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I. Introduction

A small pack of white thugs storms into a small town on Harley-Davidsons on a hot midsummer evening, intent on ridding the town of the young African-Americans who have been congregating on the town square that summer. Joined by a swarm of hundreds of angry townspeople, the vigilantes scream racial epithets and threats at the interlopers ("Get the n____," "N____, get out of town," et cetera). They are particularly enraged at the relationships that have developed between the young black men and local white women. The mob chases and attacks the black youths and their white friends, finally driving them out of the square after several terrifying hours. Only a few police officers are on the scene. They stand by idly, despite town officials' advance knowledge of the impending confrontation.

The violence continues the next night. The mob is unrestrained despite an onslaught of racially charged threats and assaults. An exchange of rocks and bottles ensues between the factions. The police finally intervene. They arrest the entire interracial group, rather than their attackers, on disorderly conduct charges notwithstanding a complete lack of evidence of individual guilt (the charges are later dismissed on appeal). Nearby, the mob blocks, threatens ("Kill the n____. Get the f____ing n____ out of town before we kill them."), and descends upon two black men and two white women attempting to enter a car and drive away. Police drag off and arrest the four occupants of the car, ignoring the mob. Elsewhere in town, a crowd hurls threats at an interracial couple sitting quietly in their home. The police only urge the couple to move out of town.

* Associate Professor of Law, Seton Hall University School of Law. I would like to thank Richard Gutman, lead counsel for the plaintiffs in Clark v. Clabaugh, for many patient hours of assistance with this Article, and for having the courage and perseverance to litigate the case for three years without remuneration. I also would like to thank Jon Romberg for his endless hours of assistance with the many drafts of this Article. Michelle Adams, Susan Block-Lieb, Kip Cornwell, Ed Hartnett, John Jacobi, Bob Kaczorowski, Marc Poirier, and Mike Zimmer also contributed many thoughtful and insightful suggestions.
This scene occurred neither in the 1800s, nor in the South in an early
decade of this century, but in the town of Hanover, Pennsylvania during July
of 1991, only a few months after videotapes of the Rodney King beating were
nationally televised. The event, however, is eerily reminiscent of the much
earlier Reconstruction era when the Ku Klux Klan and local white militia
groups similarly intimidated the newly freed slaves from exercising their
democratic rights. The historical markers dotting the Hanover area, located
six miles north of the Mason-Dixon line and ten miles from Gettysburg, are
poignant reminders that the Civil War and Reconstruction era reforms never
accomplished their goal of preventing and deterring racist violence.

While the interracial group members in this case clearly had legal claims
against the white bikers who instigated the riot, the nonresponsiveness of the
police is to me the most shocking aspect of the story. Their liability, however,
is less than apparent, because the police did not join directly in any racist
activity, and because the crux of their dereliction was a failure to protect the
riot’s victims. Tort law does not normally impose a duty to protect, nor do
the police ordinarily have a duty to render assistance to any particular member
of the public.

The interracial youth group probably would have no legal recourse
against the police were it not for the 1871 Civil Rights Act, also denominated
the Ku Klux Klan Act (Act), which Congress passed to address similar
conduct. The Act includes provisions now codified at 42 U.S.C. §§ 1985 and
1986 that provide a cause of action against both perpetrators of class-
based conspiracies and individuals who fail to protect victims of such conspir-

1. This is a synopsis of the facts of Clark v. Clabaugh, 20 F.3d 1290, 1293-94 (3d Cir.
1994), discussed infra at text accompanying notes 115-25. It is interesting to note that the riot
occurred only months after the national broadcast of the videotape of the Rodney King beating.
See King v. City of Los Angeles, 92 F.3d 842, 844-45 (9th Cir. 1996).

2. See infra text accompanying notes 47-51 (discussing violence of the Reconstruction
era).

Plaintiffs’ Second Amended Complaint at 2, Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994)
(No. 1:CV-92-0595) (on file with the author).

4. See infra text accompanying notes 115-16 (discussing facts of Clabaugh).

5. See infra text accompanying notes 255-58 (discussing tort law regarding duty to
protect).

6. Under the common-law tort doctrine of public duty, state actors owe a duty only to
the public at large, rather than to any particular individual. See, e.g., Doe v. Calumet City, 641
N.E.2d 498, 503-05 (Ill. 1994) (stating mother had no negligence claim against municipality
or officer for failure to protect minor children from rapist who broke into family’s apartment,
despite officer’s knowledge of events).

7. See Ku Klux Klan Act, 17 Stat. 13-15 (1871); MARY FRANCES BERRY, BLACK
RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 79 (1994)
(noting that Congress passed Ku Klux Klan Act in response to Ku Klux Klan violence).
Section 1986 claims are important tools for civil rights litigators attempting to deter and punish racial violence. Unfortunately, however, few civil rights litigators are aware of the statute's existence and its utility in fighting racist conspiracies.

Section 1986, the subject of this Article, imposes perhaps the strongest affirmative duty of any piece of legislation arising from the Civil War. It demonstrates the extent to which Congress reached, pursuant to the enforcement clause of the Fourteenth Amendment, to attempt to eradicate Ku Klux Klan violence during Reconstruction.\(^9\) Section 1986 imposes a "Good Samaritan" duty to protect upon police, bystanders, or others who have knowledge of impending execution of a racist conspiracy as defined by § 1985 of the Act\(^9\) and have the ability to prevent the conspirators from carrying out their objectives. Section 1986 provides:

10. Section 1985, in pertinent part, reads as follows:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully
Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case.11

Thus, knowledge of a § 1985 conspiracy, power to protect its victims, and neglect or refusal to protect results in liability under § 1986. Section 1986 reaches more broadly than § 1985, its predicate, by inculpating bystander defendants who are not themselves conspirators under § 1985. It is unique among American civil rights statutes in creating liability when a defendant has neither personally committed a discriminatory act, engaged in a conspiracy to do so, nor acted with discriminatory intent. A negligent failure to protect by an actor with knowledge of a § 1985 conspiracy and power to protect its victims is actionable.12 The statute creates a legal duty. In effect, it "deputizes" local actors in a position to intervene in prohibited conspiracies and renders them liable to victims of conspiratorial violence, thus focusing on those in the best position to stop the violence. As a result, § 1986 extends the reach of liability beyond the immediate circle of conspirators and thus buttresses § 1985, which attaches liability only to those who affirmatively enter into the conspiracy.13

The statute's duty to protect is instrumental in confronting a particularly serious evil — racist conspiracies — that cannot be adequately addressed by other means. The harms of racism remain serious. Racist conspiracies and other hate crimes continue to be committed, demonstrating the ongoing need for the remedies of § 1986.14 Congress enacted § 1986 as a response to the Ku

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


11. Id. § 1986.
12. See Clark v. Clabaugh, 20 F.3d 1290, 1298 (3d Cir. 1994) (finding that negligence is sufficient to maintain § 1986 claim).
14. The Department of Justice's hate crime statistics for 1996 reveal that 8759 hate crimes were reported to the FBI during that year — 5396 of these crimes were motivated by racial bias.
Klux Klan violence of the Reconstruction era when the foundations of the Civil War victory were being undermined. Although our current circumstances of racial rivalry, discontent, and social alienation are generally less egregious and blatant than those during Reconstruction, the remedies of § 1986 are still needed. The persistence of racial hatred and discrimination, as documented by hate crime statistics, confirms that ongoing need. Section 1986 is thus a vital, but underused, weapon in the battle against racist conspiracies.

Moreover, § 1986 has significance beyond its immediate application, as it sheds light on the proper reach of the Fourteenth Amendment. The strongly affirmative provisions of § 1986, in conjunction with its passage under the authority of the Enforcement Clause of the Fourteenth Amendment only three years after adoption of that amendment in 1868, indicate that the Reconstruction-era Forty-Second Congress construed the scope of its enforcement powers very broadly. In turn, this virtually contemporaneous congressional understanding that enforcement of the Constitution can call for vigorous, affirmative governmental action to safeguard constitutional rights corroborates what Robin West has called the "abolitionist interpretation" of the Fourteenth Amendment.

See Criminal Justice Information Services Division, United States Dept. of Justice, Uniform Crime Reports, Hate Crime Statistics 1996 § 1, at 5. In 1995, 7947 hate crimes were reported. See id.; see also Cause for Concern: Hate Crimes in America (Leadership Conf. Educ. Fund/Leadership Conf. on Civil Rights, Wash., D.C.) Jan. 1997, at 7-10 (giving examples of hate crimes committed upon African-Americans); The Year in Hate, Intelligence Report (Intelligence Proj. of the Southern Poverty Law Ctr., Montgomery, Ala.) Winter 1998, at 6 (indicating that number of hate groups rose significantly in 1997).

15. See infra text accompanying notes 47-62 (discussing Reconstruction-era violence as impetus for enactment of § 1986).


17. The Fourteenth Amendment to the United States Constitution reads as follows:

Section I: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section V: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5.


19. See infra text accompanying notes 52-62.
Amendment. Drawing on the earlier work of Jacobus tenBroek and other legal historians, West has concluded that a proper interpretation of the Equal Protection Clause, in particular, focuses as much on the concept of affirmative governmental protection as on that of equality. Other commentators have embraced similar understandings. In other words, government is required not only to treat citizens equally, but to accord them protection from threats of private violence and other private violations of law that undermine equality.

A failure to provide equal protection can arise as easily from inaction as from action: a failure to rescue or protect an aggrieved citizen from racist violence can also constitute a failure to provide equal protection.

The Equal Protection Clause is therefore not merely a mandate to provide government services in a colorblind manner if government chooses to provide them at all, as many now believe. According to West and other scholars, the Equal Protection Clause is also an affirmative obligation to ensure that citizens are protected from private violence, denial of the right to contract, and the like, that would deny them their status as free, equal persons. TenBroek posited an essentially similar and overlapping contemporary interpretation of the Fourteenth Amendment’s Due Process Clause. In sum, according to this


22. See West, supra note 20, at 23-25 (noting that denial of state protection to one group of its citizens leaves those citizens profoundly unequal).

23. For instance, Steven Heyman and Eric Schnapper also have endorsed the view that the Fourteenth Amendment provided strong affirmative authority to Congress to protect blacks by means of race-conscious programs such as the Freedmen’s Bureau Acts. See Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 Duke L.J. 507, 546 (1991) (suggesting central purpose of Fourteenth Amendment was to establish right to protection as part of federal constitution); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754 (1985) (discussing race-conscious reconstruction programs enacted concurrently with Fourteenth Amendment).

24. See West, supra note 20, at 24-25 (arguing that protection from unchecked violence was necessary to eradicate slavery).

25. See id. at 33-34 (suggesting that state can breach its duty to protect through action or inaction).

26. See id. at 9-16 (discussing modern equal protection scholarship and jurisprudence).

27. See supra notes 22-25.

28. TenBroek, supra note 21, at 206-07, 222-23 (detailing similar nature and construction of Due Process Clause and Equal Protection Clause).
broad interpretation, enforcement of the Constitution can, in some circumstances, require governmental protection and prohibit governmental inaction. The scope of required action can exceed the bounds normally acceptable in the common law if necessary to remediate the grievous harms of racism, and, more narrowly, even if the Constitution does not mandate affirmative protection in certain circumstances, statutorily created protection duties may still be constitutional enforcement mechanisms.\textsuperscript{29}

I do not claim in this Article that the abolitionist interpretation is the only correct reading of the Fourteenth Amendment. My claim is narrower: The Forty-Second Congress’s understanding of its Fourteenth Amendment-based enforcement powers has value for our current understanding of the Amendment and requires further attention. In this regard, the abolitionist interpretation of the Fourteenth Amendment and the affirmative obligations of § 1986 contrast sharply with the extremely limited view of the reach of constitutional rights and duties currently proclaimed, even trumpeted, by many courts and commentators.\textsuperscript{30} According to this view, the Constitution is a "chart of negative liberties," the function of which is to restrain behavior only when it fundamentally interferes with the autonomous exercise of liberty by others.\textsuperscript{31} Correlatively, few affirmative duties are imposed on either government or individuals under constitutional law. Thus, governmental or private inaction, even in the face of longstanding injustices or tragedies that the actor has the power to prevent, invokes no legal duty to act.\textsuperscript{32}

Accordingly, under this limited view, government has no constitutional duty to rescue or protect individuals from harms perpetrated by third parties in the absence of a special relationship (often limited to custodial relation-

\textsuperscript{29} See infra text accompanying notes 178-93.


\textsuperscript{31} See, e.g., Jackson v. Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). The court in Jackson stated:

\begin{quote}
[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the laissez-faire era only anarchists thought the state should not provide [police services] . . . . But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided. The concern was that some states might provide those services to all but blacks, and the equal protection clause prevents that kind of discrimination.
\end{quote}

\textit{Id.} (citations omitted).

\textsuperscript{32} See infra text accompanying notes 259-61, 267-68.
ships) or in the narrowly circumscribed category of dangers created by the
state.\textsuperscript{33} A particularly distressing example of the limited reach of government
duty is the Supreme Court's 1989 decision in \textit{DeShaney v. Winnebago County
Department of Social Services}.\textsuperscript{34} In \textit{DeShaney}, the Court held that the Due
Process Clause imposed no duty on child welfare caseworkers to protect a
four-year-old boy subjected to ongoing physical abuse by his father despite
the continuing involvement of the child welfare system in supervising the
father's custody and caseworkers' knowledge of the continuing pattern of
abuse.\textsuperscript{35} This decision provoked a flurry of commentary, much of it highly
critical of the Court's cramped view of constitutional duty under the Four-
teenth Amendment.\textsuperscript{36} Commentators have presented persuasive arguments
undermining the limited view that refuses to recognize more than the narrow-
est constitutional duty to protect against the misconduct of others.\textsuperscript{37} Nonethe-
less, the individualistic, libertarian view continues to predominate.\textsuperscript{38} How-
ever, the abolitionist interpretation of the Fourteenth Amendment as well as
the history of § 1986 undermine the restrictive view of the Fourteenth Amend-
ment by providing evidence supporting an alternative interpretation that con-
ceives of broader governmental protective duties.

\textsuperscript{33} See infra text accompanying notes 259-61, 267-68.

\textsuperscript{34} 489 U.S. 189 (1989).

\textsuperscript{35} See \textit{DeShaney v. Winnebago County Dep't of Soc. Servs.}, 489 U.S. 189, 192-94
(1989) (affirming lower court's holding that there was no actionable § 1983 claim); accord
municipal employee was fatally injured because of city's alleged failure to train its employees);
\textit{Soto v. Flores}, 103 F.3d 1056, 1058 (1st Cir. 1997) (finding police officers' qualified immunity
defeated plaintiff's due process claim where police failed to follow up on report of abuse and
where abuser subsequently killed plaintiff's children).

2271, 2278-2308 (1990) (criticizing Court's failure to articulate coherent principle to apply to
cases like \textit{DeShaney}); Aviam Soifer, \textit{Moral Ambition, Formalism, and the "Free World" of
DeShaney}, 57 Geo. Wash. L. Rev. 1513, 1514 (1989) (characterizing majority's opinion in
\textit{DeShaney} as illogical, insensitive, and wrong); David A. Strauss, \textit{Due Process, Government
Inaction, and Private Wrongs}, 1989 Sup. Ct. Rev. 53, 56-71 (discussing inadequacies of
theoretical approach that Court used in \textit{DeShaney}); Benjamin Zirpursky, Note, \textit{DeShaney
and the Jurisprudence of Compassion}, 65 N.Y.U. L. Rev. 1101, 1102-03 (1990) (suggesting major-
ity's sterile methodology prevented Court from reaching proper decision in \textit{DeShaney}).

\textsuperscript{37} See, e.g., Bandes, supra note 36, at 2278-79 (undermining highly rigid distinctions
underlying conventional wisdom about governmental duties); Heyman, supra note 23, at 509-12
(suggesting original understanding of Fourteenth Amendment encompassed more than courts
have recognized).

