Frank, a white couple, are moving to a medium-size metropolitan city. In conversations with Suzy, their realtor, Kris and Frank explain that they would like a house that costs no more than \$200,000, with 1500 to 2000 square feet, two full baths and a yard, located in a safe, quiet neighborhood. At no time in their conversations with Suzy do they discuss their preference on the racial composition of the neighborhood. All twelve of the neighborhoods Suzy takes them to are in white neighborhoods with houses starting at approximately \$240,000. After touring houses for several days with Suzy, Kris and Frank find a \$250,000 home in a white neighborhood. There were

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155. Dovidio & Gaertner, *supra* note 137, at 153; Gaertner & Dovidio, *supra* note 152, at 692-93.

more affordable homes with the attributes the couple sought, in neighborhoods that had black and Latino families. Suzy never offered to show these to Kris and Frank, and they never asked to see them.

Once persuasion is complete, members of the in-group will conform to the norm of the group, adjusting their behavior and attitudes, even at the cost of their own self-interest. Based on perceived stereotypic norms of the group that are generated based on group prototypes, the individual applies these norms to self and shifts his behavior to conform to the stereotypes and the norms of the group.<sup>156</sup> In other words, individuals “adjust their sense of identity, their thoughts, and their behaviors, to match the collectively defined attributes of their social groups.”<sup>157</sup> The individual is persuaded by the in-group norms. In the process of being more reflective of the in-group, to bolster self-esteem, the individual seeks to adopt the perceived norms of the group as a personal frame of reference, leading to in-group conformity.<sup>158</sup>

When racial identification occurs, the individual engages in *racial conformity*, or when a racially identifying individual conforms to the perceived norms of the racial group.<sup>159</sup> In the study on helping behavior, the racially identifying white bystander was persuaded by the inaction of the other white bystanders and then conformed to the behavior by failing to act in a situation in which he may have acted had he been alone.

In the vignette, racial conformity is so powerful that it is assumed by the realtor that the white couple preferred a white neighborhood as an automatic norm. And Kris and Frank conform to the norm by failing to ask about more diverse neighborhoods. Once

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156. Turner, *supra* note 19, at 30–31 (“When social identity is salient, depersonalization occurs, such that a person’s feelings and actions should be guided more by group prototypes and norms than by personal factors. An opposite pattern is expected when personal identity is salient—shifts toward this end of the continuum means that personal factors should have the strongest impact on feelings and behaviors.”); see also Terry, Hogg & White, *supra* note 97, at 76.

157. Brown, *supra* note 77, at 35; Turner, *supra* note 19, at 30.

158. These norms and conforming acts may exist, even when the in-group no longer exists. Abrams et al., *supra* note 148, at 98; Brown, *supra* note 77, at 14 (discussing another classic study by Sherif in 1936 that demonstrated that in situations of uncertainty, groups “spontaneously generate their own norms and frame of reference when making judgments”); see also Abrams et al., *supra* note 148, at 99 (“[A] person conforms to a *cognitive representation* of an in-group norm, based on but not necessarily synonymous with the observable behaviour of others.”); Brown, *supra* note 77, at 35 (“People take on the group characteristics and make these their own, at any rate for the time being, to a greater or lesser extent.”).

159. See, e.g., Wetherell, *supra* note 75, at 35; Turner, *supra* note 19, at 30; Abrams et al., *supra* note 148, at 99.

again, this process is more easily operational because of the constellation of manifestations that accompany notions of race.

Individuals who racially identify are loyal to members of their race, persuaded by members of their race and attempt to conform to a racial group norm because of social categorization and the quest for positive self-esteem. These group dynamics lead to group behaviors that have real world consequences.

### *B. The Special Dangers of Race-Based Conspiracies*

Race-based conspiracies pose unique dangers to society that are different than individual acts of discrimination and non-race-based conspiracies. As this section will explain, every race-based conspiracy under § 1985(3) is imbued with racial identification that spawns racialized group dynamics of racial loyalty, racial persuasion and racial conformity. These dynamics increase the chances that the conspiracy will occur and reduce the chance that any conspirator will withdraw from the conspiracy. It is for these reasons that § 1985(3) is one of the most powerful weapons against such discrimination.

