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Charlottesville, January 6 and Incitement: Can Civil Conspiracy Laws Permit an End-Run around Brandenburg v. Ohio?

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In this article we analyze how courts have applied the federal Anti-Riot Act, the Brandenburg test for incitement, and civil conspiracy laws to two events: 1) the 2017 Unite the Right march in Charlottesville, Virginia, and 2) the January 6, 2021 insurrection and the storming of the U.S. Capitol. The thesis of this article is that civil conspiracy laws will be more effective for plaintiffs seeking redress of grievances against Donald Trump for the January 6, 2021 insurrection than will invoking the federal Anti-Riot Act because the Brandenburg test's requirement of proving a speaker's intent to incite violence is too steep a hill to climb. When plaintiffs file civil conspiracy suits, there is no guarantee that they will prevail. Whether they win or lose, however, they may be trying to turn a civil trial into a public forum in order to focus society's attention on grievous wrongs that they have suffered.

Introduction

- On August 12, 2017, neo-Nazi James Fields murders Heather Heyer by running over her with his car at a "Unite the Right" rally in Charlottesville, Virginia.

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- Donald Trump gives a speech on January 6, 2021, after which his supporters storm the U.S. Capitol, injuring 150 police officers. Officer Brian Sicknick dies of multiple strokes the next day, and four police officers later died by suicide (Cameron, 2022).
- Federal district court judge David Carter describes Trump's attempt to overturn the results of the 2020 election by pressuring Mike Pence to reject the electors' votes for Joe Biden as a "coup in search of a legal theory" (Eastman v. Thompson, 2022).

These events raise the question of whether or not the organizers in Charlottesville incited the violence resulting in Heather Heyer's murder, or whether Donald Trump himself, who spoke on January 6, incited the violence that resulted in severe injuries to 150 U.S. Capitol and Metropolitan police officers (Cameron, 2022).

When James Fields murdered Heather Heyer by running her over, he also hit William Burke, who is suffering permanent injuries. Burke filed a civil suit against Fields, Richard Spencer, Jason Kessler, and others who had organized the Unite the Right rally (Burke v. Fields, 2020). Elizabeth Sines and nine co-plaintiffs also filed a civil suit against those who organized the Unite the Right rally (Sines v. Kessler, 2018). Following the January 6, 2021 insurrection, several members of Congress (Thompson v. Trump, 2021; Swalwell v. Trump, 2021) and U.S. Capitol police officers (Blassingame v. Trump, 2021; Smith v. Trump, 2021; Tabron v. Trump, 2022) have sued Donald Trump for conspiring to incite the riot that caused their injuries.

This discussion analyzes the legal arguments in these cases, focusing on the federal Anti-Riot Act, Brandenburg v. Ohio (1969), and an alternative in which plaintiffs turn to civil conspiracy complaints rather than relying on criminal prosecutions. In our society, when prosecutors decline to file criminal charges, injured parties can turn to civil suits for redress of grievances, as in the cases considered here.

The thesis of this article is that civil conspiracy laws will be more effective for plaintiffs seeking redress of grievances against Donald Trump for the January 6, 2021 insurrection than will the federal Anti-Riot Act because the Brandenburg test's requirement of proving a speaker's intent to incite violence can be difficult or impossible.

When plaintiffs file these civil suits, there is no guarantee that they will prevail, but whether they win or lose, they may be trying to turn a civil trial into a public forum in order to focus society's attention on grievous wrongs that they have suffered. Following an overview of early U.S. Supreme Court precedents, this discussion will focus on 1) the Unite the Right march in Charlottesville, Virginia in 2017, and 2) the January 6, 2021 insurrection and the question of whether or not Donald Trump may be found liable for civil conspiracy to incite a riot.

Although prosecutors have not charged Donald Trump for inciting the January 6, 2021 insurrection under the federal Anti-Riot Act, several members of Congress and U.S. Capitol police officers have charged Trump with civil conspiracy,

> defined as an agreement between two or more people to participate in an unlawful act. The agreement can be either express or tacit....A civil conspiracy requires a showing "that there was a single plan, the nature and scope of which were known to each person...And, to be actionable, there must be an overt act in furtherance of which results in injury (Hobson v. Wilson, 1984, 51-52, cited in Thompson v. Trump, 2022, 61-62).

Before considering the specific cases, however, we should begin with a brief overview of the "clear and present danger" test, the federal Anti-Riot Act, the Brandenburg test for incitement and how courts have applied it during the past 50 years.

The "Clear and Present Danger" Test

When the U.S. government conscripted young men to serve in World War I, Charles Schenck distributed flyers urging them to resist the draft on the grounds that it violated the Thirteenth Amendment, which abolished "involuntary servitude" (Schenck v. United States, 1919, 51). Police arrested Schenck and prosecutors charged him with violating the Espionage Act of 1917. He appealed, but the U.S. Supreme Court held that his flyers were tantamount to "falsely shouting fire in a theatre and causing a panic" (Schenck v. United States, 1919, 52) when there is no fire. In other words, Schenck had created a "clear and present danger" to national security by advising young men to resist being drafted; thus, the High Court thus upheld his conviction.

Just as Schenck was convicted for distributing an anti-conscription message, Benjamin Gitlow was arrested and convicted for distributing his "Left Wing Manifesto"

in 1919. The U.S. Supreme Court upheld Gitlow's conviction under the "bad tendency" test, which permitted the government to punish speech if its sole tendency was to incite illegal activity. The seven-person majority perceived Gitlow's Manifesto as a "clear and present danger," warning that "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration" (Gitlow v. New York, 1925, 669). Justices Oliver Wendell Holmes and Louis Brandeis dissented on the grounds that Gitlow's Manifesto created "no present danger of an attempt to overthrow the government by force" (Gitlow v. New York, 1925, 673). In other words, the Manifesto urged the proletariat to rise up and take over the means of production at some indefinite time in the future. Furthermore, Justice Holmes noted that "Every idea is an incitement" (Gitlow v. New York, 1925, 673).

The U.S. Supreme Court eventually adopted the approach that Justices Holmes and Brandeis had taken in Gitlow three decades later when it held that Oleta Yates and several other Communist Party members could advocate for the violent overthrow of the government, provided their arguments were in abstract (rather than specific) terms (Yates v. United States, 1957).

The Federal Anti-Riot Act and the Brandenburg Test for Incitement

A decade after Yates, Congress passed the federal Anti-Riot Act as Title X of the Civil Rights Act in April 1968 (18 U.S.C. § 2101). It is still on the books and provides that:

> (a) (1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent --
>
> (A) to incite a riot; or
>
> (B) to organize, promote, encourage, participate in, or carry on a riot; or
>
> (C) to commit any act of violence in furtherance of a riot; or
>
> (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph --

> Shall be fined not more than $10,000, or imprisoned not more than five years, or both (Anti-Riot Act, 18 U.S.C. § 2101, 1968).

The Anti-Riot Act differs from state riot laws in that "it did not criminalize rioting itself, but rather criminalized interstate travel...with intent" to incite a riot (Britt, 2022, 2281). Critics of the Anti-Riot Act have charged that it equates political protest with organized violence. In 1969 an organization representing some of the Chicago Seven defendants sought a declaratory judgment, hoping that a court would find that the Anti-Riot Act violated the First Amendment, but the U.S. Court of Appeals for the Seventh Circuit held that the law was constitutional (National Mobilization Committee v. Foran, 1969). After a jury found the Chicago Seven defendants guilty of violating the Anti-Riot Act, they appealed and again challenged the Anti-Riot Act as unconstitutional. Although the Seventh Circuit reversed their conviction because the trial judge Julius Hoffman had failed to ensure a fair trial, the appellate court again upheld the Anti-Riot Act as constitutional (United v. States v. Dellinger, 1972).

A year after Congress had passed the Anti-Riot Act in 1968, the U.S. Supreme Court set a very high bar for prosecutors to actually win a conviction for incitement. Clarence Brandenburg was a Ku Klux Klan leader in Ohio; he invited a broadcast journalist to film a speech he gave to Klan members in which he referred to "revengeance against [people of color] and Jews." Prosecutors charged Brandenburg with advocating violence under Ohio's criminal syndicalism law, and a jury convicted him. Brandenburg appealed. The U.S. Supreme Court reversed his conviction, holding that the First Amendment protects incendiary speech unless prosecutors can show that 1) the speech explicitly or implicitly encouraged violence or lawless action, 2) the speaker intends that his speech will result in violence or lawless action, and 3) the imminent use of violence or lawless action is the likely result of his speech (Brandenburg v. Ohio, 1969). The High Court thus created the three-part Brandenburg test for incitement. Because it is difficult to prove a speaker's intent (and speakers often deny that they had intended a violent outcome), the Brandenburg test has given prosecutors the proverbial "steep hill" to climb in order to convict speakers for inciting a riot.

The requirement for a conviction under Brandenburg appears to be that the speaker must give very specific instructions to the crowd. For example, in 1972 Peter Bohmer led a protest against the Vietnam War in San Diego, California. He asked the crowd to gather railroad ties and light them on fire in order to stop a train carrying military supplies. Bohmer used a megaphone, talked about "blocking the train and called people down, making sure everybody was on the tracks" (People v. Bohmer, 1975, 196). About 100 protesters piled wooden railroad ties on the tracks, poured fuel on them, tossed a match, and they burst into flames. Prosecutors charged Bohmer with incitement. The court held that "his speech organizing the [fire on the train tracks] was calculated to incite or produce imminent lawless action, and the First Amendment did not protect it" (People v. Bohmer, 1975, 185); thus, Bohmer was convicted.