\textsuperscript{38} Even post-\textit{DeShaney}, however, federal courts have determined that certain instances
of governmental inaction violate the Due Process Clause of the Fourteenth Amendment. For
instance, if a state actor refuses to rescue a potential drowning victim and refuses to allow others
to aid in the rescue, courts may find a constitutional duty. See \textit{Ross v. United States}, 910 F.2d
1422, 1430 (7th Cir. 1990) (finding plaintiff sufficiently alleged that county arbitrarily denied
Fourteenth Amendment right to life); see also infra notes 259-60.
In addition, the evidence supporting a broader interpretation of the Fourteenth Amendment, and the Equal Protection Clause in particular, casts doubt on the Supreme Court's narrow, constrained position on affirmative action, most recently expressed in *Adarand v. Pena*. Under *Adarand*, affirmative action efforts are constitutional only when narrowly tailored to remedy specific past acts of discrimination occurring within the jurisdiction of the party responsible for the program. No affirmative action plan may correct racial imbalances occasioned by broader societal discrimination. In other words, notwithstanding our long history of blatant discrimination against racial minorities and its continuing legacy reflected in the inferior opportunities available to most minority group members, the Supreme Court's current position holds affirmative action programs constitutional in only the narrowest of circumstances. Those proposing an affirmative action plan must themselves have been involved in past discrimination before the remedy of race conscious affirmative action is permissible. In contrast, a more affirmative interpretation of the Equal Protection Clause suggests a broader and more effective remedy, which would focus primarily on the need to protect victims of discrimination who have been denied the ability to earn a livelihood.

Moreover, the remedies of § 1986, which I will demonstrate are a constitutional exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment, also stand in opposition to the Court's constrained interpretation of permissible affirmative action under the Equal Protection Clause. Section 1986 requires that protection be provided by those able to assist victims of racist conspiracies regardless of their status as causal agents or their individual intent. It reflects a Reconstruction-era understanding that the evils caused by racial discrimination may require the government, under the authority of the Fourteenth Amendment, to take affirmative actions to combat private discrimination in circumstances that would not otherwise require the intervention. In order to provide effective protection for aggrieved victims, those outside the immediate circle of direct causation may be drawn into corrective action. Without such affirmative protection, victims would not receive protection equivalent to that afforded the relatively more privileged, who remain free from such violent intrusions into their lives.

41. See id. ("Societal discrimination, without more, is too amorphous a basis for imposing racially classified remedy." (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986))).
42. See WEST, supra note 20, at 37-38 (suggesting protectionist approach is more permissive of affirmative action than formal approach). Notwithstanding this broad mandate, certain restraints are necessary to ensure that the remedy remains within constitutional bounds and that it does not unduly burden the innocent. See infra text accompanying notes 273, 278.
43. See infra text accompanying notes 203-23.
This is the first law review article to address, discuss, and evaluate § 1986 in depth. Despite its strong, affirmative remedy and the continuing need for its application, civil rights litigators are not generally familiar with the statute and few reported opinions discuss it. Even fewer reported opinions have granted relief under § 1986. Part of my purpose in writing this Article is to bring the statute to the foreground, examine its workings, and catch the attention of those working within the legal system to remedy civil rights violations. I also hope to begin to explore the implications of § 1986 for our understanding of the Fourteenth Amendment and the government’s affirmative duty to protect those subjected to racial discrimination—even discrimination perpetrated by private actors. This Article does not fully develop the constitutional ramifications of § 1986. Rather, the intent of this Article is to suggest fruitful areas for further research and to highlight evidence undermining the Supreme Court’s current restrictive view of Fourteenth Amendment rights.

In this Article, I first explicate the scope and purposes of section § 1986 by examining its text and history. In light of these purposes, I next examine justifications for the broad reach of § 1986, focusing primarily on prevention of extreme harm as justifying the section’s extension of liability to new defendants. I continue by arguing that the statute is both effective and efficient because it renders liable those whose knowledge of the underlying conspiracy puts them in the optimal position to prevent it. I include discussion of the few cases in which successful § 1986 claims have been brought, as well as some cases in which § 1986 claims should have been raised. I focus particularly on the obligations of public officials under § 1986 because their liability has the greatest significance for prevention and deterrence of racist conspiracies. I discuss the liability of private bystanders as well, but my focus in those instances is on the officials of private organizations such as the Ku Klux Klan. As official representatives of an organization, they bear a heightened responsibility for the conduct of members, arising in part from their ability to engage in effective preventive measures.

I continue by examining the constitutionality of §§ 1985 and 1986 in light of the Supreme Court’s recent decision in City of Boerne v. Flores, in which the Court narrowly construed the scope of the Fourteenth Amendment’s enforcement clause. Finally, I discuss the potential implications of § 1986 for interpretation of the duty to protect and affirmative action programs under the authority of the Fourteenth Amendment and conclude that the constitutional authority for affirmative obligations to rescue is stronger than many believe and demands further study. Unearthing authority for a vigorous duty

44. See infra text accompanying notes 114-202.
45. 117 S. Ct. 2157 (1997).
ANATOMY OF AN AFFIRMATIVE DUTY TO PROTECT

ANATOMY OF AN AFFIRMATIVE DUTY TO PROTECT

to protect is an important project with implications for many critical constitutional and political issues.

II. Historical Background

Sections 1985 and 1986 were enacted in 1871, as part of the Civil Rights Act, which also contained the more commonly construed § 1983. The Act was passed against the backdrop of brutal and pervasive Klan violence in the South. Subsequent to the Civil War, Reconstruction represented an attempt on the part of the North to realign relationships between the races in the South and to give African-Americans the right and ability to participate fully in economic and civic life. Most of the Southern states fought back by enacting so-called Black Codes that attempted to reimpose many of the burdens of slavery on free blacks. Unrepentant Southerners also harassed and intimidated white supporters of black rights. The struggle intensified after Congress adopted the Fourteenth Amendment in 1868:

By 1870, the Ku Klux Klan and kindred organizations... had become deeply entrenched in nearly every Southern state. One should not think of the Klan, even in its heyday, as possessing a well-organized structure or

47. See Berry, supra note 7, at 78-79 (suggesting that Civil Rights Act was Congress's response to reports of violence).


49. See Nelson, supra note 18, at 42. Nelson stated:

Southern intransigence also took the form of denying freedom of speech to those who attacked Southern ways. As another of Sherman's correspondents wrote, it was "notorious" that "Northern men have been subjected to the Gun knife the pistol the rope & tar & feathers for opinion sake all over the South" and that such persecution would prevent "employment" of "[a] multitude of people" in "teaching and preaching in the South." Representative Butler observed that a Southerner "knows that he can go to any part of the North and speak his sentiments freely," whereas Northerners could not go South and "argue the principles of free government without fear of the knife or pistol, or of being murdered by a mob."

Id. (alterations in original); see Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1217 (1992) ("As with the slavery system itself, the [Black Codes] would invariably require systematic state abridgements of the core rights and freedoms in the Bill of Rights. These abridgements would of course hit blacks the hardest, but the resurrection of a caste system would also require repression of any whites who might question the codes or harbor sympathy for blacks."). Amar's arguments in his article have been further elaborated in his new book, The Bill of Rights. See generally AKHIL REED AMAR, THE BILL OF RIGHTS (1998).
clearly defined regional leadership. Acts of violence were generally committed by local groups on their own initiative. But the unity of purpose and common tactics of these local organizations makes it possible to generalize about their goals and impact, and the challenge they posed to the survival of Reconstruction. In effect, the Klan was a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy. Its purposes were political, but political in the broadest sense, for it sought to affect power relations, both public and private, throughout Southern society. It aimed to reverse the interlocking changes sweeping over the South during Reconstruction: to destroy the Republican party’s infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life.50

Klan members’ attacks focused in particular on leaders of the African-American community, blacks in general, white Republicans, and federal agents.51

Faced with such a disturbing level of violence confronting the fragile national unity achieved by the Union in the Civil War, Congress enacted the Civil Rights Act of 1871 pursuant to the enforcement authority granted it by Section 5 of the Fourteenth Amendment.52 Section 1 of that Act, now codified at 42 U.S.C. § 1983, conferred a private right of action on victims of constitutional or other deprivations of federal law and was passed with little debate and no amendment.53


51. BERRY, supra note 7, at 78-79 (noting Ku Klux Klan’s clashes with state militia units that included both whites and blacks); FONER, supra note 50, at 426-30 (discussing violence of Klansmen).


The Supreme Court later found authority for § 1985 of the Civil Rights Act (and presumably § 1986 as well, because it is ancillary to § 1985) in the Thirteenth Amendment and its enforcement clause. See Griffin v. Breckenridge, 403 U.S. 88, 104-05 (1971); see also Red Elk v. Vig, 571 F. Supp. 422, 425 (D.S.D. 1983) (discussing Griffin). The Thirteenth Amendment outlaws slavery: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIV, § 1. It also specifies in § 2 that "Congress shall have power to enforce this article by appropriate legislation." Id. § 2.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction
The provisions of § 1985 were derived from Section 2 of the 1871 Act, and create a cause of action based on a conspiracy which deprives one of access to justice or equal protection of law.

The debates surrounding the passage of the Act expressed concern that conspiratorial and unlawful acts of the Klan went unpunished because Klan members and sympathizers controlled or influenced the administration of state criminal justice. Section 2 was designed to provide civil and criminal remedies in federal court for such conspiratorial activities. The criminal penalties of this and related sections proved very controversial. Like § 1985, the provision now codified as § 1986 also evolved along a tortuous path. The inaction of state and local governments and the local citizenry in the face of Klan-instigated beatings and murders was a major concern of supporters of the legislation. Police passivity despite apparent prior knowledge of these crimes was particularly troublesome, as it evidenced tacit involvement of local authorities in the violence. Section 1986 addressed that concern by extending liability beyond the immediate perpetrators of the violence. The section as ultimately passed, however, was considerably narrower than the version originally proposed.

Senator John Sherman, the Senate sponsor of the bill, sought to amend the bill that had passed the House and had been introduced in the Senate to impose liability on any inhabitant of a municipality "for damage inflicted by persons 'riotously and tumultuously assembled.'" The purpose of the amendment, according to Sherman, was to provide an incentive for property owners to aid in the enforcement of civil rights laws by putting their property at stake. Similar statutes, he explained, existed in England, as well as in a number of states. The amendment passed the Senate, but the House, refusing to acquiesce, required submission to a conference committee. The first conference committee draft provided for a similar action, but only against a local governmental


54. Bell v. City of Milwaukee, 746 F.2d 1205, 1233 (7th Cir. 1984) (citing Briscoe v. LaHue, 460 U.S. 325 (1983)).

55. In fact, the Supreme Court struck down the criminal counterpart to § 1985 in United States v. Harris. See United States v. Harris, 106 U.S. 629, 644 (1882).


57. Monell, 436 U.S. at 666.

58. Id. at 667.
entity, and only in the event that a judgment was not satisfied against individual defendants responsible for the violence.\textsuperscript{59} The House rejected the first conference substitute and called a second conference. That conference committee rejected municipal liability and drafted the statutory language later codified as §1986.\textsuperscript{60} Although Congress rejected imposition of municipal liability, its intent in drafting and passing the section was to provide broad, effective protection to victims of racist conspiracies.\textsuperscript{61} The focus of the conference committee's revision of the Sherman amendment and the ensuing debates was the need to compel protective action from local citizens and municipalities.\textsuperscript{62} The statute as passed accomplishes that objective.

III. Elements and Scope of §1985 and §1986

To set forth a violation of §1986, a plaintiff must first prove a violation of §1985, its predicate, which prohibits discriminatory conspiracies.\textsuperscript{63} A plaintiff need not prove that a §1986 defendant had the discriminatory intent requirement of §1985.\textsuperscript{64} Rather, the plaintiff need only demonstrate: (1) the defendant had actual knowledge of the §1985 conspiracy; (2) the defendant had the power to prevent or aid in preventing the commission of the §1985 violation; (3) the defendant neglected or refused to prevent the §1985 conspiracy; and (4) a wrongful act was committed by the conspirators.\textsuperscript{65} The defendant is liable for all damages that he or she could have prevented with reasonable diligence.\textsuperscript{66} Knowledge of rumors may satisfy the first element.\textsuperscript{67} A showing of negligence suffices to prove a violation of the section.\textsuperscript{68} To escape liability, a defendant need only exercise reasonable diligence to prevent commission of the §1985 conspiracy.\textsuperscript{69}

Thus, a violation of §1986 turns on the potential defendant's ability to prevent execution of a class-based conspiracy under §1985. Initially, it may

\begin{itemize}
\item 59. \textit{Id.}
\item 60. \textit{Id.} at 668-69.
\item 61. \textit{Foner, supra} note 50, at 454-55.
\item 62. \textit{Id.}
\item 64. \textit{Id.; 3 Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Actions §13.10 (1998).}
\item 66. \textit{Clark,} 20 F.3d at 1298.
\item 67. \textit{Id.} at 1296-97.
\item 68. \textit{See id.} at 1298; \textit{see also} Park v. City of Atlanta, 120 F.3d 1157, 1160 (11th Cir. 1997) (citing Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994)).
\item 69. \textit{See} Bell v. City of Milwaukee, 746 F.2d 1205, 1258 (7th Cir. 1984).
\end{itemize}
seem startling and perhaps even inconsistent with ordinary notions of liability in our legal system that liability is predicated upon such a low, indirect level of personal involvement. However, as elaborated throughout this Article, the unusual and extreme nature of the underlying harm justifies the statute’s reach. In addition, a vital limiting principle to the affirmative obligation to protect imposed by § 1986 is that protection is only required from a § 1985 conspiracy. Nonetheless, a § 1986 defendant need not have been a member of the § 1985 conspiracy, nor have been involved in it, as mere knowledge of the conspiracy and failure to exercise reasonable diligence to prevent it suffice to impose liability. Therefore, the statute represents a significant extension of liability beyond ordinary limits, although the need to make out a violation of § 1985 restricts its scope.

The standards for liability under § 1985 are quite stringent. Because subsection three of § 1985 is the most commonly used, it will serve as the focus of this discussion. Subsection three reads in pertinent part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Thus, the elements of a violation under this section are as follows: (1) the defendants did "conspire or go in disguise on the highway or on the premises of another"; (2) the defendants acted "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; and (3) one or more conspirators did or caused to be done "any act in furtherance of the

70. Subsection one prohibits conspiracies directed at interfering with the duties of government employees and officials, and is thus obviously limited in its applicability. 42 U.S.C. § 1985(1) (1994). Subsection two prohibits conspiracies to interfere with court proceedings, as well as conspiracies "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice . . . with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing . . . the right of any person . . . to the equal protection of the laws." Id. § 1985(2).

71. Id. § 1985(3).
object of [the] conspiracy," whereby another was (a) "injured in his person or property" or (b) "deprived of having and exercising any right or privilege of a citizen of the United States."72

To plead a civil rights conspiracy under this section, a plaintiff must allege that the defendants reached a conspiratorial agreement to violate one or more of the protected conspiracy, rights, as discussed infra, that a conspirator performed an overt act in furtherance of the conspiracy, and that the act caused injury.73 Further, because "[t]he very nature of a conspiracy obscures most, if not all, information about the alleged conspirators’ agreement," the complaint "must simply plead sufficient facts from which a conspiracy can be inferred; the facts detailing the conspiratorial agreement can be pleaded generally."74

Additionally, a conspiratorial agreement can be proved inferentially from circumstantial evidence. The gist of a civil conspiracy is an agreement between the defendants to violate the law. Again, because of the inchoate nature of conspiracies, direct evidence of the agreement often does not exist. However, a person may legally be considered a coconspirator without taking part in an overt act and without expressly agreeing to join the conspiracy if he or she tacitly authorizes, encourages, ratifies, or otherwise exhibits agreement with the conspiratorial aims.75 This standard is not dissimilar to the criminal law standard for accomplice liability, which requires little affirmative evidence indicating agreement.76 Thus, § 1985 conspiracies encompass all who intend to and act to encourage the conspiratorial aims. A defendant must personally intend to join the conspiracy as evidenced by engaging in an act or acts indicating authorization or encouragement. Inaction by a defendant will not suffice to impose liability.