#### 1. Race-Based Conspirators Engage in Racial Identification

Racial identification—the categorization of a racial in-group and a racial out-group that taps into a host of socially constructed beliefs and stereotypes—occurs in every race-based conspiracy under § 1985(3).<sup>160</sup>

As explained earlier, to demonstrate a § 1985(3) conspiracy, the plaintiff must prove: (1) a conspiracy of two or more persons; (2) who are motivated by some racial or class-based, invidiously discriminatory animus; (3) to deprive the plaintiff of the equal enjoyment of rights secured by the law to all; (4) which results in injury to the plaintiff's person, property or a deprivation of a right or privilege of citizenship;<sup>161</sup> (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy.<sup>162</sup>

To meet the first element, a conspiracy of two or more persons, § 1985(3) requires proof that two or more persons agreed to discriminate on the basis of race.<sup>163</sup> To make this finding, the jury

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160. Brewer, *supra* note 80, at 247.

161. To prove a conspiracy between two or more persons, the plaintiff must show that the conspirators planned to inflict injury on the plaintiff, who, in fact, suffered injury to his or her person, property or to a right granted to United States citizens. See *Green v. Benden*, 281 F.3d 661, 665–66 (7th Cir. 2002).

162. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68 (1993); *Griffin v. Breckenridge*, 403 U.S. 88, 102–03 (1971).

163. See *Bray*, 506 U.S. at 267–68; *Griffin*, 403 U.S. at 102–03.

must be convinced that a meeting of the minds or an agreement occurred among the co-conspirators to discriminate on the basis of race.<sup>164</sup> It is not necessary to prove that each conspirator knew every detail of the plan or even other co-conspirators, but that each conspirator was aware of the general nature and scope of the plan and agreed to the racially discriminatory objective.<sup>165</sup> Proof of such an agreement among the conspirators is *prima facie* evidence of racial identification, which, as I have described it, occurs when an individual cognitively places himself in a racial in-group and others in a racial out-group, immediately tapping into the constellation of manifestations that accompanies the social construction of race. Individuals who agree to discriminate against a member of a race distinct from their own have engaged in racial identification—each identified with membership in a racial category (the in-group) against a member of another race (the out-group). Once the plaintiff proves that the defendants agreed to discriminate on the basis of race—and therefore that they identified along racial lines—the conspiracy is shown to have been imbued with racialized group dynamics that increase the chances the conspiracy will occur and reduce the likelihood that conspirators will withdraw.<sup>166</sup>

## 2. Racialized Group Dynamics Increase the Chances that the Conspiracy will Occur

Social psychologists now understand that group behavior is often driven primarily by an individual's continual quest for positive self-esteem. Through this process, individuals often engage in racial discrimination, not solely based on out-group derision, but also because of in-group favoritism. Through the racially driven in-group—out-group process, individuals engage in what this article theorizes to be racial identification and racialized group dynamics. These racialized group dynamics bind the individual conspirators as a collective, separate and apart from the objective of the conspiracy.

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164. See *Green*, 281 F.3d at 665-66.

165. See *id.* Direct evidence of the agreement is not required but can be inferred from circumstantial evidence. *Id.*; see also *Smith v. Thornburg*, 136 F.3d 1070, 1090 (6th Cir. 1998) (Clay, C.J., dissenting) (citing *Bell v. City of Milwaukee*, 746 F.2d 1205, 1255-59 (7th Cir. 1984)) (“Rarely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire, and circumstantial evidence may provide adequate proof of conspiracy.”).

166. Hogg & Abrams, *supra* note 106, at 11 (“The far-reaching consequences of this process include conformity, and group influence, cohesion and solidarity, and stereotyping.”); Abrams et al., *supra* note 148, at 99 (“It is suggested [that social categorization] underlies three phenomena which have usually attracted separate explanations in social psychology: norm formation, conformity and group polarization.”).