In contrast to Bohmer, in which prosecutors had filed criminal charges, the U.S. Supreme declined to hold that National Association for the Advancement of Colored People (NAACP) leader Charles Evers was guilty of incitement in the civil lawsuit NAACP v. Claiborne Hardware Company (1982). This case began in 1968 when two Port Gibson, Mississippi police officers shot a young Black man to death, and Evers organized a boycott of white merchants in town. The NAACP had stationed "store watchers" to dissuade Blacks from patronizing the stores of white merchants; in a speech, Evers warned Black citizens not to patronize the stores: "If we catch any of you going into these racist stores, we're going to break your damn neck" (NAACP v. Claiborne Hardware Company, 1982, 902). When the case reached the U.S. Supreme Court, they concluded that Evers had a First Amendment right to deliver "emotionally charged rhetoric." Furthermore, the High Court held that based on the Brandenburg test's requirement of imminent violence, although there had been attacks on Blacks who violated the boycott before Evers' speech, no attacks had occurred afterwards, meaning that Evers' speech could not have incited the earlier violence. The justices thus explained that Evers' threats, which were part of an "impassioned plea for Black citizens to unify, to support and respect each other, and to realize the political and economic power available to them" did not rise to the level of incitement (NAACP v. Claiborne Hardware Company, 1982, 928).

The Federal Anti-Riot Act and Domestic Terrorism in Charlottesville

After Peter Bohmer was convicted for inciting anti-Vietnam war demonstrators to light a fire on train tracks in San Diego, no one invoked the federal Anti-Riot Act again until prosecutors revived it to charge neo-Nazis in California and Charlottesville, Virginia with inciting violence against counter-protesters. Although the legislative history of the Anti-Riot Act indicates that those who drafted it were concerned about violent protests on the political left, prosecutors applied it more than 40 years later to violent neo-Nazi demonstrations on the right in United States v. Rundo (2021) and United States v. Miselis (2021).

In March and April 2017, white supremacist Robert Rundo and three others[†] traveled to political rallies in Huntington Beach, San Bernardino and at the University of California at Berkeley where they confronted counter-protesters and attacked them. Cell phone videos showed Rundo punching counter-protesters in Huntington Beach and punching a police officer in Berkeley. Rundo and his friends were members of a neo-Nazi group, the Rise above Movement (RAM). Although the federal Anti-Riot Act had "been lying nearly dormant for decades" (Harvard Law Review Association, 2021, 2614), it re-emerged when prosecutors charged Rundo and the others with violating the Anti-Riot Act by inciting violence in the three California towns. Although a grand jury returned an indictment against them, a federal district court judge dismissed the indictment, holding that the Anti-Riot Act was overbroad. On appeal, however, the U.S. Court of Appeals for the Ninth Circuit reversed. The appellate court noted that in order to recruit new members, "RAM members post videos online of their hand-to-hand combat training...with videos of their assaults on people at political events and messages supporting their white supremacist ideology" (United States v. Rundo, 2021, 712-713). The appellate judges also explained that "it would be cavalier to assert that the government and its citizens cannot act, but must sit quietly and wait until they are actually physically injured or have had their property destroyed" (United States v. Rundo, 2021, 721). Holding the Anti-Riot Act constitutional, the Ninth Circuit remanded the case to

[†] The other three white supremacists were Robert Boman, Tyler Laube and Aaron Eason.

the federal district court, and prosecutors reinstated the charges against Rundo and the other three defendants.

Joining Rundo and the others in the violent attacks against counter-protesters in Huntington Beach and Berkeley, California were RAM members Michael Miselis and Benjamin Daley. Miselis and Daley also traveled to Charlottesville, Virginia in August 2017, where they later admitted that they had "collectively pushed, punched, kicked, choked, head-butted, and otherwise assaulted a group of counter-protestors, and not in self-defense, in Huntington Beach, Berkeley and Charlottesville" (United States v. Miselis, 2020a, 547). Prosecutors charged them under the Anti-Riot Act, and a federal district court judge sentenced Miselis to 27 months and Daley to 37 months in prison.

Miselis and Daley appealed, however, arguing that the Anti-Riot Act violates the First Amendment. The U.S. Court of Appeals for the Fourth Circuit noted that no one had challenged the constitutionality of the Anti-Riot Act since United States v. Dellinger (1972) because prosecutors had seldom charged anyone under this statute. The justices further noted that Brandenburg had "significantly (if tacitly) narrowed the category of incitement" (United States v. Miselis, 2020a, 533). The judges explained that "to obtain a conviction under the Anti-Riot Act, the government must at a minimum prove that...the defendant acted with specific intent to engage in unprotected speech or conduct" (United States v. Miselis, 2020a, 535). Because Miselis and Daley were challenging the Anti-Riot Act as unconstitutional, the appellate judges examined the wording and agreed that the statute's phrases about speech tending to "encourage" or "promote" a riot, as well as speech "urging" others to riot or "involving" mere advocacy of violence were overly broad. The judges held that these phrases were "severable," however. In other words, they struck down these phrases from the Anti-Riot Act but left the rest of the statute intact, holding that with these phrases severed, the statute was consistent with the First Amendment (United States v. Miselis, 2020a, 518). After the Fourth Circuit denied their petition for a rehearing en banc (United States v. Miselis, 2020b), Miselis and Daley filed an appeal with the U.S. Supreme Court, but the High Court declined to hear their case (Miselis v. United States, 2021; Daley v. United States, 2021). The Fourth Circuit has thus upheld their convictions under the Anti-Riot Act.

Can a Speaker Be Held Liable for Injuries Caused by a Third Party?

Whereas Robert Rundo and Michael Miselis' violation of the Anti-Riot Act was a criminal offense, the question of whether or not a speaker can be found liable in a civil lawsuit when a third party harms a police officer arose in Doe v. Mckesson (2022). Four days after a Baton Rouge, Louisiana police officer shot the unarmed Black man Alton Sterling to death in July 2016, Black Lives Matter leader DeRay Mckesson organized a demonstration during which protesters blocked Airline Highway outside the Baton Rouge Police Department. When police arrived to clear the highway, someone hurled a rock or slab of concrete and hit Officer "John Doe" in the head, causing permanent damage to his jaw, teeth and brain. Doe sued Mckesson, arguing that Mckesson should be held liable for Doe's injuries.

A federal district court judge dismissed Doe's suit as barred by the First Amendment, but the U.S. Court of Appeals for the Fifth Circuit reinstated it. Mckesson appealed to the U.S. Supreme Court, which declined to rule on the case but remanded it to the Fifth Circuit, which remanded it to the Louisiana Supreme Court to answer certain questions of state law. The Louisiana Supreme Court's opinion was thus not a ruling, but provided answers to the Fifth Circuit's questions regarding whether or not Doe could pursue his case against Mckesson.

Mckesson argued that even if it was a misdemeanor for him to lead the protest onto the highway, he could not be personally liable for the violent act of a third-party individual whose only association with him was attendance at the protest. The Louisiana Supreme Court noted that blocking a public highway is a criminal act, however. Indeed, police arrested Mckesson, who livestreamed his own arrest. The state supreme court explained that

> Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators....By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration (Doe v. Mckesson, 2022).

The state supreme court explained that "Mckesson's negligent actions were the `but for' causes of Officer Doe's injuries;" in other words, "but for [Mckesson's] conduct,

the [injury] probably would not have occurred" (Doe v. Mckesson, 2022). The Louisiana Supreme Court thus declined to dismiss Doe's case, ruling that "Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery" (Doe v. Mckesson, 2022).

Civil Suits against Donald Trump and Unite the Right Leaders before January 6, 2021

Although the Louisiana Supreme Court held that Officer John Doe's civil suit against DeRay Mckesson can proceed to discovery, the U.S. Court of Appeals for the Sixth Circuit dismissed a similar civil suit against Donald Trump when he was a presidential candidate in 2016. In March 2016 two young women, Kashiya Nwanguma and Molly Shah, along with 17 year-old Henry Brousseau, protested peacefully at a Trump rally in Louisville, Kentucky (Nwanguma v. Trump, 2018). Despite their peaceful protest, Trump saw the signs they were holding; he told his supporters "Get 'em out of here," repeating this five times. When Trump supporters Matthew Heimbach and Alvin Bamberger assaulted the protesters, and an unknown woman punched Brousseau in the stomach, Trump added, "Don't hurt 'em--if I say go 'get 'em,' I get in trouble with the press" (Nwanguma v. Trump, 2017, 724).

