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## NOTE

# AN OLD LAW FOR A NEW WORLD? THIRD-PARTY LIABILITY FOR TERRORIST ACTS—FROM THE KLAN TO AL QAEDA

*Rebecca Blackmon Joyner\**

### INTRODUCTION

On August 15, 2002, 744 plaintiffs, including surviving spouses, children, siblings, parents, and legal representatives of those killed in the September 11, 2001 terrorist attacks, filed suit against financial institutions, charities, the country of Sudan, members of the Saudi royal family, and several individuals known or suspected to be members of the Al Qaeda terrorist organization, including Osama bin Laden.<sup>1</sup> Plaintiffs' complaint in *Burnett v. Al Baraka Investment & Development Corp.* alleged fifteen grounds including federal claims under the Torture Victim Protection Act<sup>2</sup> and the Federal Racketeer Influenced and Corrupt Organizations ("RICO") Act<sup>3</sup> as well as state

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1. See *Burnett v. Al Baraka Inv. & Dev. Corp.* (D.C. Cir. filed Aug. 15, 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/burnettba81502cmp.pdf> (last visited Sept. 6, 2003) [hereinafter *Burnett Complaint*]. Plaintiffs in this case recently withstood a motion to dismiss brought by five of the defendants seeking relief before the court. The district court rejected the plaintiffs' claim under RICO for want of standing, see *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. CIV.A.02-1616, 2003 WL 21730530, at \*9-14 (D.D.C. July 25, 2003), and suggested that there is only limited evidence to support plaintiffs' claim against Al Rahji Banking and Investment Corporation, a Saudi Arabian retail bank. See *id.* at \*17-18. The court encouraged Al Rahji to bring a motion for a more definite statement under Federal Rules of Civil Procedure 12(e) and, upon plaintiffs' response, again seek a motion to dismiss. See *id.* at \*18.

2. 28 U.S.C. § 1350 (2000).

3. 18 U.S.C. § 1962 (2000).

common law claims such as wrongful death, negligence, and negligent or intentional infliction of emotional distress.<sup>4</sup>

In April of 1871, Congress passed the Ku Klux Klan Act, which provided both civil and criminal penalties against a person who conspires to violate another's civil rights.<sup>5</sup> Sections 1 and 2 of this Act are now codified as 42 U.S.C. §§ 1983 and 1985.<sup>6</sup> Section 6 of the Act created a claim for third-party liability against any person who, with knowledge of a conspiracy to violate another's civil rights and the capacity to prevent the act, failed to do so.<sup>7</sup> Codified in federal statutes as 42 U.S.C. § 1986,<sup>8</sup> this section of the law has remained relatively untapped since its enactment.<sup>9</sup>

Designed to stop Ku Klux Klan (the Klan) violence erupting across the Reconstruction South, section 6 of the Act recognized that Klan activities could not exist without acceptance by the local community.<sup>10</sup> While other sections of the Act provided a direct remedy against civil rights conspirators,<sup>11</sup> section 6 extended civil responsibility for Klan violence to members of the local community whose quiet assent made it possible.<sup>12</sup> Legislators believed that by making area leaders financially responsible for terrorist acts, they would bring social forces to bear to stop the Klan.<sup>13</sup>

While developed to prevent violent acts against newly-freed black citizens and those white citizens who would support their struggle,<sup>14</sup> application of section 6 of the Ku Klux Klan Act of 1871 need not have such a limited reach. Structured to create a disincentive to those who would protect or foster conspiratorial terrorist acts,<sup>15</sup> section 6 of the Act has a very obvious modern application—international terrorism. This Note will evaluate whether the plaintiffs in the *Burnett* case referenced above could have, in addition to their existing

4. See *Burnett* Complaint, *supra* note 1, at 240-56.

5. See H.R. Con. Res. 320, 42d Cong., 17 Stat. 13 (1871).

6. See 42 U.S.C. § 1983 (2000) (providing civil remedies against any person who, acting under color of state law, violates a person's civil rights); *id.* § 1985 (providing civil remedies for any person who conspires to violate another's civil rights). Section 2 of the statute as originally enacted also contained a criminal remedy against any person conspiring to violate another's civil rights. H.R. Con. Res. 320, 42d Cong. § 2 (1871); 17 Stat. 13 (1871). The United States Supreme Court ruled that portion of the law unconstitutional in *United States v. Harris*, 106 U.S. 629 (1882).

7. See H.R. Con. Res. 320, 42d Cong. § 6 (1871); 17 Stat. 13 (1871).

8. 42 U.S.C. § 1986 (2000).

9. See Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986*, 56 Wash. & Lee L. Rev. 461, 470 (1999) ("[C]ivil rights litigators are not generally familiar with [§ 1986] and few reported opinions discuss it.").

10. See *infra* notes 113-17 and accompanying text.

11. See H.R. Con. Res. 320, 42d Cong. §§ 1-2 (1871); 17 Stat. 13 (1871).

12. See *infra* notes 113-17 and accompanying text.

13. See *infra* notes 113-17 and accompanying text.

14. See *infra* notes 25-107 and accompanying text.

15. See *infra* notes 113-17 and accompanying text.

claims, also sought a remedy under 42 U.S.C. § 1986. As this Note demonstrates, jurisdiction is appropriate.<sup>16</sup>

Part I of this Note traces the legislative history of the so-called Sherman Amendment, the provision that would become § 1986. This part places the Klan Act in social and political context with a discussion of Klan activities in the Reconstruction South and the federal government's response to those activities.<sup>17</sup> Part I also explores the policy and legal rationale for Congressional action of this type.<sup>18</sup> Part II examines judicial review of the law as enacted, reviewing Supreme Court jurisprudence on both §§ 1985 and 1986 and articulating judicially-constructed tests for both claims.<sup>19</sup> Part III applies the facts alleged in the *Burnett* complaint to the judicially-created tests for a § 1986 claim.<sup>20</sup> This Note concludes that application of § 1986 to international terrorism is compatible with many of the framers' policy goals highlighted during debate on section 6 of the 1871 Act.<sup>21</sup> However, limitations inherent in the legislature's transition from a strict liability standard to a negligence standard for § 1986 claims<sup>22</sup> and the Supreme Court's narrow application of § 1985<sup>23</sup> would limit recovery in *Burnett* and other similar cases.<sup>24</sup>

## I. THE KU KLUX KLAN ACT OF 1871

Part I addresses the social and political changes that took place in the post-Civil War South that gave rise to the development of the Ku Klux Klan.<sup>25</sup> It describes the governmental response that manifested itself in a legislative remedy, one controversial element of which was the Sherman Amendment.<sup>26</sup> Finally, this part highlights both the policy and legal rationale put forth by proponents of the controversial Sherman Amendment to justify its adoption by the Forty-second Congress.<sup>27</sup>

### A. *The Problem*

President Abraham Lincoln emancipated the slaves on January 1, 1863,<sup>28</sup> and, with the ratification of the Thirteenth,<sup>29</sup> Fourteenth<sup>30</sup> and

16. *See infra* notes 343, 364, 382, 394 and accompanying text.

17. *See infra* notes 25-107 and accompanying text.

18. *See infra* notes 108-54 and accompanying text.

19. *See infra* notes 160-248 and accompanying text.

20. *See infra* notes 268-397 and accompanying text.

21. *See infra* notes 253-67 and accompanying text.

22. *Compare infra* note 92 and accompanying text *with infra* notes 101-04 and accompanying text.

23. *See infra* notes 186, 204-05, 318-21 and accompanying text.

24. *See infra* notes 401-03 and accompanying text.

25. *See infra* notes 28-51 and accompanying text.

26. *See infra* notes 52-107 and accompanying text.

27. *See infra* notes 108-54 and accompanying text.

28. *See* The Emancipation Proclamation (Jan. 1, 1863), *reprinted in* 6 A

Fifteenth<sup>31</sup> Amendments to the United States Constitution, by 1870 former slaves maintained a legal status equivalent to those who had formerly held them in bondage.<sup>32</sup> Southern whites, long believing in the inferiority of the black race and fearful of radical changes in their economic, political and social life, instituted a series of laws designed to keep former slaves subordinate, despite their newly-freed status.<sup>33</sup> These so-called Black Codes, enacted as early as 1865 and modeled on Slave Codes,<sup>34</sup> provided for the continuation of contract labor and "plantation discipline," limited black land ownership, instituted vagrancy laws punishable by plantation labor<sup>35</sup> and, after ratification of the Fifteenth Amendment, instituted poll taxes and other voting impediments designed to limit black suffrage.<sup>36</sup> It was in this context that the Ku Klux Klan was born.

Started in Pulaski, Tennessee in the spring of 1866 by a group of six former Confederates, the Klan was a secret vigilante organization that developed out of the Southern defeat in the Civil War, the liberation of slaves and, ultimately, Northern Reconstruction policy.<sup>37</sup> A white supremacist group seeking to regain the southern way of life, the Klan targeted the southern Republican minority and blacks attempting to exercise their newly-granted rights.<sup>38</sup> Though initially contained within Tennessee, by 1868 the Klan had spread to "every Southern state between the Potomac and the Rio Grande."<sup>39</sup> Klansmen<sup>40</sup>

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Compilation of the Messages and Papers of the Presidents 157-59 (James D. Richardson ed., Washington Government Printing Office 1899); *see also* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 1 (1989); Everette Swinney, *Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments, 1870-1874*, at 6 (1987).

29. U.S. Const. amend. XIII.

30. U.S. Const. amend. XIV.

31. U.S. Const. amend. XV.

32. *See* Swinney, *supra* note 28, at 7-25.

33. *See* Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction*, at xv-xvi (1971); *see also* Swinney, *supra* note 28, at 32. Eric Foner cites the comment of an observer that "Southern whites [were] quite indignant if they [were] not treated with the same deference that they were accustomed to under slavery, and behavior that departed from the etiquette of antebellum race relations frequently provoked violence." Foner, *supra* note 28, at 120 (internal quotation marks omitted).

34. *See* Swinney, *supra* note 28, at 9.

35. *See* Foner, *supra* note 28, at 199-202; *see also* Trelease, *supra* note 33, at xxiii.

36. *See* Foner, *supra* note 28, at 422.

37. *See* Swinney, *supra* note 28, at 41-43. Trelease notes that, at least initially, the Klan was designed "purely for amusement." Trelease, *supra* note 33, at 5. He suggests that the Klan did not espouse a more political rationale for its acts until the takeover of the organization by "generals, politicians, and vigilantes," *id.*, namely former Confederate General Nathan Bedford Forrest in 1867, *see id.* at 19-20, and the expansion into other Southern states. *See id.* at 10.

38. *See* Trelease, *supra* note 33, at 7-8, 28-29.

39. *See id.* at 27. It is worth noting that the Klan was not one large organization but rather a series of splinter groups acting with a common purpose. Foner, *supra* note 28, at 425. Other organizations included the Knights of the White Camelia, the

operated in secrecy and hid under disguises that covered their faces.<sup>41</sup> They targeted blacks holding public office<sup>42</sup> and white Republicans,<sup>43</sup> sometimes instigating large-scale riots against Republican campaign rallies.<sup>44</sup> All objects of black prosperity became targets,<sup>45</sup> with those blacks who had achieved economic success cited as the most “offensive.”<sup>46</sup> Ultimately, the Klan was strongest in western North and South Carolina, northern Georgia, Alabama, Mississippi, and western Tennessee.<sup>47</sup> A congressional report issued in 1871 estimated total membership within Tennessee alone at approximately 40,000.<sup>48</sup> By the late 1860s and early 1870s, Klan outrages had reached a fever pitch. The Mississippi Klan regularly burned school buildings used to educate black students and harassed teachers working at those

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White Brotherhood, the White Line, the Seventy-Six Association, the Young Men's Democratic Clubs, the Knights of the Rising Sun. *See* Foner, *supra* note 28, at 425; Swinney, *supra* note 28, at 46-47; Trelease, *supra* note 33, at 51, 82-83. These groups engaged in similar tactics designed to prevent citizens, typically blacks, from exercising their legal rights. *See* Foner, *supra* note 28, at 425; Swinney, *supra* note 28, at 46-47; Trelease, *supra* note 33, at 51, 82-83. Rather than discussing only the Ku Klux Klan, Swinney's book refers to the movement of “Klanism.” Swinney, *supra* note 28, at 41-53. He defines it as “the attempt by disguised persons, operating at night, to use violence or the threat of violence in order to prevent citizens, usually Negroes, from doing something which they had a legal right to do.” *Id.* at 47. Further, Swinney's book distinguishes between “Klanism” and lynch mobs. *Id.* at 47-48. He suggests that lynch mobs often killed their victims, who were usually accused as murderers or rapists. *Id.* Klansmen often whipped their target, typically a black citizen attempting to exercise a constitutional right, hold political office, or bear arms. *See id.* at 46-48.

40. By using this term, this Note refers to all members of white supremacist organizations—not just members of the Ku Klux Klan.

41. *See* Trelease, *supra* note 33, at 19.

42. “At least one-tenth of the black members of the 1867-1868 constitutional conventions” were victims of Klan violence, and seven members were actually murdered. Foner, *supra* note 28, at 426.

43. Klansmen murdered three Republican members of the Georgia legislature and “drove ten others from their homes.” *Id.* at 427. Republican State Senator John W. Stephens of North Carolina was assassinated in 1870 after receiving several threats on his life. *Id.*

44. *See id.* at 427-28.

45. The Klan targeted black churches and schools and attacked black and white citizens engaged in the education of black students. *See id.* at 428.

46. *See id.* at 429.

47. *See* Swinney, *supra* note 28, at 49. Swinney notes, interestingly, that these regions had, relatively speaking, the fewest number of black citizens. *Id.* He explains this seeming paradox with four points: (1) whites in the tidewater and black belt regions were outnumbered by blacks nearly ten to one and were likely reluctant to launch a race war, instead using economic control over blacks; (2) the patrician tradition of fair play toward blacks was the strongest in large plantation areas, acting as a restraint to the development of the Klan; (3) the smaller farmer class present in the regions the Klan was strongest feared competition from the blacks; (4) this area was often evenly divided politically so that intimidation of blacks might be sufficient to swing elections to Democrats. *See id.*

48. Swinney, *supra* note 28, at 133; *see* Report on the Condition of Affairs in the Late Insurrectionary States, S. Rep. No. 41, pt. 1, at 8 (1872) [hereinafter KKK Report].

schools.<sup>49</sup> The Governor of North Carolina was subjected to impeachment proceedings for his acts to stop Klan violence.<sup>50</sup> York County, South Carolina operated in a state of near-anarchy due to the dominance of white supremacists.<sup>51</sup> As Klan violence increased, often overwhelming local law enforcement, it became clear that a federal response was necessary.

### B. Governmental Response

While commanding general of the U.S. Army, Ulysses S. Grant sent troops to put down Klan terrorism,<sup>52</sup> but it was not until assuming the presidency that he solidified his commitment to federal suppression of the Klan. Both the President and Congress received a series of requests from southern Republicans for assistance in dealing with Klan violence.<sup>53</sup> Grant made reference to such occurrences in the southern states during an annual message on foreign affairs, recognizing that "a free exercise of the elective franchise has by violence and intimidation been denied to citizens in exceptional cases in several of the [s]tates lately in rebellion."<sup>54</sup> Following the speech, the Senate asked the President to provide them with all the information he had on southern outrages.<sup>55</sup> Upon receipt of the information, the Senate appointed a committee, known as the Morton

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49. See Trelease, *supra* note 33, at 293-94. Trelease notes that in response to paying taxes to support schools for black students, the Klan instituted an assault on public education for blacks, closing, among others, twenty-six schools in Monroe County and whipping the superintendent. *Id.* at 294.

50. See *id.* at 336.

51. See *id.* at 362-63. Trelease notes that of the 2,300 adult white males in the county, 1,800 were sworn members of the Ku Klux Klan. *Id.* at 363. For a complete discussion of Klan outrages in the Southern states, see Trelease, *supra* note 29 and KKK Report, *supra* note 48.

52. See Trelease, *supra* note 33, at 384.

53. See *id.* at 386. Governor William Holden of North Carolina, who was eventually removed from office for his efforts to put down the Klan using the local militia, sought assistance from President Grant to deal with Klan violence. *Id.* at 336, 385-86. Holden asked the President to suspend the writ of habeas corpus in certain localities. See Swinney, *supra* note 28, at 125. Holden provided Grant with accounts of Klan outrages within North Carolina and this was part of the information that Grant later passed along to the Senate. See Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1019 (1995).

54. See 7 A Compilation of the Messages and Papers of the Presidents 96 (James D. Richardson ed., Washington Government Printing Office 1899); see also Swinney, *supra* note 28, at 126; Trelease, *supra* note 33, at 386.

55. See Trelease, *supra* note 33, at 386; see also Swinney, *supra* note 28, at 126. Senator Oliver Morton, Republican from Indiana, sponsored the resolution seeking documentation from the President. As Senator Morton was the proponent of the committee, historians refer to it as the Morton Committee, and this Note will follow suit. See Swinney, *supra* note 28, at 126.

Committee,<sup>56</sup> to investigate these activities and suggest an appropriate federal response.<sup>57</sup>

### 1. Butler's Bill

Concurrent to these Senate committee deliberations, Benjamin Butler, a Radical Republican representative from Massachusetts, drafted a bill designed to suppress Klan violence.<sup>58</sup> Modeled on the Fugitive Slave Act of 1850<sup>59</sup> and authorized under the federal enforcement power granted under the Fourteenth Amendment,<sup>60</sup> Butler's bill was the basis for what would ultimately become the Ku

56. See *supra* note 55.

57. See Trelease, *supra* note 33, at 386-87; see also Swinney, *supra* note 28, at 128. Swinney notes that the Democratic minority in the Senate objected to the creation of an investigative committee as unnecessary, suggesting that stories of violence in the South were "grossly exaggerated" and "[a] pretext by which [the Republicans] shall place the Southern people again under martial law." Swinney, *supra* note 28, at 127. Though the Morton Committee deliberations began during the third session of the Forty-first Congress, they continued during the Forty-second Congress in a special session called to deal specifically with Ku Klux Klan terror, reporting to the Senate as a whole on March 10, 1871. See Trelease, *supra* note 33, at 386-87.

