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# Decentralizing Hate: The Use of Tort Litigation in Combating Organized Hate

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# Decentralizing Hate: The Use of Tort Litigation in Combating Organized Hate



## INTRODUCTION

In 1981, in Mobile, Alabama, a black teenager named Michael Donald was lynched[1] by two members of the United Klans of America ("UKA"), a Ku Klux Klan ("KKK") organization

1. The historical significance of the manner in which Donald was murdered cannot be ignored. Lynching, a vicious practice to which blacks have almost exclusively been subjected, has been defined as "an illegal death at the hands of a group acting under pretense of service to justice, race or tradition." *What Is Lynching?* ATLANTA J.-CONST., Apr. 28, 2002, at F7. *See generally* W.J. CASH, THE MIND OF THE SOUTH 43, 113–18, 122, 301–10 (Vintage Books 1991) (1941) (discussing the emergence of lynching in the South of the late nineteenth and early twentieth century). In response to hearing that a Mobile County jury had been unable to reach a verdict in a case involving the murder of a white Birmingham police officer by a black man, the UKA members went out and " 'drove around looking for a black man to hang.' " Hays v. State, 518 So. 2d 749, 752 (Ala. Crim. App. 1985) (quoting trial court's factual findings). They found Donald walking along the road and abducted him, beat him until he was unconscious, cut his throat three times, and hung his body from a tree in a residential neighborhood. *Id.* at 752.

responsible for some of the most vicious crimes of the civil rights era.[2] In 1988, in Portland, Oregon, Mulugeta Seraw, a twenty-six year old student from Ethiopia, was beaten to death on the sidewalk in front of his apartment building by members of a Pacific Northwest neo-Nazi group called White Aryan Resistance ("WAR").[3] In the summer of 1995,[4] near Manning, South Carolina, Macedonia Baptist Church was burned to the ground by members of the South Carolina-based Christian Knights of the Ku Klux Klan.[5]

In addition to sharing the nomenclature "hate crime,"[6] the murders of Donald and Seraw and the burning of Macedonia Baptist

2. *See* Composite Complaint at 16–17, Donald v. United Klans of Am., No. 84-0725 AH Civ. (S.D. Ala. filed Aug. 19, 1985), *available at* http://www.splcenter.org/legal/docket; *see also* MORRIS DEES & STEVE FIFFER, HATE ON TRIAL: THE CASE AGAINST AMERICA'S MOST DANGEROUS NEO-NAZI 10 (1993) (recounting the Southern Poverty Law Center's role in bankrupting the UKA and that organization's culpability for "some of the most heinous crimes of the civil rights era"). Among other crimes, members of the United Klans were responsible for the 1963 bombing of Birmingham's 16th Street Baptist Church, in which four young girls were killed, and for the 1965 murder of civil rights worker Viola Liuzzo. *See* Frank Judge, *Slaying the Dragon*, AM. LAWYER, Sept. 1987, at 83, 86–87 (describing the violent history of the United Klans).

3. *See* Amended Complaint for Wrongful Death at 4–5, Bernahu v. Metzger et al., No. A8911-07007 (Or. Cir. Ct. filed Apr. 2, 1990), *available at* http://www.splcenter.org/legal/docket; DEES & FIFFER, *supra* note 2, at 3–7.

4. In the mid 1990s there was a dramatic increase in the incidence of church burnings. From January 1995 to June 1996, there were thirty-seven suspicious fires at black churches in the South. William Booth, *In Church Fires, a Pattern but No Conspiracy*, WASH. POST, June 19, 1996, at A1. *See generally Church Burnings: Hearing Before the Senate Comm. on the U.S. Judiciary*, 104th Cong. (1996) (illustrating, through the testimony of various church leaders, government officials, and religious advocacy groups, the then-emerging problem of the burning of predominantly black churches). The rash of church burnings in the South during this period led to the enactment of the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392.

5. *See* Michael Dorman, *Klansmen Guilty in Arsons*, NEWSDAY, Aug. 15, 1996, at A19. The men who burned Macedonia Baptist Church also admitted to setting fire to Mount Zion AME Church in Greeleyville, South Carolina, and to stabbing a black man at a bus stop in June 1995. *Id.*

6. "Hate crime" was previously defined as a crime against a person or property motivated by bias against race, religion, ethnicity/national origin, or sexual orientation. *See* Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, sec. 1, § 534(b)(1), 104 Stat. 140, 140 (codified as amended at 28 U.S.C. § 534 (2000)). The Hate Crime Statistics Act of 1990 was amended by the enactment of the Violent Crime and Law Enforcement Act of 1994 to include bias against disabled persons. *See* UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 1 (2001), http://www.fbi.gov/ucr/01hate.pdf (on file with the North Carolina Law Review). According to the FBI's most recent compilation of information on hate crimes in the Uniform Crime Reports, law enforcement agencies reported 9,730 bias-motivated crimes in 2001. *Id.* at 5. As in previous years, the majority of reported hate crimes were racially motivated, but an increase in hate crimes motivated by religion and ethnicity was noted. *Id.* Since the September 11, 2001, terrorist attacks, violence against Muslims and persons of Arab descent has increased. *Id.*

Church also share a common, powerful outcome. In both of these cases, the victims' use of tort litigation led to the financial and organizational ruin of the responsible hate groups.[7] In Donald's case, the jury in a federal civil lawsuit filed against the UKA and several of its individual members delivered a verdict of $7 million for Donald's mother.[8] Unable to otherwise satisfy the enormous judgment, the UKA was forced to transfer its national headquarters to Mrs. Donald.[9] Among other facilities, the headquarters housed the private offices of Robert Shelton, the Imperial Wizard of the United Klans.[10]

In Seraw's case, a jury found that WAR, through its agents, substantially encouraged the conduct of Seraw's killers and engaged in a conspiracy that led to his death.[11] In addition to $10 million dollars in punitive damages, the jury awarded Seraw's family $2.5 million dollars in damages for Seraw's unrealized future earnings and the pain and suffering he experienced during the beating.[12] As WAR

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7. *See generally* Southern Poverty Law Center, Case Docket (describing several cases in which the Southern Poverty Law Center used civil litigation to cripple some of the largest white supremacist groups in the nation), *at* http://www.splcenter.org/legal/docket (2003) (on file with the North Carolina Law Review).

8. Final Judgment and Order, Donald v. United Klans of Am., No. 84-0725 AH Civ. (S.D. Ala. Feb. 12, 1987), *available at* http://www.splcenter.org/legal/docket; *see also* Anti-Defamation League of B'nai B'rith, The Decline of the United Klans of Am., *at* www.adl.org/issue_combating_hate/uka/decline.asp (2001) (on file with the North Carolina Law Review).

9. *See* William E. Schmidt, *Black Is Handed Deed to Offices of Klan Group*, N.Y. TIMES, May 20, 1987, at A18. In addition to losing its headquarters, the United Klans has also steadily lost its membership and seen a decline in its ability to operate on a large scale. *See* Judge, *supra* note 2, at 89 (describing the statements of Irwin Suall, an expert on the Klan with the Anti-Defamation League of B'nai B'rith: "[T]he Donald case has already caused an 'erosion' in United Klans membership. 'Their fear that they may be hit hard in their pocketbooks,' he explains, may ultimately change the way the Klan does business."); *see also* Schmidt, *supra* (stating that the membership of the United Klans has dwindled from about 30,000 in the 1960s to about 1,500 in 1987). *See generally* Craig Whitlock, *Little Left of Klan Except the Scary Name: Lawsuits and Changing Times Have Eroded South's Most Infamous Hate Group*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 30, 1997, at A15 (describing the recent decline of the KKK).