Nwanguma, Shah and Brousseau filed suit against Trump for incitement, claiming that Trump's command to "Get 'em out of here" instigated the crowd to attack them. When the protesters filed charges against Heimbach and Bamberger for injuring them, Alvin Bamberger filed a cross-claim, arguing that Trump had incited him to shove the three protesters out the door. Bamberger argued that if he were "adjudged liable to Ngwanguma for his actions, Trump and/or the Trump Campaign should be adjudged liable to Bamberger in an equal sum, because Trump and/or the Trump Campaign urged and inspired Bamberger to act as he did" (Nwanguma v. Trump, Answer and Cross-Claim, 2017, 4). The federal district court in Kentucky appeared to rely on the plaintiffs' allegations that Trump intended for violence to occur and knew that his words were likely to result in violence. The judge thus denied Trump's motion to dismiss on the grounds that Trump's directive had created "a chaotic and violent scene in which a crowd of

people turned on [Nwanguma, Shah and Brousseau], and those individuals were injured as a result" (Nwanguma v. Trump, 2018, 608).

Trump appealed (In re Trump, 2017). The U.S. Court of Appeals for the Sixth Circuit, relying on the Brandenburg test, reversed. The appellate judges explained that because Trump added "But don't hurt 'em," Trump's speech itself "included express disavowal and discouragement of violence" (Nwanguma v. Trump, 2018, 604). The judges commented that

> the hostile reaction of a crowd does not transform protected speech into incitement...[and the] subjective reaction of any particular listener cannot dictate whether the speaker's words enjoy constitutional protection. It is the words used by the speaker that must be at the focus of the incitement inquiry, not how they may be heard by a listener (Nwanguma v. Trump, 2018, 613).

The appellate judges did not mention the "heckler's veto" (see Feiner v. New York, 1951) in Nwanguma, no doubt because the heckler's veto occurs when police arrest a speaker whom a crowd is heckling rather than individuals who might be threatening the speaker (see Bible Believers v. Wayne County, 2015). (The police were obviously not going to arrest Trump; furthermore, the three protesters held signs, but no one was heckling Trump out loud). The Sixth Circuit thus held that the "plaintiffs' allegations fail to make a valid incitement-to-riot claim" (Nwanguma v. Trump, 2018, 609).

Although Nwanguma, Shah and Brousseau did not prevail in their civil suit against Trump, several counter-protesters who were injured in Charlottesville, Virginia succeeded in their civil suits against Unite the Right leaders. One of these plaintiffs was William Burke, who suffered severe, permanent injuries when James Fields drove his car into the counter-protesters (Burke v. Fields, 2020). Burke filed a racketeer-influenced corrupt organization (RICO) suit against James Fields, Richard Spencer, his white supremacist organization the National Policy Institute, Jason Kessler, Ku Klux Klan leader David Duke, neo-Nazi groups called Vanguard America, Traditionalist Worker Party, Nationalist Front, and the Proud Boys (Burke v. Fields, 2020). In order to settle the suit, the Ku Klux Klan and David Duke paid Burke $5000 and the Traditionalist Worker Party paid Burke $10,000. A federal district court judge in Ohio ordered Richard Spencer's National Policy Institute (NPI) to pay Burke $2.4 million in May 2021,

although "it remains unclear whether Burke will see any of the money he has been awarded [from Spencer's organization]" because Spencer's NPI declared bankruptcy (Hammel, 2021).

Charging Unite the Right Leaders with Civil Conspiracy

One could argue that the cases of Rundo and Miselis converge with Sines v. Kessler, discussed below, in the sense that in all three cases, white supremacist leaders incited violence against counter-protesters. These cases diverge from each other, however, as a result of prosecutors filing criminal charges in Rundo and Miselis, but declining to file criminal charges against Unite the Right leaders, thus leaving the injured plaintiffs to file civil conspiracy lawsuits against the perpetrators.

In addition to William Burke, Elizabeth Sines and nine other counter-protesters who were injured filed a civil suit against Jason Kessler and other Unite the Right leaders (Sines v. Kessler, 2021). Kessler, with legal representation from the American Civil Liberties Union (ACLU), obtained the permit for the Unite the Right march despite Charlottesville officials' efforts to deny him the permit (Kessler v. City of Charlottesville, Virginia, 2017). During the march on the night of August 11, 2017, Kessler, Richard Spencer and Christopher Cantwell led the marchers, who sprayed tear gas and threw their burning torches at Tyler Magill, Natalie Romero, "John Doe" and other counter-protesters under the statue of Thomas Jefferson (Sines v. Kessler, 2018, 785-787). When the neo-Nazis marched by Congregation Beth Israel they shouted anti-Semitic and Nazi slogans while passing the synagogue. Daily Stormer blogger Robert "Azzmador" Ray

> carried a banner that read "Gas the kikes; race war now!" An anonymous individual later threatened to "torch those Jewish monsters" in a comment on a YouTube video, leading Charlottesville's mayor to ask for police protection for the synagogue... [A Unite the Right marcher] threw an open bottle with a "foul liquid" that hit Hannah Pearce (Sines v. Kessler, 2018, 779)....Once they had surrounded the counter-protesters at the [Thomas Jefferson] statue and torches were being thrown at counter-protesters, Ray shouted "The heat here is nothing compared to what you're going to get in the ovens!" (Sines v. Kessler, 2018, 789).

During the second Unite the Right march on the morning of August 12, 2017, Michael Tubbs ordered League of the South members to attack, yelling "Charge!" On his command, the League of the South "streamed past him to attack counter-protestors"

(Sines v. Kessler, 2018, 792). Charlottesville police determined that their assembly was "unlawful" and ordered the crowd to disperse. As people started to leave, Identity Evropa leader Eli Mosley (whose real name is Elliot Kline) sought neo-Nazis who were armed, shouting "I need shooters because we're gonna send 200 people with long rifles back to [the Thomas Jefferson] statue" (Sines v. Kessler, 2018, 791).

Elizabeth Sines and nine other plaintiffs,[‡] all of whom suffered physical or emotional injuries when neo-Nazis assaulted them, filed suit. They charged that the Unite the Right marchers entered Emancipation Park in Charlottesville in military formation, where they knocked Reverend Seth Wispelwey into a bush and knocked Natalie Romero to the ground. The plaintiffs sued Jason Kessler and several more individuals[§] along with 10 organizations[¨] that these individuals had led. Sines and her co-plaintiffs charged that Kessler and his co-defendants "had conspired to commit racially motivated violence" (Sines v. Kessler, 2018, 765). The plaintiffs' attorneys emphasized that the First Amendment does not protect conspiracy to commit physical assaults on others.

The plaintiffs submitted leaked chat conversations from Discord, a platform that the organizers had used to orchestrate the rally in private conversations that Jason Kessler had moderated. For example, before James Fields ran over counter-protester Heather Heyer and killed her,

> the possibility of running over counter-protestors was explicitly mentioned on the invite-only Discord platform before the events.... A "run them over" catchphrase was popularized on the Fox Nation website. A Discord user posted the comment "I know a North Carolina law is on the books that driving over protesters blocking a roadway isn't an offense . . . Sure would be nice" (Sines v. Kessler, 2018, 796).

[‡] The plaintiffs were Elizabeth Sines, Tyler Magill, Natalie Romero, Marcus Martin (whose ankle was broken when James Fields hit Martin with his car), Chelsea Alvarado (whom James Fields hit with his car), Melissa Blair, April Muñiz, Rev. Seth Wispelwey, Hannah Pearce and "John Doe."

[§] The individual defendants were Jason Kessler, Richard Spencer, Christopher Cantwell, James Fields (who murdered Heather Heyer), Michael Peinovich, Andrew Anglin, Robert "Azzmador" Ray, Elliot Kline (known as Eli Mosley), Nathan Damigo, Matthew Heimbach, Michael Hill, Michael Tubb, Jeff Schoep, Augustus Sol Invictus and Matthew Parrott.

[¨] The 10 defendant organizations were the Traditionalist Worker Party, Identity Evropa, League of the South, Fraternal Order of Alt-Knights, Loyal White Knights of the Ku Klux Klan, East Coast Knights of the Ku Klux Klan, the National Socialist Movement, Moonbase Holdings, Vanguard America and the Nationalist Front.

Indeed, Samantha Froelich, who had been part of Unite the Right but who has since left the movement, testified that she heard people talking about hitting counter-protesters with their cars at a party at the "Fash Loft" (short for "Fascist Loft") earlier in the summer.

In addition to leaked social media posts about driving their cars into counter-protesters, there were also leaked text messages and tweets showing that Unite the Right organizers conspired to foment violence against racial and religious minorities, which violates the law. One video on social media showed Unite the Right leader Christopher Cantwell boasting, "I came pretty well prepared,'...while pulling out three pistols, two semi-automatic machine guns, and a knife....I think a lot more people are going to die before we're done here, frankly" (Sines v. Kessler, 2018, 805). The plaintiffs argued that Kessler and his co-defendants' conspiracy deprived them of their civil rights; thus, they sought compensatory and punitive damages for their physical injuries, emotional distress and lost income.

The plaintiffs' attorney Roberta Kaplan relied on the Ku Klux Klan Act (1871), which Congress had passed during Reconstruction to stop the Klan from denying civil rights to former slaves. In response, Kessler and his co-defendants argued that the First Amendment did protect their speech; they argued that their online conversations comprised "lawful event planning." In a preliminary ruling to determine whether the plaintiffs' case could proceed to trial, federal district court Judge Norman Moon carefully considered the evidence:

> Forming an agreement to engage in criminal activities—in contrast with simply talking about religious or political beliefs—is not protected speech. Just as those conspiracies can violate the criminal law, the First Amendment [allows for] tort liability for . . . losses that are caused by violence and by threats of violence (Sines v. Kessler, 2018, 802).