58. See Swinney, *supra* note 28, at 138; see also Trelease, *supra* note 33, at 387.

59. See Swinney, *supra* note 28, at 139-40; see also Fugitive Slave Act of 1850, 9 Stat. 462 (1850). Similar to the structure of Butler's bill, the Fugitive Slave Act of 1850 created federal civil and criminal penalties and a federal enforcement mechanism to enforce a slave owner's constitutionally-protected property right in his slave. *Id.* at 464-65. It authorized the appointment of federal commissioners to try fugitive slave cases and required marshals to comply with the provisions of the Act or face civil liability. *Id.* at 464. Butler's bill used some of the same wording as that in the Fugitive Slave Act of 1850 and even organized the sections in much the same order. See Swinney, *supra* note 28, at 138-39.

60. Butler's bill, in its preamble, explains the basis for Congressional action in this area. It states:

Whereas large numbers of lawless and evil-disposed persons, especially in the States lately in rebellion, having conspired together and bound themselves to each other by unlawful oaths, have formed secret organizations . . . having for their main object to defeat certain classes of citizens of the United States in the liberty, rights, and equal protection of the laws guaranteed [sic] by the Constitution; and whereas by the use of disguises worn upon their persons, by perjury[,] violence, threats, overawing the local authorities, and otherwise, such persons and organizations, their aiders and abettors, have evaded and set at defiance the power of the States wherein they exist, and thus with impunity have deprived, and still do deprive, peaceable citizens of the enjoyment of life, liberty, and property without due process of law, and have taken from them, and do still take from them, the equal protection of the laws . . . and whereas the States have failed and still fail to prevent or suppress such violations of law and denial of the liberty, rights, and protection guaranteed [sic] by the Constitution of the United States to persons within their respective jurisdictions; and whereas it has been thus rendered impertive [sic] on Congress to enforce all constitutional guarantees by appropriate legislation.

H.R. 189, 42d Cong. (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173 (1871).



Klux Klan Act of 1871.<sup>61</sup> The bill gave special federal commissioners the power to arrest anyone who violated the constitutional rights of a United States citizen.<sup>62</sup> It required that all local marshals comply with the Act, creating civil penalties for failure to do so,<sup>63</sup> and authorized marshals to employ the aid of bystanders, "posse comitatus,"<sup>64</sup> and the military, if necessary, to aid in the Act's enforcement.<sup>65</sup> The bill identified the kinds of Klan activity subject to its penalties,<sup>66</sup> criminalized membership in secret organizations,<sup>67</sup> and prohibited any act to "counsel, aid, or abet the commission of any offense set forth in this [A]ct."<sup>68</sup> The resolution established punishments for these offenses;<sup>69</sup> provided a detailed method for jury selection;<sup>70</sup> and authorized the President to suspend habeas corpus and institute military force against a state to bring about compliance with the Act.<sup>71</sup> Finally, the bill contained a provision allowing the injured party or his

61. See *infra* notes 80-107 and accompanying text. Butler's bill was introduced on February 13, 1871. See Swinney, *supra* note 28, at 138-39.

62. See H.R. 189, 42d Cong. §§ 1-2 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173 (1871); Swinney, *supra* note 28, at 139. These officials could issue a warrant for arrest

upon information of any outrage committed or wrong done against the liberty, property, or person of a citizen of the United States within his precinct, with intent to hinder, impair, or deprive such citizen of the full enjoyment of any right guaranteed [sic] to him under the Constitution of the United States

H.R. 189, 42d Cong. § 2 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173 (1871). These officials could also, with sufficient probable cause, bind offenders over for trial before a district court. H.R. 189, 42d Cong. § 2 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173 (1871).

63. See H.R. 189, 42d Cong. § 3 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173 (1871); see also Swinney, *supra* note 28, at 139.

64. "Posse comitatus" is Latin for "power of the county" and is defined as a group of citizens who are called together to assist the sheriff in keeping the peace. Black's Law Dictionary 1183 (7th ed. 1999).

65. See H.R. 189, 42d Cong. § 3 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 173-74 (1871); Swinney, *supra* note 28, at 139.

66. See H.R. 189, 42d Cong. §§ 4-10 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871); Swinney, *supra* note 28, at 139. These activities included going in disguise or with arms along the public highway or upon the property of another with intent to do injury to another's person or property or to frighten a person in order to prevent the enjoyment of their "legal rights, privileges, or immunities, under the laws and Constitution of the United States." H.R. 189, 42d Cong. § 4 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871). The bill included acts of violence and extended to intimidation and employment discrimination. See H.R. 189, 42d Cong. § 7 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871). Finally, the bill explicitly prohibited the deprivation of arms or weapons by violence or threat. See H.R. 189, 42d Cong. § 8 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871).

67. See H.R. 189, 42d Cong. § 9 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871).

68. *Id.* § 10.

69. See *id.* § 12.

70. See *id.* §§ 15-18.

71. See *id.* § 14.

next of kin to bring a civil suit for damages against the inhabitants of the city, county, or parish in which the violence occurred.<sup>72</sup> While Butler sought support for the bill in the House of Representatives, House Republicans were not prepared to take any action before the Senate's Morton Committee completed its investigation. The bill remained in committee at the end of the Forty-first Congress.<sup>73</sup>

Butler renewed his efforts when the Forty-second Congress convened on March 4, 1871,<sup>74</sup> but action on the issue was stalled by disagreements over what form a bill to address Klan violence should take.<sup>75</sup> By mid-March, proposals to create a joint committee to continue to study the issue were gaining support, and proponents feared that Congress would end another session without legislation on this issue.<sup>76</sup> Soon thereafter, President Grant went to the Capitol to address party leaders and urge passage of a measure to prevent Ku Klux Klan violence.<sup>77</sup> Party leaders explained that given the current political stalemate, legislation on this topic was unlikely without a formal request from the President.<sup>78</sup> Later that day, Congress received a letter from Grant seeking federal legislation designed to secure the legally-recognized rights to life, liberty, and property and put an end to Klan violence immediately.<sup>79</sup>

72. *See id.* § 11; Swinney, *supra* note 28, at 139. The provision applied to both property and personal injury of any individual inhabitants of the defendant county, city, or parish. *See* H.R. 189, 42d Cong. § 11 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871); *see also* Swinney, *supra* note 28, at 139. The bill provided for double damages against the inhabitants if no effort had been made to punish those responsible for the injury in state court. *See* H.R. 189, 42d Cong. § 11 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 174 (1871); Swinney, *supra* note 28, at 139. Butler based this provision on old English riot statutes and state anti-mob legislation on the books in his home state, Massachusetts. *See* Cong. Globe, 42d Cong., 1st Sess. 791-92 (1871); *infra* note 127; *see also* Swinney, *supra* note 28, at 139.

73. *See* Swinney, *supra* note 28, at 140-41.

74. *See id.* at 141.

75. *See id.* at 142-43. Many considered Butler's bill too long and preferred a more straightforward, one-section bill based on the Fourteenth Amendment. *See id.* at 142. Others believed the appropriate remedy lay in a bill giving United States courts jurisdiction over politically-motivated violence. *See id.* Infighting among Republican proponents strengthened the position of congressional Democrats who argued that no federal measure was necessary. *See id.* at 142-43.

76. *See id.* at 143-44; *see also* Trelease, *supra* note 33, at 387-88.

77. *See* Trelease, *supra* note 33, at 387; *see also* Swinney, *supra* note 28, at 147-48. Both Trelease and Swinney note several other factors that likely contributed to congressional action on Klan violence. Conditions in South Carolina had deteriorated, forcing Grant to provide military assistance to maintain order. *See* Trelease, *supra* note 33, at 387. In addition, violence in Mississippi had escalated following the murder of a state judge during court proceedings and the assault upon A.P. Huggins, an Internal Revenue Service collector. *See* Swinney, *supra* note 28, at 145-46. Finally, North Carolina Governor William Holden was convicted on impeachment charges for his use of martial law to stop Klan violence. *See id.* at 146-47.

78. *See* Trelease, *supra* note 33, at 388.

79. *See* Cong. Globe, 42d Cong., 1st Sess. 244 (1871) (reading of Grant's letter

## 2. Shellabarger's Resolution

Five days after receipt of Grant's letter, Representative Samuel Shellabarger, a Republican from Ohio, introduced House Resolution 320 to enforce the provisions of the Fourteenth Amendment of the United States Constitution.<sup>80</sup> Section 1 of the resolution created civil liability for any person or persons who, acting "under color of any law, statute, ordinance, regulation, custom, or usage of any [s]tate," deprived any person within the United States of "any rights, privileges, or immunities secured by the Constitution of the United States."<sup>81</sup> Section 2 attached criminal liability to two or more persons who, in depriving another of his or her constitutional rights, engaged in criminal activity.<sup>82</sup> Section 3 authorized the President, upon the failure of state officials, to protect their citizens from violation of any of the rights, privileges, or immunities secured by the Act, to provide military forces or "other means, as he may deem necessary for the suppression of such insurrection."<sup>83</sup> In addition, section 4 gave the President the power to suspend habeas corpus, if necessary, to put

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urging Congress to act to suppress Klan violence). Grant's letter stated:

To the Senate and House of Representatives:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of [s]tate authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.

U.S. Grant.

Washington, D.C., March 23, 1871.

*Id.*

80. *See id.* at 317. Shellabarger's bill was the result of a House committee formed immediately after receipt of the President's letter. *See id.* at 244-47. The bill was an amalgam of several of the bills proposed prior to Grant's request, including some, but not all, of Butler's bill. *See Swinney, supra* note 28, at 155.

81. *See* H.R. 320, 42d Cong. § 1 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). This section is now codified as 42 U.S.C. § 1981 (2000).

82. *See* H.R. 320, 42d Cong. § 2 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). This section was ultimately amended to extend both civil and criminal liability. *See* Cong. Globe, 42d Cong., 1st Sess. 477-78 (1871). The criminal provision was ruled unconstitutional by the Supreme Court in *United States v. Harris*, 106 U.S. 629 (1882).

83. *See* H.R. 320, 42d Cong. § 3 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). The bill suggested that any state that failed or refused to enforce these rights was denying equal protection of the laws "to which [citizens] are entitled under the fourteenth articles of the amendments to the Constitution of the United States." *Id.* The bill explained that "in all such cases it shall be lawful for the President, and it shall be his duty, to take such measures." *Id.*

down a Klan rebellion.<sup>84</sup> Shellabarger's proposal excluded the municipal liability provision contained in the Butler bill.<sup>85</sup> Despite opposition from House Democrats to several of the bill's provisions,<sup>86</sup> House debate on the bill resulted in only three substantive amendments.<sup>87</sup> The bill passed the House on April 6 by a straight party vote.<sup>88</sup>

### 3. The Sherman Amendment

Senate debate was similarly divided along party lines with a small group of Liberal Republicans voicing opposition to the bill.<sup>89</sup> Although the Senate adopted more than twenty amendments, only two were substantive, one of which was the Sherman Amendment.<sup>90</sup>

84. See H.R. 320, 42d Cong. § 4 (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 317 (1871).

85. See H.R. 320, 42d Cong. (1st Sess. 1871), *reprinted in* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). Shellabarger's proposal also excluded the jury selection procedures previously contained in Butler's bill. See *id.*

86. As this Note is focused on the constitutionality of what was finally codified as section 6 of the Ku Klux Klan Act of 1871, I will not provide a complete legislative history of the Act. In general, House Democrats' opposition to the bill was focused on the broad powers granted to the President, particularly the authorization to suspend the writ of habeas corpus, and based on a general belief that this and other recent legislative measures, particularly the criminal law and court provisions, were a usurpation of state power over their local affairs. See, e.g., Cong. Globe, 42d Cong., 1st Sess. 364-67 (1871) (statement of Representative William Arthur, Democrat from Kentucky).

87. The first change was an explicit enumeration of the acts or intentions of conspirators that would be classified as illegal under the Act, an amendment to the relatively broad language of section 2 providing for criminal liability designed to limit application of the law to only those deprivations which attack the equality of rights of American citizens. See Cong. Globe, 42d Cong., 1st Sess. 477 (1871). This amendment is particularly relevant as the Supreme Court's later interpretation of § 1985 cited to a legislative intent to narrow application of the Ku Klux Klan Act of 1871 for which the Court instituted the class-based animus prong of the *Griffin* test. See *infra* note 218 and accompanying text. The second change was to expand Section 4 to include language providing that the violence prohibited by this Act "set at defiance the constituted authorities of [a] state, and of the United States" for the President to suspend habeas corpus. Cong. Globe, 42d Cong., 1st Sess. 478 (1871). Finally, a new section, reminiscent of the Butler bill, was added prohibiting service by any jury member who failed to take an oath that they had neither participated in nor abetted any conspiracy subject to penalty under the Act. This provision replaced a prior jury oath instituted on July 17, 1862. See Cong. Globe, 42d Cong., 1st Sess. 521 (1871).

88. The bill passed the House by a vote of 118 to 91. See Cong. Globe, 42d Cong., 1st Sess. 522 (1871); see also Swinney, *supra* note 28, at 158.

89. Liberal Republicans, while recognizing that the situation in the South was "deplorable" and life there unsafe, did not believe it to be the role of Congress to address such ills. They believed the causes of the outrages could not be removed by congressional action, but that "[i]t must be done by the Southern people themselves." Cong. Globe, 42d Cong., 1st Sess. 687-89 (1871) (comments by Senator Charles Schurz, Republican from Missouri, espousing the Liberal Republican view); see also Swinney, *supra* note 28, at 158.

90. See *id.* at 566-82, 648-66, 685-709; see also Swinney, *supra* note 28, at 158-59.

Offered by Senator John Sherman, a Republican from Ohio, the Sherman Amendment was patterned on Representative Benjamin Butler's earlier provision, creating municipal liability for acts prohibited by the bill.<sup>91</sup> The amendment provided for full recovery in tort against the inhabitants of the city, county, or parish in which the victim's civil rights were violated.<sup>92</sup> The amendment passed the Senate with little debate.<sup>93</sup> The House failed to accept the controversial amendment as Representative Shellabarger urged non-concurrence in order to bring about a conference committee on the provision.<sup>94</sup> The Senate, similarly seeking conference committee consideration, voted not to recede.<sup>95</sup> A conference committee was appointed on April 17, 1871.<sup>96</sup>

The first conference substitute maintained a form of the Sherman Amendment<sup>97</sup> and, despite heated debate, the Senate accepted the

The first of the substantive amendments related to the jury oath amendment added during the House debates. Senator Thomas Osborn, a Republican from Florida, proposed an amendment to reinstate the 1862 jury oath replaced by the House amendment, allowing for both provisions to remain. *See* Cong. Globe, 42d Cong., 1st Sess. 653-55 (1871). Osborn suggested that the original provision was specifically targeted to Klansmen and to repeal that section would leave Southern courts powerless to stop Klan violence. *See id.*

91. *See supra* note 72 and accompanying text.

92. *See* Cong. Globe, 42d Cong., 1st Sess. 663 (1871). The provision specifically allowed for recovery by any person for personal or property damage injured by persons riotously and tumultuously assembled together . . . if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude.

*Id.*

93. *See id.* at 708 (approval of jury oath amendment by a vote of 34 to 25 in the Senate); *id.* at 705 (approval of Sherman Amendment by a vote of 39 to 25). It is worth noting that this amendment was passed without debate over the objections of Senator Allen Thurman, Democrat from Ohio. *Id.* This quick passage should not reflect a voice of unanimous support in the Senate.

94. *See id.* at 725 (House rejects jury oath by a vote of 12 to 114); *id.* at 723, 725 (House rejects Sherman Amendment by a vote of 45 to 132).

95. *See id.* at 728 (Senate votes not to recede from proposed amendments by a vote of 17 to 33).

96. *See id.* at 725 (House appoints Representatives Shellabarger; Glenni Scofield, Republican from Pennsylvania; and Michael Kerr, Democrat from Indiana, to the conference committee); *id.* at 734 (Senate appoints Senators George Edmunds, Republican from Vermont; John Sherman; and John Stevenson, Democrat from Kentucky, to the conference committee).

97. *See id.* at 787-89. Instead of allowing recovery in tort against the inhabitants of the municipality, the first conference substitute confined recovery to the city, county, or parish as a corporate entity only, and added the right to join as defendant the person or persons actually responsible for the violent act. *Id.* (text of the conference substitute included in the comments of Representative Michael Kerr); *see also id.* at 751 (comments of Representative Shellabarger describing the conference committee amendments); Robert J. Kaczorowski, *Reflections on Monell's Analysis of the Legislative History of § 1983*, 31 Urb. Law. 407, 410 (1999). Further, the new provision explicitly provided that a successful plaintiff could recover a judgment

amended version.<sup>98</sup> Once again dogged by significant Liberal Republican opposition, the House rejected the first conference report,<sup>99</sup> requiring another conference committee.<sup>100</sup> The second conference report represented a considerable departure from earlier versions of the Sherman Amendment. Eliminating municipal liability for wrongs committed within their boundaries, the second conference substitute provided for recovery in tort only against persons who knew of a conspiracy to violate another's civil rights, had the power to prevent or aid in preventing the event, but failed to do so.<sup>101</sup> The second conference report included the right to join as defendant the person or persons actually responsible for the violence, a right included in the first conference version,<sup>102</sup> but restricted recovery to actions commenced within one year of the act of violence.<sup>103</sup> Further, distinct from prior provisions, the second conference version limited damages for the wrongful death recoverable by a widow, widower, or next of kin to \$5,000.<sup>104</sup> In spite of continued debate<sup>105</sup> on the Sherman Amendment, both houses ultimately accepted the second conference report,<sup>106</sup> and the Ku Klux Klan Act of 1871 was enrolled on April 20, 1871.<sup>107</sup>

### *C. The Policy and Legal Rationale Behind the Sherman Amendment*

Sherman and other amendment proponents articulated both policy and legal arguments to justify the imposition of civil liability against third parties for Klan violence. Policy goals included the improved

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against "all moneys in the treasury of such county, city, or parish" while, at the same time, granting the municipality authority to proceed for recovery of such funds against anyone local officials believed to be a "principal or accessory in such riot." Cong. Globe, 42d Cong., 1st Sess. 789 (1871) (text of the conference substitute included in the comments of Representative Kerr); *see also id.* at 751 (comments of Representative Shellabarger describing the conference committee amendments); Kaczorowski, *supra*, at 410-11.