10. Schmidt, *supra* note 9.

11. *See* Judgment at 2–3, Bernahu v. Metzger, No. A8911-07007 (Or. Cir. Ct. Oct. 25, 1990) [hereinafter Judgment], *available at* http://www.splcenter.org/legal/docket; DEES & FIFFER, *supra* note 2, at 145–46 (describing the theories of liability employed against WAR and its individual defendants); *see also id.* at 142–43 (including several pages of trial exhibits used during the Seraw trial). On the fourth page of photographs located between text pages 142 and 143 is a copy of a letter from defendant John Metzger seeking to "open up communications" between his hate group, the Aryan Youth Movement, and East Side White Pride. *Id.* This letter was the proverbial "smoking gun" linking the WAR defendants to the Portland skinheads who murdered Seraw. *Id.* The jury awarded Seraw's family $10 million in punitive damages. *Id.* at 272.

12. *See* Judgment, *supra* note 11, at 4–5. The amount of each damages award was apportioned among WAR and the four individual defendants. *Id.* Metzger then mounted

was unable to satisfy the multimillion dollar judgment, Seraw's family was able to force the sale of WAR leader Tom Metzger's home and personal property.[13] The judgment in this case effectively bankrupted WAR and rendered Metzger a "pariah" in the white supremacist movement.[14] Metzger has become a pariah due to a court order allowing the Seraw plaintiffs to monitor Metzger's mail and seize half of all money contained therein.[15] Because Metzger is subject to this monitoring, he is no longer considered trustworthy within the white supremacist movement, and his role therein has been greatly diminished.[16] While the American white supremacist movement is not dormant,[17] WAR no longer occupies a position of influence in the movement.[18]

Finally, and perhaps most dramatically, a South Carolina jury returned a $37.8 million judgment against the Christian Knights of the Ku Klux Klan for its role in conspiring to burn Macedonia Baptist Church.[19] Although a judge ultimately reduced the damage award to $21.5 million, calling the $37.8 million judgment "unduly liberal,"[20] the Christian Knights of the Ku Klux Klan was forced to relinquish ownership of its headquarters in satisfaction of the judgment.[21] The property was eventually sold under a deed restricting the property from being used for Klan or white supremacist activities in the future.[22]

While numerous state and federal laws provide for the criminal

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an unsuccessful appeal to the United States Supreme Court, but he was ultimately compelled to begin satisfying the judgment. *See* Bernahu v. Metzger, 850 P.2d 373 (Or. Ct. App. 1993), *cert. denied*, 511 U.S. 1106 (1994).

13. DEES & FIFFER, *supra* note 2, at 275.

14. *See Little Money but Still a Big Victory*, NAT'L L.J., Sept. 26, 1994, at C9.

15. *Id.*

16. *Id.*

17. *See generally* Southern Poverty Law Center, Active U.S. Hate Groups in 2002, *at* http://www.splcenter.org/intel/map/hate.jsp (last visited Nov. 7, 2003) (featuring a map illustrating the location and classification of various hate groups throughout the United States) (on file with the North Carolina Law Review).

18. *See id.* (reporting on hate groups known to have actively participated in such activities as rallies, publication of racist materials or criminal acts in 2002 and omitting any reference to WAR).

19. *See* Verdict Form at 2, Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan, No. 96-CP-14-217 (S.C. Ct. Com. Pl. July 24, 1998), *available at* http://www.splcenter.org/legal/docket; *see also Klan Must Pay $37 Million for Inciting Church Fire*, N.Y. TIMES, July 25, 1998, at A7.

20. *See* Herb Frazier, *Money Klan Groups Must Pay Is Cut*, POST & COURIER (Charleston, S.C.), Nov. 10, 1998, at 3B.

21. *See* Southern Poverty Law Center, *supra* note 7.

22. *Id.*

prosecution of hate crime perpetrators,[23] tort litigation of the kind described above has emerged as a powerful complementary tool for compensating individual victims and holding hate groups responsible for the actions of hate crime perpetrators.[24] With the future of comprehensive national hate crimes legislation still uncertain,[25] tort litigation may offer victims of hate crimes individualized remedies while also serving the indirect, but arguably equally important, function of bankrupting and decentralizing violent organized hate groups. While the legitimacy of the use of tort litigation for victim compensation is well established,[26] the use of tort litigation to disband hate groups has raised serious questions regarding its tendency to chill freedom of speech.[27]

This Comment will explore the use of tort litigation in compensating victims of hate crimes and decentralizing hate groups, with an emphasis on determining whether the latter is a legitimate goal of tort litigation. Part I of this Comment will describe how organized hate groups encourage and finance the commission of hate crimes. Part II will discuss specific tort theories and strategies that

23. *See* WASHINGTON LAWYERS' COMM. FOR CIVIL RIGHTS & URBAN AFFAIRS, CIVIL AND CRIMINAL REMEDIES FOR HATE MOTIVATED VIOLENCE 10–38, 66–85, 100–246 (Sept. 1999) [hereinafter WASHINGTON LAWYERS' COMMITTEE] (providing a comprehensive summary of federal and state criminal statutes addressing hate-motivated violence), *at* http://www.equalrightscenter.org/resources/Civil&Criminal.pdf (on file with the North Carolina Law Review).

24. The Montgomery, Alabama, based Southern Poverty Law Center pioneered the use of civil litigation to bankrupt organized hate groups. For a description of the Center's approach, see Morris Dees & Ellen Bowden, *Taking Hate Groups to Court*, TRIAL, Feb. 1995, at 22, 22, 24; *see also* Brian Levin, *The Vindication of Hate Violence Victims Via Criminal and Civil Adjudications*, 1 J. HATE STUD. 133, 158–60 (2001–02) (describing eleven prominent civil lawsuits against hate groups). *See generally* WASHINGTON LAWYERS' COMMITTEE, *supra* note 23 (providing a comprehensive summary of federal and state criminal statutes addressing hate-motivated violence); Southern Poverty Law Center, *supra* note 7 (providing brief descriptions of several cases in which the Center used civil lawsuits to dismantle violent hate groups).

25. While most states have hate crime laws, Congress has yet to enact comprehensive national legislation on the issue. *See generally* WASHINGTON LAWYERS' COMMITTEE, *supra* note 23 (describing state and select federal statutes addressing hate-motivated violence). However, Congress has enacted legislation in response to specific instances of hate crimes. *See, e.g.*, Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (codified in scattered sections of 18, 28, and 42 U.S.C.) (addressing the specific problem of church burning).

26. *See generally* MARSHALL S. SHAPO, BASIC PRINCIPLES OF TORT LAW § 71.03 (1999) (describing several rationales for providing injured individuals with compensatory damages).