73. Collins v. Hardyman, 341 U.S. 651, 659-60 (1951) (outlining elements of civil rights conspiracy); Lenard v. Argento, 699 F.2d 874, 882-83 (7th Cir. 1983) (same).
74. Quinones v. Szorc, 771 F.2d 289, 291 (7th Cir. 1985); see Burns v. Cineplex Odeon, Inc., No. 95 C 5280, 1996 WL 501742, at *8 (N.D. Ill. Sept. 3, 1996) ("[T]he Complaint must make a general allegation of a conspiracy that is supported by sufficient factual allegations to suggest a ‘meeting of the minds’ between the parties to the conspiracy." (quoting Kunik v. Racine County, 946 F.2d 1205, 1256 (7th Cir. 1991))); cf. Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) ("[W]hile a plaintiff should not plead mere evidence, he should make an effort to provide some ‘details of time and place and the alleged effect of the conspiracy.’").
75. See Bell v. City of Milwaukee, 746 F.2d 1205, 1256 (7th Cir. 1984). For example, to hold a supervisory official liable for a civil rights conspiracy, "[a]t a minimum plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of offending officers." Id. (citing Hayes v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982)).
76. See, e.g., N.J. STAT. ANN. § 2C:2-6 (West 1995) (setting forth similar standard for jury instructions on accomplice liability); cf. Ianelli v. United States, 420 U.S. 770, 777 n.10 (1975) (finding that agreement in criminal conspiracy need not be explicit and may be inferred from circumstances (citing Direct Sales Co. v. United States, 319 U.S. 703, 711-13 (1943))).
Interpretation of the second element—the intent requirement—has occupied most of the Supreme Court’s attention in construing § 1985(3). The intent requirement of the statute was set forth by the Supreme Court in *Griffin v. Breckenridge*, the leading case construing the section: "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action." In other words, the discriminatory intent must target a group to which the plaintiff belongs, rather than the plaintiffs as an individual. Moreover, "the right must be 'aimed at'; its impairment must be a conscious objective of the enterprise," that excludes conspiracies intended only incidentally to affect the protected right.

Whether the language of § 1985 concerning "class-based . . . animus" covers conspiracies other than race-based ones is still an open question in the Supreme Court. Many lower courts have sustained § 1985(3) claims charging gender-based, religion-based, and disability-based conspiracies, among others. This Article focuses primarily on race-based conspiracies.

Another important question addressed by the Court has been whether, or to what extent, § 1985(3) covers private conspiracies to violate protected rights, rather than conspiracies involving only state action. The *Griffin* Court adverted to the statutory language "going in disguise," mentioned that it referred to private conduct, and noted that the statute’s failure to include a state action requirement was a significant indication of legislative intent to include private conduct. Not all private conspiracies, however, are included within the scope of the statute. Actionable private conspiracies must aim at "interfering with rights" that are "protected against private, as well as official, actions."
encroachment." If the object of a conspiracy is to deprive a victim of constitutional rights protected only against state infringement, § 1985(3) is not violated "unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State." Thirteenth Amendment rights incident to the abolition of slavery are among the few constitutional civil rights actionable against wholly private conduct. Whether Section 1 of the Thirteenth Amendment itself accomplished more than the simple abolition of slavery remains an open question. However, pursuant to Section 2, the Enforcement Clause of the Thirteenth Amendment, Congress may enact legislation "to abolish both the conditions of involuntary servitude and the 'badges and incidents of slavery.'" The right to interstate travel, resting in part on Thirteenth Amendment authority, was cited by the Griffin Court as one constitutional right "assertable against private as well as governmental interference." The right to be free from public or private racist violence — the concern at the heart of § 1985 — should also be actionable as authorized by the Thirteenth Amendment, even without proof of intent to interfere with interstate travel. As a corollary to this


87. The Supreme Court decided in Novotny that a conspiracy to violate women employees' Title VII rights could not be a § 1985(3) violation because it would impair the effectiveness of Title VII's remedial scheme. See Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979). The Court did not address whether conspiracies to violate federal statutes, as opposed to constitutional rights, could ever violate § 1985(3).


89. See id. at 124-25 (citing and quoting the Civil Rights Cases, 109 U.S. 3, 20 (1883)); see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

90. Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971); see Bray, 506 U.S. at 274 (discussing right to interstate travel).

91. Some lower courts have required careful pleading of violations of the Thirteenth Amendment, as opposed to the right to equal protection generally, before sustaining § 1985 claims against private actors. Compare Peavey v. Polytechnic Inst. of N.Y., 775 F. Supp. 75, 79 (E.D.N.Y. 1991) (dismissing plaintiff's claim of private racial and religious bias premised on Fourteenth Amendment right to equal protection because court found no state action), and Emanuel v. Barry, 724 F. Supp. 1096, 1103 (E.D.N.Y. 1989) (finding private anti-Semitic conspiracy not actionable because plaintiffs alleged deprivation of equal protection right to be secure in their persons, which is "not among the rights the Constitution guarantees against private deprivation"), with Johnson v. Smith, 810 F. Supp. 235, 238 (N.D. Ill. 1992) (upholding
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doctrine, if governmental conduct (or its private counterpart under state action
doctrine)\textsuperscript{92} is involved, conspiracies to violate the full range of constitutional
rights relating to equal protection, privileges, and immunities are actionable
under § 1985(3).

In summary, a § 1986 claim is dependent upon establishing an underlying
conspiracy claim under § 1985. Section 1986 then acts to reinforce and extend
§ 1985 by permitting claims against defendants not implicated under § 1985.
That is, a § 1985 defendant must be a conspirator and must have joined in the
illegal conspiracy by at least manifesting his or her agreement with the con-
spiratorial plan. While evidence of mere encouragement of the conspiracy
rather than direct participation may suffice to establish coconspirator liability,
the existence of some evidence of an active link between this defendant and
the conspiracy is necessary. Section 1986, on the other hand, requires no such
direct connection to the conspiratorial agreement. It attaches liability for culp-
able inaction. It renders responsible those whose knowledge places them
closest to the underlying conspiracy regardless of whether or not they acted
affirmatively.

IV. Effectiveness in Addressing Extreme Harm Justifies the Duty to
Rescue or Protect Under § 1986

A. Prevention of Extreme Harm Is the Primary Rationale
for the Statute

A number of justifications – legal, moral, and pragmatic – can be ad-
vanced to support the extension of liability contained in § 1986. The most
important is the extremely serious nature of the underlying harm addressed by
§ 1986. As a matter of morality or policy, a more severe underlying harm
normally would justify a correspondingly stronger duty to prevent harm. That
principle applies forcefully in this instance.

Continued widespread racism in the South and Southern states' concomi-
tant refusal to enforce the Fourteenth Amendment necessitated the passage of
§ 1986 in 1871. The stubborn persistence of racist violence threatened to
undermine any attempts to reach even a fragile national unity and impose
federal authority on the region.\textsuperscript{93} The refusal of government officials and law

\textsuperscript{92} See West v. Adkins, 487 U.S. 42, 54 (1988) (finding that private individual perform-
ing state functions acts "under color of law" for § 1983 purposes).

\textsuperscript{93} See supra notes 47-51 and accompanying text.
enforcement agencies to enforce the law was particularly problematic. Their inaction in the face of continued racial oppression effectively denied the protection of the post-Civil War Constitution to black citizens. For that reason, this Article focuses, in particular, on the liability of public officials.

As the 1870s progressed, the country grew increasingly disenchanted with Reconstruction. The United States simply lacked the political will to forge a national commitment to eradicate the legacy of slavery. The federal government abandoned and dismantled the machinery of Reconstruction, leaving the South to its own devices. After that, emboldened white supremacists engaged in a pattern of lynching, harassment, and oppression of blacks that continued for decades.

The pattern of governmental underenforcement continued into the 1960s, as the police refused to prevent attacks on civil rights workers by racist groups, including the Ku Klux Klan. As demonstrated by certain recent events, the problem has abated, but has not stopped. Section 1986 can be instrumental in further limiting these racial conspiracies. It gives those in the best position to prevent § 1985 conspiracies an incentive to act. A realistic threat of § 1986 liability could propel an officer or bystander with knowledge of impending execution of a racist conspiracy to offer the reasonable protection required by the statute.

In addition, the morality of imposing an affirmative duty to protect victims of racist conspiracies is from this perspective even stronger than the morality supporting a general duty to rescue (for example, the duty to rescue an accident victim). The evil intent motivating racist conspiracies, amplified by our long

94. FONER, supra note 50, at 433-46.
95. See generally id. (discussing United States’s treatment of slavery issue).
96. See id. at 587-601 (discussing effects of termination of Reconstruction in South).
97. Id.; see BERRY, supra note 7, passim; see also GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 552-53 (1944) ("It is notorious that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned by name in the local press.").
98. See BERRY, supra note 7, passim.
101. While I would support a general duty to rescue and consider the arguments set forth by a number of commentators in this regard persuasive, see generally John M. Adler, Relying...
history of oppression of African-Americans, distinguishes the situations, as it exacerbates the harm caused to the victims. When an individual is targeted for reprisal based on an immutable characteristic such as race, and when that characteristic has fated the individual to a permanent lesser status in a culture, reinforcement of the victim’s powerlessness only corroborates and reinstills a message of permanent victimhood and despair. Moreover, racial violence, in effect, denies blacks the right to citizenship. Since the Civil War, racial violence has been a primary weapon of hate groups that have used it to intimidate African-Americans and keep them from exercising their civil rights.

The harm that the conspiracy perpetrates on society is, in that sense, worse than the harm that an accident causes. In protecting against race-based conspiracies, § 1986 not only protects the particular victims, but also protects the community at large from the evil of violence motivated by racial animus.

Racial violence causes severe harm to American democracy and its foundational values and principles. Not only are such acts inherently pernicious, but they echo the incredibly destructive racial subordination that was institutionalized as the system of slavery, an institution whose legacy persists today. That corrosive system utterly belied the fundamental premise of liberal democracy that equality for all is a precondition of enduring liberty. Its remnants continue to plague us. Given this history, all members of American society bear a heightened responsibility to intervene to minimize racist conspiracies and the ravages of racist violence. The harms flowing from the system of slavery and America’s resulting responsibility justify both § 1986 and related extensions of liability.

Since Reconstruction, Congress has recognized the unique harms caused by racism and has legislated against them numerous times. The Supreme
Court has ratified Reconstruction-era civil rights legislation by upholding, for instance, a broad construction of § 1985(3) in *Griffin v. Breckenridge*\(^{106}\) and a broad construction of § 1982 of the 1866 Civil Rights Act in *Jones v. Alfred H. Mayer Co.*\(^{107}\) The Court also recognized in *Brown v. Board of Education*\(^{108}\) the damage done by racism and the role of the Fourteenth Amendment in rectifying racism.\(^{109}\) The Court has reiterated its condemnation of racist conduct a number of times since 1954.\(^{110}\)

As recounted earlier in this Article, Congress enacted the 1871 Civil Rights Act in part to counter the passivity and complicity of Southern officials in the face of racial violence.\(^{111}\) In light of that history, § 1986 should be

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107. 392 U.S. 409, 443 (1968). The Court reasoned:

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.


What we have [in the hate crime ordinance at issue is] . . . a prohibition of fighting words that contain . . . messages of "bias-motivated" hatred and in particular, . . . messages "based on virulent notions of racial supremacy." One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear . . . ."


111. I should note that the harm of a racist conspiracy increases when it is executed in public and the government (or the public) acquiesces. A privately conceived and planned conspiracy may be intentionally executed in public in order to intimidate its victims and their supporters from responding. Essentially, publicly enacted conspiracies carry an intensified message of threat and coercion, which is exacerbated when the victims cannot rely on the authorities (or fellow citizens) for protection. Section 1986 focuses on these authorities (and knowledgeable bystanders) and targets them for liability. And even if the conspiracy is executed in private, its victims are doubly harmed if they have no recourse in the form of police assistance. *See Johnson v. Harron*, No. 91-CV-1460, 1995 WL 319943, at *1-*3 (N.D.N.Y. May 23, 1995) (stating claim under §§ 1985 and 1986). In *Johnson*, customs officials detained an African-American man and his white wife at the Canadian border. *Id.* During the detention, the customs inspectors threat-
interpreted similarly to focus on responsible officials who fail to protect victims of racist violence. Most of those litigating under § 1986 have brought suit against such public defendants, presumably in recognition of their primary responsibility to engage in rescue efforts. Moreover, official refusal to control crime is especially morally blameworthy because of the denial of responsibility that normally accompanies it. That denial becomes the entire public’s denial when the government is an actor. In addition, once the government has endorsed a position of nonintervention, every governmental agent involved in these racially charged situations is immunized from responsibility. Absent legal compulsion in these situations, only exceptional individuals can be expected to take a moral stand and act to prevent further violence. Thus, legal, in addition to political processes, are sometimes needed to ensure adequate protection. Section 1986 fortifies constitutional antidiscrimination mandates and imposes societal responsibility for a societal problem.

B. Effectiveness in Addressing Harm by Providing a Remedy Where No Other Remedy Is Available

Not only must the harm from which relief is sought be extreme, but a fully justified statute must effectively address that harm. The case law construing § 1986, although relatively sparse, confirms the statute’s utility in providing an avenue of redress in situations where no alternative relief is available. The statute’s rationale, then, is in part pragmatic. Concerns about the advisability of attaching liability to the inaction of defendants who were

ened the husband with physical harm, stripped him, subjected him to a body cavity search, and berated him with ongoing racist abuse. *Id.* The bystanding state police officer did not intervene to stop the abuse. *Id.*

112. *See infra* notes 127-34 and accompanying text.

113. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 267 (1963) (commenting in this regard on trial of Adolph Eichmann in Israel). Arendt stated:

*[[The judges did not believe [Eichmann]], because they were too good, and perhaps also too conscious of the very foundations of their profession, to admit that an average, "normal" person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong. They preferred to conclude from occasional lies that he was a liar — and missed the greatest moral and even legal challenge of the whole case. Their case rested on the assumption that the defendant, like all "normal persons," must have been aware of the criminal nature of his acts, and Eichmann was indeed normal insofar as he was "no exception within the Nazi regime." However, under the conditions of the Third Reich only "exceptions" could be expected to react "normally." This simple truth of the matter created a dilemma for the judges which they could neither resolve nor escape.*

*Id.*

114. Morally, the statute is justified if it actually and effectively addresses the harm at which it is aimed. Legally, the statute is justified if it effectively enforces the Equal Protection Clause, under which authority it was enacted.
not involved in the conspiracy are outweighed by the necessity of attacking the underlying evil. In the most dramatic example, the United States Court of Appeals for the Third Circuit in *Clark v. Clabaugh*, the case that in broad strokes introduces this Article, denied the defendants' motion for summary judgment and set down for trial claims of liability under §§ 1985 and 1986.15

As described in the opinion:

Hanover Center Square, in Hanover Borough, York County, Pennsylvania, was the site of a disgraceful two-day spectacle of racial unrest which ignited between the members of a self-styled interracial youth group on the one side, and a band of all-white motorcyclists and a crowd of townspeople on the other. The incidents which gave rise to this cause of action were preceded by a rumor, which apparently circulated about town for two weeks, that the white bikers were conspiring to assemble in the Square on the evening of July 13, 1991, to drive the interracial group, which regularly congregated and socialized in the Square, out of Hanover. In fact, on the evening of July 13th, the interracial group and the white bikers did assemble in the Square, apparently in anticipation of and prepared for a hostile confrontation. The presence of the two groups, as well as, presumably, the effect of the rumors, incited the participation of many townspeople who had also gathered as spectators and as supporters of the bikers.