98. *See* Cong. Globe, 42d Cong., 1st Sess. 779 (1871) (Senate accepts first conference report by a vote of 32 to 16).

99. *See id.* at 800 (House rejects first conference report by a vote of 74 to 106); *see also* Kaczorowski, *supra* note 97, at 411.

100. *See* Cong. Globe, 42d Cong., 1st Sess. 802 (1871) (Senate appoints Senators George Edmunds; Matthew Carpenter, Republican from Vermont; and Allen Thurman, to the conference committee); *id.* at 810 (House appoints Representatives Shellabarger; Luke Poland, Republican from Vermont; and Washington Whitthorne, Democrat from Tennessee, to the conference committee).

101. *See id.* at 819 (conference report read into the record); *see also* Kaczorowski, *supra* note 97, at 412. The second conference substitute is essentially what is now codified as 42 U.S.C. § 1986 (2000).

102. *See supra* note 97.

103. *See* Cong. Globe, 42d Cong., 1st Sess. 820 (1871).

104. *See id.*

105. *See generally id.* at 751-820 (full debate of second conference substitute).

106. *See id.* at 808 (House accepts the second conference report by a vote of 93 to 74); *id.* at 831 (Senate accepts the second conference report by a vote of 36 to 13).

107. *See id.* at 832.

ability to recover for those harmed by prohibited acts of violence<sup>108</sup> and the redistribution of loss associated with Klan violence in order to bring about community action to curb activities of this type.<sup>109</sup> Legally, proponents based this provision on English anti-riot precedent and state anti-mob laws which provided similar remedies to injured parties.<sup>110</sup> They found authority to enact the Sherman Amendment in a broad interpretation of federal enforcement powers under the Fourteenth Amendment.<sup>111</sup>

Sherman believed his amendment was a vital provision in any law Congress passed to deal with Klan violence.<sup>112</sup> By holding area residents responsible for wrongs committed within their borders, Sherman, in his original amendment, was targeting wealthy landowners whom he believed had displayed quiet assent to white supremacist activities in the South.<sup>113</sup> Sherman believed that by imposing tort damages on area residents, landowners would rise up against these groups and, by their community leadership, force their elimination.<sup>114</sup> Similarly, Representative Butler, author of the original municipal liability provision and the most vocal House proponent of

108. See *infra* notes 119-22 and accompanying text. Applying § 1986 to acts of international terrorism would similarly provide victims with another means of compensation for their losses. See *infra* notes 268-397 and accompanying text.

109. See *infra* notes 113-17 and accompanying text.

110. See *infra* notes 123-27 and accompanying text.

111. See *infra* notes 128-54 and accompanying text.

112. See Cong. Globe, 42d Cong., 1st Sess. 761 (1871) ("In my judgment, this section will do more to put down this class of outrage in the South, and to secure to every man that which the Constitution gives him, than all the criminal statutes you can put on the statute book . . ."). Sherman made these comments during Senate debate on the first conference substitute. *Id.*

113. See *id.* During Senate debates over the first conference report, Sherman articulated this position:

If the property-holders will not [stop the Klan]; if, as in the southern [s]tates the property-holders will lay there quiet on their farms and see these outrages go on day by day; if property-holders will shut their doors when they hear the Ku Klux riding by to burn and slaughter; if they will not rise in their might, and, with the influence which property always gives in any community, put down these lawless fellows, I say let them be responsible.

*Id.* Likewise, the *Burnett* plaintiffs seek to hold those who explicitly or implicitly backed the plans for the September 11, 2001 attacks accountable for their acquiescence to violent acts. See *supra* notes 1-4 and accompanying text.

114. See Cong. Globe, 42d Cong., 1st Sess. 761 (1871):

[W]hat do these men . . . care for a suit in the courts of the United States for damages in the name of some negro man who has been whipped? Nothing at all. . . . But when you have a suit against a county, . . . you will have a sympathy in favor of the plaintiff . . . wronged . . .

*Id.*; see also Kaczorowski, *supra* note 97, at 412-13. During Senate debates over the second conference report, Sherman reiterated his position by stating, "There is no county in North Carolina where twenty of the richest men . . . could not put down these bands of outlaws." Cong. Globe, 42d Cong., 1st Sess. 820 (1871). Sherman believed that "these crimes could not exist a day if they were not sustained by the public sentiment of the property-holders of the community[.]" *Id.*

the Sherman Amendment,<sup>115</sup> suggested that riotous activity of this kind could not take place without tacit approval from the leaders of the community.<sup>116</sup> Butler argued that the amendment created a financial incentive for property owners to act as inaction could lead to direct financial liability for wealthy members of the community.<sup>117</sup>

Despite direct civil and criminal penalties,<sup>118</sup> many proponents believed it would be difficult for victims to recover from their attackers. Concerns over an inability to identify the perpetrator or prove conspiracy or intent led many to believe that sections 1 and 2 of the bill would be largely unenforceable.<sup>119</sup> Proponents believed that the Sherman Amendment was a necessary piece of any Klan reform legislation if victims were to receive compensation for their injuries.<sup>120</sup> Advocates believed that strict liability, present in earlier versions but eliminated in the adopted amendment,<sup>121</sup> overcame problems of proof and enforceability that opponents had raised in objection to sections 1 and 2. While victims might not be able to identify the person or persons responsible for the violence, they could always identify the community in which the act occurred.<sup>122</sup>

With no provision in the common law for bystander liability of this kind,<sup>123</sup> Sherman found support for his amendment in the English

115. See generally *id.* at 792 (statements of Representative Butler in support of the Sherman Amendment).

116. See *id.* (“[N]o riot can have place . . . [or] gain head unless its continuance is winked at or connived at by the leading men of the community.”).

117. See *id.* Butler stated:

The moment the men of property in the South, the men of substance in the South, the men who have something at stake, understand that they are being injured by Kukluxism, that their property is being put in danger by Kukluxism, that their taxes are being increased by Kukluxism, that moment they will come forward and put down Kukluxism.

*Id.*

118. See H.R. Con. Res. 320, 42d Cong. §§ 1-2 (1871); 17 Stat. 13 (1871).

119. See, e.g., Cong. Globe, 42d Cong., 1st Sess. 793 (1871); see also Kaczorowski, *supra* note 97, at 414.

120. See Cong. Globe, 42d Cong., 1st Sess. 820-21 (1871). During Senate debate over the second conference report which eliminated strict liability for a stiffer negligence standard, Sherman lamented “[w]hat is the remedy now proposed for these wrongs? No judgment against the county, no remedy against the community, but a private suit, where all the chances are against the plaintiff.” *Id.* at 821; see also Kaczorowski, *supra* note 97, at 414.

121. See *supra* note 92 and accompanying text.

122. See Kaczorowski, *supra* note 97, at 414. Republican Congressman Michael Kerr, Republican Congressman Luke Poland and Democratic Senator Allen Thurman raised concerns about the enforceability of both the civil and criminal provisions of the act and cited problems of proving the conspiratorial intent necessary to recover under the act. See Cong. Globe, 42d Cong., 1st Sess. 788, 793, 822 (1871); see also Kaczorowski, *supra* note 97, at 429. Sherman later criticized the second conference committee for eliminating the strict liability element, rendering the provision too weak. See Cong. Globe, 42d Cong., 1st Sess. 820-21 (1871).

123. See Cong. Globe, 42d Cong., 1st Sess. 752 (1871) (comment by Representative Shellabarger referencing statutory nature of local government liability for mob violence).



Statute of Winchester, dating from the year 1285,<sup>124</sup> and several state laws providing for recovery in tort against local governments for those injured by mobs within their jurisdiction. Discussed extensively in debates in both houses, the Statute of Winchester required community residents to raise “a hue and cry” if a robbery was committed, holding them liable in tort if the robber was not arrested.<sup>125</sup> Similarly, Sherman cited several state laws providing comparable remedies, including Maryland and New York statutes,<sup>126</sup> and Butler referred to a comparable statute in his home state of Massachusetts.<sup>127</sup>

Advocates of the Sherman Amendment also found authority for their proposal in Congress’ enforcement power under the Fourteenth Amendment.<sup>128</sup> Interpreting it as a grant of fundamental rights to all United States citizens, bill proponents in both houses espoused a theory of broad congressional enforcement power, imposing a duty on

124. The Statute of Winchester, 1285, 13 Edw., c. 1-6 (Eng.).

125. See Cong. Globe, 42d Cong., 1st Sess. 762 (1871) (statement of Senator John Stevenson); see also The Statute of Winchester, 1285, 13 Edw., c. 6 (Eng.). Sherman Amendment opponents argued that Sherman’s proposal was broader than the English statute, see Cong. Globe, 42d Cong., 1st Sess. 762 (1871) (statement of Senator John Stevenson), and that subsequent revisions to the English statute had extended it well outside the scope of the proposed provision. See *id.* at 770 (statement of Senator Allen Thurman). For additional information on the Statute of Winchester, see 4 William Blackstone, Commentaries \*292; Henry Summerson, *The Enforcement of the Statute of Winchester, 1285-1327*, 13 J. Legal Hist. 232, 233, 235 (1992).

126. See Cong. Globe, 42d Cong., 1st Sess. 757, 771, 772-73 (1871). Opponents later argued that these statutes imposed municipal liability only where local authorities had knowledge of the riot and the means to prevent it but, nevertheless, failed to stop it—a more limited scope than Sherman’s proposal. See *id.* at 757, 762-65, 770-73, 787-91, 794, 798-99; see also Md. Ann. Code art. 82, §§ 1-2 (1867); N.Y. Gen. Mun. Law ch. 428, § 1 (1855).

127. See Cong. Globe, 42d Cong., 1st Sess. 792 (1871). The Massachusetts law read:

When property of the value of fifty dollars or more is destroyed, or property is injured to that amount, by any persons to the number of twelve or more, routously [sic] or tumultuously assembled, the city or town within which the property was situated shall be liable to indemnify the owner thereof, to the amount of three fourths of the value of the property destroyed, or of the amount of such injury thereto, to be recovered in an action of tort: *Provided*, [t]hat the owner of such property uses all reasonable diligence to prevent its destruction or injury, and to procure the conviction of the offenders.

Mass. Gen. Stat. ch. 164, § 8 (1860), reprinted in Cong. Globe, 42d Cong., 1st Sess. 792 (1871) (emphasis in original). “A city or town which pays any sum under the provisions of the preceding section may recover the same against any or all of the persons who destroyed or injured such property.” Mass. Gen. Stat. ch. 164, § 9 (1860), reprinted in Cong. Globe, 42d Cong., 1st Sess. 792 (1871). It is worth noting that most states currently maintain laws providing for municipal liability in tort for property damage due to riots with approximately fifteen states extending similar protection to resultant personal injury. For the most complete listing of personal injury statutes, see Note, *Municipal Liability for Riot Damage*, 81 Harv. L. Rev. 653 (1968).

128. See Kaczorowski, *supra* note 97, at 421-23.

the federal government to protect against infringement of fundamental rights.<sup>129</sup> Debate over congressional authority to enact the Ku Klux Klan Act of 1871 focused primarily on sections 1 and 2 of the Act,<sup>130</sup> as these provisions operated as direct remedies for those facing violation of their fundamental rights.<sup>131</sup> The Sherman Amendment, in contrast, represented a more indirect exercise of Congress' enforcement power, providing a remedy where state and local officials failed to protect fundamental rights.<sup>132</sup> Proponents of the Sherman Amendment put forth two arguments for constitutional authority—Congress' responsibility to enforce equal protection under the law<sup>133</sup> and congressional authority to act to enforce a federally-conferred right.<sup>134</sup>

Senate proponents found constitutional support for the Sherman Amendment in a constitutionally-conferred responsibility of Congress to ensure equal protection under the law. Under the Fourteenth Amendment:

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.*<sup>135</sup>

Additionally, section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article."<sup>136</sup> Senate proponents argued that congressional authority to institute the Sherman Amendment derived from both the equal protection and enforcement clauses of the Fourteenth Amendment.<sup>137</sup> They argued that the Fourteenth Amendment imposed a duty on states and their political subdivisions to provide their citizens with equal protection under the law and that their failure to meet this burden required remedial congressional action.<sup>138</sup> In arguments similar to those articulated in the preamble to

129. *See id.*

130. For a list of citations to constitutional arguments made by proponents of sections 1 and 2 in congressional debate, see *id.* at 420 n.50.

131. *See id.* at 421.

132. *See id.*

133. *See infra* notes 135-39 and accompanying text.

134. *See infra* notes 141-54 and accompanying text.

135. U.S. Const. amend. XIV, § 1 (emphasis added).

136. *Id.* § 5.

137. *See* Cong. Globe, 42d Cong., 1st Sess., 756-57 (1871).

138. *See id.* Senator George Edmunds gave voice to this position:

[T]he Constitution declares that it shall be the duty of the State to give to everybody the equal and complete protection of its laws; and where, therefore, there is a State organism, as a county, which is intrusted [sic] with the local administration of justice, which is intrusted [sic] with the local

the original Butler bill,<sup>139</sup> Senate Republicans concluded that it was the duty of the state to ensure equal protection under the law and the Fourteenth Amendment required congressional action where states failed to meet this duty.

House leaders, though less supportive of the Sherman Amendment than their Senate counterparts,<sup>140</sup> never disputed the constitutional authority to enact it. During the House debates on the first conference report, Representative Shellabarger, floor manager and member of both conference committees, addressed three arguments made by opponents that the amendment was unconstitutional. In response to the first argument, that rights protected by the amendment were not within the purview of the federal government, Representative Shellabarger explained that the “amendment confines itself in express words to protection of a right conferred under the Constitution and laws of the United States.”<sup>141</sup> He went on to suggest that to provide such a right without the power to enforce it would render the Constitution without force and undermine the effectiveness of the federal government.<sup>142</sup> Secondly, Shellabarger suggested that enactment of this provision against communities which “tolerate” riotous activities was an entirely “appropriate” response, highlighting the English law and state anti-mob statutes Sherman had alluded to earlier.<sup>143</sup>

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preservation of peace . . . then this clause in the Constitution which speaks of the protection which the States must afford to all their inhabitants equally under the law, to preserve them against riots and tumults, does speak, . . . to the municipal authorities existing under the State law directly; and when, therefore, they fail to perform the duty of protection, . . . against tumult and riot, then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement.

*Id.* at 756. It is significant that Senator Edmunds suggested federal action was required not only to correct state action in violation of the Fourteenth Amendment, but also to correct state inaction. *See id.* The United States Supreme Court rejected this interpretation of the Fourteenth Amendment, limiting Congressional authority only to state action, in both *United States v. Morrison*, 529 U.S. 598 (2000), and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

139. *See supra* note 60 (quoting the preamble to Butler’s bill explaining the need for Congressional action due to states’ failure to provide equal protection under the laws).

140. *See supra* notes 94, 99 and accompanying text (House rejects Sherman Amendment in original bill and first conference report)

141. *See* Cong. Globe, 42d Cong., 1st Sess. 751 (1871).

142. *See id.* Shellabarger stated that:

[T]o say we can pass no law to protect a right given by our own statutes and Constitution is not only to deny the power to pass this bill in any part of it, is not only to deny the United States the right to enforce its own laws, but is to literally and self-evidently strip the United States of every attribute of government—is to place it precisely where the doctrine of secession . . . placed it, with a Constitution but no power to enforce it, with laws but no right to execute them, with citizens but no attribute to defend them!

*Id.*

143. *See id.* (internal quotation marks omitted).

Finally, Shellabarger addressed opponents' assertion that the amendment exceeded congressional authority over local governments as creatures of the states.<sup>144</sup> While primarily focused upon the first conference substitute, which incorporated direct liability against municipal corporations,<sup>145</sup> Representative Shellabarger's response to this argument applies with equal force to the Sherman Amendment as ultimately enacted. Shellabarger suggested that the United States is authorized to act upon any state or local government in areas governed by federal law if granted the authority to govern persons living there.<sup>146</sup>

Shellabarger's comments regarding federal authority to legislate against municipal governments and their citizens are reminiscent of the interpretation of constitutional authority offered by Justice Joseph Story in the United States Supreme Court decision, *Prigg v. Pennsylvania*.<sup>147</sup> In *Prigg*, Story construed the extent of congressional power to enforce the Constitution's Fugitive Slave Clause.<sup>148</sup> Story

144. See, e.g., *id.* at 788 (statement of Republican Representative Michael Kerr).

145. See *supra* note 97 and accompanying text; see also Cong. Globe, 42d Cong., 1st Sess. 751, 787-89 (1871).

146. See Cong. Globe, 42d Cong., 1st Sess. 751 (1871). Representative Shellabarger suggested that:

[T]he United States may impose on a body of the people the obligation to see to it that the United States laws are not riotously defied to the damage of the people in a particular district, and may make the inhabitants of such prescribed district liable if they neglect said duty, then as a matter of convenience, the United States may just as well designate the district and inhabitants so made liable by the name of a county as by any other method of designation or description, and having made them, as such, liable to have a valid judgment against them by their corporate name, and they being, under well-recognized United States law, a person in the courts, it is perfectly competent to enforce a judgment for such a liability in the same manner as could any other judgment be enforced against the same legal person or corporation.

*Id.* at 752. Additionally, he explained that:

[T]he United States [can] coerce a county of a State, touching [upon] a subject matter over which the United States has power to coerce every person in that county, to wit: touching there being or not being mobs in such county, . . . to defy the laws of the United States and destroy the rights secured by these laws . . . .

*Id.* at 751. Representative Shellabarger's comments were made in response to opponents' claims that by granting plaintiffs the ability to claim judgments against local governments, the federal government was exacting a tax from the state in excess of its constitutional authority. See generally *id.* at 756-65, 777.

147. See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). This is perhaps not so surprising considering Butler's original bill was offered for discussion in the House and was based upon the Fugitive Slave Act of 1850 which was modeled after the 1793 Act that the Court in *Prigg* interpreted. See *supra* note 59 and accompanying text; see also Swinney, *supra* note 28, at 139.