27. *See, e.g.*, Jason Paul Saccuzzo, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. W. L. REV. 395, 398 (2001) (arguing that the use of tort litigation aimed at bankrupting hate groups is unconstitutional because it tends to chill speech protected by the First Amendment).

have proven effective when used to penalize hate groups for the violent or destructive actions of their individual members. Part III will examine the rationales and justifications for pursuing civil remedies in addition to criminal penalties in the context of hate crimes. Part IV will address the constitutional and pragmatic arguments opposing the use of tort law as a hate crime remedy. Finally, Part V will argue that decentralizing hate groups is a legitimate goal of tort litigation.

## I. THE LINKS BETWEEN ORGANIZED HATE GROUPS AND THE COMMISSION OF HATE CRIMES

There has been considerable debate concerning how and to what extent hate crimes can be distinguished from ordinary crimes, such as those motivated by pecuniary gain. Many commentators agree, however, that in order for a criminal act to be designated a hate crime, it must be motivated by prejudice, and there generally must be a causal link between the act and the underlying prejudice.[28] In addition to this distinction, we can draw several other generalities about hate crimes. First, hate crimes are much more likely to take the form of violent personal assaults than other crimes.[29] They are also more likely to involve physical injury.[30] Finally, hate crimes are often perpetrated by two or more offenders rather than a single individual.[31]

Members of organized hate groups commit only about five percent of all hate crimes in the United States.[32] While this statistic indicates that members of identifiable groups like WAR or the KKK commit only a small fraction of hate crimes, it fails to reflect more

28. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 16–28 (1998) (identifying the prejudices that may motivate hate crimes and discussing the causal links between prejudice and hate crimes in terms of both the intensity of the prejudice and the degree of causation); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9–10 (1999) (explaining that in order to classify a criminal act as a bias crime, the bias must constitute a significant motivation for the criminal conduct).

29. JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 11 (1993) (discussing a study of hate crimes reported to Boston police in which half of the reported crimes were assaults and comparing this proportion to that found in ordinary crimes, in which seven percent of all crimes reported to police were assaults).

30. *Id.* (explaining that about a third of victims of hate crime assaults need treatment at a hospital for their injuries, as compared to seven percent for other kinds of assaults).

31. LEVIN & MCDEVITT, *supra* note 29, at 16. By contrast, most other violent crimes are committed by lone individuals. *Id.*

32. Jack Levin, *Hatemongers, Dabblers, Sympathizers and Spectators: A Typology of Offenders*, *in* THE HATE DEBATE, *supra* note 6, at 71, 73–74.

indirect ways in which hate groups contribute to the problem of hate crime. While some hate groups have openly directed their followers to engage in violence,[33] others have fostered violence in more subtle ways:

> [G]roups of white supremacists continue behind the scenes to inspire murder, assault and vandalism. They provide propaganda to individuals looking to justify their own hateful behaviour, train youngsters in the art of bashing minorities, recruit on college campuses and prisons and workplaces, and operate cable-access television programmes featuring interviews with one another. They encourage and support much larger numbers of violent offences committed by non-members who may be totally unsophisticated with respect to the ideology of hate: racist skinheads, alienated teenagers, hate-filled young men looking to have a good time at someone else's expense.[34]

By way of understanding the varying degrees to which hate groups encourage or overtly mandate the commission of hate crimes, consider the following cases.

### *A. Michael Donald: A Direct Link Between the Hate Group and the Crime*

In 1981, Michael Donald was brutally murdered by Henry Hays[35] and James "Tiger" Knowles,[36] two members of the UKA.[37] According to Johnny Matthew Jones, a former Klansman in Hays's unit, the impetus for the murder was the declaration of a second mistrial in the case of a black man accused of murdering a white

33. For example, Tom Metzger's WAR telephone hotline featured the following message on February 17, 1989: "A new law is being drafted called the Skinhead Law. Anyone killing a black or a Jew gets an automatic death penalty in Oregon. That's okay! Let's get it right out in the open and go for broke. The system plans to destroy all pro-white resistance, if they can." DEES & FIFFER, *supra* note 2, at 36.

34. Levin, *supra* note 32, at 74.

35. Hays was given a death sentence for murdering Donald, the first such sentence to be imposed on a white man for the murder of a black man since 1913. *Ex KKK Executed for Black Slaying*, COM. APPEAL (Memphis, Tenn.), June 7, 1997, at A2. Hays was executed on June 6, 1997. *Id.*

36. Knowles was only seventeen years old at the time of Donald's murder. *See* Judge, *supra* note 2, at 84. Because he pled guilty, he was sentenced to life in prison. *Id.* Knowles was later an instrumental plaintiff's witness at the civil trial which resulted in the $7 million verdict against the UKA. *Id.* at 83, 88–89.

37. *See supra* notes 1–2 (briefly describing the Donald murder and some examples of the violent history of the United Klans).

Birmingham police officer.[38] Jones claimed that during a weekly Klan meeting held prior to Donald's murder, Bennie Hays, a Klan "Great Titan" in control of the group's activities in southern Alabama, told his son [Henry Hays] to:

> "[G]et this down: If a black man could kill a white man, a white man should be able to get away with killing a black man." The other Klansmen chortled in agreement. Jones remembered that Henry Hays added, "A nigger ought to be hung by the neck until dead to put them in their place."[39]

Upon hearing news reports of the second mistrial,[40] Henry Hays and Knowles abducted Michael Donald, beat him until he was unconscious, and hanged him by the neck from a tree visible from Bennie Hays's front porch.[41]

In order to understand the causal link between Bennie Hays's statement at the weekly Klan meeting and the subsequent murder of Michael Donald, it is necessary to understand the Klan's paramilitary[42] structure. Because of the secrecy under which the KKK has traditionally operated, there is little specific information available on its exact organizational structure. Still, throughout its history, writers and historians have revealed several of the KKK's highest ranking positions and the persons occupying them.[43] As a result, it has become clear that the Klan's high ranking officers are responsible for directing the activities of its members.[44] In developing

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38. *See* Judge, *supra* note 2, at 85.

39. *Id.*

40. The second mistrial was announced on the local news on the night of March 20, 1981. Hays v. State, 518 So. 2d 749, 751–52 (Ala. Crim. App. 1985).

41. *See* Alex Duval Smith, *Electric Chair Closes Case of KKK Lyncher*, GUARDIAN (London), June 7, 1997, at 3 (describing how Donald was hanged from a tree "opposite Benny Hays's porch").

42. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1638 (1993) (defining "paramilitary" as "existing where there are no military services or existing alongside the military services and professedly nonmilitary but formed on an underlying military pattern as a potential auxiliary or diversionary military organization").

43. *See, e.g.*, J.C. LESTER & D.C. WILSON, KU KLUX KLAN: ITS ORIGIN, GROWTH, AND DISBANDMENT 135–40 (AMS Press, 1971) (1884) (featuring appendices detailing the prescript—or constitution—of the Klan, along with descriptions of the duties performed by each of the Klan's officers). United Klans Imperial Wizard Robert Shelton, for example, has received considerable attention from the media for his role in orchestrating the Klan's violent opposition to the civil rights movement in the deep South in the 1960s. *See, e.g.*, Judge, *supra* note 2, at 87 (alluding to Shelton's involvement in orchestrating attacks on Freedom Riders in Birmingham in 1961 and to inciting the murder of civil rights worker Viola Liuzzo in 1965).