As a result of these racialized group dynamics, race-based conspiracies pose unique threats to society.

Each conspirator is more loyal to the group, more persuaded by group norms and more likely to conform to those norms because the conspirators are members of the in-group, and the racial manifestations associated with the in-group compared to those in the out-group. There is no single process by which the infinite numbers of manifestations occur, but once the racialized group dynamics begin, the conspirators are bound, separate and apart from the goals of the conspiracy. Once racial identification and the group dynamics of racial loyalty, racial persuasion and racial conformity begin, the conspirators—just as the group rationales of criminal conspiracy law purport—are more likely to stay the course to achieve the objective of the conspiracy and individual conspirators are less likely to withdraw from the conspiracy.

### 3. An Example: *Dickerson v. Alachua County Commission*

The following section theorizes how the conspirators in *Dickerson v. Alachua County Commission*<sup>167</sup> engaged in racial identification and the racialized group dynamics of racial loyalty, racial persuasion and racial conformity, increasing the chances that Dickerson would be racially discriminated against in his employment and decreasing the chances that individual conspirators would withdraw from the illegal conspiracy.

On March 3, 1994, Alachua County Corrections Center guards on Shift I (11:00 PM to 7:30 AM) discovered inmate, Richard Meissner, had escaped from the new twenty-eight million dollar facility.<sup>168</sup> Accused of the stabbing death of a University of Florida student and the attempted murder of the student's roommate, Meissner's escape was a public relations nightmare for Alachua County and the Florida Department of Corrections.<sup>169</sup> Meissner was apprehended after a nationwide manhunt, but questions about how he escaped remained.<sup>170</sup> After completion of an internal investigation, Lieutenant Alfred Dickerson, the African-American male supervisor for Shift I, and three African-American guards were demoted. None

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167. 200 F.3d 761 (11th Cir. 2000).

168. *Id.* at 763. Although Meissner's absence was discovered during Shift I (11:00PM to 7:30 AM), the escape occurred at 9:50 PM during Shift III (3:00 PM to 11:00 PM). *Id.* at 763-64.

169. *Racing Fans Warned of Jail Escapee*, MIAMI HERALD, Mar. 18, 1994, at 2BR; Patricia Walsh, *Accused Killer of Miramar Student Remains at Large*, MIAMI HERALD, Mar. 7, 1994, at 2BR.

170. *Escaped Inmate Captured Near Gainesville*, PALM BEACH POST, March 31, 1994, at 20A.

were on duty at the time of the escape.<sup>171</sup> Lieutenant Steve Roberts, the white supervising officer on duty at the time of the escape, who violated orders by failing to close the recreation door through which Meissner escaped, received a written reprimand.<sup>172</sup> Dickerson sued Alachua County and several correctional officers alleging a race-based conspiracy and a federal jury agreed, finding that the white correctional officers violated § 1985(3) by engaging in a racially motivated conspiracy to make Dickerson and his subordinates the scapegoats for the prison escape because they were black.<sup>173</sup>

As explained earlier, once the plaintiff proved that conspirators agreed to the discriminatory objective of the conspiracy, the plaintiff has proof of racial identification. In *Dickerson*, each individual conspirator's racial identification triggered the cognitive process that makes racialized group dynamics possible. It is impossible to get into an individual conspirator's head, but one can imagine the many racial manifestations that fueled the conspiracy in *Dickerson*. The racialized group dynamics of race-based conspiracies, unlike other types of conspiracies, are not fueled by mere abstract notions of group membership, but are more volatile, more accessible and more efficient because of the racial constellation of manifestations that are present or readily available to each conspirator and the group. We can only speculate as to what those manifestations might have been. It is possible that the members of the conspiracy retained a sense of entitlement to the job that did not extend to the black guards. As white men, they may have believed that they were more entitled to the job than black people and viewed themselves, their co-conspirators and other white men as more "deserving" of the positions that they held.<sup>174</sup> Another scenario could be that they justified stripping the black guards of their job ranks based on a host of negative stereotypes or beliefs about blacks and corresponding positive stereotypes or beliefs about whites.<sup>175</sup> Or a third scenario could be that they viewed the job as a scarce commodity—one that should be reserved for white correctional officers.<sup>176</sup> For these

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171. *Dickerson*, 200 F.3d at 764.