148. See *Prigg*, 41 U.S. at 561-605; U.S. Const. art. IV, § 2, cl. 3. The clause reads: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

suggested that the clause, which prohibited any state from denying a slave-holder the return of a fugitive slave, created a constitutionally-protected property right in slaves and a federal duty to enforce this right.<sup>149</sup> Story explained that in order to give full meaning to the text of the Constitution, one must construe the language so as to “fully and completely effectuate the whole objects of it.”<sup>150</sup> To read the Fugitive Slave Clause any other way, Story posited, would be to undermine its effectiveness.<sup>151</sup> The prohibition on state action, by its nature, defines the property right in slaves. Story connected the creation of the right to a constitutional guarantee by the federal government by quoting from Madison’s Federalist No. 43: “A right implies a remedy,” he explained, and with a federally-conferred right comes a duty of the federal government to enforce that right.<sup>152</sup>

Shellabarger’s arguments support an interpretation of the Fourteenth Amendment consistent with *Prigg*. His statements suggest that he believed that section 1 of the Fourteenth Amendment granted positive rights to due process of life, liberty, and property, equal protection of the law, and privileges and immunities of United States citizens,<sup>153</sup> and that, with these rights, Congress gained the duty to guard against their infringement.<sup>154</sup> Shellabarger found sufficient authority for Congress to act against both individuals and the governmental units in which they reside under its duty to enforce these federally-conferred rights.

After providing an overview of the rise of Klan violence<sup>155</sup> and the federal legislative response designed to stop it,<sup>156</sup> part I reviewed both the policy and legal foundation upon which Sherman Amendment proponents instituted third-party liability for terrorist acts.<sup>157</sup> While the framers’ identified the Fourteenth Amendment as the source for congressional authority,<sup>158</sup> judicial review of the Act would soon re-focus the legal underpinning and, in doing so, significantly narrow the Act’s ultimate reach.<sup>159</sup>

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*Id.* While not formally repealed, with the passage of the Thirteenth Amendment, the Fugitive Slave Clause has been made virtually inoperative. See U.S. Const. art. XIII, § 1; see also U.S. Const. art. IV, § 2, cl. 3.

149. See *Prigg*, 41 U.S. at 612.

150. *Id.*

151. See *id.*

152. See *id.* at 616 (internal quotation marks omitted).

153. U.S. Const. amend. XIV, § 1; see also *supra* notes 141-42, 146 and accompanying text.

154. U.S. Const. amend. XIV, § 5; see also *supra* notes 141-42, 146 and accompanying text.

155. See *supra* notes 28-51 and accompanying text.

156. See *supra* notes 52-107 and accompanying text.

157. See *supra* notes 108-54 and accompanying text.

158. See *supra* notes 128-54 and accompanying text.

159. See *infra* notes 160-248 and accompanying text.

## II. JUDICIAL REVIEW OF THE KU KLUX KLAN ACT OF 1871

Despite very early review of the criminal provisions created by section 2 of the Ku Klux Klan Act of 1871,<sup>160</sup> judicial consideration of section 6 of the Act would have to wait for over a century.<sup>161</sup> Linked in statute to the remaining civil provisions of section 2 (what is now a § 1985 claim),<sup>162</sup> jurisprudence on section 6 (§ 1986) claims would necessarily flow from developments in the courts' interpretation of § 1985. As the federal courts would ultimately require satisfaction of all the elements of a § 1985 claim before proceeding with review of a § 1986 claim,<sup>163</sup> this Note will discuss the tests for both provisions. Part II highlights the four primary Supreme Court cases upon which the test for a § 1985 claim has been developed, illustrating the Court's continued refinement over time of the elements required to achieve remedy under this statute.<sup>164</sup> In addition, this part explores the *Clark v. Clabaugh*<sup>165</sup> decision and the test it sets out for a § 1986 claim.<sup>166</sup> Part III proceeds by applying the modern-day facts of anti-terrorism suits to the judicially-created tests for § 1985 and § 1986 claims.

### A. Section 1985

The Supreme Court's first review of the civil provisions in section 2 of the Ku Klux Klan Act of 1871 occurred in 1951 in *Collins v. Hardyman*.<sup>167</sup> Plaintiffs were members of a political club organized for "the purpose of participating in the election of officers of the United States, petitioning the national government for redress of grievances, and engaging in public meetings for the discussion of national public issues."<sup>168</sup> Defendants—members of the American

160. See *United States v. Harris*, 106 U.S. 629 (1882); see also *Baldwin v. Franks*, 120 U.S. 678 (1887).

161. The first case to raise a claim under § 1986 (formerly section 6 of the Ku Klux Klan Act of 1871) was *Taylor v. Nichols*, 409 F. Supp. 927 (D. Kan. 1976).

162. The Ku Klux Klan Act of 1871, section 6, as enacted read:

That any person or persons, having knowledge that *any of the wrongs conspired to be done and mentioned in the second section of this act* are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which . . . reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action . . . .

H.R. Con. Res. 320, 42d Cong. (1871); 17 Stat. 13 (1871) (emphasis added).

163. See *infra* note 231 (providing citations to all § 1986 cases that would ultimately fail due to failure to satisfy the elements of a § 1985 claim).

164. See *infra* notes 167-227 and accompanying text.

165. 20 F.3d 1290 (3d Cir. 1994).

166. See *infra* notes 230-48 and accompanying text.

167. 341 U.S. 651 (1951).

168. *Id.* at 653.

Legion who opposed the views of the plaintiffs' organization—descended upon the group's meeting and assaulted and intimidated the plaintiffs.<sup>169</sup> Plaintiffs brought suit under § 1985.<sup>170</sup> The district court ruled § 1985 unconstitutional as it afforded redress for civil rights violations perpetrated by individuals, a remedy the Supreme Court had prohibited under its Fourteenth Amendment jurisprudence as far back as the *Slaughter-House Cases*.<sup>171</sup> While the Ninth Circuit reversed the district court's ruling,<sup>172</sup> the Supreme Court ruled with the district court, finding insufficient evidence that this conspiracy sufficiently deprived the plaintiffs of "equal protection of the laws, or of equal privileges and immunities under laws"<sup>173</sup> and leaving the constitutional question unanswered.<sup>174</sup> While the Court did not rule out the possibility of a conspiracy of private individuals so large as to bring about "a deprivation of equal protection of the laws, or of equal privileges and immunities under laws,"<sup>175</sup> the Court preferred to leave redress for injuries of the type complained of by plaintiffs with the state courts.<sup>176</sup>

Twenty years later, the Court reversed its earlier position and upheld application of § 1985 to a small private conspiracy. In *Griffin v. Breckenridge*,<sup>177</sup> two black men traveling in the car of a white driver were stopped by two white residents of Kemper County, Mississippi, and the driver and both passengers were clubbed, beaten and threatened with death.<sup>178</sup> While the district court, relying on *Collins*,

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169. *See id.* at 654.

170. *See id.* at 652.

171. *See id.* at 656; *see also* *Slaughter-House Cases*, 83 U.S. 36 (16 Wall. 1872) (interpreting the Fourteenth Amendment as a limit on state power but not a grant of power to the federal government).

172. *See Collins*, 341 U.S. at 656.

173. *Id.* at 662.

174. *Id.*

175. *Id.* The Court noted that "the post-Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so." *Id.*

176. *See id.* at 662-63. The dissenters, Justices Burton, Black and Douglas, argued that this conspiracy was exactly the type that Congress intended to reach and that the language of the statute clearly did not limit its application to state action. *See id.* at 662 (Burton, J., dissenting). The dissenters believed that Congress had the power to create a federal cause of action for persons injured by private conspiracies to abridge federally created constitutional rights, *see id.* at 663 (Burton, J., dissenting); moreover, according to the dissenters, this action was not inconsistent with the Fourteenth Amendment as Congress had authority to pass laws supporting rights which exist apart from the Fourteenth Amendment. *See id.* at 664 (Burton, J., dissenting). Interestingly, this argument is not that different from the legal rationale put forth by supporters of the 1871 Act in the Forty-second Congress. The legislators believed, however, that the Fourteenth Amendment created federal constitutional rights and Congress was, therefore, authorized by section 5 of the Fourteenth Amendment to enforce those rights through appropriate legislation. *See supra* notes 135-54 and accompanying text.

177. 403 U.S. 88 (1971).

178. *See id.* at 91.

dismissed the complaint for failure to state a claim<sup>179</sup> and the Fifth Circuit affirmed,<sup>180</sup> the Supreme Court suggested that there had been an “evolution of decisional law in the years that have passed since [Collins] was decided” that enabled the Court to reach the constitutional questions left open by that decision.<sup>181</sup> Reviewing the text of § 1985,<sup>182</sup> judicial interpretations of companion provisions passed simultaneously,<sup>183</sup> and the Act’s legislative history,<sup>184</sup> the Court concluded that the enacting statute was within congressional authority.<sup>185</sup> Acting to “determine . . . the badges and the incidents of slavery,” the Court concluded that Congress acted “wholly within its powers under [section] 2 of the Thirteenth Amendment” when it created a cause of action for “Negro citizens” victimized by “racially

179. *See id.* at 92.

180. *See Griffin v. Breckenridge*, 410 F.2d 817 (5th Cir. 1971). The Fifth Circuit expressed “some doubts as to the continued vitality” of *Collins v. Hardyman*, suggesting there was a strong likelihood that *Collins v. Hardyman* would eventually be overturned and § 1985 “held to embrace private conspiracies to interfere with rights of national citizenship.” *Id.* at 825-26. The court concluded, however, that “[s]ince we may not adopt what the Supreme Court has expressly rejected, we obediently abide the mandate in *Collins*.” *Id.* at 826-27; *see also Griffin*, 403 U.S. at 92-93.

181. *See Griffin*, 403 U.S. at 96. The Court explained that in the decisions made since *Collins*, the Court’s approach to civil rights statutes was “to ‘accord [them] a sweep as broad as [their] language.’” *Id.* at 97 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968)). The Court suggested that “[a] century of Fourteenth Amendment adjudication ha[d] . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons.” *Id.* Yet, the Court found that Congress’ reference to “equal protection of the laws” or “equal privileges and immunities under the laws” without reference to state action suggested it was Congress’ intent to apply § 1985 to all deprivations, “whatever their source.” *Id.*

182. *See id.* at 96 (citing H.R. Con. Res. 320, 42d Cong. (1871); 17 Stat. 13 (1871)). The Court examined the wording, “two or more persons in any [s]tate or [t]erritory . . . who conspire . . . or go in disguise,” and concluded that this activity was best interpreted to apply to private individuals as official action is rarely undertaken in disguise but often done so by “private marauders.” *Griffin*, 403 U.S. at 96.

183. *See id.* at 97. The Court compared similar language in other civil rights legislation of the time and concluded that there were three possible forms for a state action limitation on § 1985: (1) action under color of law, (2) interference with or influence upon state authorities, or (3) a private conspiracy so large and effective as to supplant authority and satisfy the state action requirement. *See id.* at 98. As each of these provisions existed when Congress instituted what is now § 1985, the Court concluded they did not intend to simply duplicate one or more of them as the *Collins* opinion would suggest. *See id.* at 99.

184. *See id.* at 100-01. The Court cited several comments made by members of the Forty-second Congress suggesting this provision was always intended to cover private conspiracies. Representative John Coburn, Republican from Indiana, asked, “Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments.” *Id.* at 101 (quoting Cong. Globe, 42d Cong., 1st Sess. 459 (1871)). Senator John Pool, Republican from North Carolina, suggested that “Congress must deal with individuals, not States. It must punish the offenders against the rights of the citizen . . .” *See id.* (quoting from Cong. Globe, 42d Cong., 1st Sess. 608 (1871)).

185. *See id.* at 101.



discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."<sup>186</sup> Additionally, the Court explained that the right to interstate travel, long recognized as "among the rights and privileges of National citizenship," provided further support for congressional regulation of acts occurring "upon the federal, state, and local highways."<sup>187</sup>

Reversing the *Collins* ruling that § 1985 was unconstitutional,<sup>188</sup> the Court laid out a four-part test to determine applicability of the statute to any claim, requiring that plaintiffs show that the defendants did:

(1) conspire or go in disguise on the highway or on the premises of another (2) 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 . . . (3) [performed] or caused to be [performed], any act in furtherance of the object of [the] conspiracy, whereby another was (4a) injured in his person or property or (4b) deprived of having and exercising any right or privilege of a citizen of the United States.<sup>189</sup>

Applying the facts of *Griffin* to this test, the Court held that the defendants, acting in concert, did go onto the public highways with "the requisite animus to deprive the petitioners of the equal enjoyment of [their] legal rights because of their race."<sup>190</sup> Through "force, violence and intimidation," the defendants engaged in acts in furtherance of the conspiracy from which all three plaintiffs suffered personal injury.<sup>191</sup> The Court remanded the case to the district court for reconsideration of the § 1985 claim.<sup>192</sup>

The *Griffin* decision, while restoring the effectiveness of § 1985 in racially-motivated conspiracies, failed to comment on other types of class-based, invidiously discriminatory animus sufficient to qualify for

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186. *See id.* at 105. The Court's interpretation under the Thirteenth Amendment, rather than the Fourteenth Amendment, would necessarily narrow the application of § 1985, despite stated congressional intent that the Ku Klux Klan Act of 1871 was an application of the enforcement clause of the Fourteenth Amendment. *See supra* notes 135-54 and accompanying text.

187. *See id.* at 106 (internal quotation marks omitted). It is worth noting that the Court did not limit constitutional sources of congressional power to the Thirteenth Amendment and the right to travel. The Court ended its opinion by noting that the current complaint did not require consideration of the scope of congressional power under section 5 of the Fourteenth Amendment, a question reserved for future courts. *See id.* at 107.

188. *See id.* at 96-97.

189. *See id.* at 102-03 (quoting from H.R. Con. Res. 320, 42d Cong. § 6 (1871), 17 Stat. 13 (1871) (internal quotation marks omitted)).

190. *See id.* at 103. It is this language that future court decisions point to when suggesting the Supreme Court created a requirement of class-based animus to sustain a § 1985 claim. *See United Bhd. of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 834 (1983); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993).

191. *See Griffin*, 403 U.S. at 103.

192. *See id.* at 107.

recovery under 42 U.S.C. § 1985.<sup>193</sup> Future Supreme Court decisions applying the *Griffin* test to non-racially based conspiracies would serve both to clarify what the Court said in *Griffin* and provide an additional hurdle for those seeking recovery under the Act.<sup>194</sup>

In July of 1983, the Supreme Court decided *United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott*.<sup>195</sup> The claim was brought by a construction company and two of its employees against a trades council, its union, and certain union members for an attack allegedly instigated by the union members against company employees and various pieces of construction equipment on the company's construction site.<sup>196</sup> The attack arose out of a protest at the construction site organized by the union to protest the construction company's hiring of non-union workers.<sup>197</sup> The district court found support for all four *Griffin* elements and entered judgment for the plaintiffs.<sup>198</sup> The Fifth Circuit affirmed.<sup>199</sup> Both courts identified the right deprived by the union's actions as the "right to associate or not to associate with any group or class of individuals."<sup>200</sup> The Court of Appeals explicitly identified this as a "First Amendment right,"<sup>201</sup> the deprivation of which was "within the meaning of § 1985(3)."<sup>202</sup>

The Supreme Court overturned the Fifth Circuit's decision, holding that infringement of a First Amendment right was not a violation of § 1985 absent state action and that the non-union employees and their employer were not a protected class to which § 1985 remedies attached.<sup>203</sup> The Court explained that while *Griffin* determined that private conspiracies are within the reach of federal regulation, the rights at issue must be guaranteed by the federal constitution against all encroachment in order to gain recovery under § 1985.<sup>204</sup> As the First Amendment protects plaintiffs' rights only from official conduct, recovery under § 1985 for conspiratorial deprivation of this right is limited to conspiracies involving state actors.<sup>205</sup> Additionally, the

193. *See id.* at 102.

194. *See Carpenters*, 463 U.S. at 825; *see also Bray*, 506 U.S. at 263.

195. *See Carpenters*, 463 U.S. at 825.

196. *See id.* at 827-28.

197. *See id.* at 828.

198. *See id.* at 828-29.

199. *See id.* at 829-30.

200. *Id.* at 829.

201. *Id.* at 830.

202. *Id.*

203. *See id.* at 830-31.

204. *See id.* at 833.

205. *See id.* Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor in dissent, suggested that the Radical Republicans who supported the bill believed it was an application of the Fourteenth Amendment and that "Congress now was permitted to protect life, liberty, and property by legislating directly against criminal activity." *See id.* at 842 (Blackmun, J., dissenting). As Blackmun noted, even moderate Republicans "believed that Fourteenth Amendment rights were possessed by persons regardless of the presence of state action." *Id.* (Blackmun, J., dissenting).

Court found insufficient class-based animus to support application of § 1985 to the facts of the complaint. While the Court referenced some legislative history to support a broader view of applicability outside solely race-based conspiracies,<sup>206</sup> the majority found no evidence supporting “the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities.”<sup>207</sup> Thus, because the attacks were not race-based, they did not violate § 1985.

In 1993, in *Bray v. Alexandria Women’s Health Clinic*,<sup>208</sup> the Court similarly refused to extend § 1985 recovery, citing both insufficient class animus and the lack of deprivation of a federally-protected right.<sup>209</sup> *Bray* addressed anti-abortion protests outside abortion clinics in the Washington, D.C. metropolitan area.<sup>210</sup> The plaintiffs argued that such organizations were conspiring to deprive women seeking abortions of their right to interstate travel.<sup>211</sup> While both the district court and the Fourth Circuit ruled in favor of the plaintiffs,<sup>212</sup> Justice Scalia, writing for the majority of a sharply divided Court,<sup>213</sup> reversed the lower court decision.<sup>214</sup> With the *Bray* decision, the *Griffin* test, articulated as a four-part analysis in 1971, became a two-prong

The dissenters believed that to give full effect to *Griffin’s* suggestion that the Court give civil rights statutes “‘a sweep as broad as [their] language,’” *id.* at 854 (citing *Griffin*, 403 U.S. at 97), there was no reason to require state action to apply § 1985 where a person’s First Amendment rights had been violated. *See Carpenters*, 463 U.S. at 849.