44. *See, e.g.*, Judge, *supra* note 2, at 88 (describing James Knowles's deposition testimony regarding the UKA's chain of command).

the civil case against the UKA, Donald's lawyer, Morris Dees,[45] convinced Bennie Hays's wife to turn over records detailing the structure and constitution of the UKA.[46] The records described in considerable detail the military structure of the UKA and provided insight regarding its chain of command.[47] Although the official constitution of the UKA contained no policy expressly encouraging violence, the testimony of Klan members, some of whom had knowledge of more than forty years of its history, illuminated a chain of command through which violence against blacks had nonetheless been ordered.[48]

According to Knowles, one of the men convicted of the Donald murder, he took his orders from Bennie Hays, a Klan "Great Titan" whom he claims suggested the killing. Bennie Hays, in turn, took his orders from Robert Shelton,[49] the Imperial Wizard of the UKA since its formation in 1961.[50] During the weekly meeting described above, Henry Hays, a Klan leader known as an "Exalted Cyclops,"[51] was told not just to listen to, but to write down, a statement of Bennie Hays[52] condoning the murder of blacks in retaliation for the pending mistrial.[53] When Bennie Hays learned of Donald's murder, he appeared to be pleased, and is said to have commented that it was going to look good for the Klan.[54]

The *Donald* case thus illustrates a relatively direct connection between hate group membership and the commission of a violent hate crime. That Bennie Hays ordered Henry Hays to write down the statement provides additional support for the view that, in making the statement, Bennie Hays was authorizing his subordinates to carry out the murder of a black person in retaliation for what he perceived as

45. *See* Donald v. United Klans of Am., No 84-0725 AH Civ. (S.D. Ala. 1987). For a brief overview of Dees's work as a civil rights attorney and co-founder of the Southern Poverty Law Center, see generally MORRIS DEES, A SEASON FOR JUSTICE (1991); Southern Poverty Law Center, Pioneers of Justice and Equality (2003) (providing links to biographies of the Center's co-founders, Morris Dees and Joe Levin), *at* http://www.splcenter.org/center/about.jsp (on file with the North Carolina Law Review).

46. Judge, *supra* note 2, at 86.

47. *Id.*

48. *Id.*

49. *Id.* at 88.

50. *Id.* at 86.

51. For a listing of the titles and hierarchy of Klan leaders and a general description of the organization of the KKK, see Afro-American Almanac, *Ku Klux Klan Organization and Principles 1868*, *at* http://www.toptags.com/aama/docs/kkk.htm (last visited Sept. 6, 2003) (on file with the North Carolina Law Review).

52. *See id.*

53. *See* Judge, *supra* note 2, at 85.

54. *Id.* at 83.

the injustice of the impending second mistrial. Without the cooperation of Bennie Hays's wife in turning over key Klan documents, it might have been difficult to prove that Hays's statement at the Klan meeting was anything other than hateful, but otherwise harmless, rhetoric. Such language generally cannot give rise to liability.[55] However, Bennie Hays's statement on the night of the Klan meeting, while possibly rhetorical in the abstract, assumed the unmistakable character of an order communicated through the chain of command when he asked his son and Klan subordinate to write it down.[56]

### *B. Benjamin Smith: An Indirect Link Between the Hate Group and the Crime*

In 1999, twenty-one year old college student Benjamin Smith shot and killed two people and injured nine others[57] before committing suicide.[58] Smith was a follower of the white supremacist, neo-Nazi World Church of the Creator ("WCOTC"),[59] which advocates a general "RaHoWa" (racial holy war):

> We gird for total war against the Jews and against the rest of the goddamned mud races of the world—politically, militantly, financially, morally and religiously. In fact we regard it as the heart of our religious creed, and as the most sacred credo of all. *We regard it as a holy war to the finish—a racial holy war.*[60]

Smith first met WCOTC's leader, Matthew Hale,[61] in the spring

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55. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (establishing that the First Amendment guarantee of freedom of speech does not allow states to forbid advocacy of the use of force except where it is calculated to incite imminent lawless action).

56. *See* Judge, *supra* note 2, at 85.

57. All of Smith's victims were black, Asian, Asian-American, or Jewish. *See* Bill Dedman, *Midwest Gunman Had Engaged in Racist Acts at 2 Universities*, N.Y. TIMES, July 6, 1999, at A1 (describing Smith's careful selection of only black, Asian, or Jewish victims).

58. *Id.* Smith killed Ricky Byrdsong, a black former Northwestern University basketball coach, and Won Joon Yoon, a Korean student at Indiana University. *Id.*

59. For a general description of this white supremacist, neo-Nazi group, see Southeastern Connecticut Gang Activities Group, *Hate and Occult Group Information*, *at* http://www.segag.org/hatemain.html (last visited Oct. 13, 2003) (on file with the North Carolina Law Review). For an overview of the WCOTC's growth nationwide, see Southern Poverty Law Center, *supra* note 7.

60. *See* Anti-Defamation League of B'nai B'rith, *Recurring Hate: Matt Hale and the World Church of the Creator* (quoting BEN KLASSEN, RAHOWA! THIS PLANET IS ALL OURS 12 (1987) (emphasis added)), *at* http:www.adl.org/special_reports/wcotc/wcotc-intro.asp (March 1998) (on file with the North Carolina Law Review).

61. Hale, the leader of the World Church of the Creator, is a 1998 graduate of the Southern Illinois University School of Law. *See* Matt O'Connor, *Hale Held in Plot To Kill Judge; Professed Racist Grabbed by FBI Before Hearing*, CHI. TRIB., Jan. 9, 2003, at N1.

of 1998 when Hale was recruiting on the campus of the University of Illinois at Champaign-Urbana.[62] During the year Smith spent as a member of the WCOTC, he was recognized for his "service" to the group[63] and often voiced his desire to use violence to advance the goals of the WCOTC, a desire Hale claims to have discouraged.[64]

Despite Smith's obvious involvement with the WCOTC and with Hale, Hale has attempted to distance his group from the shootings by pointing out that Smith had resigned from the group in May 1999, prior to committing the crimes.[65] The connection between Smith's crimes and the advocacy of violence by the WCOTC would therefore seem attenuated at best. Given the lack of evidence regarding a direct order to commit murder through a formal chain of command, the connection is less conclusive than was the connection between Hays and Knowles's affiliation with the UKA and the murder of Michael Donald. Still, the underlying philosophy of the WCOTC is unambiguously violent.[66] Specifically, the use of war metaphors and phrases like "holy war to the finish" seems calculated to promote a bellicose and violent mood among WCOTC's followers with regard to other racial and minority groups.

The WCOTC, rather than taking the Klan's paramilitary approach, has adopted "leaderless resistance,"[67] a strategy which

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Although he passed the Illinois bar exam in June 1999, shortly before the beginning of Smith's Midwest shooting spree, Hale was denied admission to the Illinois State Bar. Megan O'Matz, *White Supremacist Loses Bid to Join Bar*, CHI. TRIB., July 4, 1999, at C3. A hearing board determined that Hale's racist views were irreconcilable with the Illinois Bar's character and fitness requirements. *Id.*

62. Dedman, *supra* note 57.

63. *See* Kirsten Scharnberg et al., *The Making of a Racist*, CHI. TRIB., July 25, 1999, at C1 (reporting that Smith had been named "Creator of the Year" for his aggressiveness in recruiting new members and distributing WCOTC literature).

64. *See* Stephen Beaven, *Benjamin Nathaniel Smith: Portrait of a Killer; Consumed by Rage*, INDIANAPOLIS STAR, Aug. 22, 1999, at 1A.