Judge Moon noted that Unite the Right leaders had brought weapons such as assault rifles and had advised their marchers to "bring picket sign posts, shields, and other self-defense implements which can be turned from a free speech tool to a self-defense weapon." He added the defendants had incited violence when they encouraged their marchers to throw the burning torches at the counter-protesters, and when they ordered

their marches to "Charge!" at the counter-protesters (Sines v. Kessler, 2018, 803). Judge Moon thus rejected the defendants' argument that the First Amendment immunized them from liability, and he denied the defendants' motion to dismiss the case (Sines v. Kessler, 2018, 807). The case proceeded to trial in November 2021.

With Judge Moon presiding, a jury held that Jason Kessler and his co-defendants were liable under Virginia law for engaging in a civil conspiracy that led to the plaintiffs' injuries. The jury awarded the plaintiffs more than $25 million in damages to cover medical expenses for injuries such as concussions and a shattered leg when James Fields hit several of them with his car. Lawyers for the defendants reported, however, that their clients could not pay any damages, describing their clients as "destitute" (MacFarquhar, 2021, A-1, A-11).

Prequel: Trump's Approval of Violence against his Opponents before January 6

Long before January 6, 2021, Trump had a pattern of encouraging violence against his opponents. For example, Trump encouraged the Michigan Liberty Militia to "lock up" Michigan Governor Gretchen Whitmer (Association Press, 2020), tweeted "I LOVE TEXAS!" after Trump supporters tried to run a Biden campaign bus off the road (Smith v. Trump, 2021, 17), and tweeted that Georgia Secretary of State Brad Raffensperger was "an enemy of the people, whether he's Republican or not" (Smith v. Trump, 2021, 24).

Applying the Anti-Riot Act to January 6, 2021

Less than a week after Trump supporters stormed the U.S. Capitol on January 6, 2021, prosecutors charged the "Q-Anon Shaman" Jacob Chansley and later Mark Leffingwell with violating the Anti-Riot Act (Gerstein, 2021). Chansley later pled guilty to obstruction of a federal proceeding, and a judge sentenced him to more than three years in prison (Feuer, 2021). Leffingwell pled guilty to assaulting U.S. Capitol police officers; as part of their plea bargains, prosecutors dropped the charges against Chansley and Leffingwell under the Anti-Riot Act.

In a related case, United Pharaoh Guard leader John Subleski was not in Washington, D.C. on January 6, 2021 (United States v. Subleski, 2021); rather, he was

in Louisville, Kentucky, where he posted numerous statements to social media such as Signal and Facebook, intending to incite a "contemporaneous riot" in sympathy with the rioters at the U.S. Capitol. For example, on Facebook he posted, "Time to storm LMPD [Louisville Metro Police Department]!" Subleski then joined other members of the United Pharaoh Guard (UPG), a division of the Boogaloo Bois, where he incited them to commit violence in a riot at the Second Street Bridge. Subleski and other UPG members surrounded drivers stopped in rush-hour traffic, pointed guns at the drivers and damaged their cars. Subleski fired his gun at a driver, although the driver managed to escape. Prosecutors charged Subleski with violating the Anti-Riot Act; he pled guilty and a judge sentenced him to five months in prison (United States v. Subleski, 2021).

Civil Lawsuits Resulting from Invasion of U.S. Capitol on January 6, 2021

After the January 6, 2021 invasion of the Capitol, Acting Capitol Police Chief Yogananda Pittman told the House Appropriations Subcommittee why the U.S. Capitol would need enhanced security for the immediate future. She explained:

> We know that members of the militia groups that were present on January 6 have stated their desire that they want to blow up the Capitol and kill as many members [of Congress] as possible....They wanted to send a symbolic message to the nation [regarding] who was in charge of that legislative process (Idliby, 2021).

Several members of Congress and several police officers have filed civil conspiracy suits against Donald Trump. Both the U.S. Representatives and the police argue in their complaints that Trump should be held liable for the injuries that they suffered.

Members of Congress' Lawsuits under Ku Klux Klan Act

U.S. Representatives Bennie Thompson and Eric Swalwell have filed separate lawsuits against Donald Trump for civil conspiracy. In February 2021 Mississippi Congressman Bennie Thompson sued Donald Trump, Rudy Giuliani, the Proud Boys and the Oath Keepers, charging that they "conspired to incite" the march to the Capitol to disrupt Congress' certification of President Joe Biden's Electoral College victory. Like Elizabeth Sines and her co-plaintiffs who had sued the Unite the Right leaders, Thompson relied on the Ku Klux Klan Act, which had the purpose of protecting "against

conspiracies, through violence and intimidation, that sought to prevent members of Congress from discharging their official duties" (Ku Klux Klan Act, 1871). The National Association for the Advancement of Colored People (NAACP) joined Thompson in the lawsuit. NAACP President Derrick Johnson charged that the insurrection was a

> meticulously organized coup incited by Donald Trump....In his last act of desperation, [Trump] conspired with Proud Boys, Oath Keepers, and Rudy Giuliani to stop the constitutional process of certifying the 2020 presidential election while also disenfranchising African-American voters who cast valid ballots (NAACP, 2021).

Thompson charged that "Trump and Giuliani incited a crowd of thousands to descend upon the Capitol in order to prevent...through the use of force the counting of Electoral College votes" (Thompson v. Trump, Complaint, 2021a, 3). Thompson added that the insurrection at the Capitol was a "direct, intended and foreseeable result of [Trump and Giuliani's] unlawful conspiracy" (Thompson v. Trump, Complaint, 2021a, 3). Thompson explained that Trump's "gleeful support of violent white supremacists led to a breach of the Capitol that put my life and that of my colleagues in grave danger" (Floyd, 2021).

In April 2021, 10 members of Congress joined Bennie Thompson's lawsuit.[††] One of the 10 was Representative Pramila Jayapal, who had recently had knee-replacement surgery. The evacuation from the House Gallery caused her to suffer "throbbing pain in her greatly swollen knee," and she "endured significant pain and experienced setbacks in her... recovery" (Swalwell v Trump, 2022, 19). Enrique Tarrio had dissolved the Proud Boys in February 2021 and became the leader of the Warboys, so the amended complaint names Tarrio and the Warboys as defendants.

In July 2021 Bennie Thompson withdrew from the lawsuit after House Speaker Nancy Pelosi asked Thompson to chair the January 6 House Select Committee to investigate the causes behind the siege of the U.S. Capitol. Thompson explained that he needed to avoid the appearance of a conflict of interest; in other words, as chair of this committee, he would have access to information that might not be available to the general

[††] The 10 Congresspersons are Karen Bass (D-CA), Steve Cohen (D-TN), Bonnie Watson Coleman (D-NJ), Veronica Escobar (D-TX), Hank Johnson, Jr. (D-GA), Marcy Kaptur (D-OH), Barbara Lee (D-CA), Jerrold Nadler (D-NY), Pramila Jayapal (D-WA); and Maxine Waters (D-CA).

public. The NAACP and the other 10 members of Congress are continuing the lawsuit (still called Thompson v. Trump), however. Trump, Giuliani and the Oath Keepers filed a motion to dismiss the case, arguing that the First Amendment protected their actions on January 6; Trump further argued that he had absolute immunity from the lawsuit because he was acting in his official capacity as President on January 6.

The plaintiffs countered that Trump could not claim absolute immunity because he was "acting solely in his personal capacity" as a candidate—and not in his official capacity as President:

> The tweets [from] Trump...came from his personal (rather than official) Twitter account, and when he spoke to the assembled crowd on January 6, 2021, he continued to hold himself out as a viable candidate for the Presidency. Indeed, [the Donald J. Trump Campaign] made direct payments of at least $3.5 million to organizers of the January 6 events (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 65).

The plaintiffs also emphasized that the First Amendment did not protect Trump's actions; for example, former White House official Olivia Troye had predicted: "There will be violence on January 6 because the President himself encourages it....This is what [Trump] does....He incites it. [His supporters] think they're being patriotic because they are supporting Donald Trump" (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 8). The plaintiffs added that the FBI had obtained telephone records showing that "the Trump White House was in communication with the Proud Boys in the days leading up to the January 6 rally" (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 11-12). The Proud Boys regarded themselves as part of the "Trump Army," and set up a secure, encrypted communications channel called "Boots on the Ground" to coordinate the invasion of the U.S. Capitol on January 6 (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 12). Although the organizers of the "Save America" rally had a permit to gather at the Ellipse, it expressly stated: "This permit does not authorize a march from the Ellipse." Trump clearly violated the terms of the permit when he told his supporters to march to the Capitol building (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 14). The plaintiffs charged that there was "a coordinated plot to invade [the Capitol]: the insurrectionists shared maps, discussed the best weapons...for their assault, and communicated over

secure channels as they moved through the Capitol" (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 33). Trump also refused to send a tweet to call off the rioters when they breached the Capitol. When House Minority Leader Kevin McCarthy begged Trump to call off the rioters, Trump responded, "Well, Kevin, I guess these people are more upset about the election than you are" (Thompson v. Trump, Plaintiffs' Omnibus Memorandum, 2021b, 37).