172. *Id.*

173. *Id.* at 764–65. Dickerson's vindication was short-lived; a federal appeals court, applying the intracorporate conspiracy doctrine, struck down the judgment against Alachua County and the individual conspirators because it held that the defendants did not engage in an actionable race-based civil conspiracy. *Id.* at 768-70. For further explanation and discussion of § 1985(3) and the intracorporate conspiracy doctrine, see Smith, *supra* note 10, at 146-48.

174. Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & L. 171, 182 (1995).

175. ALLPORT, *supra* note 122, at 191.

176. SIDANIUS & PRATTO, *supra* note 74, at 17.

emotions, beliefs and ideas that attach to notions of race and fuel the group dynamics, I will offer a few hypothetical scenarios to make my point in the context of racial loyalty, racial persuasion and racial conformity.<sup>177</sup>

a. Racial Loyalty in *Dickerson*

Racial loyalty impacts individual behavior by binding the individual conspirators to the group.<sup>178</sup> Generally, the more loyal group members are to the group, the more likely the group is to remain intact, making group loyalty a significant aspect of group stability.<sup>179</sup> Social identity has been described as “one of the cornerstones of a high group integrity, which is the key to group survival.”<sup>180</sup> This group loyalty was evident in *Dickerson*—the conspirators demonstrated extreme loyalty to each member of the conspiracy, even at the cost of their own self-interest.<sup>181</sup>

First, the *Dickerson* conspirators had other options to protect their own self-interest, but chose the group’s interest over their own. If the individual white correctional officers had sought to protect

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177. I do not include the history of racism in correctional institutions or in the state of Florida. Both separately and together (i.e., the history of racism in correctional institutions in Florida), they may serve to bolster the analysis of the racialized group dynamics in *Dickerson*.

178. The *Dickerson* conspirators, as high group identifiers, such as those who socially identify on the basis of race (and consciously agree to discriminate), will exhibit more loyalty to the group than low group identifiers (i.e., those who do not socially identify on the basis of race). Van Vugt & Hart, *supra* note 136, at 587, 594–95; see Katyal, *supra* note 17, at 1318-19 (discussing under-polarization and risk-taking).

179. Van Vugt & Hart, *supra* note 136, at 586 (“We believe that one important psychological and behavioral force contributing to group stability and integrity is a member’s *group loyalty*, the desire to forgo attractive alternatives for group membership.”). This is sometimes referred to as group cohesion. See Bettenhausen, *supra* note 74, at 361 (“[G]roup cohesion [is] the degree to which members of a group are attracted to other members and are motivated to staying in the group.”) (citation omitted).

180. Van Vugt & Hart, *supra* note 136, at 595.

181. The minimal group studies, mentioned earlier, have shown that social categorization per se is sufficient for intra- and inter-group behaviors to emerge. See Wetherell, *supra* note 75, at 210-11. For example, North American school children, randomly assigned to two groups were placed in cubicles and asked to allocate money between the two groups. They were never in contact with other anonymous in-group or out-group members. However, the students demonstrated in-group favoritism and out-group discrimination even when it was against their self-interest. The students opted to give the in-group the largest gains in comparison to the out-group. In other words, they typically did not select maximum joint profit of the two groups if it meant that the out-group would receive more gains than the in-group and chose the maximum difference in gains between the in-group and out-group. Essentially, personal relationships, group social construction or zero-sum relationships, are not necessary for group dynamics to occur. The mere delineation of two groups, such as X and Y, may be sufficient to create the group dynamics.

their own individual self-interest (i.e., their individual job), as opposed to the collective interest of the group, they could have obtained better outcomes for themselves by leaving the group and the conspiracy.<sup>182</sup> There was an obvious solution that did not include race discrimination. Instead of agreeing to use their resources to make the black guards the scapegoats, the members of the conspiracy who investigated the escape could have very easily concluded that Lieutenant Roberts, the white officer who left the recreation yard door open, was at fault and should be penalized. This option could have saved their individual jobs and avoided unlawful racial discrimination that could lead to severe repercussions.