65. *See* Jim Nesbitt, *Hate Groups Keep Practitioners at Arm's Length*, ARK. DEMOCRAT-GAZETTE, July 18, 1999, at J1.

66. The WCOTC is not as well known as the KKK for advocating specific acts of racially motivated violence, although its members have been accused of such acts on several occasions. *See generally Supremacist Guilty in Killing*, ST. PETERSBURG TIMES, July 30, 1992, at 4B (reporting the conviction of a WCOTC leader, George Loeb, for murdering Harold Mansfield, a black sailor); Jodi Wilgoren, *White Supremacist Is Held in Ordering Judge's Death*, N.Y. TIMES, Jan. 9, 2003, at A16 (reporting the arrest of WCOTC "Pontifex Maximus" Matt Hale's arrest on charges that he had solicited someone to murder a federal judge presiding over a copyright trial regarding his group's name, "World Church of the Creator").

67. *See generally* Louis Beam, *Leaderless Resistance*, 12 SEDITIONIST (Feb. 1992) (outlining the leaderless resistance approach for use by anti-government militia groups), *at* http://www.louisbeam.com/leaderless.htm (on file with the North Carolina Law Review). Beam is a prominent leader of the American white supremacist and neo-Nazi movements.

relies "on hate groups advocating racial violence in abstract terms, a constitutionally protected form of free speech that can be turned into specific action by a lone gunman or a small group of racial terrorists."[68] Hate groups implement this strategy by mounting massive propaganda campaigns targeting disgruntled individuals who might be particularly receptive to their hate-filled messages[69] and willing to act on them.[70] When analyzed in the context of leaderless resistance theory, Smith's careful selection of only non-white victims[71] seems to be directly linked to the WCOTC's exhortation to its members and to whites in general to pursue a racial holy war.[72] The dangerous brilliance of leaderless resistance theory, as illustrated by the Smith shootings, is that it allows hate groups to mandate violent actions, while using freedom of speech to insulate them from liability when individuals act on the group's abstract advocacy of racially motivated violence.[73]

While it cannot be argued that any leader of the WCOTC directly ordered Smith to start shooting blacks, Asians, and Jews as part of the "RaHoWa," the violent implications of the group's philosophy clearly supported such an action. It appears that Smith deliberately chose his victims from among the groups Ben Klassen vilified in his description of "RaHoWa."[74] That Smith resigned from the WCOTC shortly before going on his shooting spree is also significant. In hate groups operating under a leaderless resistance philosophy, it is standard practice for group members to dissociate themselves from the group prior to taking violent action.[75] Because it does not appear that any disenchantment with the WCOTC

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*See* Anti-Defamation League of B'nai B'rith, *Extremism in America: Louis Beam*, *at* http://www.adl.org/learn/Ext_US/beam.asp? xpicked=2&item=beam (last visited Oct. 29, 2003) (on file with the North Carolina Law Review).

68. Nesbitt, *supra* note 65.

69. *See* Levin, *supra* note 32, at 73–74 (describing in general terms the manner in which hate groups use propaganda and other techniques to inculcate non-members with the values of the hate group).

70. *See* Nesbitt, *supra* note 65 (explaining that "[t]hrough the Internet, shortwave radio broadcasts and publications, an individual can plug into the racist philosophy of a particular hate group and unilaterally decide to take violent action without receiving specific instructions from group leaders").

71. *See* Dedman, *supra* note 57 (describing Smith's selection of black, Asian, and Jewish shooting victims).

72. *See* Anti-Defamation League of B'nai B'rith, *supra* note 60.

73. *See* Nesbitt, *supra* note 65 (providing an overview of the application of leaderless resistance theory to the operation of hate groups).

74. *See supra* note 60 and accompanying text.

75. *See supra* note 60 and accompanying text.

motivated Smith's resignation,[76] it is reasonable to assume that his reason for resigning was to protect the group from the possible consequences of the violence he planned to commit.

It is important to understand the varying degrees to which hate groups incite acts of violence. It is only by establishing a sound connection between the commission of hate crimes and the corresponding advocacy of violence by hate groups that these groups can be held accountable in tort litigation.[77] Where highly organized groups like the KKK are concerned, it is relatively simple to establish civil liability by tracing violent mandates through an established chain of command.[78] However, with the emergence of leaderless resistance and intentionally loosely organized groups, it may become more difficult to hold hate groups civilly liable for hate crimes because there is a careful avoidance of expressly advocating or condoning such crimes.[79]

## II. SUCCESSFUL CIVIL STRATEGIES

The establishment of some causal connection between hate groups and the perpetrators of hate crimes has been crucially important to the successful use of tort litigation against hate groups.[80] The *Restatement (Second) of Torts* sets forth a guiding principle for understanding how these connections can give rise to liability:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach

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76. According to Hale, five days before Smith died, he dropped by to pick up some WCOTC leaflets for distribution. Kirsten Scharnberg, *FBI Agents Quiz Church Leader Over Rampage; Investigators Look at Hale's Contact with Smith Before Attacks*, CHI. TRIB., July 8, 1999, at N1. Even though Smith officially resigned from the WCOTC in April 1999, it is clear that he continued his affiliation with the group right up until the time of his death. *See id.*

77. *See generally* Dees & Bowden, *supra* note 24 (describing the Southern Poverty Law Center's civil strategies for holding hate groups accountable for hate crimes, several of which depend exclusively on establishing a connection between the hate group and the commission of the hate crime in question).

78. *See* Judge, *supra* note 2, at 88 (reporting Knowles's testimony regarding the UKA's chain of command); *see also* Afro-American Almanac, *supra* note 51 (describing the hierarchy of official positions within the KKK).

79. *See* Nesbitt, *supra* note 65 (discussing the application of leaderless resistance theory to the operation of hate groups).

80. For an overview of such civil strategies, see generally SCOTT FREY, PRELIMINARY REPORT: UNITED STATES CASE LAW RELATING TO THE CIVIL LIABILITY OF GROUPS THAT PROMOTE VIOLENCE (Aug. 2001), *available at* www.auslaenderschutz-durch-zivilrecht.de/en/usareport.pdf (on file with the North Carolina Law Review).

> of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[81]

This Section discusses the application of civil conspiracy, aiding and abetting, and respondeat superior theories within the context of hate crimes.

### *A. Conspiracy*

Where tortious acts are committed in furtherance of a common design for "cooperation in a tortious line of conduct or to accomplish a tortious end," the parties are said to be engaged in a conspiracy.[82] In its case against Tom Metzger and the WAR defendants, the Southern Poverty Law Center presented the theory of civil conspiracy to the jury as a ground for establishing the connection between WAR and the Seraw murder.[83] In order to prove a civil conspiracy in the context of a hate crime, the plaintiff must establish the following elements: (1) that the defendants agreed upon a course of action, (2) that the purpose of the course of action was to encourage hate crimes, (3) that the resulting violence advanced the course of action, and (4) that the violence was illegal or tortious.[84] In the WAR case, for example, liability was premised on the idea that Metzger dispatched Dave Mazella to Portland to forge ties between WAR and the skinhead gang East Side White Pride, members of which later murdered Seraw.[85] Prior to Mazella's arrival in Portland, John Metzger had written a letter to East Side White Pride, desiring to "work with [them]."[86] The theory of WAR's liability was that WAR and East Side White Pride entered into a tacit agreement to engage in hate-motivated violence, that such violence, in the form of Seraw's murder, occurred, and that the violence advanced the purposes animating that agreement.