In short, by midnight of July 13th, a volatile assemblage of approximately 40 interracial youth group members, twelve or more white bikers and approximately 200 to 300 townspeople had gathered in the Square. A racially charged altercation and exchange of taunts, challenges, accusations, and obscenities ensued. Only six Hanover police officers were present. . . . Over 500 townspeople congregated on the street outside [a nearby] apartment building on the evening of July 14th to confront members of the interracial group gathered on the rooftop [of the building]. Again, a racial altercation ensued, but this time the two factions threw objects such as stones and bottles at each other. Police officers ascended the fire escape, arrested all the members of the interracial group present on the rooftop and charged them with disorderly conduct.16

Members of the white mob on the street were not arrested. The opinion continues by describing further racial incidents occurring that evening in which the police failed to protect the victims.17

It is extremely troubling that such a riot could occur in the United States in 1991.18 It is even more troubling that police inaction compounded the problem by adding the imprimatur of the state to the events and making it clear that the youth group had no protection from the mob. Congress enacted

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115. See *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994) (denying summary judgment).
116. *Id.* at 1293-94.
117. *Id.*
118. See supra note 1 (indicating that riot took place only months after Rodney King incident).
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§ 1986 precisely to provide a remedy to plaintiffs in situations such as this. Although no serious physical injuries occurred during the Hanover riot, striking parallels between this situation and Klan violence in the Reconstruction-era South exist. These range from overtly racist references to alleged miscegenation to the vigilante tactics of the bikers and the white mob’s participation with the bikers, finally culminating with the police refusal to intervene until they made mass arrests of the interracial group members.

Moreover, the plaintiffs in the interracial youth group would have had no potential remedy against the police absent § 1986, because no evidence existed of police involvement in the bikers’ conspiracy. The police arrested only the interracial group and not members of the mob, and that may well indicate racial motivation, but additional evidence of racially discriminatory intent would be necessary to state an equal protection claim under § 1983. Nor would a due process-based claim of the violation of the duty to protect exist under DeShaney. Evidence did exist, however, of the mayor’s and the

119. See Clark, 20 F.3d at 1293 (stating that incident did not involve any serious bodily harm).

120. Plaintiffs’ Second Amended Complaint ¶ 85, Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994) (No. 1: CV-92-0595) (“I hope the baby rots inside you before it comes out because we don’t need any more niggers.”) (on file with the author); id. ¶¶ 155, 158.

121. Id. ¶¶ 42-44, 64, 67, 69, 71, 89.

122. See id. ¶ 57 (“Members of the White mob approached the interracial group and yelled ‘niggers,’ ‘nigger lovers,’ ‘white trash,’ ‘little girls with niggers,’ ‘we’re going to get you, niggers,’ ‘nigger bitch,’ ‘niggers, go back where you came from’ and other anti-Black slurs.”); see also id. ¶ 55, 56, 96, 97.

123. Id. ¶¶ 91, 92, 108, 112, 128, 152, 153. The defendants in this case included the mayor and police chief, several Hanover police sergeants, individual police officers who were on the scene, and the motorcycle gang members who initiated the violence. Id. ¶¶ 19-38. As the highest town officials with foreknowledge of the incipient riot, the mayor and the police chief bear the greatest responsibility for the events, and hence culpability. The police sergeant who had received advance information concerning the impending racial confrontation and who failed to take adequate protective action, id. ¶ 51, would bear a lesser, but still significant, responsibility. Of the individual police officer defendants, those best able, because of prior knowledge and proximity to unfolding events, to take protective action would be more culpable under § 1986. For instance, on at least one occasion, white members of the mob physically attacked a member of the interracial group in the presence of Hanover police officers. The officers failed to stop the attack or arrest the offenders. Id. ¶ 88. On a number of other occasions, instead of protecting interracial youth group members from the mob’s racist threats of violence, officers instead arrested the plaintiffs for disorderly conduct. Id. ¶¶ 108-116, 126-134, 140-160. While the degree of culpability of a defendant is not itself relevant to liability under § 1986 if the defendant’s conduct meets the requisite standards for liability, culpability is certainly relevant to a determination of an appropriate level of damages.

124. Id. passim.


126. See infra text accompanying notes 249-54.
police chief’s prior knowledge of the bikers’ plans to run the interracial group out of town. The ability of the police to act with reasonable diligence to prevent further consequences of the conspiracy is evident, given that they were able to call a curfew and quell the violence on the second night of the riot. This case thus exemplifies the continued relevance of and need for § 1986. It simply would not be just to leave the plaintiffs without legal recourse against the police in this situation.

There are other examples of § 1986 claims alleged successfully in cases in which no other legal claim would have been available to the plaintiffs against police defendants. The United States Court of Appeals for the Sixth Circuit in Green v. Francis$^{127}$ upheld a jury verdict arising out of an incident in which the home of an elderly black couple was riddled with a heavy barrage of gunfire.$^{128}$ The couple’s son was chased and fired upon by an armed band as he fled to seek help for his parents.$^{129}$ The private defendants, neighbors of the couple, apparently were enraged over a racially tinged boundary line dispute with the plaintiffs. Although the plaintiffs repeatedly sought the assistance of the county sheriff’s department, the sheriff and his two deputies did very little to assist them or to investigate the incident.$^{130}$ Ultimately, the plaintiffs were forced to flee their home of thirty years to escape further danger.$^{131}$

The sheriff and deputies were sued under § 1986 for failing to assist the plaintiffs and failing to investigate the incident that was the culmination of a § 1985 conspiracy among the private defendants.$^{132}$ Following a jury verdict awarding damages to the plaintiffs and a decision granting declaratory and injunctive relief, the private defendants appealed, although the police defendants did not. The United States Court of Appeals for the Sixth Circuit upheld the verdict.$^{133}$ Consequently, the opinion does not discuss § 1986, but the case is noteworthy in presenting a classic factual situation for relief under that statute. No other claims against the official defendants would have been available to the plaintiffs to challenge the defendants’ inaction. No special relationship existed, nor did the sheriff and deputies create a danger. Section 1986 considerably widens the circle of potential defendants to include the police, whose knowledge and ability to prevent harm placed them in a unique position to prevent further harm and made them appropriate defendants. The

127. 705 F.2d 846 (6th Cir. 1983).
128. See Green v. Francis, 705 F.2d 846, 848-49 (6th Cir. 1983) (finding ample evidence to support plaintiffs’ claim).
129. Id. at 848.
130. See id. (stating that plaintiffs and defendants were involved in emotional litigation).
131. Id.
132. See id. (stating that violence drove plaintiffs from their home).
133. Id. The plaintiffs also brought claims under §§ 1981, 1983, and 1988. Id.
134. See id. at 848-49 (upholding verdicts).
police could have acted to ameliorate the situation and perhaps allow the plaintiffs to remain in their home. Their failure to protect against a racist conspiracy was actionable under § 1986, and properly so.

C. Effectiveness in Reaching the Underlying Evil Justifies the Extension of Liability Beyond the Scope of § 1985

This subpart examines the problem of justification from a somewhat different perspective. In order effectively to deter or prevent the evil of racist conspiracies, parties, in addition to those already subject to liability under § 1985, must be reachable. This need militates in favor of applying the reasons justifying § 1985 to § 1986. As discussed in the previous section, § 1986 expands liability beyond that of § 1985 by widening the circle of potential defendants to include nonconspirators with knowledge of the conspiracy and the ability to prevent it. It shifts the relevant legal inquiry from the defendant's bad intent and acts to a determination of whether the defendant had a realistic ability to prevent the consequences of illegal racist conspiracies. The primary harm to be blocked, deterred, or compensated — damage occasioned by a racist conspiracy — is virtually identical with respect to both provisions. Section 1986, however, focuses on a different, wider group of parties who are causally responsible. Both sections are thus justifiable by largely overlapping sets of reasons. These sections appropriately concentrate on deterring a particularly grievous harm by targeting either those directly responsible or those sufficiently involved to be able to prevent the harm, whose unwillingness to do so renders them morally responsible, given the gravity of racist violence.

In addition, assuming that coconspirator liability under § 1985 is objectionable, the fine line between the standard for proving that liability — tacit authorization of the conspiratorial objectives — and that for proving bystander liability under § 1986 — knowledge and ability to act — can be crossed with few grounds for objection. Therefore, if an officer observing the execution of a racist conspiracy is not a coconspirator but merely a passive bystander, that officer also should be liable for damages caused by the conspiracy that he or she reasonably could have prevented. The goals of the 1871 Act provide strong support for this conclusion. There are times when one cannot prove that a conspiracy existed, but moral harm exists in both instances.

135. The set of harms addressed by § 1986 is somewhat larger in that § 1986 encompasses the harm that the inaction of officials or bystanders caused as well as the harm that the conspirators directly caused. However, the focus of both § 1985 and § 1986 is on harm that the conspiracy itself occasioned. That is, legally the chain of causation is substantially weaker when one reaches the bystanders. My argument, however, is premised in part on the assumption that an attenuated form of causation is still present. Morally, the harms that the actors and bystanders caused may differ, but moral harm exists in both instances.

136. Compare this argument to the discussion in Part VI.B. See infra text accompanying notes 249-73 (arguing for extension of constitutional tort liability in duty to protect or rescue
Imagine a situation such as that in *Clark v. Clabaugh* where rumors have been circulating for weeks around a small town concerning an impending racial altercation on a specific date by a group of white bikers and supportive townspeople against an interracial group of black and white young people. The police chief and mayor have heard days ahead of time of the plans. When the appointed time arrives, however, they deploy only a few officers who stand by and do nothing as the bikers and hundreds of local citizens riot and chase the interracial group out of the square. The next evening, the mob gathers again, hurling objects at the interracial group. When someone in the vicinity of the interracial group starts throwing objects back at the white mob, the police arrest every member of the interracial group, but not a single member of the biker group or the mob.

In one variation of this fact pattern, imagine further that the mayor and police chief were overheard discussing the impending riot days in advance. They tell the leader of the white biker group that they intend to do nothing to stop the attack by the bikers, and agree that blacks do not belong in the town. This variation contains direct evidence of a conspiratorial agreement between the officials and the bikers to violate the interracial group’s Thirteenth and Fourteenth Amendment rights. It clearly would support an action under § 1985.

In a second variation, the police chief and mayor are seen conferring with the biker group leader immediately before the riot. They vigorously nod their heads, laugh, and walk back to the municipal building. Shortly thereafter, the riot breaks out, and the few police officers on hand passively watch the unfolding events. The police chief emerges from the police station with a number of officers not long before the police arrest the interracial group. All stroll to the scene, where they remain on the outskirts of the mob’s attack until moving in decisively to arrest the interracial group. The second scenario also could evidence a § 1985 conspiracy, though the question is closer. The evidence could permit an inference of authorization or encouragement by the police sufficient to sustain a conspiracy claim, though it does not require that conclusion. A factfinder reasonably could find either way.

In a third variation, corresponding to the actual facts of *Clabaugh*, no evidence of the town officials’ racial motivation or complicity with the bikers situations beyond current limits to encompass at least those situations governed by § 1986).

137. See *supra* text accompanying notes 116-17 (discussing facts of *Clark v. Clabaugh*).

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exists. With no evidence of a conspiracy on the part of the four officials, this scenario could sustain only a § 1986 claim against the police. The bikers carry out the attack with the assistance of the townspeople, but police reaction consists only of passivity during the attack, and later arresting the entire interracial group when someone in the group's vicinity begins throwing objects. Evidence of all elements of a § 1986 claim exists: The police had prior knowledge of a § 1985 conspiracy and the power to prevent it, but they failed to do so. In the absence of § 1986, however, the interracial group in this variation would have no civil rights claim against the police.

My point in elaborating these variations is that the plaintiffs should have legal recourse in all three scenarios despite the lack of evidence of conspiracy in the third variation: The evil to be blocked and the conduct of the police do not differ in any legally, morally, or politically significant way among the three scenarios. The statutory objective of preventing and deterring these conspiracies is not served by starkly distinguishing between the three variations outlined above such that the first two can result in liability while the third cannot, particularly because no strong countervailing reasons exist to make the distinction. The failure of the police to intervene despite prior actual knowledge of the conspiracy is highly culpable and is similar to that of police in Southern small-town racial attacks occurring earlier in the century. Surely the civil rights acts passed during Reconstruction to enforce the post-Civil War amendments should support these claims.

On an even more practical level, § 1986 is needed and justified because coconspirator liability of police or other officials is often extremely difficult to prove even when they have joined the conspiratorial objectives. Conspiracy cases can pose insurmountable proof problems because of the clandestine nature of conspiracies. Just as § 1985 defendants can don Klan robes and

139. See supra text accompanying notes 116-17 (describing facts of Clark v. Clabaugh).

140. The plaintiffs in Clabaugh would have a claim under § 1985 against the bikers assuming the bikers aimed at interfering with the right to interstate travel. See supra notes 116-17 and accompanying text. This conspiracy would be the predicate for the § 1986 claim against the police. The utility of a claim directly against the bikers is limited because normally these defendants are practically judgment-proof. Moreover, the moral and political significance of a verdict against them is much less than that of a verdict against the police. The plaintiffs would not have a § 1983 claim against the police for disparate treatment of the white and interracial groups based on the arrests of the latter but not the former because there is no additional evidence of an intent to discriminate on the part of the police. See Washington v. Davis, 426 U.S. 229, 238-44 (1976) (discussing need to demonstrate discriminatory intent in order to bring equal protection claim).


142. BERRY, supra note 7, passim (discussing incidents of racial violence).

143. See Clark, 20 F.3d at 1296 (stating that nature of conspiracies typically precludes direct evidence).
hoods to conceal their identities, police and officials can conceal their involvement by apparent passivity. Proving that a passive official has tacitly or expressly authorized, encouraged, or otherwise quietly furthered conspiratorial aims can be impossible unless a fellow conspirator confesses the conspiratorial activities, which rarely occurs. On the other hand, proving that the same individual had prior knowledge of a conspiracy and failed to exercise reasonable diligence to prevent it is a more realistic endeavor. Essentially, difficulty of proof inversely correlates with statutory effectiveness. Section 1986 eliminates many proof problems and thus increases the possibility of actually blocking § 1985 conspiracies.

Once again, the case law construing § 1986 corroborates this conclusion. A case from the Southern District of Texas resulted in issuance of a preliminary injunction against the Ku Klux Klan’s interference with Vietnamese shrimp fisherman in Galveston Bay. It concerns not police defendants, but private Klan officials. In *Vietnamese Fishermen’s Association v. Knights of the Ku Klux Klan*, plaintiffs sued under, inter alia, §§ 1985(3) and 1986 to prohibit the Klan from threatening violence against the fishermen. Klan officials and members, hooded and visibly armed, had taken a boat out into the bay, fired a cannon, carried a figure of a fisherman in effigy, and made threats against local fishermen and a business establishment that catered to the fishermen. Previously, they had held a rally and called upon the government to rid the bay of the Vietnamese fishermen, stating that it "may become necessary to take laws into our own hands" if the presence of Vietnamese fishermen in the bay did not decrease. The speaker, the Grand Dragon of the Texas Klan, had stated further that it was necessary to "fight fight fight" and see "blood blood blood." He had also demonstrated how to burn a boat, and someone had burned a cross as well. Additional evidence of the defendants’ actions, such as burning other Vietnamese-owned or operated shrimp boats and pointing guns at members of the class, verified the Klan’s racial animus.

The significance of the § 1986 claim in this case lies in its ability to encompass all of the Klan defendants for purposes of demonstrating a likelihood of success on the merits, thus warranting a preliminary injunction. It would have been extremely difficult for the plaintiffs to show that each individ-

144. For a private individual, reasonable diligence to prevent a conspiracy might involve no more than calling the police.
147. See id. at 1001 (describing "boat ride").
148. *Id.*
149. *Id.*
150. *Id.*
151. See id. at 1015-16 (describing acts of violence and intimidation).
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ual who stood by during the threatening rallies had actually participated in the § 1985(3) conspiracy and there would have been further difficulties with the lack of evidence of the exact scope of the conspiracy. For example, the plaintiffs could prove that the Grand Dragon had knowledge of the boat ride and that Klan members would wear their robes and carry semiautomatic weapons on the boat, and that he failed to act to prevent the ride.\textsuperscript{152} No additional evidence of his complicity with the boat ride participants existed, however. Perhaps his speech and prior knowledge could be considered sufficient encouragement of the § 1985 conspiracy to justify finding him a coconspirator, but that task is obviated and the analysis simplified by a § 1986 claim. Furthermore, the troubling facts of this case include not only that the Grand Dragon may have conspired with the other participants, but that, in the face of knowledge of conspiratorial activities, he failed to block their enactment. His situation is analogous to that of the Hanover mayor and police chief in that each had both the responsibility and knowledge to avert the tragedy, but failed to do so.