But because of racial loyalty, they did not select Lieutenant Roberts. In the racialized group context, a white individual's job loss no longer simply impacts that one white individual, but impacts the status of the group, and the individual conspirator's status as a member of the group.<sup>183</sup> To avoid losing status, each member of the conspiracy has a heightened loyalty to the group because of membership in the white race and the continual quest for a positive image.<sup>184</sup> Furthermore, because of the power of racial loyalty (and racial persuasion), Lieutenant Roberts was probably blamed less, or not at all, for his failures.<sup>185</sup>

The conspiracy was not simply driven by negative associations or beliefs of the out-group, the black guards, but was also driven by loyalty to the in-group, the white guards. This is a dynamic that binds the conspirators to each other and to the objective of the conspiracy. Even more startling, because of racial loyalty conspirators are more likely to stay in the group, even if staying has personal costs or is against their self-interest.<sup>186</sup> In fact, two of the

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182. Van Vugt & Hart, *supra* note 136, at 586–87, 594–95.

183. Dovidio & Gaertner, *supra* note 137, at 193 (“Needs for self-esteem and superior status are frequently hypothesized to be among the major causes and perpetuators of prejudice and racial discrimination.”).

184. “As many studies have found, social identity is particularly influential when people perceive a threat to the status of the group.” Van Vugt & Hart, *supra* note 136, at 587 (citation omitted).

185. Turner, *supra* note 19, at 28; Operario & Fiske, *supra* note 73, at 43. In one study, ethnocentric people give more credit to whites than blacks for succeeding on a task and blame whites less than blacks for failing at it. NAT'L CONFERENCE FOR CMTY. & JUSTICE, INTERGROUP RELATIONS IN THE UNITED STATES: RESEARCH PERSPECTIVES 44–45 (Wayne Winborne & Renae Cohen eds., 1998). In another study people were more likely to blame a car accident on the driver's personality when the driver is of a different ethnicity than when the driver is of the same ethnicity. *Id.*

186. Van Vugt & Hart, *supra* note 136, at 587.



*Dickerson* conspirators were indicted for perjury for giving false testimony in the *Dickerson* trial and fired from their jobs.<sup>187</sup>

b. Racial persuasion and conformity in *Dickerson*

As for racial persuasion and racial conformity, each conspirator was persuaded by, and conformed to, a group norm. Absent a detailed written record, videotape or audio of exactly how the guards behaved during the course of the conspiracy, it is extremely difficult to know how racial persuasion and racial conformity operated in the context of *Dickerson*.<sup>188</sup> However, the jury concluded that the conspirators all agreed, as a part of the conspiracy, that the black guards should be targeted as the scapegoats in the prison break. Thanks to social psychology literature, we do know that group persuasion leads to the development of and conformity to an in-group norm because an individual's attitudes and behaviors become more normative (conformist) as their "category membership becomes salient."<sup>189</sup> Once racial identification occurred, through the white guards forming an agreement to discriminate against the black guards, the guards were positively influenced by the behavior of their co-conspirators and more likely to emulate that behavior.<sup>190</sup>

As demonstrated via *Dickerson*, the racialized group dynamics increase the chances that the conspiracy would be achieved and reduce the chances of withdrawal.<sup>191</sup> The *Dickerson* case illustrates the limiting effect courts have placed on § 1985(3)'s reach by failing to consider the unique dangers of race-based conspiracies.<sup>192</sup> Despite a jury's verdict that held that *Dickerson* was the victim of a race-based conspiracy, a federal appeals court ignored the dangers of a race-based conspiracy of white correctional officers and immunized the defendant county and individual racist actors by invoking the intracorporate conspiracy doctrine.<sup>193</sup> The correctional officers were permitted to garner the powerful forces of racial loyalty, racial persuasion, and racial conformity to achieve their racially