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81. RESTATEMENT (SECOND) OF TORTS § 876 (1979) [hereinafter RESTATEMENT].

82. *Id.* § 876 cmt. b.

83. Dees & Bowden, *supra* note 24, at 25–27.

84. *Id.* at 27. For a description of the more general elements of civil conspiracy, see generally Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983), and Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D. S.C. 1981).

85. Dees & Bowden, *supra* note 24, at 25–27.

86. *Id.*

### B. *Aiding and Abetting*

The theory of aiding and abetting has also been instrumental in establishing the culpability of hate groups in the context of hate crimes. The *Restatement* illustrates the theory using the following example: "A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice."[87] Under this theory, a person who encourages another to commit tortious conduct is responsible for the other person's act if the encouragement or advice was a "substantial factor" in causing the tort.[88] Take, for example, Bennie Hays's statements at the Klan meeting preceding Michael Donald's murder.[89] Although Hays did not expressly order his Klan subordinates to commit murder, he clearly condoned the murder of a black person as an appropriate response to "a black man . . . [getting away with] kill[ing] a white man."[90] It is reasonable to conclude that Hays's statement was a "substantial factor" in causing Donald's death, since the Klansmen who killed him felt the need to hang his body from a tree within view of Hays's front porch,[91] presumably to signal to Hays that his suggestion had been carried out.

### C. *Respondeat Superior*

Under the doctrine of respondeat superior, an employer can be held liable for its employees' acts undertaken within the scope of their employment.[92] Hate groups are arguably more similar in their structures to voluntary "civic" organizations than to traditional employers, so the use of respondeat superior in civil proceedings against hate groups is probably not common. Still, the doctrine bears mentioning because a recent lawsuit netting $6.3 million against the Idaho based Aryan Nations used repondeat superior to establish the group's liability.[93]

In the Aryan Nations case, three of the group's security guards were convicted of aggravated assault in connection with an attack on

87. *See* RESTATEMENT, *supra* note 81, § 876 cmt. d, illus. 5.

88. *Id.* § 876 cmt. d.

89. *See* Judge, *supra* note 2, at 85.

90. *Id.*

91. *Id.* at 84.

92. For a description of the respondeat superior doctrine, see FREY, *supra* note 80 and accompanying text.

93. Judgment, Keenan v. Aryan Nations, No. CV99-441 (Idaho Dist. Ct. Sept. 8, 2000), *available at* http://www.splcenter.org/legal/docket. *See generally* Michael F. Leavitt, Keenan v. Aryan Nations: *Making Hate Groups Liable for the Torts of Their Members*, 37 IDAHO L. REV. 603 (2001) (describing the litigation against Aryan Nations).

a mother and son who had been driving by the group's compound in rural Idaho.[94] The mother and son had turned their car around in order to recover a wallet that had been accidentally dropped from the window.[95] The defendants claimed that they heard gunshots, so they followed the car and forced it into a ditch.[96] One of the defendants proceeded to strike the mother on the face with his gun and drag her out of the car by her hair, while another held a gun to her son's back, threatening to kill them.[97] The defendants later admitted that they "roughed up" the mother and son because they thought they were members of a local Jewish group that opposed the Aryan Nations.[98]

In deciding the case, the Idaho court undertook to determine whether, under established agency principles set forth in the *Restatement (Second) of Agency*, the security guards were acting within the scope of their employment.[99] Under the *Restatement*, the conduct of an employee is generally considered to be within the scope of employment if:

> (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.[100]

The plaintiffs prevailed in this case because they were able to show that defendants acted within the scope of their employment and on the authority of Richard Butler, the leader of the Aryan Nations, when they chased the plaintiffs.[101] Because the defendants attacked the plaintiffs while on duty just outside the compound, they were acting "within the authorized time and space limits."[102] Furthermore, the use of force was expectable to Butler, who had advocated "extermination" of the Jews and had reason to believe that his security guards would use force against persons they believed to be trespassing Jews.[103]

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94. Leavitt, *supra* note 93, at 608.

95. Amended Complaint at 5, Keenan v. Aryan Nations, No. CV99-441 (Idaho Dist. Ct. May 24, 1999) [hereinafter Amendment Complaint], *available at* http://www.splcenter.org/legal/docket.

96. *See* Leavitt, *supra* note 93, at 608; Amended Complaint, *supra* note 95, at 5.

97. Amended Complaint, *supra* note 95, at 5.

98. Leavitt, *supra* note 93, at 609.

99. *Id.* at 620.

100. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

101. Leavitt, *supra* note 93, at 621–22.

102. *Id.*

103. *Id.*

In addition to these general tort doctrines, the liability of hate groups may also be premised on various statutory or common law provisions. For example, Oregon's wrongful death statute was one of the bases for proceeding against WAR in the Seraw case.[104]

## III. ARGUMENTS FOR PURSUING CIVIL REMEDIES THROUGH TORT LITIGATION

Criminal prosecution is well-suited to administering punishment to individual perpetrators of hate crimes.[105] However, the experience of the criminal legal system for victims of hate crimes and their families may prove unsatisfactory on several levels. First, while criminal prosecution imposes punishment on the actual perpetrator of a hate crime, it often fails to root out and punish the hate group that provided the impetus for the crime. This failure may be attributed to a number of factors, including the strict burden of proof and rather narrow discovery rules that inhere in criminal procedure.[106]

Second, criminal punishments are based primarily on the attributes of the perpetrator, not the needs of the victim. While victim impact statements may influence sentencing,[107] the determination of punishment is largely guided by predetermined sentencing guidelines in federal court and the characteristics or history of the person convicted, i.e., whether he or she has a prior

104. Dees & Bowden, *supra* note 24, at 24.

105. *See generally* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 29–77 (2d ed. 1999) (discussing the principles of punishment in the context of the criminal law).

106. In criminal law, the prosecution is required to prove a defendant's guilt beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 362–64 (1970); *see also* DRESSLER, *supra* note 105, at 10–14 (providing an overview of proof beyond a reasonable doubt). In addition, criminal discovery rules tend to be considerably stricter than civil discovery rules. *See* MYRON MOSKOVITZ, CASES & PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM 91–92 (3d ed. 2000) (explaining some of the differences between civil and criminal discovery). In attempting to hold hate groups criminally liable, prosecutors are restrained by the difficulty of proving a hate group's culpability beyond a reasonable doubt, especially if an individual has already been convicted of the crime. Stricter discovery may also prevent prosecutors from obtaining the information necessary to link a hate group to a specific crime. For example, because depositions are usually not allowed in criminal discovery, prosecutors may be unable to properly illuminate the often shadowy or complex power structures of hate groups. *See id.* at 92.