A preliminary injunction under, inter alia, §§ 1985(3) and 1986 also was issued in \textit{Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.}\textsuperscript{153} The Chippewa Indian plaintiffs in that case enjoined a group of white protesters from interfering with their treaty rights to spearfish for walleye in northern Wisconsin lakes.\textsuperscript{154} The protesters had engaged in a pattern of harassing behavior that included stone throwing, threats of harm, racial and sexual insults, property damage, and minor batteries.\textsuperscript{155} To prevent the plaintiffs from catching fish, the protesters also blocked boat landings, created wakes in the water, planted concrete walleye decoys, and harassed the Indians when they were fishing by making loud noises.\textsuperscript{156}

\textsuperscript{152} \textit{See id.} at 1001-02 (giving testimony of Grand Dragon as to his knowledge of "boat ride").

\textsuperscript{153} \textit{Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc}, 759 F. Supp. 1339, 1354 (W.D. Wis. 1991). For the subsequent history of this litigation, see 41 F.3d 1190 (7th Cir. 1994); 991 F.2d 1249 (7th Cir. 1993); 843 F. Supp. 1284 (W.D. Wis. 1994); and 781 F. Supp. 1385 (W.D. Wis. 1992). The court issued a preliminary injunction on March 15, 1991. \textit{See Stop Treaty Abuse-Wis.,} 41 F.3d at 1192. On January 6, 1992, the district court granted summary judgment to the plaintiffs and issued a permanent injunction under 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." \textit{Id.} (quoting 42 U.S.C. § 1982). Moreover, "[b]ecause full relief was available under section 1982, the district court dismissed plaintiffs' other claims." \textit{Id.} The dismissal of the §§ 1985 and 1986 claims under these circumstances does not diminish the arguments I make in this section regarding the value of § 1986 claims because § 1982 is only narrowly applicable to property claims and because, under the facts of this case, evidence existed that the defendant leader of the organization personally participated in racist activities.

\textsuperscript{154} \textit{See Stop Treaty Abuse-Wis.,} 759 F. Supp. at 1354 (describing relief granted).

\textsuperscript{155} \textit{Id.} at 1344.

\textsuperscript{156} \textit{Id.}
The racist insults included such invective as: "Save a walleye, spear a squaw," "Timber nigger," "Custer had the right idea," "Scalp 'em," and "You're a conquered nation; go home to the reservation."157

After finding a likelihood of success on the merits of the plaintiffs' § 1985(3) claim, the court turned to the § 1986 claim, focusing on the individual defendant, a private individual, who was the leader of the protesters' organization.158 Because this defendant had been personally involved in harassing protest activities and had a demonstrable influence on the organization, the court implicitly concluded that he had the levels of both knowledge and power it deemed necessary under § 1986 to stop further conspiratorial actions.159 Again, as in Vietnamese Fishermen's Association, this defendant conceivably could have been included in the § 1985(3) conspiracy, but § 1986 clarifies and simplifies the analysis by providing directly for liability.160 It establishes a straightforward claim the strength of which lies in assigning responsibility to those in the best position to block conspiratorial actions regardless of their conscious intent or personal participation in the events.

In most of the cases discussed herein, top officials have been most directly responsible for the decision not to take responsive action. Those officers or organization members on the next level down of the hierarchy bear a correspondingly lesser level of responsibility, as their ability to control others decreases. On the other hand, their knowledge of the conspiracy may be equal to or greater than that of their superiors, in which case reasonable diligence under § 1986 should include alerting others to events or possible methods of ameliorating the situation. Those least responsible in these cases ordinarily would be bystanders not otherwise connected to the conspiracy. None of the reported cases named a private bystander as a defendant under § 1986, an appropriate result under the statute because a bystander's reasonable diligence could not consist of more than alerting the authorities to the situation.

D. Section 1986 Is Effective in Providing Analytical Clarity While Addressing the Underlying Evil in an Appropriate Fashion

The preceding sections have demonstrated that a primary strength of a § 1986 claim is its ability to reach the targeted harm directly. While certain

157. Id. at 1345.
158. Id. at 1352.
159. Id. The court apparently required a § 1986 defendant to have the individual power to stop the conspiracy, rather than considering the reasonable diligence requirement in light of the ability of the particular individual to take any blocking action. Id.
160. Presumably, because of the preliminary nature of the relief sought here, both opinions are somewhat opaque concerning the relationship between § 1985 and § 1986 liability as applied to the facts of those cases.
§ 1986 claims also could be brought under alternative theories, in many circumstances a § 1986 claim more precisely reaches the harm to be prevented or compensated, whereas alternative statutory claims may require expansion or distortion of their terms to encompass the allegedly illegal conduct. This section presents additional cases that substantiate this conclusion.

Probably the most dramatic case is *Bell v. City of Milwaukee*,\(^1\) in which a police officer admitted, twenty years after the fact, that he and his partner had shot and killed an African-American man without provocation in 1958, and afterwards concocted a massive cover-up of the incident.\(^2\) Upon hearing this revelation, the victim's family filed suit under, inter alia, §§ 1983, 1985, and 1986 against numerous police and municipal defendants and recovered more than $1.5 million in damages after a federal jury trial.\(^3\) The jury found liability under §§ 1985 and 1986, as well as other statutes.\(^4\) The plaintiffs alleged that the responsible officers conspired with their supervising sergeant and the Milwaukee police chief to conceal the facts of the shooting and that these supervisory defendants failed to stop the conspiracy despite their knowledge of it.\(^5\) Although there was no direct evidence of the supervisors' participation in the cover-up, the United States Court of Appeals for the Seventh Circuit considered whether they implicitly authorized the patrol officers' actions and shared the same general conspiratorial objective.\(^6\) The court found sufficient evidence to sustain the sergeant's liability as a coconspirator because he implicitly adopted subsequently written versions of police reports that justified the shooting and sharply contradicted the responsible officers' first recounting of the incident.\(^7\) The sergeant also gave disingenuous testimony at an inquest, indicating that the shooting officer had related a consistent version of the incident on the night of the shooting.\(^8\) His liability was thus premised primarily upon ratification of the offending officers' conduct.\(^9\)

With regard to the police chief, however, the court determined that insufficient evidence of conspiratorial involvement existed. The police chief did not meet with the defendants nor did he testify at the inquest.\(^10\) Rather, his involvement was limited to knowledge of "the glaring conflicts in [the

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161. 746 F.2d 1205 (7th Cir. 1984).
162. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1223 (7th Cir. 1984).
163. *See id.* at 1253-54 (describing jury's award of damages).
164. *Id.*
165. *See id.* at 1255-58 (discussing conspiracy to conceal facts).
166. *See id.* at 1257 (discussing implicit authorization or approval of conduct).
167. *See id.* at 1257-58 (discussing evidence supporting finding of coconspirators).
168. *Id.*
169. *Id.* at 1257.
170. *Id.* at 1257-58.
shooting officer’s] explanation," and a failure to investigate further. This was a sufficient basis for liability under § 1986:

As chief of police, Johnson had supervisory power over all other alleged conspirators . . . . As the ultimate supervisor, cognizant soon after the shooting of both the gravity of the matter and the inconsistencies in the explanations of the shooting, it is an inevitable conclusion that Johnson could have through reasonable diligence prevented or at least aided in preventing . . . others from concealing the truth. [A number of the defendants] manipulated the facts and packaged the incident without any apparent interference from their ultimate supervisor. Milwaukee Police Department internal rules require that the chief of police confer regularly with district commanders and the inspector of detectives to be fully advised on all matters of "serious departmental concern." Johnson testified that he was cognizant of the internal rules and that the Bell killing was a matter of serious departmental concern; yet he testified he never spoke with district commanders or [the Inspector of Detectives] with respect to the matter. Johnson’s disregard of his obligation under departmental rules evidences his failure to exercise reasonable diligence in connection with the Bell matter. By neglecting to scrutinize and deter the efforts of [the other defendants] to conceal the truth, Johnson is liable under Section 1986.72

Without § 1986, the police chief might well have had no legal obligation to investigate or deter this serious cover-up by his subordinates. While a possibility of supervisory liability under § 1983 existed, it is not explicitly provided for by the statute.73 Section 1983 supervisory liability is premised upon the employer/employee relationship and a consequent duty to ensure that a subordinate’s conduct complies with applicable law.74 Courts, however, are reluctant to uphold § 1983 liability on this theory,75 presumably because the statute itself, unlike § 1986, does not directly provide for imputed liability. As a result, to prevail on a supervisory liability theory, the plaintiffs would have had to prove the police chief’s deliberate indifference to, or reckless or callous disregard of the cover-up, while § 1986 requires only negligence.76

171. Id. at 1258.
172. Id.
174. MICHAEL AVERY ET AL., POLICE MISCONDUCT LAW AND LITIGATION § 4.4, at 4-7 (3d ed. 1996) (stating that officers may be liable for failure to act if omission was callous, reckless, or deliberate).
175. Id. § 4.13, at 4-22.
176. Id. § 4.4, at 4-7. Because the police chief was not present when the cover-up was planned and executed and because the constitutional violation resulted from inaction, rather than active participation, the police chief’s violation is separate from that of the conspiring officers and thus has an independent state of mind requirement. Id. § 4.5, at 4-8. Lower courts
With § 1986, courts need not expand provisions such as § 1983 to cover situations like *Bell* in which the defendant’s liability is intuitively appealing, but not definitively provided for by statute. A court construing a § 1986 claim also can avoid struggling with the applicability of common-law doctrines such as special relationship to federal statutory claims, because § 1986 explicitly provides for liability in those instances. In *Bell*, § 1986 provided a necessary tool to attack a cover-up at the highest levels of a department.177 Given the police chief’s knowledge of the conspiracy and his responsibility for maintaining departmental integrity, liability was appropriate and consistent with the aims of the 1871 Civil Rights Act.178

In *Hawk v. Perillo*,179 the plaintiffs could have brought a § 1986 claim but elected not to. Instead, the plaintiffs claimed damages under only §§ 1983 and 1985. I analyze this case by comparing the court’s rationale and outcome with the rationale and outcome that the plaintiffs might have have obtained under § 1986. This analysis again reveals the usefulness of creating a vehicle for duty to protect claims that eliminates unnecessary evidentiary hurdles, screens out nonmeritorious claims that do not comport with the policy objective of assigning responsibility only to those with the knowledge and the ability to avert serious damage, and directly attacks the problem of police nonintervention in the execution of class-based conspiracies.

*Hawk v. Perillo* is in many ways a classic case for § 1986 relief. It concerns an allegation by three African-American men that they were confronted by a white gang which yelled racist insults and physical threats at them.180 During the confrontation, one of the black men went into the restaurant to call the police. Meanwhile, the other two men were attacked and severely beaten.181 Two police officers then arrived, interviewed the two beating victims, and obtained descriptions of the gang members. The officers indicated their familiarity with the attackers.182 During this period, three of the attackers stood nearby and one of the officers then held a private conversation with them, at which point the attackers fled. The police did not pursue them until

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181.  *Id.*

182.  *Id.* at 382-83.
they had run into an alley. Even then the officer ran only a short distance before returning. The police interviewed no one at the scene.\textsuperscript{183}

The plaintiffs brought claims under, inter alia, §§ 1983 and 1985(3). They did not raise a § 1986 claim. The § 1983 claim alleged that the police defendants failed to act to protect the plaintiffs because of their race.\textsuperscript{184} The court denied the motion to dismiss, reasoning that although a failure to protect is not ordinarily actionable, a racially motivated failure to protect states an equal protection claim.\textsuperscript{185} The court similarly upheld the § 1985 claim against the police defendants, explaining that the facts sufficiently alleged a conspiracy between the police and the white gang.\textsuperscript{186} The court also emphasized that the private conversation between one officer and members of the white gang and their subsequent flight with only a belated and aborted police pursuit could indicate a conspiracy not to investigate the incident or make arrests.\textsuperscript{187}

While at the pleading stage these claims sufficed to allow the action against the police to proceed, to prevail on the § 1983 claim the plaintiffs would have had to prove the racial motivation of the police. This is invariably a difficult task, compounded in \textit{Hawk}, as is often true, by the lack of direct evidence. However, § 1986 requires no proof of racial animus. Under § 1985, the plaintiffs would have had to prove the conspiracy between the officers and gang members by a preponderance of the evidence, an unlikely proposition given the paucity of the evidence.

By contrast, a § 1986 claim would have required only actual knowledge by the police of the white gang’s presumed conspiracy to attack the black men and evade justice, an ability to block the outcome by pursuing and arresting the offenders, and a failure to act. The plaintiffs’ statements to the officers and the officers’ familiarity with the attackers could have shown knowledge of the conspiracy. The officers’ ability to act and failure to do so are evident. By its terms, however, § 1986 refers to conspiratorial wrongs that "are about to be committed," and to potential defendants who "neglect or refuse" to "prevent or aid in preventing commission of the [conspiratorial acts]."\textsuperscript{188} This statutory language raises an issue whether officers who fail to apprehend racist conspirators taking flight after overt conspiratorial acts have been

\textsuperscript{183} \textit{Id.} at 383.

\textsuperscript{184} \textit{Id.} at 384.

\textsuperscript{185} \textit{Id.} The court cited \textit{Monroe v. Pape} for the proposition that failures to act can on occasion state viable claims: "While one main scourge of the evil – perhaps the leading one – was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were \textit{unable or unwilling} to enforce a state law." \textit{Hawk}, 642 F. Supp. at 384 (citing Monroe v. Pape, 365 U.S. 167, 175-76 (1961), overruled on other grounds by \textit{Monell v. Department of Soc. Servs.}, 436 U.S. 658, 700 (1978)).


\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{See supra} text accompanying notes 9-13.
committed are liable under § 1986. The statute is directed at those who fail to prevent the conspiracy; failing to rectify its consequences afterwards may not fall within the statutory ambit. On the other hand, the definition of the underlying conspiracy may be broadened: It may extend to the conspirators’ evasion of justice, as well as to their commission of directly racist acts against the plaintiffs.

This broader definition comports with the history of the 1871 Civil Rights Act in that a central evil the Act confronted was the Klan’s evasion of justice and the Southern authorities’ failure to apprehend perpetrators of racist violence. In fact, Southern anarchy was perhaps the foremost problem that Congress addressed in the Act.\(^{189}\) A § 1986 claim in this case would have incisively attacked the modern legal and moral problem this incident presents—police negligence and indifference in the face of racist violence. Although conscious, provable racial animus exacerbates the wrong committed by the police, its nonexistence or the plaintiffs’ inability to prove it does not mitigate the harm a refusal to protect causes.\(^{190}\) That is the clarity that § 1986 confers.

The case of *Harris v. City of Pagedale*\(^{191}\) can instructively be compared to the previously discussed cases.\(^{192}\) In *Harris*, deliberate indifference by city officials to a known pattern of sexual misconduct by city police officers led to a jury verdict against the city.\(^{193}\) The plaintiff did not raise claims under either §§ 1985 or 1986, but rather under § 1983. Numerous complainants had accused several Pagedale police officers and the police chief of committing sexual acts against them without their consent while the officers were on duty. The police chief was aware of most, if not all, of the allegations, and many of the acts were committed in the presence of, or with the knowledge of, fellow officers.\(^{194}\) Although city officials were made aware of many of the complaints, they engaged in no meaningful efforts to address the situation.\(^{195}\) The United States Court of Appeals for the Eighth Circuit affirmed the finding of a municipal policy of "persistently fail[ing] to remedy a known and continuing pattern of unconstitutional police misconduct" engaged in with deliberate indifference to the women victims’ rights, and therefore upheld the jury verdict in the plaintiff’s favor.\(^{196}\) The unconstitutionality was presumably an

\(^{189}\) See, e.g., CONG. GLOBE, 42d Cong., 1st sess. 71-74 (1871) (remarks of Rep. Austin Blair).