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187. See Mark Ward, *Federal Indictment Leads to Suspension of Two Jail Employees*, ALLIGATOR ONLINE, Dec. 3, 1999, <http://www.alligator.org/edit/issues/99-fall/991203/b03jail3.htm>.

188. For example, in the Texaco case in which board executives were recorded making racist jokes, it is clear that the members of the group were willing to condone or even participate in the racist banter. Kurt Eichenwald, *The Two Faces of Texaco*, N.Y. TIMES, Nov. 10, 1996, § 3, at 1. Unfortunately, this type of evidence is rare.

189. Abrams et al., *supra* note 148, at 99.

190. It is the author's contention that these racialized group dynamics present in race-based conspiracies support imputing intent under § 1985(3).

191. See generally *Dickerson v. Alachua County Comm'n*, 200 F.3d 761 (11th Cir. 2000).

192. See *id.* at 766.

193. See *id.* at 767-70 (relying on *Chamblis v. Foote*, 562 F.2d 1015 (5th Cir. 1977)).

discriminatory objective. Yet had they engaged in a criminal conspiracy, they would have been convicted and gone to jail. The same federal circuit court that decided *Dickerson* in 2000 had previously rejected the intracorporate conspiracy doctrine in criminal conspiracy law because “the action by an incorporated collection of individuals creates the ‘group danger’ at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose.”<sup>194</sup>

As this article has explained, although the 1871 Congress’ original intent in enacting § 1985(3) was to combat the dangers of race-based collective action, federal courts have continually ignored Congress’ mandate and contemporary social psychologists’ explanations of how group identification among individuals fuels group dynamics. While this doctrine may be appropriate in the realm of antitrust law, it has no place in civil rights jurisprudence. The intracorporate conspiracy doctrine flies in the face of the original purpose of § 1985(3), which was to stamp out racial discrimination stemming from collective action, and it does not take into account what we now know about how individuals behave as self-identified members of groups.<sup>195</sup> The intracorporate conspiracy doctrine immunizes corporate and government entities from § 1985(3) liability for internal agreements to engage in racial discrimination, which relegates § 1985(3) to obsolescence because most race-based conspiracies take place within the confines of a government agency or corporation.<sup>196</sup>

#### IV. CONCLUSION

When Congress enacted § 1985(3), it did so specifically to combat the dangers of collective action. Moreover, we know far more today than the 1871 Congress knew about group conduct. Social psychologists now understand that group behavior is driven primarily by an individual’s continual quest for positive self-esteem, resulting in discriminatory conduct not solely because of animus or bias against “out-groups,” but also because of in-group favoritism. When this group behavior is driven by racial distinctions, racial in-group preferences fuel racial loyalty, racial persuasion, and racial conformity—dynamics that increase the chances that the goals of the conspiracy will be achieved and reduce the chances that the individual conspirators will withdraw.

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194. *United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1992).

195. *See Washington v. Duty Free Shoppers*, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) (“In the area of civil rights, a real danger exists from the collaboration among agents of a single business to discriminate.”).

196. *See Smith*, *supra* note 10, at 129.

Despite congressional intent and the unique dangers of race-based conspiracies, federal courts have ignored the group dangers rationale in § 1985(3)—while embracing it in the criminal context—and have gone so far as to immunize internal agreements to discriminate within corporations. This article's findings mandate a re-conceptualization of contemporary race-based civil conspiracy law to recognize the group dangers of race-based conspiracies so that corporate actors are held accountable for harnessing the power of collective action to engage in racial discrimination; the rejection of the intracorporate conspiracy doctrine's application to § 1985(3) claims is a critical reform.