The plaintiffs thus stressed the fact that the First Amendment did not protect Trump's speech under the Brandenburg test; they argued that Trump intended for violence to occur. The prong of the Brandenburg test requiring that violence must be "imminent and likely" was met: the rioters injured 150 U.S. Capitol and Metropolitan police officers (Cameron, 2022). Indeed, some were so severely injured that they can never work as police officers again (Gonell, 2022, A23).

In March 2021 Democratic Congressman Eric Swalwell of California filed a lawsuit against Trump, Giuliani, Republican Congressman Mo Brooks of Alabama (one of the speakers at the Ellipse) and Donald Trump Jr. (also a speaker at the Ellipse), charging that these defendants had conspired to incite the rioters on January 6 (Swallwell v. Trump, 2021). Like Bennie Thompson, Swalwell charged that Trump had "directly incited the violence at the Capitol" when he said they should "fight like hell" and "walk down Pennsylvania Avenue...and we're going to the Capitol...[Trump] then watched approvingly as the [Capitol] building was overrun" (Swalwell v. Trump, 2021, 5).

In a December 19, 2020 Tweet, Trump had asked his supporters to be at his rally on January 6; the Tweet ended with "Be there; will be wild!" Swalwell noted that in response, Trump supporter "Nameless King" tweeted: "Will be wild is a hidden message for us to be prepared...as in armed" (Swalwell v. Trump, 2021, 25). Swalwell explained that "Trump intended for his supporters to interpret his `will be wild' tweet as a call to violence, and he knew they had done just that" (Swalwell v. Trump, 2021, 26). Swalwell further argued that Trump's "will be wild" tweet along with the false election claim tweets "were in essence an offer to join a conspiracy to disrupt members of Congress from performing their duties" (Swalwell v. Trump, 2021, 48).

Even before Trump finished speaking at the Ellipse, his supporters were trying to force their way through barricades at the Capitol "while blasting Trump's speech on a bullhorn" (Swalwell v. Trump, 2021, 35). After they breached the Capitol,

> ...some of the insurgents were in helmets and full tactical gear; others carried baseball bats, hockey sticks and crutches; they had plastic handcuffs and ropes...fire extinguishers, stun guns and explosives....The insurrectionists sought out Speaker of the House Nancy Pelosi on the House floor and in her office, which they ransacked, terrorized her staff and publicly declared their intent to kill her (Swalwell v. Trump, 2021, 36-37).

As they were desperately trying to hold off the rioters, the Capitol Police told Swalwell and other members of Congress trapped inside the House to put on gas masks underneath their seats because the Capitol Police were going to use tear gas against the rioters. The Capitol Police also told them to seek shelter from possible gunfire (Swalwell v. Trump, 2021a, 37). Swallwell, fearing for his life, texted his wife, saying: "I love you very much. And our babies" (Swalwell v. Trump, 2021, 58). Swalwell also sued Trump and his co-defendants for intentional infliction of emotional distress.

In May 2021 Trump asked a judge to dismiss the suit, arguing that he had absolute immunity from suit (just as he had argued in Bennie Thompson's lawsuit). Trump's co-defendant Morris "Mo" Brooks also denied that he had conspired with Trump and the other co-defendants to incite the January 6 riot. Brooks asked the Department of Justice for scope-of-employment certification under the Federal Employees Liability Reform & Tort Compensation Act of 1988, also known as the Westfall Act (28 U.S.C. § 2679). The Westfall Act protects federal employees from common law tort suits while discharging the duties of their office. Brooks argued that when he spoke at the Ellipse, he was acting in his official role as a Congressman. Swalwell argued that when Brooks spoke at the Ellipse, this comprised campaign activity, which the Westfall Act does not cover. Brooks acknowledged that the Donald J. Trump Campaign had funded and organized the January 6 rally at the Ellipse, but insisted that his speech was part of his official duties. The Department of Justice, however, concluded that Brooks' speech at the Ellipse comprised "campaign activity," which fell outside of his official duties, and the federal district court denied Brooks' petition to substitute the United States as a

defendant under the Westfall Act (Swalwell v. Trump, Proposed Order Denying Petition, 2021c).

Lawsuits by U.S. Capitol Police Injured on January 6

In addition to the U.S. Representatives' lawsuits, U.S. Capitol Police James Blassingame and Sidney Hemby have sued Trump for inciting a riot (Blassingame v. Trump, 2021). Conrad Smith and six fellow officers (Smith v. Trump, 2021) and Bobby Tabron and DeDevine Carter (Tabron v. Trump, 2022) have also filed suits against Donald Trump for conspiracy in violation of the Ku Klux Klan Act.

Trump supporters attacked James Blassingame and Sidney Hemby with pepper spray and tear gas that burned their eyes and skin. The rioters slammed Blassingame against a stone column and struck him with their fists and flagpoles while chanting "N--r" at him; he still suffers from head and back pain. Blassingame sustained both physical and emotional injuries; he has suffered from depression in the aftermath of the January 6 siege. The rioters pinned Hemby against a metal door and struck him with their fists and with flagpoles; they injured his left hand and left knee, and he was bleeding from a gash half an inch from his eye. Blassingame and Hemby also sued Trump for intentional infliction of emotional distress. Their lawsuit echoed the claims that Bennie Thompson, Eric Swalwell and their colleagues had made: when Trump tweeted "Be there [on January 6]; will be wild, Trump's supporters interpreted this Tweet as "marching orders." For example, Trump supporter "loveshock" posted on the web site TheDonald.win, "Cops don't have standing if they are [lying] on the ground in a pool of their own blood" (Blassingame v. Trump, 2021, 12). When Trump told his followers, "If you don't fight like hell, you're not going to have a country anymore," his supporters began chanting "Fight like hell" and "Storm the Capitol" (Blassingame v. Trump, 2021, 16). After the Capitol Police desperately called for back-up, Trump "refused to condemn his followers' conduct for several hours; [this refusal] was a ratification of that conduct" (Blassingame v. Trump, 2021, 35).

Blassingame and Hemby are thus arguing that Trump violated the District of Columbia's Code § 22-1322(b) which makes it a criminal offense to incite a riot. Trump's

attorneys again countered that Trump had absolute immunity from suit as a sitting President. Law professors Evan Caminker, Andrew Kent, Sheldon Nahmod, Daphna Renan and Peter Shane filed an amicus brief on Blassingame and Hemby's behalf, arguing that presidents cannot claim absolute immunity "for actions taken outside the outer perimeter of their responsibility" (Blassingame v. Trump, Amici Curiae, 2021, 1). Caminker and his colleagues explained that on January 6, Trump was acting "not as president, but as a candidate running for president who, having lost the election, was trying to prevent the democratic process" that the Constitution mandated (Blassingame v. Trump, Amici Curiae, 2021, 2). They explained that Trump was trying to "invoke the immunity doctrine as a shield from damages liability for...his own private interests as a candidate...by forcibly interfering with...the functions of Congress" (Blassingame v. Trump, Amici Curiae, 2021, 3).

In addition to Blassingame and Hemby's suit against Trump, U.S. Capitol Police Officer Conrad Smith and six fellow officers[##] have filed suit against Donald Trump and various co-defendants.[§§] Smith and his co-plaintiffs emphasized the point that well before January 6, Trump had approved of violence against his opponents. The plaintiffs' attorneys noted that "Stop the Steal, aware that it was considered an extremist group, concealed its plans for [the January 6] rally by applying for a rally permit on Capitol grounds using a false name" (Smith v. Trump, 2021, 37).

Trump's co-defendants had also spread the lie that the 2020 was "stolen," and they had called for violence against members of the Democratic Party. For example, Alan Hostetter spoke at a Stop the Steal rally in December 2020 in which he told members of the American Phoenix Project, that "execution is the just punishment for the [Democratic Party's] ringleaders of this coup" (Smith v. Trump, 2021, 24). Proud Boys' Ministry of Self-Defense member Joseph Biggs posted on Parler that "Every law makers [sic] who

[##] The co-plaintiffs are Conrad Smith, Danny McElroy, Byron Evans, Governor Latson, Melissa Marshall, Michael Fortune and Jason DeRoche.

[§§] Along with Donald Trump, the co-defendants are the Donald J. Trump Campaign, Stop the Steal, Roger Stone, the Proud Boys, the Oath Keepers, American Phoenix Project leader Alan Hostetter, Joseph Biggs, Thomas Caldwell, and numerous individuals connected with these organizations.

breaks their own stupid f**king laws should be dragged out of office and hung." Thomas Caldwell posted that it was time to "smite [members of Congress] now and drive them down" (Smith v. Trump, 2021, 31). After the January 6 riot, Caldwell boasted, "I said let's storm the [Capitol] and hang the traitors. Everybody thought that was a good idea so we did....If we'd had guns I guarantee we would have killed 100 politicians" (Smith v. Trump, 2021, 45).

U.S. Capitol Police Officers Smith, McElroy, Evans, Latson and Fortune are Black; the rioters screamed "N----r" at them and sprayed them with pepper spray; they also struck Latson with their fists. The rioters sprayed pepper spray, mace and tear gas at Officers Marshall and DeRoche, who are white.