\(^{191}\) 821 F.2d 499 (8th Cir. 1987).

\(^{192}\) *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1987).

\(^{193}\) *Id.* at 500.

\(^{194}\) *Id.* at 500-04.

\(^{195}\) *Id.* at 506.

\(^{196}\) *Id.* at 508.
equal protection violation. The affirmative act was that of discriminating against women. Although *Harris* was decided before *DeShaney*, the discriminatory acts constituting the equal protection violation distinguish this situation from the inaction of the social worker in *DeShaney*.

The successful § 1983 claim against the city presents an interesting contrast to the potential outcome under §§ 1985 and 1986. Assuming that a claim of a police conspiracy to engage in unconstitutional sexual harassment is actionable under § 1985 based on animus against women as a class, and assuming a conspiracy among the police to at least tacitly authorize sexual misconduct was provable, the city officials easily could have been held liable under § 1986. They had provable knowledge of the pattern of sexual misconduct, they had the power as officials to act preventively, and they failed to take any remedial action.

Whether the case was litigated under § 1983 or §§ 1985 and 1986, however, the plaintiff would have confronted the difficulty of proving legal responsibility for the passive response of either the police or the city officials. In the face of massive complaints of acts ranging from rape to serious sexual harassment of very young women, the moral culpability of both groups is apparent: Neither had made meaningful attempts to deal with the ongoing pattern of misconduct. Nonetheless, legal responsibility ordinarily attaches only for misfeasance, and both §§ 1983 and 1985 require proof of affirmative misconduct, though deliberate indifference or tacit encouragement sometimes suffice to meet that standard.

By contrast, § 1986 makes one liable for culpable inaction. It renders responsible those whose knowledge places them closest to the underlying conspiracy, regardless of whether or not they acted affirmatively. In *Harris*, claims under §§ 1985 and 1986 would have focused on the passivity of the city officials in the face of the blameworthiness of the police. In contrast, the plaintiffs' § 1983 action focused on the blameworthiness of the city officials. The former is probably the more morally accurate construction of the situation as well as a more straightforward approach to the 1871 Civil

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197. See supra notes 36-42 (discussing criticism of limited governmental liability for inaction).

198. See supra note 80 (discussing Supreme Court's unwillingness to decide if § 1985 protects women as class); cf. supra note 81 (citing lower courts' findings that § 1985 claims can properly be based on sex discrimination). I am unaware of any reported cases involving § 1985 sexual harassment issues.

199. See supra text accompanying notes 63-69 (evaluating elements of § 1986 claim).

200. See *Harris v. City of Pagedale*, 821 F.2d 499, 500-04 (8th Cir. 1997) (stating that "extensive evidence of prior incidents of sexual misconduct" was presented at trial).

201. See supra text accompanying notes 73-76 (discussing when liability can attach under § 1985 in absence of overt action to further conspiracy).
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Rights Act. The clarity and accuracy on both legal and moral levels of a § 1986 claim makes it a superior vehicle for claims against passive, knowledgeable bystanders or onlookers faced with conspiracies animated by invidious motivation.

V. Sections 1985 and 1986 Are a Constitutional Exercise of Congressional Enforcement Power Under Section 5 of the Fourteenth Amendment

As Part II of this Article describes, Congress passed the Civil Rights Act of 1871 pursuant to the enforcement power granted it by the Enforcement Clause, § 5 of the Fourteenth Amendment. The Thirteenth Amendment provides support and authority for §§ 1985 and 1986 as well, allowing the statutes to address certain private as well as public acts. The Supreme Court has upheld the constitutionality of § 1985(3) under the authority of the Thirteenth Amendment, although it has never addressed the constitutionality of § 1986. Lower courts, however, have declared the section constitutional.

Until the 1996 Term of the Supreme Court, the constitutionality of these statutes did not present a terribly difficult issue. With the decision in City of Boerne v. Flores, however, the Court's newly devised test for the constitutionality of legislation passed under the authority of Section 5 of the Fourteenth Amendment raises fresh questions concerning the scope of Section 5. The Court, in an opinion by Justice Kennedy, conceded that Congress has broad

202. Cf. ARENDT, supra note 113, at 247. Arendt quotes from the Israeli trial court's judgment in the Eichmann case, referring to the criminal activities of the Nazi regime:

For these crimes were committed en masse... and the extent to which any one of the many criminals was close to or remote from the actual killer of the victim means nothing, as far as the measure of his responsibility is concerned. On the contrary, in general the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands.

Id.

203. See supra note 52 (discussing legislative history of Civil Rights Act of 1871).

204. See Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (stating that § 1985 was proper exercise of Congress's power to define "badges and incidents of slavery"). The Court in United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825, 837 (1983), declared that the "central concern" of § 1985(3) is to "[c]ombat the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." See Douglas Colbert, Liberating the Thirteenth Amendment, 30 HARV. C.R.-C.L. L. REV. 1, 15-32 (1995) (discussing evolution of Supreme Court's construction of Thirteenth Amendment).

205. Griffin, 403 U.S. at 96.


power to define the scope of liability under the Fourteenth Amendment's enforcement clause \(^{208}\) (and presumably, the enforcement clause of the Thirteenth Amendment as well) and that Congress may impose liability for conduct that is not necessarily unconstitutional. \(^{209}\) The Court also conceded that limitations on the scope of congressional authority under Section 5 of the Fourteenth Amendment do not pertain to remedial legislation that is "corrective or preventive, not definitional." \(^{210}\) However, the Court required that legislation employ means "proportionate to [the desired] ends." \(^{211}\) Such a "congruence and proportionality," \(^{212}\) according to the majority, ensures that the statute does not work a substantive change in the meaning of the Constitution. \(^{213}\) Additionally, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." \(^{214}\) This inquiry essentially involves whether the evil inducing the legislation's passage presents or presented an actual threat. This appears to be primarily an empirical inquiry. \(^{215}\)

Nowhere does the Court elaborate on the meaning of the "congruence and proportionality" standard. Its purpose of protecting against congressional overreaching is apparent, but it lacks referents in existing caselaw, rendering it susceptible to a variety of interpretations. Notwithstanding the ambiguities, however, one may ascertain certain likely meanings of the standards. First,  

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\(^{208}\) Id. at 2163 (stating that "§ 5 is a positive grant of legislative power" and that Congress may prohibit conduct which is not itself unconstitutional, if prohibiting that conduct would "deter or remedy" constitutional violations).

\(^{209}\) Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

\(^{210}\) Id. at 2166; see id. at 2163-64. Thus, §§ 1985 and 1986 do not appear in any danger of eradication. In Boerne, the Court struck down the Religious Freedom Restoration Act on the ground that its enactment exceeded the authority of § 5, because it mandated a substantive interpretation of the Constitution in cases in which a law of general applicability substantially burdened a person's free exercise of religion. Id. at 2170-72. The majority opinion distinguished between such substantive pronouncements and "[l]egislation which deter or remedies constitutional violations [that] fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional," and accords the latter legitimacy. Id. at 2163. Moreover, "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects," particularly this country's long history of race discrimination. Id. at 2169.

\(^{211}\) Id. at 2170-71.

\(^{212}\) Id. at 2171.

\(^{213}\) Id. at 2170.

\(^{214}\) Id. at 2169 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

\(^{215}\) Id. at 2161 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."). It is not clear whether the Court is referring to threats existing at the time the statute was passed or current threats. The more likely interpretation is that a reviewing court must consider conditions at the time of the statute's passage.
proportionality evidently relates means and ends, requiring an appropriate balance between the seriousness of the legislative goal and the intrusiveness and efficacy of the legislative means to accomplish that goal. The meaning of congruence is less clear; presumably it refers to the relationship between the class of potential defendants and the particular evil the legislation seeks to eradicate. A statute would not be congruent with the legislative goal if it held liable defendants who were too far removed from the core concerns of the legislation and the Fourteenth Amendment or whose actions were too peripheral to the central illegal activities.

Sections 1985 and 1986, construed together, fit within these constitutional parameters. First, Congress passed the provisions to remedy Klan depredations, directly intending to prevent and deter further violence. Rather than declare the meaning of the Constitution, the provisions enforce the constitutional mandate of granting equal protection to African-Americans. Because a § 1985 violation requires a class-based conspiracy to violate an underlying, independently existing federal right, it reinforces the remedial nature of these statutes. Breaking the argument into its component parts, the Thirteenth Amendment requires elimination of the badges and incidents of slavery and permits legislation directed against private individuals to enforce the prohibition. Section 1985 accomplishes this by providing a private right of action against conspirators. The Equal Protection Clause of the Fourteenth Amendment requires government to protect African-Americans. Section 1986 enforces it by making government officials, private officials, and even knowledgeable bystanders liable for failing to protect against a racist conspiracy. Private liability is justified in part because it reinforces the responsibility of government officials. It also makes rescue efforts more effective. When private bystanders have an obligation to report a conspiracy to government officials, the obligation of those officials to respond intensifies.

Second, focusing in particular on § 1986, application of the proportionality standard corroborates the conclusion of constitutionality. The dependence of a § 1986 claim upon proof of the requisite underlying conspiracy ensures that its application remains within narrow bounds. Moreover, the evil of racist conspiracies justifies the reach of the statute. References to the historical conditions spawning the original legislation, as well as the continuing


217. See Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979) ("Section 1985(3) ... creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section.").

218. See supra text accompanying notes 70-92 (discussing elements of § 1985 conspiracy).
threat that racist conspiracies pose, militate in favor of its constitutionality. Considered in light of the Klan's insurrectionist violence and local law enforcement's indifference to the plight of the Klan's victims, § 1986 appears to be an appropriate and proportional response.

The congruence of § 1986 with the statutory objectives is more disputable. At its outer margins, § 1986 reaches defendants who have no personal or vicarious liability under § 1985. Section 1986 demands only advance knowledge of a § 1985 conspiracy, ability to prevent it, and failure to prevent its occurrence. Thus, § 1986 draws within its ambit many whose liability would rest purely on inaction—a failure to protect—and who would have no special relationship to the individual plaintiffs or defendants. Particularly with respect to private defendants, who have no power over conspirators, the connection between inaction and the underlying racist conspiracy may be too tenuous to warrant liability. In addition, liability creates only a second-order incentive to prevent the execution of conspiracies, because private bystanders can normally act preventively only by calling the police. By contrast, official defendants such as police officers, bound by a general duty to protect the public, appropriately should bear more responsibility than private bystanders. Therefore, their situation presents less of a problem.

The constitutionality of applying § 1986 to private defendants can appear particularly problematic if one accepts the negative, restrictive view of the Constitution outlined earlier in this Article. That is, if the Constitution does not impose strong, affirmative duties to protect, or if it does not permit statutorily created affirmative duties that overcome the problems of nonfeasance and lack of direct state action, private defendants may be beyond the reach of legislation passed pursuant to the Fourteenth Amendment's enforcement clause. Notwithstanding this view, however, as Part VI of this Article explains, private individuals can legitimately and constitutionally be named as defendants under § 1986. Under both a broader interpretation of the Fourteenth Amendment, as suggested herein, and under § 1986, the duty to protect equally can require that private individuals report racist conspiracies to the responsible public officials.

The seriousness of the historical and current threat of racist conspiracies to the American community necessitates and justifies the extended remedies
of § 1986. In recent decades, the Supreme Court has adverted to the harm racism causes its victims, with lower courts echoing the theme. The courts’ recognition of this harm has by now become embedded in the fabric of the Fourteenth Amendment. Moreover, because private individuals are expected to act only with reasonable diligence to protect a conspiracy’s targets, their role and hence the extent of their liability is diminished. The focus of the statute remains on the police and other officials with the authority and wherewithal to institute effective protective action. Thus, although § 1986 in part reaches far beyond any constitutional duty, questions of its authority to do so must be resolved in the context of its historical origins and ongoing conditions. This Article supports the proposition that the remedies of § 1986 do not exceed the bounds of congressional power under Section 5 of the Fourteenth Amendment.

VI. The Affirmative Duties of § 1986 Support Interpretation of the Fourteenth Amendment as an Affirmative Mandate to Provide Effective Protection to African-Americans, Undermining the Negative, Restrictive View of Constitutional Duties

A. The Passage of § 1986 Shortly After Enactment of the Fourteenth Amendment Makes It a Helpful Guide to Interpreting the Nature of Constitutional Duties

Congress passed § 1986, as part of the 1871 Civil Rights Act, only three years after the enactment of the Fourteenth Amendment in 1868, pursuant to the authority of the enforcement clauses of both the Thirteenth and Fourteenth

221. See, e.g., United States v. Piche, 981 F.2d 706, 720 (4th Cir. 1992) (upholding conviction for racist conspiracy to kill Asians); United States v. Lane, 883 F.2d 1484, 1487 (10th Cir. 1989) (upholding convictions for murder of Jewish talk show host).

222. See supra text accompanying note 103; see also Fisher v. Shamburg, 624 F.2d 156, 162 (10th Cir. 1980) ("[A] racially motivated conspiracy to interfere with one’s enjoyment of a place of public accommodation constitutes a badge of slavery which is a deprivation of equal privileges and immunities under 42 U.S.C. section 1985(3).”); United States v. Glass Menagerie, 702 F. Supp. 139, 142 (E.D. Ky. 1988) ("The 1940’s and 1950’s had many pleasant nostalgic aspects, but the flagrant discrimination in public accommodations... was not one of them. It was a disgrace. It was an abomination of which we all should be ashamed. To permit it to recur in any form or to any degree would be a regression in the evolution of our society. Any such resurgence must be immediately and decisively eliminated whenever it occurs."); King v. Greyhound Lines, 656 P.2d 349, 352 (Or. Ct. App. 1982) ("The chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual’s sense of self-worth and personal integrity.")

223. See infra text accompanying notes 259-61 (discussing courts’ rejection of constitutional duty to protect and rescue).
Amendments. As such, § 1986 evidences a virtually contemporaneous understanding of the scope of the Fourteenth Amendment's enforcement powers and can shed light on its interpretation. That is, the breadth of § 1986 indicates that the enacting Congress had an expansive view of its abilities to impose obligations on local actors to counter racial violence. In turn, that expansive view suggests that the current Supreme Court's interpretation of Fourteenth Amendment obligations and enforcement may be too narrow. The scope of § 1986 supports a conclusion contrary to the Court's current understanding.

Congress ratified the Thirteenth Amendment in 1865. Over the next few years, it became evident that the abolition of slavery was not accomplishing the desired goal of improving the lives of black citizens. Vigilante groups perpetrated outrageous acts of violence on former slaves and their supporters who had dared to protest the resubjugation of African-American citizens under an economic and social system frighteningly similar to slavery. Simultaneously, the constitutionality of the 1866 Civil Rights Act was called into question and its authority challenged. As a result, the

224. See supra notes 203-04 and accompanying text.

225. Eric Schnapper employs a similar method of comparing virtually contemporaneous enactments to argue for a broad interpretation of the Fourteenth Amendment: "[T]he framers of the Fourteenth Amendment cannot have intended it to nullify remedial legislation [such as the Freedmen's Bureau Acts, providing specific relief to black citizens] of the sort Congress simultaneously adopted." Schnapper, supra note 23, at 789.

226. See TENBROEK, supra note 21, at 156 (stating date of Thirteenth Amendment's ratification).

227. See Amar, supra note 49, at 1216-17 (discussing lives of African-Americans after enactment of Thirteenth Amendment).

228. See Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War, in RACE, LAW AND AMERICAN HISTORY 1700-1990: EMANCIPATION AND RECONSTRUCTION 377, 383 (Paul Finkelman ed., 1992) (discussing attitudes of opponents to Reconstruction Amendments). Kaczorowski has stated:

Former Confederates tenaciously adhered to a philosophy of State sovereignty and refused to respect national authority. They defiantly resisted the emancipation guaranteed blacks by the Thirteenth Amendment. Southern white supremacists denied the freedmen's freedom by continuing to treat them as if they were slaves. White supremacists frequently met the attempts of freed blacks to assert their constitutionally guaranteed freedom with violent repression and economic intimidation. Moreover, they treated white Unionists and federal officers with disrespect, and resorted to economic intimidation and violence toward them as well.