107. *See* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 203 (1988) (describing how information provided in victim impact statements, including "the circumstances surrounding the crime and the manner in which the crime was perpetrated, the identity and characteristics of the victim, the effects of the crime on the victim and the victim's family, and the victim or victim's family's opinion of the defendant and of an appropriate sentence," can influence the ultimate sentencing decision).

criminal record.[108] As such, the criminal sentences levied on hate crime perpetrators often fail to reflect the input or objectives of hate crime victims, such as a possible preference for punishment in the form of restitution or community service instead of jail time[109] or a desire to purge vengeful feelings by participating in decisions regarding the punishment of the person or persons who wronged them.[110]

Third, victims and their families have little, if any, control over the operation of criminal prosecutions. While victims may serve as instrumental prosecution witnesses, and they and their families may provide testimony influencing the sentencing of hate crime perpetrators,[111] the extent to which victims and their families are empowered by the process of criminal prosecution is limited. Empowering victims to participate in the criminal justice process is important in the context of violent crime, but because of the criminal law's focus on the rights and needs of defendants and the idea that the crime is against society generally, there are few opportunities for such empowerment.[112] Because tort plaintiffs sue to vindicate their own interests, retain attorneys of their own choosing, and have considerable input into the manner in which their cases are presented, hate crime victims and their families are necessarily more empowered by the process of tort litigation than that of criminal prosecution.

Finally, hate crime prosecutions are unlikely to raise public consciousness about the problem of organized hate unless the crimes were particularly heinous, involved someone of notoriety, or, more importantly, involved a clear connection between the crime and a

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108. *See, e.g.*, 18 U.S.C. § 3553(a) (2000) (listing seven considerations guiding sentencing, including the nature of the offense and the history and characteristics of the defendant; the types of sentences available; the type of sentences and sentencing ranges established for the particular offense, and the need to avoid sentence disparities between defendants with similar records or who have been convicted of similar crimes); N.C. GEN. STAT. § 15A-1340.13 (2001) (providing that for sentences imposed for felony convictions, the judgment of the court should contain a minimum sentence determined with respect to the class of the offense and the prior record level of the offender).

109. *See* Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?* 8 ST. JOHN'S J. LEGAL COMMENT. 225, 233–34 (1992) (describing a 1978 study in Dade County, Florida, in which victims participated in pretrial conferences and explaining that in one of the three test courtrooms, the rate of incarceration was reduced as a result of victims preferring sentences that required community service or restitution).

110. *See id.* at 236 (explaining that victims may experience a constructive form of catharsis by participating in plea-bargaining negotiations).

111. *Id.*

112. *See id.* at 225 (examining victims' roles in the criminal justice system and advocating state constitutional amendments supporting victims' rights).

hate group. It may be very important to the victims of hate crimes and their families to use their stories to educate the general public about the activities of the hate group responsible for the crime.[113] Unlike a murder, assault or vandalism trial, the impact of which might be diluted by the sheer number of similar trials, a civil lawsuit demanding millions of dollars in damages may command a great deal of attention. Consider, for example, the Donald lawsuit against the UKA. While the criminal trial of Henry Hays garnered much local attention, it was Mrs. Donald's victory in the civil suit that ultimately grabbed national headlines and placed a spotlight on her son's violent death and the hate group responsible for it.[114] Predictably, the civil lawsuit resulting in an elderly black woman taking title to the national headquarters of one of the most violent KKK groups in history was much more widely reported than Hays's criminal conviction for the murder. Had Mrs. Donald been satisfied with Hays's conviction alone, history might have recorded her son's death as a garden variety robbery-murder, which, though horrible, would have failed to highlight the murderous consequences of white supremacists' vicious race hatred.

The publicity objective may be frustrated still further by the proliferation of plea-bargaining, which has become a common method of disposing of criminal cases.[115] If the perpetrator of a hate crime opts to plead guilty pursuant to a plea agreement in order to avoid trial or a more severe punishment, publicity surrounding the crime, the perpetrator, and the culpability of the hate group may be virtually nonexistent.

The criminal legal system is therefore not the best forum in which to address the full scope of the injuries of individual hate crime

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113. For Beulah Donald, this goal must have been an important part of her civil lawsuit against the UKA. Investigators did not initially believe her son's murder was motivated by racial hatred. Rather, they speculated that his murder was drug-related. *See* Damon Henderson Taylor, *Civil Litigation Against Hate Groups: Hitting the Wallets of the Nation's Hate-Mongers*, 18 BUFF. PUB. INTEREST L.J. 95, 129 (2000).

114. Mrs. Donald's lawsuit has been credited with bringing down the Klan in Alabama. *See* Anti-Defamation League of B'nai B'rith, *supra* note 8 (acknowledging Mrs. Donald's victory in her lawsuit as the "beginning of the end" for Alabama's United Klans of America). The lawsuit made her such a recognized figure that her obituary and the story of her struggle against the Klan appeared in the *Chicago Tribune* when she died. *Beulah Donald, "Woman Who Beat the Klan"*, CHI. TRIB., Sept. 19, 1988, at C7.

115. *See generally* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, ch. 1, (A)(4)(c) (Nov. 2002) [hereinafter SENTENCING COMMISSION, GUIDELINES MANUAL] (stating that "[n]early ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement"), *available at* http://www.ussc.gov/2002guid/2002guid.pdf.

victims or the true culpability of the hate groups that may have sponsored the crimes. These functions are best served by the civil legal system's application of tort law, which is structured to facilitate both the compensation of injured individuals and the imposition of punishment on wrongdoers.[116] Because tort law, unlike the criminal law, is not primarily concerned with attending to the interests of society as a whole,[117] it is able to offer plaintiffs a more flexible framework within which to pursue individualized remedies.

Tort litigation serves many practical purposes, including "vindication of certain personal rights,"[118] compensation of wronged parties,[119] acknowledgement of the ability of actors to control the activities and lives of others,[120] punishment, and/or retribution.[121] Alongside these practical rights, however, there is another purpose of tort litigation that is anchored in the concept of individual dignity and equality. This purpose of tort litigation is best understood with reference to Professor Leslie Bender's vision of tort law as a tool for social justice.[122] According to Professor Bender, tort law is an especially appropriate medium for those injured by social injustice and dignitary harms because it empowers victims to make important choices about whether and how to present their claims and provides them with opportunities to publicly air their grievances:

> Injured parties are empowered by their access to a public forum and the judgment of community members in the halls of justice .... Tort law empowers injured parties to call the harm-

116. *See* SPECIAL COMM. ON THE TORT LIAB. SYS., AM. BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-171 to 4-172 (1984) [hereinafter AMERICAN BAR ASSOCIATION] (stating that "it seems clear that a punishment rationale is firmly fixed in the law of torts, if for no other reason than its appearance, both explicitly and implicitly, in many decisions awarding punitive damages"); *see also* RESTATEMENT, *supra* note 81, § 901 cmt. c (identifying punishment as one of the purposes of punitive damages).

117. *See* SHAPO, *supra* note 26, at ¶ 1.04 (explaining that "[s]ome theorists have insisted that the principal goal of tort law is to achieve corrective justice between individuals, without reference to 'broader social considerations' "); *see also id.* ¶ 1.01 (pointing out as a crucial distinction between tort law and criminal law the fact that criminal prosecutions are brought by the State in order to "vindicate the interests of society as a whole").

118. AMERICAN BAR ASSOCIATION, *supra* note 116, at 3-1.

119. *Id.* at 4-29.

120. *Id.* at 4-116.

121. *Id.* at 4-170.

122. *See generally* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249 (1998) (discussing the conception of tort law as a tool for the vindication of personal dignity and as a means for achieving social justice).