206. *See id.* at 836-37. The Court referred to the statements of Republican Senator George Edmunds. *See infra* note 295 and accompanying text.

207. *Carpenters*, 463 U.S. at 837 (emphasis in original). The dissenters found that “the types of classes covered by the statute are far from clear.” *Id.* at 850 (Blackmun, J., dissenting). They looked both to congressional debate and social and political history to suggest that the Klan’s efforts were targeted, not just to blacks, but also to Republicans for their Reconstruction policies as well as to carpetbaggers who “moved into the South to seek their fortunes as well as to make new lives.” *Id.* at 852 (Blackmun, J., dissenting). The dissenters concluded that Klan terrorism was “directed at the legitimate economic activities of those who migrated to the South to better themselves,” *see id.* (Blackmun, J., dissenting), and that, given this history, there was sufficient support for extension of § 1985 to politically- and economically-motivated conspiracies. *See id.* at 853.

208. 506 U.S. 263 (1993).

209. *See id.* at 274, 278.

210. *See id.* at 266.

211. *See id.* at 266-67.

212. *See id.* at 267.

213. Voting for the *Bray* decision was as follows: Justice Scalia drafted the majority opinion in which Chief Justice Rehnquist and Justices White, Kennedy and Thomas joined. *Id.* at 265-87. Justice Souter filed an opinion concurring in part and dissenting in part. *Id.* at 288-307. Justices Stevens and O’Connor both drafted dissenting opinions and Justice Blackmun joined in both. *Id.* at 307-45 (Stevens, J., dissenting), 345-56 (O’Connor, J., dissenting).

214. *See id.* at 266, 287.

inquiry.<sup>215</sup> The new test required that in order to prove a private conspiracy under § 1985, the plaintiff show:

- (1) that “some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action,”<sup>216</sup> and
- (2) that the conspiracy “aimed at interfering with rights” that are “protected against private, as well as official, encroachment.”<sup>217</sup>

The Court found that “women seeking abortion” fail to rise to the level of a “class” for the purposes of the *Griffin* test.<sup>218</sup> While the *Bray* Court recognized that the *Griffin* Court made it clear that a § 1985 conspiracy need not be race-based,<sup>219</sup> the majority believed that the term “otherwise class-based, invidiously discriminatory animus” must extend to something more than “a group of individuals who share a desire to engage in conduct that the . . . defendant disfavors.”<sup>220</sup> Further, the Court rejected the plaintiffs’ assertion that the animus inherent in the defendants’ actions was directed at all women, not just those seeking abortion, and expressly refused to decide whether women, as a class, could ever meet the class-based animus requirement set forth in *Griffin*.<sup>221</sup>

215. Compare *id.* at 268 with *supra* note 189.

216. See *id.* at 268 (quoting from *Griffin*, 403 U.S. at 102).

217. See *id.* at 268 (quoting from *Carpenters*, 463 U.S. at 833).

218. See *id.* at 268-70. In dissent, Justice O’Connor questioned the Court’s strict adherence to elements developed in the *Griffin* decision, noting that she “would not parse *Griffin* so finely as to focus on that phrase to the exclusion of our reasons for adopting it as an element of a § 1985(3) civil action.” *Id.* at 347 (O’Connor, J., dissenting). Justice O’Connor suggested that the Court derived the class-based animus requirement from the statute’s legislative history in order to limit federal punishment to those “with intent ‘to do any act in violation of the rights, privileges, or immunities of another person.’” See *id.* (O’Connor, J., dissenting) (quoting from H.R. Con. Res. 320, 42d Cong. (1871), 17 Stat. 13 (1871)); see also *supra* note 86.

219. See *Bray*, 506 U.S. at 269.

220. *Id.*

221. See *id.* at 269-70. The Court suggested that there are sufficient “common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward . . . women as a class.” See *id.* at 270. Further, Justice Scalia suggested that the “animus’ requirement” required “a purpose that focuses upon women *by reason of their sex*.” *Id.* at 269-70 (emphasis in original). He found that, according to their literature, anti-abortion activists were targeting the fetus and the practice of abortion, not women. See *id.* at 271 n.2. Additionally, he suggested that just because abortion is an activity engaged in by women only, to disfavor it is not “*ipso facto* to discriminate invidiously against women as a class.” See *id.* at 271. He cited several cases applying the Equal Protection Clause of the Fourteenth Amendment in which the Court rejected discrimination claims based upon similar arguments. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a state disability insurance system that denied coverage to certain disabilities resulting from pregnancy is not a violation of the Equal Protection Clause of the Fourteenth Amendment); see also *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (deciding that a law giving preference to military veterans, 98% of whom are male, is not a violation of the Equal Protection Clause of the Fourteenth Amendment). In dissent, both Justices Stevens and O’Connor argued that women were a protected class and, as such, § 1985 must extend to “conspiracies whose motivation is directly related to characteristics unique to that class.” See *Bray*, 506 U.S. at 350 (O’Connor, J., dissenting). Justice Stevens argued that, despite

In addition, the Court held that the plaintiffs had not sufficiently proved deprivation of a right protected against purely private interference. Plaintiffs argued that anti-abortion protesters interfered with the right to interstate travel because, particularly in the Washington, D.C. metropolitan area, women often had to cross state boundaries to seek the services available at abortion clinics.<sup>222</sup> The majority found that, under *Carpenters*, the protected right cannot be one that is “incidentally affected” by the defendants’ actions—it must be the right “aimed at” for impairment by the defendants’ act.<sup>223</sup> Scalia explained that defendants in the instant case opposed abortion, and any interference with the plaintiffs’ right to interstate travel was merely incidental.<sup>224</sup> Further, Scalia concluded that even if defendants had intended to interfere with the plaintiffs’ right to interstate travel, anti-abortion demonstrations “would not implicate that right,” as the only “actual barriers to interstate movement” the defendants erected were those surrounding abortion clinics, all purely *intrastate* travel.<sup>225</sup> Finally, using the Court’s *Carpenters* analysis, Scalia quickly eliminated the plaintiffs’ argument that they were deprived of the right to abortion by the defendants’ actions by holding that the right to an abortion is not one explicitly guaranteed by the federal Constitution against all encroachment.<sup>226</sup> Absent either the requisite class-based animus or a federally-protected right, the majority remanded the case to the district court for reconsideration.<sup>227</sup>

Rolling back from the more sweeping language of the *Griffin* court, *Carpenters* and *Bray* limited the application of § 1985, and by 1993, the Court had made it clear that those seeking recovery under § 1985 for non-racially-motivated conspiracies would face a high hurdle.

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Scalia’s arguments, the anti-abortion conspiracy could “‘reasonably be presumed to reflect a sex-based intent.’” *See id.* at 322 (Stevens, J., dissenting) (quoting from Scalia’s majority opinion in *Bray*).

222. *See id.* at 267. Plaintiffs suggested that through protests in front of abortion clinics, designed to stop women from entering, the protesters were impeding the right to interstate travel, as, for example, many women seeking services at Virginia abortion clinics were Maryland residents or residents of the District of Columbia. *See id.* at 267, 276-77.

223. *See id.* at 275 (internal quotation marks omitted).

224. *See id.* at 276.

225. *See id.* at 276-77 (emphasis added) (internal quotation marks omitted).

226. *See id.* at 277-78. In his opinion, concurring in part and dissenting in part, Justice Souter suggested that “the *Carpenters* Court almost certainly narrowed [the deprivation clause of § 1985] from the scope Congress had intended.” *Id.* at 298 (Souter, J., concurring in part, dissenting in part). He argued that if Congress had intended to limit application of § 1985 solely to violations of the Thirteenth Amendment, it was not clear “why the drafters would not simply have said so, just as in the third and fourth clauses of § 1985(3) they dealt expressly with infringements of voting rights, already guaranteed against abridgement by the Fifteenth Amendment adopted in 1870.” *Id.* (Souter, J., concurring in part, dissenting in part).

227. *See id.* at 287.

Inextricably linked to a § 1986 claim,<sup>228</sup> this trend would be repeated in lower court considerations of third party liability.<sup>229</sup>

### B. Section 1986

The Supreme Court has never heard a case arising out of a § 1986 claim.<sup>230</sup> In fact, most § 1986 case law stands solely for the proposition that plaintiffs must satisfy all elements of a § 1985 claim before a court will consider a § 1986 claim, with no free-standing judicial analysis of § 1986.<sup>231</sup> In the few cases with sufficient evidence to reach the § 1986 claim, however, the lower courts have begun to provide guidelines for plaintiffs seeking recovery.<sup>232</sup>

The case that best illuminates<sup>233</sup> the elements of a § 1986 claim is

228. See *infra* note 231 and accompanying text.

229. See *infra* notes 230-48 and accompanying text.

230. See Fisher, *supra* note 9, at 470.

231. See *Breuer v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10th Cir. 1994); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085 (2d Cir. 1993); *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985); *McIntosh v. Ark. Republican Party-Frank White Election Comm.*, 766 F.2d 337 (8th Cir. 1985); *Trerice v. Pedersen*, 769 F.2d 1398 (9th Cir. 1985); *Dooley v. Reiss*, 736 F.2d 1392 (9th Cir. 1984); *Santistevan v. Loveridge*, 732 F.2d 116 (10th Cir. 1984); *Rogin v. Bensalem Township*, 616 F.2d 680, 696 (3d Cir. 1980); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Park v. City of Atlanta*, 938 F. Supp. 836 (N.D. Ga. 1996); *Robinson v. Fauver*, 932 F. Supp. 639 (D.N.J. 1996); *Risley v. Hawk*, 918 F. Supp. 18 (D.D.C. 1996); *DePugh v. Sutton*, 917 F. Supp. 690 (W.D. Mo. 1996); *Lowden v. William M. Mercer, Inc.*, 903 F. Supp. 212 (D. Mass. 1995); *Messa v. Rubin*, 897 F. Supp. 883 (E.D. Pa. 1995); *Litz v. City of Allentown*, 896 F. Supp. 1401 (E.D. Pa. 1995); *Davis v. Hudgins*, 896 F. Supp. 561 (E.D. Va. 1995); *Boykin v. Bloomsburg Univ. of Pa.*, 893 F. Supp. 409 (M.D. Pa. 1995); *Koch v. Mirza*, 869 F. Supp. 1031 (W.D.N.Y. 1994); *Kessler v. Monsour*, 865 F. Supp. 234 (M.D. Pa. 1994); *Bieros v. Nicola*, 839 F. Supp. 332 (E.D. Pa. 1993); *Mackey v. Cleveland State Univ.*, 837 F. Supp. 1396 (N.D. Ohio 1993); *Rogers v. Mount Union Borough*, 816 F. Supp. 308 (M.D. Pa. 1993); *Haverstick Enter., Inc. v. Fin. Fed. Credit, Inc.*, 803 F. Supp. 1251 (E.D. Mich. 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991); *Levy v. City of New York*, 726 F. Supp. 1446 (S.D.N.Y. 1989); *D'Amario v. Russo*, 718 F. Supp. 118 (D.R.I. 1989); *Boddie v. ABC*, 694 F. Supp. 1304 (N.D. Ohio 1988); *Mahoney v. Nat'l Org. for Women*, 681 F. Supp. 129 (D. Conn. 1987); *Thomas v. News World Communications*, 681 F. Supp. 55 (D.D.C. 1988); *Rhodes v. Mabus*, 676 F. Supp. 755 (S.D. Miss. 1987); *Weseman v. Meeker County*, 659 F. Supp. 1571 (D. Minn. 1987); *Royal v. City of Albuquerque*, 653 F. Supp. 102 (D.N.M. 1986); *Stewart v. Hunt*, 598 F. Supp. 1342 (E.D.N.C. 1984); *Sellner v. Panagoulis*, 565 F. Supp. 238 (D. Md. 1982); *Bergman v. United States*, 551 F. Supp. 407 (W.D. Mich. 1982); *DeBoer v. Martin*, 537 F. Supp. 1159 (N.D. Ill. 1982); *Marino v. Bowers*, 483 F. Supp. 765 (E.D. Pa. 1980); *Peck v. United States*, 470 F. Supp. 1003 (S.D.N.Y. 1979); *DiAntonio v. Pa. State Univ.*, 455 F. Supp. 510 (M.D. Pa. 1978); *J.D. Pflaumer, Inc., v. U.S. Dept. of Justice*, 450 F. Supp. 1125 (E.D. Pa. 1978); *Santiago v. City of Phila.*, 435 F. Supp. 136 (E.D. Pa. 1977); *Taylor v. Nichols*, 409 F. Supp. 927 (D. Kan. 1976).

232. See *infra* notes 233-46.

233. This is the only case to lay out a test for the § 1986 claim in addition to the elements that make up a § 1985 claim. See *infra* note 234; see generally Fisher, *supra* note 9, at 461-63.

*Clark v. Clabaugh*.<sup>234</sup> The case arose out of a race riot that occurred in a small Pennsylvania town in the summer of 1991.<sup>235</sup> The victims were members of an interracial youth group who were attacked by a group of white "bikers" and townspeople in the city square.<sup>236</sup> This incident was preceded by rumors that had been circulating in the town for approximately two weeks that the white bikers were planning to assemble on the city square on July 13 and drive the interracial group, which regularly congregated in the square, out of town.<sup>237</sup> The plaintiffs argued that the police, aware of the rumors, failed to provide the necessary protection for the interracial group and were, therefore, liable under § 1986.<sup>238</sup>

The Third Circuit explained that the "transgressions of § 1986 by definition depend on a preexisting violation of § 1985."<sup>239</sup> In addition, however, the court identified four elements the plaintiff must establish to prove a claim under § 1986: "(1) the defendant had actual knowledge of a § 1985 conspiracy, (2) the defendant had the power to prevent or aid in preventing the commission of a § 1985 violation, (3) the defendant neglected or refused to prevent a § 1985 conspiracy, and (4) a wrongful act was committed."<sup>240</sup> The Third Circuit opinion largely focused on the issue of defendants' knowledge because the lower court ruled against the plaintiffs primarily on that issue.<sup>241</sup>

The district court dismissed the § 1986 claim because it found that the knowledge requirement excluded rumor, thus requiring actual knowledge of the conspiracy to meet the first element of the test.<sup>242</sup> The Third Circuit, however, noted that "firsthand knowledge is not required under § 1986, [and though the] courts have nevertheless required 'actual knowledge,'"<sup>243</sup> the court concluded that the rumors constituted sufficient evidence of the defendants' potential knowledge to withstand summary judgment.<sup>244</sup> Although the court ruled only in

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234. 20 F.3d 1290 (3d Cir. 1994).

235. *See id.* at 1293.

236. *See id.*

237. *See id.*

238. *See id.* at 1296.

239. *Id.* at 1295 (quoting *Rogin v. Bensalem Township*, 616 F.2d 680, 696 (3d Cir. 1980)).

240. *Id.*

241. *See id.* at 1296-98. Conceivably, one could argue that the issue of the defendants' ability to aid or prevent the violent acts was relatively easily satisfied. The defendants were police officers and city and county officials charged with keeping the peace and, presumably, they would have the ability to at least aid in the prevention of an attack of this sort. Further, as no one disputed that the race riot took place, the final element requiring commission of a wrongful act was also probably not at issue. Finally, if the district court was able to reach the § 1986 claim, they must have been satisfied that this race riot rose to the level of a § 1985 conspiracy.

242. *See id.* at 1296.

243. *See id.*

244. *See id.* at 1296-97.

the context of a motion for summary judgment, the court did open the door for something less than the “actual knowledge” standard articulated by prior decisions.

Prior to *Clark*, two cases, one decided by the Seventh Circuit and the other by the Sixth Circuit, dealt with the issue of the defendant’s knowledge of the conspiracy. In both cases, the courts required “actual” or “personal knowledge” of the conspiracy to maintain a claim under § 1986.<sup>245</sup> Since *Clark*, only the Eighth Circuit has considered the question and, though that court failed to find sufficient evidence to satisfy the knowledge requirement, its analysis was more similar to the fact-based inquiry undertaken in *Clark* than the seemingly *per se* rule embraced by earlier decisions.<sup>246</sup>

Apart from this circuit split over the knowledge requirement, courts have yet to address the other significant interpretive issues at play in the *Clark* four-part test.<sup>247</sup> Further, given the absence of Supreme Court review of the issues present in a § 1986 claim,<sup>248</sup> broad

245. See *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973) (requiring “actual knowledge” of the conspiracy to maintain a § 1986 claim); *Veres v. County of Monroe*, 364 F. Supp. 1327 (E.D. Mich. 1973) (complaint for damages under § 1986 denied due to failure to allege any personal knowledge of conspiracy on the part of the defendant county auditor).

246. See *Brandon v. Lotter*, 157 F.3d 537 (8th Cir. 1998). This case arose out of the rape and murder of Teena Brandon, a cross-dressing young woman who lived as a man in rural Nebraska. *Id.* at 538. Brandon sought assistance from the county sheriff after being raped and assaulted by two men—John Lotter and Marvin Nissen. *Id.* at 538. Though the sheriff’s office completed the paperwork necessary to obtain arrest warrants for Brandon’s assailants, they were not issued until two days after Brandon filed a complaint. *Id.* at 538. In the interim, Lotter and Nissen murdered Brandon and two others. *Id.* at 538. While the court recognized the failure of law enforcement in this case, they failed to find that the sheriff had sufficient knowledge of Lotter and Nissen’s conspiracy to murder Teena Brandon. *Id.* at 540. The court suggested that, regardless of the sheriff’s knowledge of Lotter and Nissen’s criminal histories and their prior attack on the victim, the sheriff did not know (nor even should have known) of their plan to murder Brandon. See *id.* at 540.