Id.

229. See NELSON, supra note 18, at 48 (summarizing debate over Act). Nelson has stated:

Democrats and occasional Republicans like John A. Bingham questioned the reach of the new amendment, however, and President Andrew Johnson vetoed the proposed act, in part, he contended, because the Constitution entrusted the protection
Congress passing the Fourteenth Amendment realized that the renunciation of slavery must be accompanied by meaningful protection of the fundamental rights of African-Americans if the gains of the Civil War were to be retained.230

This subpart sets forth the abolitionist interpretation of the Fourteenth Amendment introduced at the beginning of this Article. The purpose in summarizing that interpretation here is twofold: first, to suggest that the affirmative duties of § 1986 provide further support for the interpretation, for which a substantial body of evidence already exists; second, to situate my arguments within an existing debate by identifying them with a particular interpretive tradition. The evidence presented here points to fruitful avenues for further study and deflates the claims of those endorsing a very negative, restrictive view of constitutional rights.

Several decades ago, legal historians such as Jacobus tenBroek and Howard Jay Graham argued convincingly that, in an attempt to provide clear and expansive constitutional authority for affirmative federal remedies, the drafters incorporated the language and the natural rights ideology of the abolitionist movement into the Fourteenth Amendment.231 More recently, Robin West has adopted historians’ findings to ground an argument for a more
expansive, contemporary reading of the Fourteenth Amendment. In addition, Steven Heyman has traced the origins of this natural rights ideology of protection to classical legal tradition, and similarly demonstrated how the Fourteenth Amendment incorporated this broad understanding.

The understanding of the Fourteenth Amendment's framers is significant in that it provides necessary and useful guidance to present-day courts that construe its clauses. Judges are not free to substitute their own preferred interpretation of the Constitution for that of the framers. Rather, according to Ronald Dworkin (and many other constitutional theorists), courts must adhere to what the framers intended to say when drafting, for example, the Fourteenth Amendment:

We must try to find language of our own that best captures . . . the content of what the "framers" intended to say. . . . History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did.

And further: "We cannot capture a statesman’s efforts to lay down a general constitutional principle by attributing to him something neither he nor we could recognize as a candidate for that role." This principled limitation on constitutional interpretation provides a link between the historical understandings I explore in this subpart and their significance for current interpreta-

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232. See supra text accompanying notes 20-27 (discussing West's work).
233. See Heyman, supra note 23, at 546 (tracing Fourteenth Amendment to classical theory). Heyman has stated:

A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons, black as well as white. In establishing a federal right to protection, the Fourteenth Amendment was not creating a new right, but rather incorporating into the Constitution the concept of protection as understood in the classical tradition. The debates in the Thirty-Ninth Congress over the Fourteenth Amendment confirm that the constitutional right to protection was understood to include protection against private violence.

Id. at 9.

234. RONALD DWORINKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 8 (1996). Dworkin has stated:

We turn to history to answer the question of what they intended to say, not the different question of what other intentions they had. We have no need to decide what they expected to happen, or hoped would happen . . . . We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.

Id. at 10.
235. Id. at 9.
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tion of the scope of the Fourteenth Amendment. That the framers understood the Fourteenth Amendment as incorporating natural law conceptions of protection therefore sheds light on the appropriate modern application of the Amendment.

For years, prior to the enactment of the Fourteenth Amendment, the abolitionists had employed the language of equal protection and due process to develop and to advocate the notion of federal protection of natural rights.\textsuperscript{236} Employing philosophical assumptions prevalent at the time, the abolitionist movement conceived of these fundamental rights expansively to include everything from procedural due process to the substantive rights to control of one's body and family relations, the rights to contract and to own property, the rights to freedom of speech and of religion, to travel, to earn a livelihood, and to be protected from violence and from threats to survival.\textsuperscript{237} Government protection from threats to the exercise of these rights was indispensable to their exercise.\textsuperscript{238} The abolitionists' conception of equal protection and due process emerged from this first principle and was closely linked to it:

Based on a state of nature in which all men were conceived to be equal, supported by laws of nature and of God, which endowed all men equally with certain indivestible rights, strengthened and carried forward by the doctrine of the social compact, sanctioned by the starting point of their political philosophy, namely Locke . . . , the notion that governments were instituted to protect man in his inalienable rights to life, liberty, and property and that the standard by which this protection was to be meted out was that of equality.\textsuperscript{239}

It was thus a basic function of government to ensure the rights of all, which were violated equally by direct governmental violation of rights, or by private violations against which the government failed to protect.\textsuperscript{240} The distinction between misfeasance and nonfeasance was not relevant in this context. The language of equal protection of the laws reflected this conception, as did the abolitionist notion of due process. Although due process had a strong proce-

\textsuperscript{236} See generally \textsc{tenBroek, supra} note 21.

\textsuperscript{237} Id. at 42-56 \textsc{(describing abolitionists' interpretation of fundamental rights).}

\textsuperscript{238} See id. at 169. tenBroek has stated:

[L]iberty or civil liberty is what one gets in society as a result of governmental restraint on the conduct of others. Without such governmental restraint, that is, without such laws or their enforcement, there is no civil liberty. Hence the absence of laws is a denial or withholding of the protection which was the reason for creating or entering civil society.

\textit{Id.}

\textsuperscript{239} Id. at 96.

\textsuperscript{240} See id. at 97-98 \textsc{(stating that violations of equal protection may result from both private and public conduct); see also \textit{Early Antislavery Backgrounds, supra} note 231, at 659 \textsc{(describing obligations of federal government under abolitionist theory).}
dural component, many abolitionists employed a substantive usage as well.241 Moreover, "due process was viewed not merely as a restraint on governmental power but as an obligation imposed upon government to supply protection against private action."242

Further, according to this interpretation, Congress adopted the locutions of the abolitionists in drafting the Fourteenth Amendment with its protection of the rights to due process and equal protection. Congress conceived both notions broadly to encompass full governmental protection of natural rights.243 "Due process" and "equal protection" were often considered overlapping concepts, each reinforcing the other in the command to protect black citizens. Sometimes they even were used interchangeably.244 The strong view of equal protection was held not only by proponents of the amendment but by many opponents as well, who believed that this clause empowered Congress "to legislate upon all matters pertaining to the life, liberty, and property of all the inhabitants of the several states."245 The amendment, in effect, revolutionized notions of federalism by granting Congress the power to protect the natural rights of black citizens in Section 5, the Enforcement Clause.246

After 1868, violence in the South perpetrated by the Klan and other vigilante groups only intensified, necessitating Congressional action to enforce the Fourteenth Amendment.247 Section 1986, with its duty to protect, formed

241. See TENBROEK, supra note 21, at 100 (describing substantive development of due process); Heyman, supra note 23, at 557-63 (relating history of Due Process Clause).
242. See TENBROEK, supra note 21, at 99.
243. See id. at 192-93. tenBroek has stated:

The congressional debates over the Fourteenth Amendment reemphasize the "full" or "equal" protection of men in their natural or civil rights—by the national Constitution and legislature—as the predominant element in section I . . . . Their central, almost exclusive concern was, on the part of the proponents, with the national protection of persons or citizens in their natural rights; and, on the part of antagonists, with the destructive impact of this notion upon the federal system.

Id.; see NELSON, supra note 18, at 64 ("[P]roponents of section one [of the Fourteenth Amendment], most of them veterans of the antislavery movement, referred to the same libertarian and egalitarian principles that they had commonly used during the three previous decades."); Kaczorowski, supra note 228, at 387 ("The framers. . . . were unequivocal in declaring that the natural rights to life, liberty, and property, and rights incidental to these, were the rights of U.S. citizenship that they intended to secure with the Civil Rights Act and the Fourteenth Amendment.").
244. See TENBROEK, supra note 21, at 194-95, 199, 222-23 (describing connections between "equal protection" and "due process").
245. Id. at 195 (quoting Rep. Robert S. Hale, CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866)).
246. See id. at 196-99, 204-07, 209, 224 (discussing effect of Enforcement Clause); Kaczorowski, supra note 228, at 379.
247. See FONER, supra note 50, at 425 ("In its pervasive impact and multiplicity of purposes, however, the wave of counterrevolutionary terror that swept over large parts of the
an integral part of the 1871 Civil Rights Act. Its inclusion indicates the view of that Congress that providing effective protection to those covered by the Thirteenth and Fourteenth Amendments can require unusually assertive action. It is difficult to believe that the Congress drafting and passing the bill pursuant to the authority conferred by the Thirteenth and Fourteenth Amendments was unaware of the possibility of exceeding constitutional boundaries when seeking effective protection against conspiracies. Its willingness to pass the legislation evidences its awareness that § 1986 does not exceed permissible limits and does comport with the underlying constitutional authority. That constitutional authority must be sufficiently broad to encompass liability for a failure to protect in appropriate instances. The abolitionist interpretation of the Fourteenth Amendment is consistent with the apparent understanding of the Forty-Second Congress that enacted the 1871 Civil Rights Act.

B. The Affirmative Understanding of Constitutional Duties Under the Fourteenth Amendment Vitiates the Negative View of Constitutional Duties Which Recognizes a Duty to Protect in Only the Narrowest of Circumstances and Would Support a Broader View of Such Duties

As introduced in the beginning of this Article, the current predominating view of the Constitution interprets it as primarily protecting individual liberty and, as a corollary, ensuring governmental noninterference in all but a narrow range of situations. This view has led to the Supreme Court’s refusal to recognize constitutional duties to rescue or to protect in all but extremely narrow circumstances. Those duties that do exist derive from the Due Process Clause, and have been adopted almost wholesale from tort law, which

South between 1868 and 1871 lacks a counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the nineteenth century."); see also id. at 425-26, 454-55 (discussing influence of Klan violence on movement for Fourteenth Amendment).

248. Cf. Schnapper, supra note 23, at 791. Schnapper has stated:

It is inconceivable that the majority of [the 39th] Congress, by approving the [Fourteenth] [A]mendment, intended to condemn their most important domestic program or to embody in the Constitution the social theories of their opponents. The [F]ourteenth [A]mendment may have applied explicitly only to the states, but supporters of the amendment clearly believed that the principle of equality embodied in it was entirely consistent with the Freedmen’s Bureau legislation [which required the federal government to provide affirmative protection to black citizens in the South].

Id.

249. See supra text accompanying notes 30-35 (stating this opinion).

250. See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 198 (1989) (stating that “in certain limited circumstances [only] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals”).
shares the assumption that it is not the function of the law to enforce an obligation to rescue or to protect no matter how severe the injury to the victim or how simply the rescue could be accomplished. The twin assumptions that the law should not enforce duties to protect and that the scope of constitutional duties is delimited by those imported from the common law should be reexamined. The narrow view of constitutional duties in particular is undermined by the contrary existence of workable and fully justified affirmative duties such as those of § 1986, supported by a broader interpretation of the Fourteenth Amendment. The Court’s clear pronouncements about the particular evils of racism and other conduct subject to heightened scrutiny under the Equal Protection Clause could provide the final support tipping the balance in favor of recognizing constitutional duties to protect against racist conduct in particular.

Alternatively, even if sufficient support for an additional constitutional duty to protect does not exist, the extreme, negative view of constitutional duties is undermined by the evidence presented. At the very least, the view of the DeShaney Court that the Due Process Clause is merely "a limitation on the State’s power to act, not . . . a guarantee of certain minimal levels of safety and security" is demonstrably erroneous. On the contrary, the clauses of the Fourteenth Amendment were understood by the framers as imposing duties on government to protect the natural rights of citizens to life, liberty, and property.

This subpart of the Article first summarizes the existing tort and constitutional law regarding duties to protect. I compare these limited duties to those of § 1986: The former focus on narrowly defined individual relationships, such as the custodial relationships between a jailer and a prisoner, that serve as a basis for imposing a duty of care; the latter affirmative duty of care of § 1986 focuses on the severe harm plaintiffs who are not protected from racist conspiracies suffer. I complete the contrast between the two notions by setting forth a hypothetical due process/equal protection-based duty to protect against racist conduct modeled on § 1986. I compare its potential application

251. See Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action."); W. Page Keeton et al., Prosser & Keeton on the Law of Torts, § 56, at 375 (5th ed. 1984) (concluding that "[t]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger").

252. It is not my intent in this Article to define the exact parameters of such a duty. Rather, I wish to argue that the Court’s current construction of protection duties is too narrow.


254. See supra text accompanying notes 231-46 (discussing rights that Fourteenth Amendment protects).
to that of the existing constitutional rule. The comparison reveals that, in the case of racist conduct, the existing constitutional rule does not adequately provide protection to victims of racism. The broader view of the Fourteenth Amendment outlined in this article would support, and perhaps even mandate, a much more comprehensive duty to rescue in these cases.

The common law of torts has sought to distinguish between malfeasance and nonfeasance, holding that no tort duty exists when injury occurs because of nonfeasance. However, several exceptions exist. The first category of affirmative duty arises where a special relationship exists between the defendant and the perpetrator that may require the defendant to control the perpetrator's behavior and gives rise to a defendant's duty to protect the victim. Such a duty also arises when a special relationship exists between the defendant and the victim whom the defendant failed to protect. Second, a defendant may have a duty to protect when the defendant has participated in creating or exacerbating the danger to which the victim is subjected.

Likewise, in constitutional civil rights law no general duty to protect exists, but the exceptions delineated above sometimes can be successfully

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255. See KEETON ET AL., supra note 251, at 373-75 (describing differences in liability for malfeasance and nonfeasance).

256. See RESTATEMENT (SECOND) OF TORTS, supra note 251, at § 315(a) (imposing duty when "special relation exists between the [defendant] and the [perpetrator]").

257. See id. § 315(b) (imposing duty when "special relationship" narrowly to cover only custodial relationships (such as prison guard/prisoner), see Graham v. Independent Sch. Dist. No. 1-89, 22 F.3d 991 (10th Cir. 1994), or more broadly to cover therapists' relationships with certain patients, see Tarasoff v. Board of Regents of the Univ. of Cal., 17 Cal. 3d 425 (1976). The special relationship doctrine can be troublesome in application and can render irrational results, viz:

[A]ssume that several children stretch a wire across the road in order to injure an unsuspecting bicyclist in their neighborhood. A bystander (not acquainted with the children or their bicycling victim) who could prevent the serious injury simply by shouting a warning has no legal obligation to do so. However, if one of the children who is devising the trap tells her therapist her plans to injure the victim, the therapist will have a duty to protect the bicyclist from the client, even though meeting the obligation may not be easy and may involve significant costs to the therapeutic relationship.

Adler, supra note 101, at 876. Because in some jurisdictions a therapist's relationship with a patient gives rise to a duty to protect identified targets of the patient's threats of violence, the therapist would have a duty to warn the victim of the danger here, but the bystander, who is in a much better position to prevent the violence at little or no cost to herself, is not obliged to do anything.

258. See RESTATEMENT (SECOND) OF TORTS, supra note 251, at §§ 321-22 (imposing duty to act when prior conduct causes another's peril). As a variation on this principle, if a defendant has undertaken a rescue, then he or she may be liable for failing adequately to follow through. See id. § 323 (imposing duty to act when prior conduct increases another's peril).
invoked to create a due process-based constitutional duty.\(^{259}\) Police misconduct cases, which comprise a large percentage of the reported cases under 42 U.S.C. § 1983, provide one class of examples. Under the common-law public duty doctrine, police have a duty to protect only the public at large, an abstract entity, rather than a particular individual. And the notion of limited federal constitutional obligations also supports imposing only narrow constitutional duties on individual officers or police officials.\(^{260}\) Federal courts frequently have called upon some variant or combination of these doctrines to explain their rejection of a constitutional duty to protect or to rescue in the absence of a special relationship or a state-created danger.\(^{261}\)

The existing exceptions focus on the individual relationship between the defendant and either the perpetrator or the victim, whereas § 1986 by its terms and at the margins creates a rule of almost pure bystander liability. Its underlying assumption in this respect is that of the abolitionist interpretation of the Equal Protection Clause—that the law must ensure equivalent protection to both black and white citizens to protect the relatively less powerful from private violent conspiracies. The harm from violent, racist conspiracies so undermines the opportunities for blacks to participate as full citizens that it warrants an affirmative burden on society and its members.\(^{262}\) In other words, the Court’s current notion of constitutional duties to protect privileges the freedom of unrelated defendants (whether individuals or institutions), whereas the broader view of § 1986 and its supporting constitutional interpretation privilege those wounded by a harm the Court considers uniquely grievous.