Smith and his fellow police officers are charging that Trump and his co-defendants violated the Ku Klux Klan Act. They are also charging that Trump and his co-defendants committed bias-motivated acts of terrorism in violation of the District of Columbia's Bias-Related Crimes Act of 1989, D.C. Code § 22-3704(a), which provides a civil cause of action for anyone who is injured "as a result of an intentional act that demonstrates [the perpetrator's] prejudice" (Smith v. Trump, 2021, 63). They also claimed that Trump and his co-defendants violated the District of Columbia's Anti-Terrorism Act of 2002, D.C. Code § 22-3152(1), and its Anti-Riot Act (D.C. Code § 22-1322), charging that Trump incited the riot and his co-conspirators participated in the riot, seriously injuring them and causing more than $500,000 worth of damage to the U.S. Capitol.

In addition to injuring U.S. Capitol police officers Blassingame, Hemby, and Conrad Smith and his co-plaintiffs, the rioters inflicted severe injuries on numerous officers of the Washington, D.C. Metropolitan Police Department. Two of these officers, Bobby Tabron and DeDevine Carter have filed suit against Donald Trump for conspiring with the Proud Boys and Oath Keepers to incite the rioters on January 6 (Tabron v. Trump, 2022). They emphasized the fact that law enforcement personnel had revealed cellular and call record data showing that just before January 6, "a member of the Proud Boys was in communication with a person associated with the White House" (Tabron v. Trump, Complaint, 2022, 14). They added that the

> organizers of the Ellipse rally used difficult-to-trace "burner phones" for communications with Trump's team. Burner phones are cheap, pre-paid cell phones designed for temporary use. They do not require users to have an account. This makes them hard to trace and ideal for concealing criminal activity (Tabron v. Trump, Complaint, 2022, 19).

Proud Boy Dominic Pezzola said "anyone they got their hands on, they would kill, including Nancy Pelosi, and they would have killed Mike Pence if given the chance" (Tabron v. Trump, 2022, Complaint 27-28).

Rioters attacked Tabron, called him a n----r, struck him repeatedly in the head so hard that they caused a concussion, and fractured his wrist so badly that hand surgeons had to implant a metal plate and screws. It was many months before he had the use of his wrist again. As a result of the concussion, Tabron cannot think clearly and his speech is slurred (Tabron v. Trump, Complaint, 2022, 34-35). Rioters attacked Carter, hit him with poles, and sprayed him with bear spray, causing him to repeatedly vomit on himself. Since January 6, 2021, he has been unable to sleep and wakes frequently with night terrors in which he is reliving the attack. Tabron and Carter argue that Trump violated the Ku Klux Klan Act by conspiring with the Proud Boys and Oath Keepers to incite a riot "with the goal of disrupting Congressional certification of Joe Biden's electoral victory" (Tabron v. Trump, Complaint, 2022, 48). "Members of the conspiracy…obtained paramilitary gear, tactical vests…and took steps to remain incognito and mask their participation in the conspiracy" (Tabron v. Trump, Complaint, 2022, 46).

Federal District Court Decision

In 2022 federal district court Judge Amit Mehta combined Thompson, Swalwell and Blassingame v. Donald Trump under the name Swalwell v. Trump (Memorandum Opinion & Order, 2022). Judge Mehta heard oral arguments on January 10, 2022. Trump's attorneys again argued that Trump was immune from suit; they further argued that the Impeachment Judgment Clause barred all civil suits against Trump because the Senate had acquitted him after the House of Representatives impeached him. Judge Mehta ruled, however, that Trump is not immune from suit, and that the Impeachment Judgment Clause does not foreclose possible civil claims against Trump (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 17). Judge Mehta explained that the

plaintiffs' injuries were "fairly traceable to Trump's actions as a co-conspirator and were not the result of some independent action of some third party" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 22).

Judge Mehta noted that the January 6 rally organizers were taken by surprise when Trump told his supporters to march to the Capitol, even though their permit stated explicitly: "This permit does not authorize a march from the Ellipse" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 39). Although Trump's attorneys argued that Trump was merely "discharging the duties of his office" in his speech at the Ellipse, Judge Mehta held that "President Trump's efforts to morph this case into one presenting a political question fails" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 42). Judge Mehta noted that Trump

> would have known about violent threats made against state election officials, which he refused to condemn. The President thus plausibly would have known that a call for violence would be carried out by militia groups and other supporters (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 71).

Judge Mehta observed that "the Proud Boys and the Oath Keepers had prepared for the January 6 rally by obtaining tactical equipment...and bear mace" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 65). Judge Mehta also held that there was enough evidence of a civil conspiracy between Enrico Tarrio, the Proud Boys and the Oath Keepers for the plaintiffs' case against them to proceed to discovery (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 78).

Judge Mehta thus found that the plaintiffs had

> established a plausible [Ku Klux Klan Act] conspiracy involving President Trump. That civil conspiracy included the Proud Boys, the Oath Keepers, Enrico Tarrio and others who entered the Capitol on January 6 with the intent to disrupt the Certification of the Electoral College vote through force, intimidation or threats" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 69).

Judge Mehta emphasized the point that

> a civil conspiracy need not involve an express agreement, so the fact that President Trump is not alleged to have ever met, let alone sat down with, a Proud Boy or an Oath Keeper to hatch a plan is not dispositive. A tacit agreement...not actually expressed, is enough (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 69).

Furthermore, Judge Mehta noted: "A plausible causal connection between the President's words and the response of some supporters is therefore well pleaded" (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 72).

Judge Mehta considered but rejected Trump's First Amendment defense:

> Only in the most extraordinary circumstances could a court not recognize that the First Amendment protects a President's speech. But the court believes this is that case. Even Presidents cannot avoid liability for speech that falls outside the expansive reach of the First Amendment. The court finds that in this one-of-a-kind case, the First Amendment does not shield the President from liability (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 81).

Judge Mehta then applied the Brandenburg test to Trump's speech:

> The President's words on January 6 did not explicitly encourage the imminent use of violence...but that is not dispositive. [The Supreme Court has] recognized that words can implicitly encourage violence....Federal appellate courts have understood the Brandenburg exception to reach implicit encouragement of violent acts....Having considered the President's January 6 rally speech in its entirety,...the court concludes that the President's statements that "We fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore"...immediately before exhorting rally-goers to "walk down Pennsylvania Avenue"... plausibly crossed the line into unprotected territory (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 92-94).

Judge Mehta acknowledged that Trump had at first said to his supporters that "[you will be] marching over to the Capitol building to peacefully and patriotically make your voices heard." The judge then contrasted this comment with Trump's concluding words when he said "And we fight. We fight like hell, and if you don't fight like hell, you're not going to have a country anymore." Judge Mehta explained that

> the President's passing reference to "peaceful and patriotic" protest cannot inoculate him....He called for thousands to "fight like hell" immediately before directing an unpermitted march to the Capitol, where the targets of [his supporters'] ire were at work, knowing that militia groups among the crowd were prone to violence. Brandenberg's imminence requirement is stringent, so finding the President's words here inciting will not lower the already high bar protecting political speech (Swalwell v. Trump, Memorandum Opinion & Order, 2022, 96-97).

Judge Mehta thus held that Swalwell v. Trump could proceed to discovery. Although Swalwell had also sued Trump for intentional infliction of emotional distress, Judge Mehta dismissed this claim.

Discussion

A Century of Assumptions about Effects of Communication

A century ago, with its "clear and present danger" and "bad tendency" tests, the U.S. Supreme Court seemed to fear that everyone who read the pamphlets of Charles Schenck or Benjamin Gitlow would immediately resist being drafted or become a Communist. In other words, Schenck's and Gitlow's pamphlets were a "magic bullet" with powerful, monolithic effects on everyone who read them (Lasswell, 1927, 214). Of course, we now realize that the magic bullet theory of communication is naïve and oversimplified. In the 1940s, Paul Lazarsfeld, Bernard Berelson and Hazel Gaudet identified the "two-step flow" theory of communication effects by which "ideas often flow from [mass media] to opinion leaders and from them to the less active [members] of the population" (Lazarsfeld, Berelson & Gaudet, 1948, 151). Several years later, researchers Albert Hastorf and Hadley Cantril suggested that we interpret news events "selectively," meaning that our response to mass media frames depends on selective perception based on our pre-existing view of the world (Hastorf & Cantril, 1954, 129-134).

When the U.S. Supreme Court decided Brandenburg (1969), it was no longer assuming that our responses to mass media messages are childlike and credulous, as the magic bullet theory would predict. Instead, the High Court was possibly assigning responsibility to both the speaker and the audience; in other words, Brandenburg requires that the speaker must intend for violence to occur (speaker's role) and also that the violence actually does occur (listeners' role). In Brandenburg, the U.S. Supreme Court also retreated from the paternalism of Schenck and Gitlow, in which it had insisted that the general public needed to be "protected" from dangerous ideas about resisting the draft or joining the Communist Party.

When the High Court decided Brandenburg in 1969, however, no one could have anticipated the all-encompassing influence of social media platforms such as

Twitter, Facebook, Discord and Parler, combined with the selective perception of Trump supporters who apparently believed Trump's lie that he had won the election. Indeed, 70% of Republicans still believe that Trump won the 2020 election (Greenberg, 2022). Furthermore, in June 2022 the Republican Party of Texas passed a resolution stating: "We reject the certified results of the 2020 presidential election, and we hold that acting President Joseph Robinette Biden Jr. was not legitimately elected by the people of the United States" (Stewart, 2022). We might say that Trump supporters' eagerness to believe "the big lie" that Trump won the 2020 election demonstrates selective perception on steroids.