247. See *Fisher*, *supra* note 9, at 470 (discussing limited court consideration of § 1986).

248. See *id.*; see also *McCalden v. Cal. Library Ass’n*, 955 F.2d 1214 (9th Cir. 1990), *cert. denied*, 504 U.S. 957 (1992); *Dooley v. Reiss*, 736 F.2d 1392 (9th Cir. 1984), *cert. denied*, 469 U.S. 1038 (1984); *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Fulton v. Emerson Elec. Co.*, 420 F.2d 527 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961); *D’Aurizio v. Palisades Park*, 963 F. Supp. 378 (D.N.J. 1997), *aff’d*, 151 F.3d 1024 (3d Cir. 1998), *cert. denied*, 525 U.S. 870 (1998); *Davis v. Hudgins*, 896 F. Supp. 561 (E.D. Va. 1995), *aff’d*, 87 F.3d 1308 (4th Cir. 1996), *cert. denied*, 520 U.S. 1172 (1997); *Boykin v. Bloomsburg Univ. of Pa.*, 893 F. Supp. 409 (M.D. Pa. 1995), *aff’d*, 91 F.3d 122 (3d Cir. 1996), *cert. denied*, 519 U.S. 1078 (1997); *Platsky v. Kilpatrick*, 780 F. Supp. 110 (E.D.N.Y. 1991), *aff’d*, 7 F.3d 220 (2d Cir. 1993), *cert. denied*, 511 U.S. 1021 (1994); *Boddie v. ABC*, 694 F. Supp. 1304 (N.D. Ohio 1988), *aff’d*, 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990); *Mack v. W.R. Grace Co.*, 578 F. Supp. 626 (N.D. Ga. 1983), *cert. denied*, 469 U.S. 805 (1984); *Sellner v. Panagoulis*, 565 F. Supp. 238 (D. Md. 1982), *aff’d*, 796 F.2d 474 (4th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987); *Creative Env’ts, Inc. v. Estabrook*, 491 F. Supp. 547 (D. Mass. 1980), *aff’d*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S.



interpretations remain possible under this statute. Thus, the final iteration of the § 1986 test is still to come.

As shown in Part II, Supreme Court interpretation of the § 1985 claims severely narrowed application of the law, focusing future litigants on two elements—sufficient class-based animus and a federal right targeted by the conspiracy.<sup>249</sup> As plaintiffs often fail to satisfy all elements of a § 1985 claim, a necessary precedent to gain recovery under § 1986, case law under § 1986 is limited.<sup>250</sup> Part II described the judicial review of a § 1986 claim and identified a developing judicially-constructed test plaintiffs must meet to recover under § 1986.<sup>251</sup> Part III of this Note will apply the facts of *Burnett* to both tests described in Part II to determine whether plaintiffs could have sought a remedy under § 1986.<sup>252</sup>

### III. A MODERN APPLICATION

Part III highlights the similarities between modern-day international terrorist organizations and the post-Civil War Ku Klux Klan, suggesting that the framers' policy goal of community responsibility for terrorist activity would be appropriate in the modern context.<sup>253</sup> This part reviews the relevant facts provided in the *Burnett* complaint to assess whether there is both sufficient class-based animus and a federal right targeted by the conspiracy through which the plaintiffs could satisfy the elements of a § 1985 claim.<sup>254</sup> With satisfaction of the elements necessary for a § 1985 claim, this part considers whether plaintiffs could recover under § 1986, applying the test to each of the four representative defendants.<sup>255</sup>

#### A. *Terrorism—Then and Now*

Like the Ku Klux Klan, international terrorist organizations are often composed of political or religious extremists, typically organized in splintered "cells" operating under a common mission, who practice acts of violence designed to intimidate "noncombatant targets."<sup>256</sup> Membership in these organizations is held in strict confidence and gatherings for training or recruitment typically take place in secret

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989 (1982); *Veres v. County of Monroe*, 364 F. Supp. 1327 (E.D. Mich. 1973), *aff'd*, 542 F.2d 1177 (6th Cir. 1976), *cert. denied*, 431 U.S. 969 (1977).

249. See *supra* notes 167-229 and accompanying text.

250. See *supra* notes 230-31 and accompanying text.

251. See *supra* notes 232-47 and accompanying text.

252. See *infra* notes 253-400 and accompanying text.

253. See *infra* notes 256-67 and accompanying text.

254. See *infra* notes 268-334 and accompanying text.

255. See *infra* notes 335-97 and accompanying text.

256. See Stephen C. Warneck, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. Rev. 177, 182, 184 (1998).

locations.<sup>257</sup> Goals of terrorist organizations may vary but typically include: (1) instilling “fear and helplessness in civilians to alienate them from the government or make them lose faith in its ability to protect them;” (2) “intimidat[ing] government officials;” (3) “creat[ing] an international incident to draw attention to the group’s political cause;” or (4) “bringing about a social, economic, or political transformation” of society.<sup>258</sup> Terrorist violence is designed, like Klan violence,<sup>259</sup> to instill fear among the terrorists’ target group as a whole, not just those victims of a particular violent act.<sup>260</sup> Therefore, the actions of these groups are typically undertaken on a large scale to draw as much public attention as possible.<sup>261</sup>

As was the case in the Reconstruction South,<sup>262</sup> tolerance and, in some cases, support of activities undertaken by well-known terrorist organizations is key to their continued operation.<sup>263</sup> Governmental support, in the form of a safe-haven and financial backing provided by international charities funneled through sympathetic banks and corporations, enable terrorist organizations to accomplish their missions.<sup>264</sup> Even nations, like Pakistan and Saudi Arabia, who are not considered by the international community to provide state sponsorship to terrorist organizations, nevertheless enable the continued operation of terrorist groups by overlooking activities within their borders.<sup>265</sup> More direct support is provided by militant Islamic governments, like those of Sudan and Afghanistan under Taliban rule, which provided funds, weapons, military intelligence and false passports to Al Qaeda members in order to facilitate terrorist acts.<sup>266</sup> It is this active and, in some cases, passive assent to terrorist activities for which § 1986 was designed.<sup>267</sup> The framers’ policy arguments suggest that application of § 1986 to international terrorism would be appropriate.

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257. *See id.* at 184.

258. *See id.* at 183.

259. *See supra* notes 37-46 and accompanying text.

260. *See* Warneck, *supra* note 256, at 183.

261. *See id.*

262. *See supra* notes 113-17 and accompanying text.

263. *See* Warneck, *supra* note 256, at 184-88.

264. *See generally* Burnett Complaint, *supra* note 1 (asserting that state entities should be held liable for their contributions to terrorist organizations).

265. *See, e.g.,* Douglas Jehl, *A Nation Challenged: Holy War Lured Saudis as Rulers Looked Away*, N.Y. Times, Dec. 27, 2001, at A1; Steve Vogel, *Bin Laden Still Alive, U.S. Says Pakistan is Believed to be Likely Hideout*, Wash. Post, Dec. 31, 2001, at A1.

266. *See* Burnett Complaint, *supra* note 1, at 237-40; Douglas Frantz & David Rohde, *A Nation Challenged: How bin Laden and Taliban Forged Jihad Ties*, N.Y. Times, Nov. 22, 2001, at B1.

267. *See supra* notes 113-17 and accompanying text.

### B. *The Test Case*

In *Burnett v. Al Baraka Investment & Development Corp.*,<sup>268</sup> family members and legal representatives of those killed in the September 11, 2001 terrorist attacks filed suit against corporate, sovereign and individual defendants, whom they believed to be either responsible or culpable in the death of their loved ones.<sup>269</sup> Using the facts alleged in the August 2002 complaint, this part will apply the tests developed by the courts for §§ 1985 and 1986 to evaluate their applicability to a claim arising out of a terrorist attack.<sup>270</sup> The defendants have been consolidated into four groups: banking defendants,<sup>271</sup> charity defendants,<sup>272</sup> sovereign defendants,<sup>273</sup> and individual defendants.<sup>274</sup>

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268. No. CIV.A.02-1616JR., 2003 WL 21730530 (D.D.C. July 25, 2003).

269. See *Burnett Complaint*, *supra* note 1, at 37-42. The named defendants are: (1) Al Baraka Investment and Development Corporation, (2) National Commercial Bank, (3) Faisal Islamic Bank, (4) Al Rajhi Banking and Investment, (5) Al Barakaat Exchange LLC, (6) Dar Al Maal Al Islami, (7) Al Shamal Islamic Bank, (8) International Islamic Relief Organization and its board of directors, (9) Sanabel Al Kheer, Inc., (10) Muslim World League and its board of directors, (11) Saar Foundation and its board of directors, (12) Rabita Trust, (13) Al-Haramain Islamic Foundation and its board of directors, (14) Benevolence International Foundation, Inc. and its board of directors, (15) World Assembly of Muslim Youth and its board of directors, (16) Osama Bin Laden, (17) Saudi Bin Laden Group, (18) Tarik Bin Laden, (19) Khalid Bin Salim Bin Mahfouz, (20) Abdulrahman Bin Khalid Bin Mahfouz, (21) Saleh Abdullah Kamel, (22) Mohammed Al Faisal Al Saud, (23) Turki Al Faisal Al Saud, (24) Sultan Bin Abdul Aziz Al Saud, (25) Sulaiman Bin Abdul Aziz Al Rajhi, (26) Saleh Abdul Aziz Al Rajhi, (27) Abdullah Sulaiman Al-Rajhi, (28) Khalid Sulaiman Al-Rajhi, (29) Yassin Abdullah Al Kadi, (30) Mohammad Jamal Al Khalifa, (31) Adel Abdul Jalil Batterjee, (32) Aqueel Al-Aqueel, (33) Abdullah Bin Saleh Al Obaid, (34) Abdul Rahman Al Swailem, (35) Wa'el Hamza Jalaidan, (36) Abdullah Omar Naseef, (37) The Republic of Sudan. *Id.*

270. Under § 1986, both the victims' estates and the victims' family members have standing to bring suit. See 42 U.S.C. § 1986 (2000). However, § 1986 explicitly limits recovery where "the death of any party be caused by any such wrongful act and neglect" to no more than \$5,000 in damages "for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased." *Id.* In addition, the statute carries a one-year statute of limitations with all claims required to be filed one year from the date of the incident. See *id.* Jurisdictional issues will be discussed below as applied to each representative defendant. See *infra* notes 343, 364, 382, 394.

271. See *Burnett Complaint*, *supra* note 1, at 190-205. The banking defendants are: (1) Al Baraka Investment and Development Corporation, (2) National Commercial Bank, (3) Faisal Islamic Bank, (4) Al Rajhi Banking and Investment Corporation, (5) Al Barakaat Exchange LLC, (6) Dar Al Maal Al Islami, and (7) Al Shamal Islamic Bank. *Id.*

272. See *id.* at 205-37. The charity defendants are: (1) International Islamic Relief Organization and its board of directors, (2) Sanabel Al Kheer, Inc., (3) Muslim World League and its board of directors, (4) Saar Foundation and its board of directors, (5) Rabita Trust, (6) Al-Haramain Islamic Foundation, Inc. and its board of directors, (7) Benevolence International Foundation and its board of directors, and (8) World Assembly of Muslim Youth and its board of directors. *Id.*

273. See *id.* at 237-41. The sole sovereign defendant is the Republic of Sudan. *Id.*

274. See *id.* at 37-42. Individual named defendants include Osama bin Laden and other members of the Al Qaeda terrorist organization, members of the Saudi royal family, and individual financiers suspected of contributing funds to Al Qaeda. *Id.*

For ease of application, this section will only consider one named defendant from each group.

Before addressing the applicability of § 1986 to each representative defendant, it is necessary to prove that the underlying conspiracy satisfies the elements of a § 1985 claim.<sup>275</sup> After *Bray*, the § 1985 test requires evidence of a conspiracy targeting a particular group due to class-based animus that is aimed at depriving that class of a right protected by the federal constitution.<sup>276</sup> The facts of the Al Qaeda plot to commit the September 11, 2001 terrorist attacks are well-known but a short summary will focus attention on the facts necessary to apply the § 1985 test.

On the morning of September 11, 2001, four commercial flights originating from Boston, Massachusetts; Newark, New Jersey; and Washington, D.C. were hijacked by nineteen members of the Al Qaeda terrorist organization.<sup>277</sup> The hijackers took control of each of the planes and flew three of the aircraft into American targets—both World Trade Center towers in New York City and the west wall of the Pentagon in Northern Virginia.<sup>278</sup> The fourth plane was diverted from its original course and crashed in rural Pennsylvania, killing all on board.<sup>279</sup> The World Trade Center towers ultimately collapsed under the heat from the explosions, killing nearly all inside.<sup>280</sup> An estimated 3,025 people lost their lives in the attacks.<sup>281</sup> Among the victims, over 2,900 were American citizens, with victims of British, Portuguese, Japanese, Colombian, Jamaican, Mexican, Filipino, Peruvian and

275. See *supra* note 231 and accompanying text.

276. See *supra* note 217 and accompanying text.

277. See Dan Egan & Vernon Loeb, *U.S. Intelligence Points to Bin Laden Network*, Wash. Post, Sept. 12, 2001, at A1; David Firestone & Dana Canedy, *After the Attacks: FBI Documents Detail the Movements of 19 Men Believed to Be Hijackers*, N.Y. Times, Sept. 15, 2001, at A3; see also Burnett Complaint, *supra* note 1, at 189-90.

278. See Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon, Hundreds Dead, Bush Promises Retribution; Military Put on Highest Alert*, Wash. Post, Sept. 12, 2001, at A1; see also Burnett Complaint, *supra* note 1, at 189-90.

279. See Jere Longman & Sara Rimer, *A Day of Terror: Passenger Reported Hijacking Shortly Before a Crash*, N.Y. Times, Sept. 12, 2001, at A16; see also Burnett Complaint, *supra* note 1, at 189-90.

280. See Jane Fritsch, *A Day of Terror: Rescue Workers Rush In, But Many Do Not Return*, N.Y. Times, Sept. 12, 2001, at A2; see also Burnett Complaint, *supra* note 1, at 189-90; Grunwald, *supra* note 278, at A1.

281. See *Strangers, Dads, Sisters, Friends*, N.Y. Times, Sept. 11, 2002, at G41. The actual number of victims killed on September 11, 2001 varies somewhat by source and by time of report. One year after the attacks, the *New York Times* reported 3,025 victims—2,801 of whom were killed in the twin towers and the two airplanes that hit them, 125 at the Pentagon and 59 aboard the plane that hit it and 40 aboard the plane that crashed near Shanksville, Pennsylvania. See *id.* However, as of May 31, 2002, cnn.com estimated the total number killed at the twin towers at 2,823, see *What's Next for Ground Zero?*, May 30, 2002, at <http://www.cnn.com/2002/US/05/30/wtc.what.next/index.html>, and the website [www.september11victims.com](http://www.september11victims.com) cites the total number of victims at 2,998. See <http://www.september11victims.com/september11victims> (last visited Sept. 6, 2003).

German citizenship.<sup>282</sup> While there is no information available as to the religious background of the victims, it is estimated that at least sixty Muslims were killed in the attacks.<sup>283</sup>

### 1. Requisite Class-Based Animus

As Justice Scalia explained in *Bray*, Supreme Court precedent requires that the victim seeking recovery under § 1985 be a member of a group for which the attackers possessed the requisite class-based animus necessary for recovery.<sup>284</sup> Using the data referenced above, it is possible to identify at least three “classes” targeted by Al Qaeda in the September 11, 2001 attacks: (1) Americans—a class based upon national origin; (2) non-Muslims, a religious class; and (3) a class based upon political ideology targeting those embracing a democratic, secular form of government.

The attack targeted symbols of American prosperity and power, and American citizens.<sup>285</sup> Comments made by Osama bin Laden and planning documents of the hijackers found after the attacks conveyed anti-American sentiment with references to Americans as *infidels* and instructions on how to carry out *jihād*, or holy war, against United States interests.<sup>286</sup> The timing of the attacks—during business hours on a weekday<sup>287</sup>—and the targets—large office and military buildings housing several thousand employees located in two American

282. See [http://www.september11victims.com/september11victims/COUNTRY\\_CITIZENSHIP.htm](http://www.september11victims.com/september11victims/COUNTRY_CITIZENSHIP.htm) (last visited Sept. 7, 2003). It is estimated that, in total, 211 victims were foreign citizens. See *id.*

283. See *Muslim Victims of September 11th Attack* (estimating the number of Muslim victims of the September 11 attacks), available at <http://islam.about.com/blvictims.htm> (last visited Sept. 7, 2003).

284. See *supra* note 216 and accompanying text.

285. As was discussed previously, not all victims of the September 11 terrorist attacks were United States citizens. See *supra* note 282 and accompanying text. Recovery under a national origin class would not be possible for non-United States citizens as the § 1985 test requires the plaintiff seeking recovery to have been a member of the targeted class. See *supra* notes 216, 284 and accompanying text.

286. See Michael Dobbs, *Bin Laden: A ‘Master Impresario,’ Saudi Fugitive Spouts Militant Rhetoric, but Ties to Violence Remain Mysterious*, Wash. Post, Sept. 13, 2001, at A28; Jim Rutenberg, *A Nation Challenged: In October Interview, bin Laden Hinted at Role*, N.Y. Times, Feb. 1, 2002, at A10; see also Burnett Complaint, *supra* note 1, at 42-54; Neil A. Lewis & David Johnston, *A Nation Challenged: Document That May Have Been Used to Prepare for Attacks Is Reported Found*, N.Y. Times, Sept. 28, 2001, at B4. In 1998, Osama bin Laden issued a *fatwah* to his Al Qaeda members calling for attacks against Americans. It stated:

We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan’s U.S. troops and the devil’s supporters allying with them, and to displace those who are behind them so that they may learn a lesson.

Burnett Complaint, *supra* note 1, at 50.

287. See Grunwald, *supra* note 278, at A1.

cities<sup>288</sup>—suggest an intention to destroy not only symbols of the United States' economic prosperity and military might, but also American citizens themselves. Finally, as was noted above, the large majority of those killed were United States citizens.<sup>289</sup>

Both in Constitutional equal protection claims and claims arising out of statutory guarantees of equality, the courts have a history of identifying invidious discrimination aimed at persons based upon national origin.<sup>290</sup> While courts have yet to address this question with respect to § 1985,<sup>291</sup> one could argue that a conspiracy based upon national origin is more similar to the race-based conspiracy for which § 1985 application was deemed appropriate in *Griffin* than the classes identified in *Carpenters* or *Bray*.<sup>292</sup> More severe than a conspiracy targeting economic interests<sup>293</sup> and broader than a class linked by its desire to engage in a particular behavior opposed by the group conspiring to violence,<sup>294</sup> a conspiracy aimed at Americans comes closer to the non-race-based range of application identified by members of the Forty-second Congress when creating the § 1985 cause of action. Cited by the Court in both the *Carpenters* and *Bray* decisions, Senator George Edmunds, Republican from Vermont, suggested that if a conspiracy were formed against a man “because he was a Democrat, . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.”<sup>295</sup> While the framers may not have envisioned a world in which Americans would be targeted as a class by private conspiracies, Edmunds' reference to a class of “Vermonters” is a similar application.