A Fourteenth Amendment due process and equal protection-based duty to protect\(^{263}\) authorized by Section 5 of the Fourteenth Amendment and modeled on § 1986 could accord with the broader view I have elaborated here. It could incorporate the knowledge, ability, and intent elements of § 1986, so

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\(^{259}\) See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 197-200 (1989) (outlining circumstances under which due process-based duties attach to private conduct).

\(^{260}\) See supra text accompanying notes 28-33 (describing federal duties under Constitution).

\(^{261}\) See, e.g., Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984) ("[N]othing in the Constitution requires governmental units to act when members of the general public are imperiled . . . . In our opinion, the Constitution is a charter of negative liberties; it tells the [government] to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.") (citations omitted); Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) ("[A] mere failure to rescue is not tortious just because the defendant is a public officer whose official duties include aiding people in distress.").

\(^{262}\) See supra text accompanying notes 12-14, 103, 193 (listing examples of hate crimes).

\(^{263}\) The hypothetical duty would be limited to cases involving racist and other class-based conduct protected by heightened scrutiny under the Equal Protection Clause.
that a potential defendant first must have knowledge of the impending harm. A defendant additionally would need to have the ability to act preventively. The defendant, however, would only have to act with reasonable diligence. Thus, a private member of a racist organization need not singlehandedly confront a perpetrator or intervene in an altercation and could not be liable for the failure to do so. This individual would only have to take reasonable action — generally, make a phone call or alert the police to the situation. The third element requires at least negligence in the failure to commit a preventive act, strict liability is precluded. Last, as with § 1986, the requirement that a wrongful act occur would ensure that liability relates to harmful events rather than to merely speculative conversation.

The hypothetical duty that I outline here, based on both the Due Process and the Equal Protection Clauses, could be limited to an underlying Thirteenth or Fourteenth Amendment violation in order to parallel § 1986. The justifications for the duty to protect of § 1986 are based on its efficacy in minimizing racist conduct. Any new duty to protect would be supported by similar reasons if it was also directed at limiting similar conduct.

A broader duty to protect of this nature, at least with respect to racist conduct, does not create the irrational distinctions that result from the current rule. The following example from John Adler captures the arbitrary boundaries of the current tort law categories:

[ Imagine several adults standing near a child about to step into the path of a truck. Each could easily protect the child, without inconvenience or significant risk. One of the adults is the child’s babysitter who has done

264. This requirement corresponds to the duty of easy rescue proposed by a number of commentators. See, e.g., Levmore, supra note 101. The bystanders in Clark v. Clabaugh could have been liable under § 1986 for failing to urge earlier police involvement in the riot. See supra text accompanying notes 1-25. On the other hand, an individual unable for some reason to make a phone call or otherwise contact appropriate authorities or to warn the victims could not be held liable for the consequences of the constitutional violation.


266. A constitutional duty to protect of this nature could extend only to harms defined elsewhere in the Constitution, specifically to violations of the Equal Protection Clause that involve heightened scrutiny or to Thirteenth Amendment violations involving members of protected groups. Accordingly, harms intentionally directed at members of groups protected by the Equal Protection Clause and thus violating it, as well as Thirteenth Amendment violations directed at the same populations, could trigger a duty to protect on knowledgeable third parties.

The following examples illustrate how such a duty could work: First, a knowledgeable fellow police officer would have a duty to prevent another officer’s racially motivated beating of a prisoner. Second, a public employee in a managerial position would have to take steps to prevent the demotion of a colleague based on her immediate supervisor’s antisemitic attitudes. Finally, a public housing building manager would have a duty to protect a prospective Hispanic tenant from the housing authority’s discriminatory refusal to rent an apartment to the applicant.
everything reasonably possible prior to the appearance of the truck to keep the child from harm's way, but for whatever reason, fails to restrain the child as the child steps into the path of the truck. The second adult, who also fails to restrain the child, realizes she is partially responsible for the truck's lack of control, having hit the truck with her car, through no fault of her own, only an instant before. A third adult leaps in front of the child to wave off the truck. However, seeing that the truck is out of control, she jumps back to protect herself and fails to take reasonable steps to restrain the child. Finally, the fourth passive adult (the one in the best position to restrain the child) is a "pure" bystander.267

The first three individuals have a duty to protect the child based on first, a special relationship; second, the creation of danger; and third, undertaking a rescue. The fourth individual, however, has no legal obligation whatsoever. This irrational result is a disincentive to those in the best position to provide assistance in these situations,268 although it does protect the absolute freedom of those with no relationship to the victim.

Transposing this example into a constitutional context renders similar results: The example can be reproduced with each of the adults as a police officer. The first officer has temporary custody of the child sufficient to create a special relationship.269 The second officer created the danger by hitting the truck with her police cruiser.270 The third officer must act reason-

267. Adler, supra note 101, at 874.

268. Adler gives another example of the irrationality of the current rules:

Assume that there are two competing restaurants in the same neighborhood. Both are aware of crime statistics in the neighborhood and can foresee that at some point there will be violence in their parking lots. One establishment chooses to ignore the threat; the other hires a security guard. Ultimately, customers are hurt and bring separate actions against the restaurants. The restaurant that ignored the threat successfully moves to have the case against it dismissed. On the other hand, the restaurant that hired a security guard is found to have a duty based upon its undertaking to protect its customers and faces a jury determination about the reasonableness of its conduct.

Id. at 884. Avoidance of safety measures is the obvious incentive that a legal rule that requires volunteers not to act negligently but does not sanction a total failure to provide protection creates.

269. See generally, e.g., Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995) (finding that special relationship and consequent duty to protect exist when state agency assumes guardianship of child and returns child to inadequate foster placement); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (reversing summary judgment because special relationship could exist when prison inmates on work-release abducted town clerk); Lewis v. Neal, 905 F. Supp. 228 (E.D. Pa. 1995) (finding special relationship and duty to protect exist when state agency assumes guardianship of child and returns child to inadequate foster placement).

270. See generally, e.g., Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) (reversing summary judgment because duty based on state-created danger theory could exist when officers left
ably in carrying out an undertaken task, but the fourth officer likely can stand by and watch the child die with impunity, a consequence even more disturbing than when only private individuals are involved.

intoxicated woman to walk home alone after her husband had left her in their care; woman later suffered severe brain damage after falling down embankment on way home); Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) (evaluating protestor's claim under § 1983 and Due Process Clause arising from officers' conduct in assuring skinheads that they could beat up protesters and flag burners with relative impunity and without intervention, thus increasing danger to plaintiff); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) (evaluating claim that police chief, who was close friend of plaintiff's decedent's husband, interfered with enforcement of protective order, allowing husband to kill wife); Ross v. City of Waukegan, 910 F.2d 1422 (7th Cir. 1990) (evaluating civil rights claim brought under state-created danger theory when plaintiff's decedent drowned after sheriff prevented rescue by lifeguards, firefighters, and police officer based on intergovernmental agreement requiring county to provide all rescue services); Horton v. Flenory, 889 F.2d 454 (3d Cir. 1989) (evaluating claim that police officer intentionally left arrested in custody of private citizen, who continued interrogation and killed plaintiff's decedent); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (evaluating claim that state-created danger existed when police left passenger in impounded car alone in unsafe neighborhood and she subsequently was raped); Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (evaluating claim of state-created danger after inmate posing as police officer driving patrol car that officers loaned killed plaintiff's decedent); Davis v. Fulton County, 884 F. Supp. 1245 (E.D. Ark. 1995) (finding that deputy sheriff owed duty to protect plaintiff when deputy directed pretrial detainee to unload police car parked behind plaintiff's store).

271. See, e.g., Jackson v. Joliet, 715 F.2d 1200, 1202-03 (7th Cir. 1983). The Jackson court stated:

[If you do begin to rescue someone you must complete the rescue in a nonnegligent fashion even though you had no duty of rescue in the first place . . . . The rationale is that other potential rescuers (if any) will be less likely to assist if they see that someone is already at the scene giving aid.

Id.

272. See supra notes 33-37 and accompanying text (discussing DeShaney). See generally, e.g., Stevens v. Umsted, 131 F.3d 697 (7th Cir. 1997) (finding that superintendent of state school for disabled has no duty to protect student from ongoing sexual assaults by other students notwithstanding knowledge of assaults); Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) (finding no duty to protect or warn plaintiff of release from jail of abusive former boyfriend despite police assurances to mother of his continued incarceration; boyfriend subsequently killed plaintiff's children); Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) (finding no duty to inebriated passengers of car left behind when police arrested driver); Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) (same); Losinski v. County of Trempealeau, 946 F.2d 544 (7th Cir. 1992) (finding no police duty to protect plaintiff's decedent from shooting by her abusive husband, even though deputy sheriff accompanied victim to retrieve her belongings); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1991) (finding no special relationship between school and students requiring school to protect students from student-on-student sexual assault); Andrews v. Wilkins, 934 F.2d 1267 (D.C. Cir. 1991) (finding no state-created danger when police prevented private rescue of fleeing suspect); Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984) (finding no basis for due process claim on behalf of family of children killed in fire during firefighter strike when police, pursuant to general order, refused striking firefighters access to local firehouse); Jackson v. City of Joliet,
Although the Thirteenth and Fourteenth Amendments and § 1986 do not address this situation directly because no invidious discrimination is involved, the result could be different under the hypothetical expanded duty if the truck driver were about to run down the child because of the child's race, even though the bystander and child have no relationship, no underlying conspiracy is involved, and the bystander harbors no invidious racial motivation in failing to protect the child. (The hypothetical duty to protect would reach more broadly than § 1986 to encompass not just conspiracies, but all manner of racist conduct.)

By contrast, the existing narrow constitutional rule of DeShaney cannot adequately address racist conduct because it focuses exclusively on the somewhat unusual circumstances of custodial relationships. It stands in stark contrast to the vigorous enforcement mechanism that a broader view of the Fourteenth Amendment could support. The implications of § 1986 include its endorsement of a broader view of permissible duties to protect authorized by the Fourteenth Amendment. And finally, even if the hypothetical duty is not supportable, the broader, affirmative view of the Fourteenth Amendment outlined here vitiates the cramped view of constitutional duties that the DeShaney Court set forth.

C. Section 1986 and a More Affirmative Interpretation of Constitutional Duties Suggest a Broader Affirmative Action Remedy Than the Supreme Court Currently Permits

The Supreme Court's current interpretation of the permissible scope of affirmative action plans under the Equal Protection Clause is exceedingly narrow. As elaborated in Adarand, previously discussed in this Article, race-based affirmative action plans are subject to the strictest scrutiny. The Court has expressed concern for individuals adversely affected by a program's use of racial criteria in decisionmaking. Thus, the means chosen [must] fit [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

715 F.2d 1200 (7th Cir. 1983) (finding that police had no duty to assist passengers in burning car); Rogers v. City of Port Huron, 833 F. Supp. 1212 (E.D. Mich. 1993) (finding no basis for constitutional wrongful death claim when police left unconscious and inebriated individual lying by side of road); Franklin v. City of Boise, 806 F. Supp. 879 (D. Idaho 1992) (finding no due process duty to rescue fleeing suspect from drowning).

273. See supra text accompanying notes 249-52.


275. See id. at 224 (naming "consistency" as primary value of Equal Protection Clause jurisprudence).

276. Id. at 226 (quoting City of Richmond v. Croson, 488 U.S. 469, 493 (1989)).
According to the Court, the necessary fit between means and ends can exist only when a plan remedies specific acts of past discrimination occurring within the jurisdiction of the program’s proponent. The remedy of affirmative action then becomes a sort of quid pro quo for past identifiable acts. In the absence of such specific, discoverable acts, no racial preferences can operate even in the face of large racial disparities in the workforce and undeniable broadscale discrimination from multiple sources causing the disparities.

The affirmative approach of § 1986, with its implications for interpretation of the Equal Protection Clause, and the abolitionist interpretation of the Equal Protection Clause address the issue of affirmative action from a very different perspective. Initially, the workforce racial disparities and the presence of widespread societal racism lingering since slavery ended could invoke a governmental duty to protect, to ensure that African-Americans are protected from ongoing racism and its effects on the ability to earn a livelihood. Under the abolitionist approach, the government could be obligated to provide an effective remedy to those affected by discriminatory practices. Therefore, not only would affirmative action be permissible, it could be required to remedy an unacceptable situation in certain instances. In addition, a close fit between the perpetrators of illegal deeds and those who bear the brunt of affirmative action efforts—white workers who would have obtained jobs or promotions but for the program—is not invariably necessary under the affirmative approach. Similar to § 1986, which inducts knowledgeable though otherwise "innocent" bystanders into reasonable protective action, an appropriate affirmative action plan in effect may require white job applicants, akin to bystanders, to step aside in favor of black applicants disadvantaged by diffuse prior acts of discrimination.

While not every affirmative action plan would pass constitutional muster under a broader approach, many more such efforts would survive constitutional scrutiny than is currently the case. Where precisely to draw the line is beyond the scope of this Article, as resolution of the question presents a number of issues tangential to the main thrust of this piece. I mean merely to suggest here that the approach I have elaborated has relevance to the affirmative action debate and that the Court’s current understanding of affirmative action is too narrow.

277. See id. at 220-22 (describing requirements of valid race-based classification).

278. See WEST, supra note 20, at 25-26 (discussing abolitionists’ view that government must take affirmative step to create "equal protection under the law").

279. See Schnapper, supra note 23, at 753 (describing Supreme Court jurisprudence of race as "devoid of any reference to the original intent of the framers of the [F]ourteenth [A]mendment"). Schnapper stated:

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose
This Article demonstrates that although little-used, § 1986 plays an important function in American civil rights law and ought not to be overlooked. On a practical level, it implicates defendants who can play an effective part in deterring racist conspiracies. Police and public officials whose prior knowledge of a conspiracy places them in a position to prevent its consequences are drawn into protective action, as are bystanders who knew about the conspiracy. Section 1986 is a constitutional measure to enforce the Fourteenth Amendment under Section 5 of that Amendment. Historically, § 1986 illustrates that, notwithstanding the current dominant interpretation of the Constitution, our legal tradition does contain strongly affirmative duties enacted to counter particularly extreme evils such as those perpetrated by the Ku Klux Klan.

That historical fact provides further support for the abolitionist interpretation of the Fourteenth Amendment. Under that interpretation, government and even certain private actors have an affirmative obligation to protect African-Americans, so that inaction constituting a failure to protect appropriate instances can trigger liability. This broad interpretation of Fourteenth Amendment duties contrasts sharply with the narrowly conceived duty to protect of DeShaney and its progeny. Evidence for the existence of a broader duty, in part conferred by § 1986, undermines the DeShaney rationale. Moreover, the abolitionist interpretation of the Equal Protection Clause, as exemplified by § 1986, can vitiate the Supreme Court’s current position on the constitutionality of affirmative action programs and reaffirms that the Equal Protection Clause is much more than a guarantee of color-blindness in the creation and administration of government-sponsored programs. Finally, the affirmative interpretation of the Fourteenth Amendment that I begin to outline in this Article forcefully challenges the currently popular negative view of the Constitution and indicates that the negative argument is not the final word in the debate.

benefits were expressly limited to blacks. These programs . . . were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the [F]ourteenth [A]mendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

Id. at 754.