Communication researcher Richard Cherwitz, asking whether or not Trump incited the January 6 insurrection, argues for a "language-in-use" approach in which he explains that "audiences subconsciously take on the values and beliefs implied by the words of a speaker, fill in the unstated premise, and behave in a manner consistent with those words" (Cherwitz, 2021). He explains:

> "Language-in-use," therefore, may offer a more persuasive way to prove that Trump's rhetoric caused the insurrection. His carefully crafted words and phrases...were repeated and then internalized by the crowd listening to the President's speech. This...enabled [Trump] explicitly and implicitly to prescribe the future behavior of his audience (Cherwitz, 2021).

Cherwitz further explains that "comparing speakers' language with the language of their audiences (language-in-use) affords us a way to infer a causal connection between words and deeds" (Cherwitz, 2021). For example, Trump repeated "Stop the steal" in his speech, and his supporters chanted "Stop the steal" as they stormed the Capitol.

In contrast to Trump's supporters, the U.S. Capitol police officers who have filed lawsuits Trump are quietly practicing what Michel Foucault described as parrhesia, or "speaking truth to power" in the sense that their lawsuits provide the truthful version of what happened on January 6. In Foucault's example of parrhesia, "a man stands up to a tyrant" (Foucault, 1983, 4); in other words, the injured police officers are attempting to stand up to the rich and powerful Donald Trump by suing him for civil conspiracy.

Incitement via the Internet versus In-Person Speech to an Angry Crowd

In Brandenburg v. Ohio (1969), Clarence Brandenburg was speaking to Ku Klux Klan members in person; he was not trying to incite violence by writing a book or a newspaper article. Although there are numerous lower court cases in which plaintiffs have tried to apply the Brandenburg test to content in "fixed media" such as books, song lyrics on vinyl records (McCollum v. CBS, Inc., 1988), violent television programs or Hollywood movies (Yakubowicz v. Paramount Pictures Corporation, 1989) judges have nearly always held that the First Amendment bars these cases.

One exception occurred in Rice v. Paladin Enterprises (1997), which involved a book that provided specific instructions on how to commit murder-for-hire and not get caught. Paladin Enterprises had stipulated that it intended for readers to learn how to commit murder-for-hire; thus, the U.S. Court of Appeals for the Fourth Circuit commented:

> Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of Hit Man's instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law (Rice v. Paladin Enterprises, 1997, 267).

The Fourth Circuit thus held that a jury should decide whether Paladin Enterprises should be held liable for its book Hit Man: A Manual for Independent Contractors after hired killer James Perry carefully followed its instructions and murdered three people. After the Fourth Circuit held that the case could proceed to trial, Paladin reached an out-of-court settlement with the victims' survivors (Smolla, 1999). The Fourth Circuit's decision suggests that even if a message is in a "fixed medium" such as a book, a court might find that highly specific instructions on how to commit murder could constitute incitement.

Rice v. Paladin Enterprises (1997) could thus provide a precedent for judges to rule that speech on the Internet can comprise incitement, even if a screen shot from the Internet appears to be more similar to a "fixed medium" such as a book, movie or a digital recording of a song. Commenting on this question, legal scholar JoAnne Sweeney

explains the questions that arise when applying the Brandenburg test to the Unite the Right rally in Charlottesville:

> The speech at issue in [the Unite the Right rally] is the repeated instructions...by organizers that both encouraged violence and specifically instructed attendees on how to carry it out. This speech is problematic under an imminence analysis because, as with most internet communications, the words were "heard" long after they were "spoken," depending on when the reader went online and read the various posts from the Unite the Right organizers. Indeed, there is really no way of knowing when those comments were read and by whom; when and who responded to the organizers' posts cannot possibly capture everyone who read them. Consequently, Brandenburg's sparse definition of incitement is ill-suited to this asynchronous manner of speech (Sweeney, 2019, 599).

Sweeney emphasizes the fact that the High Court's Brandenburg decision was meant for a speaker talking to a crowd in person, so there is some question of whether it applies to the Internet:

> Brandenburg was decided long before the Internet was created and is based on a gathering of people in a physical space. In such spaces, there is a direct interaction of the speaker and the audience; each can see each other's reactions and more easily anticipate when and if violence or illegal acts will occur at that gathering. Web sites and social media posts do not fit this model. The audience is not contained in a room; they come and go and the speaker usually cannot see them or know how many people have even heard them (Sweeney, 2019, 599).

Law professor Clay Calvert has noted that there are "multiple problems with applying Brandenburg to high-tech, mediated messages such as emails, texts, and posts on social media" (Calvert, 2019, 124). Sweeney and other legal scholars such as Lyrissa Lidsky (2015) and Darin Johnson (2021) have also noted that alt-right members have used the anonymity that certain social media provide, using false names and hiding their identities. For example, platforms such as the Daily Stormer, 4Chan and Discord made it possible for the Unite the Right organizers to "hide their speech from the public while making it available to like-minded individuals with dangerous intentions" (Sweeney, 2019, 602). Legal scholars Joshua Azriel and Jeff DeWitt argue that the Brandenburg test must be reconsidered, "given the increasingly widespread reach and impact of digital media platforms" (Azriel & DeWitt, 2022, 26).

Indeed, in 2009 the U.S. Court of Appeals for the Third Circuit applied Brandenburg to the web site of animal rights group Stop Huntingdon Animal Cruelty

(SHAC). The web site encouraged activists to engage in electronic civil disobedience against such as "Black Fax Mondays" (faxing a black sheet of paper to the Huntingdon Life Sciences laboratory or its insurance companies in order to exhaust the toner supply) or inundating the e-mail servers or telephone lines of the targeted companies, which comprised illegal activity. The web site "incited others to commit illegal acts at a designated time and place, which meets the Brandenburg standard, removing it from the realm of protected speech" (United States v. Fullmer, 2009, 158).

Legal scholars Joshua Azriel and Jeff DeWitt argue that Trump's Tweet that

> "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution..." could be appropriately characterized as incitement. One protestor, at least, used a bullhorn to read [Trump's Tweet] out loud, which prompted the crowd to call for the death of the Vice President, chanting "Hang Mike Pence!"...The rioters' efforts to try to find and harm Vice President Pence, who was whisked away to a secure location, not only reflects incitement but shows the actual danger that was triggered based on the Tweet... A mob on a mission looking for the vice president followed Trump's rhetoric. This satisfies the Brandenburg imminence standard (Azriel & DeWitt, 2022, 42, 48).

Do the Anti-Riot Act and the Brandenburg Test Need to be Updated?

Following Brandenburg v. Ohio (1969) and Claiborne Hardware (1982), the U.S. Supreme Court "has not had occasion to apply the Brandenburg test in the 40 years since Claiborne Hardware" (Swalwell v. Trump, Memorandum Opinion and Order, 2022, 87). Following Peter Bohmer's conviction for inciting anti-Vietnam war protesters to light a fire on train tracks in San Diego, prosecutors did not invoke the Anti-Riot Act again for nearly four decades. When they did, however, both the Ninth Circuit (United States v. Rundo, 2021) and the Fourth Circuit (United States v. Miselis, 2020) upheld the Anti-Riot Act as constitutional. Noting that "right-wing extremism remains the United States' deadliest terrorist threat today," legal scholar Blake Pendleton notes that "federal prosecutors are...turning to the Anti-Riot Act to substitute for the lack of a single federal statute" (Pendleton, 2021, 19).

Ironically, defendants charged under the Anti-Riot Act can often turn to the Brandenburg test as a shield, partly because of great confusion surrounding the definition of inciting a riot. Legal scholar JoAnne Sweeney explains:

> Although lower courts have attempted to apply Brandenburg to a variety of situations such as online advocacy of violence and support of terrorism, the result of their efforts has been the creation of an inconsistent and somewhat convoluted (and rarely-used) doctrine. The definition of incitement, therefore, is far from clear and in need of clarification, particularly in light of modern technology (Sweeney, 2019, 594).

Law professor Elizabeth Iglesias notes that Trump's incitement of the January 6 insurrection was unprecedented. She explains that the "obvious case for denying First Amendment protection to presidential incitement of insurrection has never been articulated precisely because such treasonous actions have not previously issued from any past...President of the United States" (Iglesias, 2021, 17). Igesias argues that because Trump was so successful in inciting thousands of his followers to commit violence on January 6, our current law of incitement based on the Brandenburg test might not be adequate. She explains:

> An electorally defeated lame duck Trump used the powers of the Office of the President to incite insurrection by right-wing militia groups against the federal government....These unprecedented abuses require...a rethinking of the framework of First Amendment incitement doctrine (Iglesias, 2021, 40).

Legal scholar JoAnne Sweeney observes that "Although courts are quite proficient at determining what is not a `call to action,' they have been largely silent as to what [a call to action] is" (Sweeney, 2019, 607). Sweeney concludes that

> Brandenburg's definition of incitement, though left largely untouched for the past several decades, has left too many uncertainties as to what incitement means and has allowed courts to view incendiary speech too narrowly....Failure to [consider the speaker's words in context] will only give a shield to those who seek to gain publicity and notoriety through the violence of their followers. The First Amendment was never intended to protect such behavior (Sweeney, 2019, 637).