In addition to national origin, it is possible to identify a class based

288. *See id.*

289. *See supra* note 282 and accompanying text.

290. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365 (1971) (ruling that conditioning benefits on citizenship and imposing durational residency requirement on aliens violated the Equal Protection Clause). For a statutory guarantee of equality, see, for example, the Civil Rights Act of 1964, which ensures equal access to “goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or *national origin*.” 42 U.S.C. § 2000a(a) (2000) (emphasis added).

291. *See generally supra* notes 167-227 and accompanying text (describing jurisprudence on § 1985 to date).

292. The *Griffin* plaintiffs were member of a racial class. *See supra* notes 178, 190 and accompanying text. The class in *Carpenters*, construction workers who refused to join the workers' union, was more economic in nature. *See supra* note 196-97, 207 and accompanying text. The Court suggested that the class in *Bray*, women seeking access to abortion clinics, was drawn based upon a similar desire to seek abortion services. *See supra* notes 210-11, 218-20 and accompanying text.

293. *See* *United Bhd. of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 837 (1983).

294. *See* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

295. Cong. Globe, 42d Cong., 1st Sess. 567 (1871) (cited in *Carpenters*, 463 U.S. at 837 and *Bray*, 506 U.S. at 296); *see also supra* note 206.

upon religious beliefs—specifically non-Muslim beliefs. The references cited above to Americans as *infidels* and the instructions to carry out *jihad* against United States interests<sup>296</sup> support an argument for a class based upon national origin. Furthermore, those calls to violence also reflect the religious motivations for Al Qaeda's acts as they are targeted against those they identify as acting in opposition to their fundamentalist Islamic principles.<sup>297</sup>

As with national origin, courts have a history of extending class-based protections to religious groups,<sup>298</sup> and private conspiracies targeting individuals because of their religious affiliation is more akin to the conspiracy for which the Court upheld § 1985 application in *Griffin* than those identified in *Carpenters* and *Bray*.<sup>299</sup> The statement of Senator Edmunds, while referencing conspiracies targeting "Vermonters," also suggested that private conspiracies aimed at "Catholics" or "Methodists" would fall within § 1985.<sup>300</sup> Here, however, the class would not be comprised of one particular religious group as the victims were targeted not for their particular religious beliefs but for the absence of Islamic religious beliefs.<sup>301</sup> Again, while courts have yet to rule on a question like this, there is some evidence in *Bray* that a grouping of this type would not qualify for the sufficient class-based animus required under § 1985. *Bray* prohibited a § 1985 claim, declining to uphold a class drawn to include only "a group of individuals who share a desire to engage in conduct that the . . . defendant disfavors."<sup>302</sup> Identification of a class based upon a lack of Islamic religious beliefs is more like *Bray* than *Griffin* and courts would likely fail to extend § 1985 to such a class.

Finally, distinct from the social and political communities in which

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296. See *supra* note 286 and accompanying text.

297. See Burnett Complaint, *supra* note 1, at 46-54. The *fatwah* quoted at *supra* note 286, while conveying opposition to Americans, also supports an argument for a class based upon religious beliefs as Muslims are instructed to kill "Satan's U.S. troops" and the "devil's supporters." See *id.* at 50.

298. Though argued on First Amendment grounds, the courts have generally required strict scrutiny where a law targets or specifically burdens any religious belief or practice. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating city ordinance prohibiting the ritual slaughter of animals, designed to interfere with plaintiffs' religious practices). Similar to national origin, discrimination or segregation in public accommodations based upon religious affiliation or belief is also prohibited under the Civil Rights Act of 1964. See *supra* note 290.

299. See *supra* note 292.

300. See *supra* note 295 and accompanying text.

301. As was discussed previously, however, there is evidence that there were Muslims among the victims of the September 11, 2001 terrorist attacks. See *supra* note 283 and accompanying text. Recovery for those victims would not be possible under a religious classification as they are not members of the group the terrorists were targeting, see *supra* notes 216, 284 and accompanying text, but might be possible under a national origin group if the Muslims were Americans. See *supra* notes 285-95 and accompanying text.

302. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993).

Al Qaeda operates, the United States is a democracy with a secular government that operates apart from any particular religious philosophy, in an attempt to provide economic opportunity and social equality for its citizens.<sup>303</sup> Members of the Taliban government who, it has been shown, maintained close ties to Osama bin Laden and fostered the development of the Al Qaeda network,<sup>304</sup> developed a society in Afghanistan governed by Islamic fundamentalism that prohibited educational and economic opportunity for women and allowed for violence against dissenters.<sup>305</sup> Osama bin Laden and members of the Al Qaeda organization maintained residence in Sudan, a country similarly defined by militant Islamic fundamentalism and a history of violence.<sup>306</sup> Osama bin Laden, in a taped message released during the United States invasion in Afghanistan following the September 11 attacks, suggested that the Taliban government and Afghan society under their rule represented a perfect Islamic state.<sup>307</sup> In more recent comments, bin Laden has suggested that the United States, rather than governing under Shari'a, the rules governing Islam, has "[chosen] to invent [its] own laws as [it] will[s] and desire[s] . . . separat[ing] religion from . . . policies, [which contradict] the pure nature which affirms Absolute Authority to the Lord and . . . Creator."<sup>308</sup> Driven by a political philosophy more based in religion than that of the United States, bin Laden and his followers denounce Americans for their secular political practices, targeting a class based on political ideology.

The Supreme Court has not considered a § 1985 claim applied to a politically-motivated private conspiracy since its modern jurisprudence following *Griffin*.<sup>309</sup> In *Carpenters*, the Court discussed

303. See, e.g., U.S. Const. pmbl.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

*Id.*

304. See Frantz & Rohde, *supra* note 266, at B1.

305. See Human Rights Watch, Afghanistan: Taliban Massacres Detailed, available at <http://www.hrw.org/press/2001/02/afghan0219.htm> (last visited Sept. 14, 2003); Afghanistan: New War Puts Women's Rights in Peril, available at <http://www.hrw.org/press/2001/10/afghan-women.htm> (last visited Sept. 7, 2003).

306. See *infra* notes 378-79, 383 and accompanying text.

307. See *A Nation Challenged: 'America Is in Decline,' the Leader of Al Qaeda Says*, N.Y. Times, Dec. 28, 2001, at B2.

308. See Full text: bin Laden's "Letter to America," available at <http://www.observer.guardian.co.uk/worldview/story/0,11581,845725,00.html> (last visited Sept. 7, 2003).

309. The Court did analyze a politically-motivated private conspiracy in *Collins v. Hardyman*, see *supra* notes 167-76 and accompanying text, and while they did not explicitly suggest that § 1985 failed to extend to politically-motivated conspiracies, this decision provides little insight as the *Griffin* court has since superceded this ruling. See *supra* notes 177-92 and accompanying text.



in dicta whether a § 1985 claim was meant to extend to “every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means,” and while suggesting that “[t]o accede to that view would go far toward making the federal courts . . . the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume.”<sup>310</sup> The question remained open after that decision. Senator Edmund’s statement that § 1985 extended protections to groups based upon state of origin and religious affiliation also suggested that a private conspiracy aimed at “Democrats” would fall under § 1985.<sup>311</sup> Further, as is referenced earlier in this Note, social and historical evidence suggests that Klan violence, while targeted against blacks, was also aimed at white Republicans who supported and enforced Reconstruction policies.<sup>312</sup> While a weaker classification than national origin, there is some evidence to suggest the courts might uphold application of § 1985 to a politically-motivated private conspiracy.

## 2. Federal Right Targeted by the Conspiracy

After establishing the sufficient class-based animus necessary to meet the first prong of the § 1985 test, it is necessary to identify the federal right targeted by the conspiracy in order to continue to the § 1986 test.<sup>313</sup> Given the Court’s interpretation of § 1985, satisfaction of this element presents a greater hurdle for plaintiffs seeking recovery in *Burnett*. As was explained in Part I, proponents of the Ku Klux Klan Act of 1871 identified congressional authority to institute the Act in the enforcement clause of the Fourteenth Amendment.<sup>314</sup> Interpreting the new amendment as a grant of fundamental rights to all United States citizens, bill proponents in both houses espoused a theory of broad congressional enforcement power that imposed a duty on the federal government to protect against infringement of fundamental rights.<sup>315</sup> Under this interpretation of congressional authority, the *Burnett* plaintiffs’ right to life under the Fourteenth Amendment should be sufficient to meet the test for a § 1985 claim. As was established, the Al Qaeda terrorists that hijacked the planes on September 11, 2001 intended to kill Americans, targeting three large office buildings during business hours.<sup>316</sup> In addition, the hijackers sought to deprive the victims on the airplanes of their right

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310. *United Bhd. of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 836 (1983).

311. *See supra* note 295 and accompanying text.

312. *See supra* notes 38, 43-44, 46, 49-50 and accompanying text.

313. *See supra* note 231 and accompanying text.

314. *See supra* notes 135-54 and accompanying text.

315. *See id.*

316. *See supra* notes 277-81 and accompanying text.

to liberty under the Fourteenth Amendment as they held them captive out of fear for their lives.<sup>317</sup>

The Court's decision in *Griffin*, however, identified the source of congressional authority to implement the Ku Klux Klan Act of 1871 in the Thirteenth, not the Fourteenth, Amendment.<sup>318</sup> Further, in *Carpenters*, the Court explained that to receive recovery under § 1985 for a private conspiracy, the targeted right must be one granted by the federal government.<sup>319</sup> In *Carpenters*, the plaintiffs' First Amendment rights, though granted by the federal constitution, only protect the plaintiff from state action; as such, a private conspiracy aimed at deprivation of the plaintiffs' First Amendment rights could not be sustained without some showing of state action to deprive.<sup>320</sup> Using this analysis, for the plaintiffs to gain recovery under the Fourteenth Amendment in *Burnett*, the plaintiffs have to establish some state action to deprive the victims of life or liberty.<sup>321</sup>

When the Court decided *Griffin*, they were required to address the *Collins* decision that had twenty years earlier held that § 1985 was unconstitutional.<sup>322</sup> While the *Collins* Court's decision to require state action was superseded by *Griffin*,<sup>323</sup> a statement by the *Collins* Court as to what might constitute state action still seems relevant to the current question. The Court in *Collins* did not reach the question of whether to extend § 1985 to situations where protection sought is against purely private action.<sup>324</sup> The *Collins* Court was clear to state, however, that its decision should not be interpreted to "say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws."<sup>325</sup> The Court cited the post-Civil War Ku Klux Klan and suggested that its membership, estimated at 550,000, "may well [have been] . . . a conspiracy, so far flung and embracing such numbers, with a purpose to dominate . . . [the] governments of the day," that it was able to "effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication."<sup>326</sup> One could argue that the Al Qaeda

317. See Amy Goldstein & Cheryl W. Thompson, *Jet Crash Victims' Stories Start to Emerge*, Wash. Post, Sept. 12, 2001, at A6.

318. See *supra* note 186 and accompanying text.

319. See *supra* notes 204-05 and accompanying text.

320. See *id.*

321. It is worth noting that the dissents in both *Carpenters* and *Bray* suggested that there was evidence the framers intended § 1985 to apply more broadly than the Court has interpreted it. See *supra* notes 205, 207, 218, 221, and 226.

322. See *supra* notes 167-76 and accompanying text; see also *Collins v. Hardyman*, 341 U.S. 651 (1951); *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

323. See *supra* notes 177-92 and accompanying text; see also *Griffin*, 403 U.S. at 89.

324. See *Collins*, 341 U.S. at 662; see also *supra* notes 171, 173, 176 and accompanying text.

325. See *Collins*, 341 U.S. at 662; see also *supra* note 176.

326. See *Collins*, 341 U.S. at 662; see also *supra* note 176.

organization, operating on a broad, international scale,<sup>327</sup> is so “massive and effective that it supplants [the] authorities and thus satisfies the state action requirement.”<sup>328</sup> While not on the scale of the Klan, Al Qaeda membership is estimated at 2,830<sup>329</sup> with operatives in approximately fifty countries;<sup>330</sup> in addition, Al Qaeda is reported to have affiliations with at least two other known terrorist organizations.<sup>331</sup> Employing tactics that overwhelm law enforcement not only in the United States but globally,<sup>332</sup> there is a strong argument that Al Qaeda rises to the level of conspiracy the *Collins* Court was describing. Using this analysis, the plaintiffs’ claim under the Fourteenth Amendment would meet the second prong of the test for § 1985.<sup>333</sup> Assuming satisfaction of both elements of the *Bray* test, the court could turn to consideration of the § 1986 claims for each representative defendant.<sup>334</sup>

### 3. The Representative Defendants

#### a. *Al Baraka Investment and Development Corporation*

Al Baraka Investment and Development Corporation (“Al Baraka”) is the wholly-owned financial arm of the Dallah Albaraka Group based in Jeddah, Saudi Arabia.<sup>335</sup> There are forty-three branches located primarily in Arab and Islamic countries with two banks located in the United States—one in Chicago, Illinois and one in Houston, Texas.<sup>336</sup> Many of the charity defendants cited in the *Burnett* complaint maintain accounts with Al Baraka banks<sup>337</sup> and there is evidence that the bank provided Osama bin Laden with “financial infrastructures” in Sudan as early as 1983.<sup>338</sup> The Assistant to the Director of Finance for the parent organization, Dallah Albaraka Group, is a suspect wanted by the Federal Bureau of

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327. See Stephen Engelberg, *One Man and a Global Web of Violence*, N.Y. Times, Jan. 14, 2001, at A1.

328. See *Griffin v. Breckenridge*, 403 U.S. 88, 98 (1971) (citing to *Collins*, 341 U.S. at 662).

329. See <http://cns.miis.edu/research/wtc01/alqaida.htm> (last visited Sept. 15, 2003) (fact sheet on “Al Qaida [sic]—The Base”).

330. See Engelberg, *supra* note 327, at A1.

331. See Yoram Schweitzer, *Osama bin Laden and Egyptian Terrorist Groups*, available at <http://www.ict.org.il/articles/articleDet.cfm?articleid=81> (last visited Sept. 7, 2003).

332. See Yoram Schweitzer, *Suicide Terrorism: Development and Characteristics*, available at <http://www.ict.org.il/articles/articleDet.cfm?articleid=112> (last visited Sept. 7, 2003).

333. See *supra* note 217 and accompanying text.

334. See *supra* notes 216-17, 231 and accompanying text.

335. See *Burnett* Complaint, *supra* note 1, at 190, 192.

336. See *id.* at 190.

337. See *id.*

338. See *id.*

Investigation (FBI) in connection with the September 11 attacks because he is known to have paid the rent for two of the hijackers when they lived in San Diego, California.<sup>339</sup> Dallah Albaraka Group and Al Baraka Bank allegedly provided financial support and assistance to the Hamas terrorist group.<sup>340</sup> Since 1998, Israel has refused to approve the location of an Al Baraka branch in their country citing its ties to Hamas, and in early 2001, antiterrorist authorities from Israel visited Citibank's headquarters in New York to warn its directors of the nature of the bank's activities.<sup>341</sup> Finally, the Bosnian Intelligence Agency has reported the transfer of funds from certain charity organizations to Osama bin Laden through the Turkish branch of the Al Baraka bank.<sup>342</sup> United States jurisdiction over Al Baraka bank is appropriate given the location of bank branches in two United States cities.<sup>343</sup>

For the plaintiffs to recover under a § 1986 claim against the bank, they must prove that Al Baraka had knowledge of Al Qaeda's conspiracy to commit the terrorist attacks on September 11, 2001 the ability to prevent them or aid in their prevention and they, nevertheless, failed to do so.<sup>344</sup> It has been established that the wrongful act was committed.<sup>345</sup>

While the facts described above establish some link between bin Laden's Al Qaeda organization and Al Baraka<sup>346</sup> and, possibly, a

339. *See id.* at 191.

340. *See id.* at 192.

341. *See id.*

342. *See id.* at 193.

343. 28 U.S.C. §§ 1331-1332. For application of § 1986 to international corporations located entirely outside the United States, the federal government would have to claim jurisdiction under either the Federal Sovereign Immunities Act, 28 U.S.C. § 1330 (2000), or the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). If the corporation can be classified as an "agency or instrumentality of the state," §§ 1603 and 1605 of the Foreign Sovereign Immunities Act would apply. *See* 28 U.S.C. §§ 1603-1605 (2000). One of the exceptions to the general rule of sovereign immunity lifts such immunity from civil liability when a foreign state, or its agents, engages in "torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources" in support of such activities, which would likely extend to corporations providing financial backing or assistance to terrorist organizations. *See* 28 U.S.C. § 1605(7) (2000). This would only apply to those nations recognized by the United States Department of State as state sponsors of terrorism which, as of April 2003, included Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. *See State Dept. Report Cites Seven State-Sponsors of Terrorism, available at* <http://usinfo.state.gov/topical/pol/terror/02052101.htm> (last visited Sept. 7, 2003). Interestingly, for corporations without a link to the United States, the hurdle to gain federal jurisdiction under the Foreign Sovereign Immunities Act would be greater than that necessary to gain recovery under § 1986. Jurisdiction under the Alien Tort Claims Act would arise out of any civil action in tort committed in violation of the laws of nations or a treaty of the United States. *See* 28 U.S.C. § 1350. Similarly, this standard seems to imply a violation greater than that envisioned in § 1986.

344. *See supra* note 240 and accompanying text.

345. *See supra* notes 277-81 and accompanying text.