Sweeney is correct in her assertion that judges need to clarify the definition of incitement (Sweeney, 2019, 594). Legal scholars Richard Wilson and Jordan Kiper would agree with her that the Brandenburg test has the "frailty" of "lack of guidance on how courts should evaluate the probability that an inciting speech act will cause an imminent offense" (Wilson & Kiper, 2020, 189). Referring to the "Brandenburg quagmire," law professor Clay Calvert would agree with Sweeney that Brandenburg "begs

for judicial clarification on the application of all three of its prongs--intent, imminence, and likelihood" (Calvert, 2019, 126, 153).

This raises the question that if a jury could find Donald Trump liable for civil conspiracy, should a jury likewise find Deray Mckesson liable for the injuries to Officer "John Doe" after a third party hit Officer Doe in the face with a rock? The (late) legal scholar Franklyn Haiman would have found neither DeRay Mckesson nor Donald Trump guilty of incitement; Haiman would have placed blame only on Mckesson's or Trump's supporters who committed the actual violence:

> Where is the lack of capacity on the part of the listeners to decide not to act as the speaker urges? Where is the control of will that can be described as triggering an inevitable chain of events? (Haiman, 1981, 279).

Haiman would probably have argued that the person who hit Officer "John Doe" in the face with a rock or slab of concrete and those who committed violence on January 6 could have chosen not to do so. In other words, assuming that Mckesson and Trump were not controlling their movements with computer chips implanted in their brains, Haiman would say that Mckesson and Trump should not be held liable for the head injuries to Officer Doe or the storming of the U.S. Capitol, respectively.

Judges are also aware of the fact that, although the Founding Fathers passed the First Amendment in part to discourage prior restraint of the press, they had no problem with putting in place punishment of destructive speech after the fact, as in the law of defamation, for example. Similarly, the Anti-Riot Act makes it clear that one can face a prison term for inciting a riot (after it occurs), but one cannot be punished for advocating future violence in the abstract.

Of course, the plaintiffs are making the claim that Donald Trump's January 6 speech was a "proximate cause" of the insurrection. Attorneys who argue that someone is a "proximate cause" of violence often take a "but...for" approach; in other words, they would say "but for" Trump's speech telling his supporters to march down to the Capitol, the siege of the Capitol and injuries to 150 U.S. Capitol and Metropolitan police officers would not have occurred.

Although the House of Representatives impeached Trump for inciting an insurrection on January 6, the Senate failed to convict him for incitement. If the Brandenburg test were applied to Trump's speech, Trump would no doubt argue that he did not intend for his supporters to injure the Capitol police officers, and Trump would also point to the fact that he told his supporters to march "peacefully" to the U.S. Capitol. The problem with the Brandenburg test is that it requires that the speaker be extremely specific in exhorting a crowd. Since Trump did not explicitly command the Proud Boys and Oath Keepers to attack and injure 150 police officers and desecrate the halls of Congress, he may avoid criminal prosecution (although he is already facing civil litigation for conspiracy).

As law professor Clay Calvert has observed, "Fathoming intent becomes a legal nightmare in cases...where the speaker denies desire to foment violence" (Calvert, 2019, 145). Would Trump have had to direct his supporters to break down the barricades and storm House and Senate chambers? He was clearly pleased that they did this, but because he spoke in generalities such as "we have to fight like hell," rather than specifics, Sweeney argues that it would be difficult to convict him under the Brandenburg test because "Brandenburg requires specific action words; incitement cannot be implied" (Sweeney, 2019, 605).

Legal scholars Joshua Azriel and Jeff DeWitt disagree with Sweeney, however. Analyzing Trump's speech on January 6, 2021, they conclude that

> the three key elements of the [Brandenburg] test—advocacy, incitement, imminence—are satisfied. Holding Trump personally responsible in this scenario would establish an updated standard of constitutional jurisprudence applicable to future speech-incitement cases (Azriel & DeWitt, 2022, 23).

Is Suing for Civil Conspiracy More Effective than Invoking the Anti-Riot Act?

After the 2017 Unite the Right march in Charlottesville, Virginia, attorney Roberta Kaplan, who represented Elizabeth Sines and her nine co-plaintiffs, explained that she decided to take on the civil suit "in the absence of decisive action by the criminal justice system" (MacFarquhar, 2021, A11). In other words, when Kaplan saw that neither state nor federal prosecutors filed any charges against Richard Spencer, Jason Kessler or

the other Unite the Right leaders, she felt that something had to be done. As is mentioned above, plaintiffs William Burke, Elizabeth Sines and her co-defendants won verdicts in which the juries awarded $2.4 million to Burke and more than $25 million to Sines and her nine co-defendants for engaging in a "conspiracy that led to [the plaintiffs'] injuries" (McFarquhar, 2021, A1).

U.S. Representatives Eric Swalwell, Karen Bass and her co-plaintiffs, along with police officers James Blassingame, Sidney Hemby, Conrad Smith, Bobby Tabron and Dedevine Carter, no doubt share the goals of Elizabeth Sines and her co-plaintiffs. In the absence of criminal charges against Donald Trump, they have filed civil conspiracy complaints and have requested jury trials.

Sines v. Kessler (2021) could set a precedent by which a jury could find Donald Trump liable for conspiring with the Proud Boys and Oath Keepers to incite the violence on January 6, 2021. Thompson v. Trump (2021), Swalwell v. Trump (2021), Blassingame v. Trump (2021), Smith v. Trump (2021) and Tabron v. Trump (2022) are still working their way through the courts, but so is Doe v. Mckesson. If Donald Trump is found liable for conspiring to incite violence against 150 police officers, will DeRay Mckesson be held liable for conspiring to incite the person who injured Officer Doe at the Black Lives Matter protest?

In June 2022 the American public learned from Cassidy Hutchinson (former aide to Trump's Chief of Staff Mark Meadows) that on January 6, Trump was furious that his supporters were required to pass through magnetometers. Hutchinson quoted Trump as saying, "I don't f—king care that they have weapons. They're not here to hurt me. Take the mags [magnetometers] away. Let the people in; they can march to the Capitol from here" (Edmondson, 2022, A15). Assuming that Trump knew that the Proud Boys and Oath Keepers had weapons and did not care, this would be a very different set of facts from Mckesson's leading a demonstration outside the Baton Rouge Police Department in which he did not anticipate any violence toward the police.

In other words, assuming that Trump had conspired with the Proud Boys and Oath Keepers via Mark Meadows' phone calls to Roger Stone (Stephens, 2022, A22), a jury might find him liable for civil conspiracy. Assuming that Mckesson had no prior

contact or knowledge of the person who severely injured Officer Doe, a jury might not find him liable for civil conspiracy, but we do not know yet because Mckesson's case is pending. With the exception of Rundo and Miselis, which demonstrated that the Anti-Riot Act still has teeth, however, plaintiffs who are injured when a speaker incites a riot may find greater success in court if they can prove civil conspiracy rather than hoping that prosecutors will invoke the Anti-Riot Act.

Looking at the "larger picture," we might note that the Roman orator Cicero "stressed the continuity of law and rhetoric and clearly saw the law as having...a general public function" (Hariman, 1990, 8). If we view a public trial as a "performance of the laws," it "becomes a singularly powerful locus of social control, for it is the very means by which members of the community know who they are" (Hariman, 1990, 17). Public trials also "function as rhetorical processes shaping the social construction of reality" (Hariman, 1990, 18). Robert Hariman explains that a public trial

> ...is a means by which we create, disseminate, judge, and ratify as facts those assumptions about the world and those values of the community that together are supposed to be informing the laws...[Our approach] is to define the many discourses of a trial as a unified rhetorical occasion...and to consider how the [trial] allows and and constrains a process through which a community defines itself (Hariman, 1990, 21, 23).

Applying Hariman's observations to the trial in Sines v. Kessler could raise questions such as, how do we define ourselves as a community or as a society? Do we allow neo-Nazis' hate speech? If we allow such hate speech but if Unite the Right marchers injure or kill counter-protesters, do we punish the perpetrators? Of course, the jury decision in which Elizabeth Sines and the other plaintiffs were awarded more than $25 million suggests that as a community, we reject the white supremacists' physical attacks.

Because the lawsuits of the U.S. Capitol police officers and the U.S. Representatives against Donald Trump for the January 6, 2021 riots have not yet proceeded to trial, we cannot predict how these trials will become public forums by which our society can define itself. Hariman explains that "the common elements [of public trials] are particularly well suited to supplying the performance of social knowledge

required by any society" (Hariman, 1990, 23). In other words, it will be extremely important to elevate these trials for civil conspiracy into the public forum. These trials would help the general public to make sense of the competing narratives of "the Big Lie," that Donald Trump won the 2020 election, versus the narrative that Donald Trump conspired with the Proud Boys and Oath Keepers to overthrow the government and stage a coup.

It seems evident that high-profile trials can have a profound influence on the public psyche when these trials become public forums. In other words, a trial for civil conspiracy would permit the U.S. Capitol police officers and U.S. Representatives to seek redress of their grievances. If these cases proceed to trial, and if these trials become public forums, they will provide a means by which the general public can gain a more clear understanding of what really happened on January 6, 2021.

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