346. *See supra* notes 337-38, 342 and accompanying text.

connection to the hijackers themselves,<sup>347</sup> the evidence is insufficient to establish that the bank had “actual knowledge” of the terrorist attacks. General knowledge of terrorist training, financing or membership, while it would certainly suggest a plan to carry out terrorist acts, cannot establish that the bank or its employees specifically knew of plans to carry out these particular acts. The words of the 1871 Act—“having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed”<sup>348</sup>—imply a specificity of knowledge and an immediacy of the act to be performed that would not have likely been maintained by Al Baraka. Even under the *Clark* court’s standard requiring something less than “actual knowledge,”<sup>349</sup> the bank would likely escape liability under § 1986. The *Clark* court sustained a motion for summary judgment on a rumor that had been circulating around a community for approximately two weeks, of which there was some evidence law enforcement had been apprised.<sup>350</sup> Even in that case, however, the rumor pertained to a specific act that was planned, not a general threat.<sup>351</sup> While this evidence may be sufficient to sustain a motion for summary judgment on a § 1986 claim against Al Baraka, absent additional fact-finding, it is unlikely a court would consider this sufficient to meet the actual knowledge prong of the *Clark* test.

Absent knowledge on the part of the defendant bank, the court would end a § 1986 inquiry.<sup>352</sup> For illustrative purposes, however, this Note will nevertheless apply the remaining two prongs of the test to Al Baraka. The bank clearly had the ability to prevent or aid in prevention, even if only by informing law enforcement officials of the threat posed by Al Qaeda and its operatives. Absent specific knowledge of the September 11 plot, by passing along information about the general threat posed by this terrorist organization, law enforcement officials may have been able to trace links provided by the bank to those planning the attacks and, possibly, have prevented them. This would at least qualify as the ability to aid in prevention. In addition, the bank could have refused to allow Al Qaeda funds to flow through its organization,<sup>353</sup> cutting off the resources necessary to

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347. See *supra* note 339 and accompanying text.

348. See H.R. Con. Res. 320, 42d Cong. § 6 (1871); 17 Stat. 13 (1871).

349. See *supra* note 243 and accompanying text.

350. See *supra* notes 236-38 and accompanying text.

351. If there were additional evidence that the parent organization’s Assistant to the Finance Director, in paying the rent of two of the hijackers, was doing so with knowledge that they planned to carry out the September 11 attacks, that may be sufficient to extend § 1986 liability to him alone. Extension of liability to the bank or the parent organization would require some evidence that he shared this information with his employer and, in this case, that they informed the Al Baraka officials.

352. See *supra* note 240 and accompanying text.

353. See *supra* notes 337-38, 342 and accompanying text.

finance the attacks or fund flight training for those operatives who would eventually carry out the attacks. There is no evidence to suggest, however, that the bank did either of these things<sup>354</sup> and, therefore, failed to prevent or aid in the prevention of the attacks. As was stated above, however, plaintiffs would likely be unable to gain recovery from Al Baraka under § 1986, despite support for two elements of the test, given an absence of knowledge as to the terrorist attacks carried out on September 11.<sup>355</sup>

#### b. *The Muslim World League*

Founded in Saudi Arabia in 1962 to “disseminate Islamic Dawah and expound the teachings of Islam, the Muslim World League is the parent organization for the Al Qaeda charity [International Islamic Relief Organization] (IIRO).”<sup>356</sup> This organization is “funded, supported, financed and controlled by Saudi Arabia,” but operates internationally with United States offices in New York City and Herndon, Virginia.<sup>357</sup> The Secretary/Treasurer of the Muslim World League in the United States has been under investigation by the United States government for connections to Al Qaeda and the September 11 attacks and several officers of the organization are known Al Qaeda operatives.<sup>358</sup> In the early days of the organization, Muslim World League offices were used to attract and train holy warriors for the war in Afghanistan.<sup>359</sup> In fact, according to the *Burnett* complaint, at least one member of the organization took flight lessons at the same school Zacarias Moussaoui<sup>360</sup> attended and that which Mohammed Atta<sup>361</sup> considered as a possibility for his flight

354. See *Burnett Complaint*, *supra* note 1, at 190-93.

355. See *supra* note 352 and accompanying text.

356. See *Burnett Complaint*, *supra* note 1, at 221 (internal quotation marks omitted).

357. See *id.* at 221-22.

358. See *id.* at 223. Wa’el Jalaidan, whom the United States Treasury Department named as “one of the founders of Al Qaeda,” headed the Muslim World League office in Peshawar, Pakistan. See *id.* Wadih el-Hage, convicted for his role in the 1998 United States embassy bombings in Africa, stated at his trial that he worked at the Muslim World League in Peshawar, Pakistan in the 1980s and while working at the Muslim World League he met Abdullah Azzam, the mentor of Osama bin Laden and co-founder of Al Qaeda. See *id.* Ihab Ali, another Al Qaeda operative who played a large role in the Embassy bombings and in facilitating communication between Osama bin Laden and other Al Qaeda operatives, went to work for the Muslim World League in 1987. See *id.* at 223-24.

359. See *id.* at 223.

360. Moussaoui is commonly known as the “twentieth hijacker” and is now on trial for conspiracy to commit the September 11 attacks in the Eastern District of Virginia. See generally *Indictment of Zacarias Moussaoui*, available at [www.usdoj.gov/ag/moussaouiindictment.htm](http://www.usdoj.gov/ag/moussaouiindictment.htm) (last visited Sept. 7, 2003).

361. Atta is one of the nineteen hijackers who carried out the September 11, 2001 terrorist attacks and who, it is believed, was the mastermind behind the attacks. See Steven Erlanger, *After the Attacks: An Unobtrusive Man’s Odyssey: Polite Student to*

training.<sup>362</sup> Finally, in conjunction with the attempted assassination of Egyptian President Hosni Mubarak in 1995, one of the would-be assassins stated that, “the Muslim World League bought our travel tickets and gave us spending money before we arrived at [Osama bin Laden’s] farm”—located in southern Sudan.<sup>363</sup> United States jurisdiction over the Muslim World League is appropriate as two units are located within the United States.<sup>364</sup>

Applying the § 1986 test, while plaintiffs certainly put forth more evidence to suggest that the Muslim World League had direct knowledge of the details of the September 11 attacks, nothing contained in the complaint establishes “actual knowledge” by the charity of the plan to carry out the September 11 attacks. While membership of the Muslim World League appears to contain a large Al Qaeda presence<sup>365</sup> and one could infer from that a more intimate knowledge on the part of the charity of specific Al Qaeda activities, the facts, as alleged, are insufficient to meet an “actual knowledge” standard.<sup>366</sup> Applying the *Clark* standard,<sup>367</sup> however, one could argue sufficient connections to at least sustain a complaint under § 1986. Leaders of the organization’s United States branch have been investigated for a connection to the September 11 attacks,<sup>368</sup> members have trained at the same flight school as those believed to be involved in the September 11 attacks,<sup>369</sup> and there is an alleged history of support by the Muslim World League of specific acts of terrorist violence.<sup>370</sup> With an expectation that additional evidence could be produced linking these facts to a more specific connection to the September 11 attacks, the *Clark* Court might hold these defendants over for trial on a § 1986 claim.

The Muslim World League’s ability to prevent or aid in prevention of the terrorist attacks is, like Al Baraka’s, similarly clear. With a showing of even more specific knowledge of Al Qaeda’s terrorist activities,<sup>371</sup> the charity, as the *Burnett* complaint alleges, could clearly have provided evidence to law enforcement that would have likely aided in their ability to prevent the September 11 attacks. In addition, the charity allegedly raised money for terrorist activities and helped to

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*Suicide Hijacker*, N.Y. Times, Sept. 15, 2001, at A1.

362. See *Burnett* Complaint, *supra* note 1, at 223-24.

363. See *id.* at 224 (brackets in original).

364. 28 U.S.C. §§ 1331-1332 (2000). For application of § 1986 to an international organization located entirely outside the United States, see the discussion of the Foreign Sovereign Immunities Act and the Alien Tort Claims Act, *supra* note 343.

365. See *supra* note 358 and accompanying text.

366. See *supra* note 243 and accompanying text.

367. See *supra* note 244 and accompanying text.

368. See *supra* note 358 and accompanying text.

369. See *supra* notes 360-62 and accompanying text.

370. See *supra* note 363 and accompanying text.

371. See *supra* notes 365-70 and accompanying text.

recruit and train Al Qaeda operatives.<sup>372</sup> Had it refused to do so, thus removing the organization's pipeline of both money and manpower, Al Qaeda may not have been able to carry out the attacks. There is no evidence to suggest the Muslim World League has stopped supporting Al Qaeda activities<sup>373</sup> and, therefore, failed to take the steps described above, satisfying the final element of the § 1986 test. Using the *Clark* court's formulation of the knowledge standard<sup>374</sup> and evidence that the Muslim World League had the ability to aid in prevention of the September 11 attacks but failed to do so, plaintiffs may be able to bring suit under § 1986.

### c. *The Republic of Sudan*

Sudan has been recognized by the United States Department of State as a country that sponsors terrorism since 1993 and, one through which its agents and instrumentalities has "supported, encouraged, sponsored, aided and abetted and conspired with a variety of groups that use terror to pursue their goals."<sup>375</sup> According to the *Burnett* complaint, Sudan has provided "financing, training, safe-haven, and weapons for terrorists groups, including Al Qaeda and Osama bin Laden."<sup>376</sup> In the early 1990s, Sudan's ruling National Islamic Front party allowed terrorist Osama bin Laden and his Al Qaeda organization entry into Sudan.<sup>377</sup> Abandoning visa requirements for Arabs and actively encouraging Islamic militants to locate within its borders, "[b]y the end of 1991, there were between 1,000 and 2,000 members of Al Qaeda" living in Sudan.<sup>378</sup> Bin Laden contributed funds to certain National Islamic Front party members, forged business alliances with wealthy Sudanese who maintained strong ties to the Sudanese government, and maintained a financial interest in several businesses owned and operated by the Sudanese government.<sup>379</sup> Al Qaeda maintained camps throughout Sudan, purchased communications equipment, radios and rifles from the Sudanese National Islamic Front party and were granted 200 passports from the Sudanese government so that Al Qaeda terrorists could travel under new identities.<sup>380</sup> While Osama bin Laden was expelled from Sudan in 1996, under pressure from the United States Government, Sudan is still thought to be a safe-haven for members of

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372. See *supra* note 358 and accompanying text.

373. See *Burnett* Complaint, *supra* note 1, at 221-24.

374. See *supra* note 244 and accompanying text.

375. See *Burnett* Complaint, *supra* note 1, at 237; see also Steve Hurst, *U.S. Imposes Sanctions on Sudan*, Nov. 4, 1997, at <http://www.cnn.com/WORLD/9711/04/us.sudan/index.html> (last visited Sept. 7, 2003).

376. See *Burnett* Complaint, *supra* note 1, at 237; see also Hurst, *supra* note 375.

377. See *Burnett* Complaint, *supra* note 1, at 237.

378. See *id.*

379. See *id.* at 238.

380. See *id.*



the Al Qaeda network and other terrorist organizations.<sup>381</sup> United States jurisdiction over Sudan is available under an exception to the Foreign Sovereign Immunities Act.<sup>382</sup>

While fostering an environment in which terrorist organizations could thrive,<sup>383</sup> there is no evidence that members of the ruling government in Sudan had specific knowledge of Al Qaeda's plan to carry out the September 11 attacks. Particularly in light of the fact that bin Laden was exiled from the country and was organizing in Afghanistan immediately prior to the attacks,<sup>384</sup> there is no evidence that Sudanese officials had "actual knowledge" that Al Qaeda had planned that particular attack. Like Al Baraka, the evidence suggests that officials certainly understood that Al Qaeda had the capability to carry out terrorist activities<sup>385</sup> but would have likely been unable to foresee the specific details or timing of the September 11 attacks. Even under the *Clark* Court's slightly weaker test,<sup>386</sup> Sudan could not be held liable under § 1986 because the leaders' knowledge or understanding of a general threat would still be insufficient. There is no reason to believe that additional evidence would be able to draw a more specific connection to the September 11 plan.

Sudan likely possessed an even greater ability than Al Baraka or the Muslim World League to prevent or aid in the prevention of the attacks and probably had this ability at a much earlier time. By allegedly allowing Al Qaeda to organize within its borders and providing false passports and other specific aid,<sup>387</sup> the Sudanese government facilitated Al Qaeda's development and increased its power, without which Al Qaeda may not have been able to carry out the September 11 attacks. Further, as a member of the international community, Sudan has specifically defied edicts from international organizations ordering it to cease support of terrorist organizations.<sup>388</sup> Had Sudan complied with these orders and turned over terrorist

381. *See id.* at 240. Sudan is believed to serve as a safe-haven for the Lebanese Hezbollah, al-Gama'a al-Islamiyya, Egyptian Islamic Jihad, the Palestine Islamic Jihad, and Hamas. *See id.* Sudan still has not complied fully with the United Nations Security Council Resolutions 1044, 1054, and 1070, passed in 1996, which require that Sudan end all material support to terrorists. *See id.*

382. 28 U.S.C. § 1605 (2000). As a sovereign nation, federal jurisdiction over the Republic of Sudan can be claimed as an exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2000), which removes civil immunity of a foreign state that engages in torture, extrajudicial killing, hostage-taking, or aircraft sabotage, or provides material in support of such activities. *Id.* This applies to Sudan as it is one of the seven countries designated by the United States Department of State as a state sponsor of terrorism. For a list of these countries, see *supra* note 343.

383. *See supra* notes 375-77 and accompanying text.

384. *See supra* note 381 and accompanying text; Frantz & Rohde, *supra* note 266, at B1.

385. *See supra* notes 375-81 and accompanying text.

386. *See supra* notes 243-44 and accompanying text.

387. *See supra* notes 375-81 and accompanying text.

388. *See supra* notes 375-81 and accompanying text.

leaders to international law enforcement officials, organizations like Al Qaeda may have been forced to cease operations. While one could argue that Sudan did expel Osama bin Laden in 1996, and thereby, aided in the prevention of further terrorist acts, the government did not turn him over to law enforcement officials but instead facilitated his move to Afghanistan.<sup>389</sup> In addition, members of the Al Qaeda organization remain in Sudan as do members of several other terrorist organizations.<sup>390</sup> Despite some support for the last two prongs of the test,<sup>391</sup> Sudan would likely escape liability under § 1986 given a lack of knowledge of the September 11 attacks.

#### d. *Osama bin Laden*

Osama bin Laden is on record as conspiring with the hijackers to plan the September 11th terrorist attacks.<sup>392</sup> Nonetheless, he could be as culpable as those who carried out the attacks under § 1986 because there is evidence to suggest that bin Laden had knowledge of the plot to commit the terrorist attacks, had the ability to prevent the attacks and nonetheless, failed to do so, thus satisfying the *Clark* requirements.<sup>393</sup> Federal jurisdiction over Osama bin Laden arises under the Alien Tort Claims Act.<sup>394</sup> As a party to the planning, bin Laden had “actual knowledge” of the attacks.<sup>395</sup> Further, as the leader of the Al Qaeda terrorist organization,<sup>396</sup> he would likely have had the ability to stop the hijackers from carrying out the plan. Finally, there is no evidence to suggest that bin Laden discouraged the September 11 hijackers from carrying out their plan; in fact there is evidence to the contrary.<sup>397</sup> A § 1986 claim could, therefore, likely be easily sustained against Osama bin Laden.

After identifying a policy argument for application of § 1986 to international terrorist activity,<sup>398</sup> Part III highlighted the facts in the *Burnett* complaint that could provide both sufficient class-based animus and a federal right targeted by the conspiracy through which

389. See *supra* notes 375-81 and accompanying text..

390. See *supra* note 381.

391. See *supra* note 240 and accompanying text.

392. See Dobbs, *supra* note 286, at A28; Rutenberg, *supra* note 286, at A10.

393. See *supra* note 240 and accompanying text.

394. 28 U.S.C. § 1350 (2000). The Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), provides for federal jurisdiction for any civil action in tort committed in violation of the laws of nations or a treaty of the United States. See *supra* note 343 and accompanying text.

395. See Dobbs, *supra* note 286, at A28; Rutenberg, *supra* note 286, at A10.

396. See Dobbs, *supra* note 286, at A28; Rutenberg, *supra* note 286, at A10.

397. See Dobbs, *supra* note 286, at A28; Rutenberg, *supra* note 286, at A10; see also *supra* note 286 (quoting from the *fatwah* issued by Osama bin Laden calling for members of Al Qaeda to engage in terrorist acts against the United States).

398. See *supra* notes 256-67 and accompanying text.

the plaintiffs could satisfy the elements of a § 1985 claim.<sup>399</sup> Applying the § 1986 test to each representative defendant, however, Part III concludes that only Osama bin Laden could be held liable under § 1986 as the bank, the charity and the Republic of Sudan lack sufficient actual or even rumored knowledge of the September 11 terrorist attacks to satisfy all the elements of a § 1986 claim.<sup>400</sup>

### CONCLUSION

Despite the existence of a clear policy argument to support application of § 1986 to international terrorism, the Ku Klux Klan Act of 1871, as ultimately enacted by the Forty-second Congress and as applied by the courts, is too weak to serve as a meaningful tool against conspiratorial civil rights violations. Senator Sherman's concern that a negligence standard, rather than the strict liability standard he initially proposed, would undermine the effectiveness of section 6 to stop Klan violence,<sup>401</sup> is borne out by this modern application. Limitations on the evidentiary connection between a general threat posed by terrorist organizations and an "actual knowledge" of plans to engage in a particular terrorist act make extension of liability under § 1986 difficult to sustain.<sup>402</sup> Further, the Supreme Court's interpretation of § 1985 as an application of the Thirteenth Amendment rather than the Fourteenth Amendment has made extremely difficult the extension of either § 1986 or § 1985 to cases likely intended to be within the reach of the Act.<sup>403</sup> As courts continue to evaluate claims under both these provisions, a review of the Act's framers' intent and the policy goals behind implementation of these sections should remain in the forefront. Though necessarily limited in scope, these provisions nevertheless provide an alternative under federal law for those seeking recovery for conspiratorial civil rights violations and, with broader application, particularly under § 1986, may one day serve the purpose the framers intended.

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399. *See supra* notes 268-334 and accompanying text.

400. *See supra* notes 335-97 and accompanying text.

401. *See supra* note 120 and accompanying text.

402. *See supra* notes 346-51, 365-70, 383-86 and accompanying text.

403. *See supra* notes 186, 314-21 and accompanying text.