> causing defendants to court and to require them to justify themselves and defend their actions .... Tort provides injured parties with court-ordered remedies and even more importantly with a public acknowledgement that they were wronged. A tort judgment can psychologically vindicate and emotionally validate plaintiffs' or defendants' senses of fairness and justice. Tort judgments assessing liability against defendants for blameworthy conduct also have reverberating social and reputational consequences which often satisfy injured plaintiffs' desires for punishment or vengeance.[123]

Professor Bender's vision of the tort law describes a medium well-suited to the needs of hate crime victims, a medium in which it is possible for victims to make tactical decisions and to expose their assailants to the moral judgment of the community. It is this vision of tort law that allows hate crime victims to preserve their personal dignity by taking control of the process by which responsible hate groups may be held accountable for causing them pain.

In addition to the personal dignity rationale, three practical rationales support the use of tort litigation in the context of hate crimes; each is rooted in distinctions between the criminal and civil legal systems.[124] First, while civil litigation often results in punishment for wrongdoers, one of its primary functions is compensating the victim of a wrong.[125] Because of the focus on victims of wrongdoing, civil litigation may provide individualized remedies of more direct and personal significance to hate crime victims than does criminal prosecution, which focuses primarily on punishing the wrongdoer.[126]

Second, civil penalties often take the form of money damages. The "work" of a hate group is unlikely to be disrupted by the criminal conviction of one, or even several, of its members.[127] However, the

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123. *Id.* at 259.

124. For a general analysis of the distinctions between civil and criminal law, see generally Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996).

125. *See generally id.* (discussing the "pricing" of conduct under civil law).

126. *See* SENTENCING COMMISSION, GUIDELINES MANUAL, *supra* note 115, at ch.1(A)(2) (identifying the purposes of criminal punishment as "deterrence, incapacitation, just punishment, and rehabilitation"—all of which focus on the perpetrator).

127. Consider, for example, the unabated violence orchestrated by the Ku Klux Klan in the 1960s in the South. *See* Composite Complaint at 10–11, Donald v. United Klans of Am., No. 84-0725 AH Civ. (S.D. Ala. Aug. 19, 1985) (describing incidents of violence carried out by the United Klans during the civil rights movement), *available at* http://www.splcenter.org/legal/docket; JOHN TURNER, ET AL., SPECIAL REPORT: THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 29 (1981) (listing in detail forty-four of the violent incidents perpetrated by the Klan in the late 1950s and 1960s). Despite

imposition of money damages has the potential, in some cases, to bankrupt the group entirely and thereby limit its ability to function.[128] If the goal of the hate crime victim as tort litigant is to decommission the responsible hate group,[129] there are few better ways to accomplish that goal than by pursuing the group's financial assets. Because that goal is not readily achievable in the criminal legal system, the civil legal system provides hate crime victims with a natural alternative forum in which to realize the goal.

Third, tort litigation may offer the most amenable procedural environment for holding organized hate groups accountable for advocating violent actions on the part of their members. Because civil standards of proof are less stringent and discovery rules are

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the arrest and conviction of several Klan members, there seemed to be a steady supply of replacements willing to undertake violent actions. The murder trials of Klansmen indicted for killing blacks or civil rights workers—such as that of the Klansman indicted for the murder of Viola Liuzzo—often ended in acquittals, so it is likely that the steady supply of replacements were emboldened by the apparent unwillingness of their communities to punish Klansmen for their violent actions. *See* DAVID CHALMERS, BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT 64–65, 78–81 (2003) (reporting the acquittals of various Klansmen in a number of murder trials involving victims who were either black or involved in civil rights work). However, even after the Justice Department began prosecuting, and obtaining criminal convictions against, the previously acquitted Klansmen for offenses such as conspiracy to deny civil rights, Klan violence continued. *See id.* at 77–86 (describing the Justice Department's prosecutions for conspiracy to deny civil rights and reporting contemporaneous bombings of synagogues and the homes of various civil rights workers).

Apparently, the specter of criminal conviction was similarly no deterrent to Henry Hays and his accomplices when they murdered Michael Donald in 1981. Just four years earlier, Klansman Robert Chambliss had been convicted of four counts of first-degree murder in connection with the 1963 bombing of the Sixteenth Street Baptist Church. Chambliss v. State, 373 So. 2d 1185, 1187–88 (Ala. Crim. App. 1979); Bill Richards & Andrew Kilpatrick, *Alabamian is Guilty in 1963 Fatal Bombing*, WASH. POST, Nov. 9, 1977, at A1. Like Donald's murder, the trial of Robert Chambliss took place in Alabama, so it is unlikely that the fact of Chambliss's conviction would have escaped the attention of Hays and his Klan associates. Still, the almost contemporaneous demonstrated willingness of the State of Alabama to punish Klan crimes apparently did not sway the Klansmen from their decision to murder Donald.

128. *See supra* notes 7–22 and accompanying text (describing the crippling effects of multi-million dollar civil judgments on the UKA, WAR, and the Christian Knights of the Ku Klux Klan). White supremacists are concerned about the impact of legal action on their ability to operate. *See* NATIONALIST MOVEMENT LEGAL DEF. FUND, THE EFFECT OF LEGAL ACTION ON RIGHTIST ORGANIZATIONS (2002) (warning "would-be rightists . . . undertaking controversial activity to obtain competent legal counsel" and providing a table describing the impact of state and federal criminal and civil proceedings against hate groups), *at* http://www.nationalist.org/docs/law/action.pdf (on file with the North Carolina Law Review); *see also* Southern Poverty Law Center, *supra* note 17 (describing the Nationalist Movement as an active hate group).

129. *See* text accompanying notes 105–23 (discussing the legitimacy of hate group decentralization as a goal of tort litigation).

broader than those in the criminal context, it is easier for plaintiffs to survive procedural challenges and, eventually, win on the merits. In order for the finder of fact in a civil case to hold a defendant liable for a tort, it must find by a preponderance of the evidence that the defendant committed all of the elements constituting a particular tort.[130] By contrast, in a criminal trial, the finder of fact must be convinced "beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged" in order to convict an accused person.[131] Additionally, information emerging from the broader civil discovery process has the potential to lead to further criminal prosecutions in connection with hate crimes. In one dramatic example, Bennie Hays, the "Great Titan" of the UKA group responsible for the Donald murder, and Frank Cox, Henry Hays's brother-in-law, were each indicted for conspiracy to commit murder as a result of information concerning the UKA's structure and chain of command that surfaced during the course of the Southern Poverty Law Center's investigation.[132]

Responding to hate-motivated violence by pursuing tort litigation, in addition to criminal prosecution, is therefore justified not only by the inadequacies of the criminal system to address the full range of injuries flowing from hate crimes, but also by the particular strengths of the civil system to facilitate achievement of the hate crime victim's highly individualized goals in proceeding against their assailants. To the extent that decentralizing the responsible hate group is an objective of hate crime victims, tort litigation provides an efficient and constructive way of achieving that objective.

## IV. COUNTERARGUMENTS

Although there are sound arguments for using tort litigation as a means of breaking apart hate groups, not everyone agrees that tort

130. *See generally* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1364 n.22 (1985) (quoting typical jury instructions in a civil action: "[t]o 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so").

131. *See In re* Winship, 397 U.S. 358, 364 (1970).

132. *See* Judge, *supra* note 2, at 15 (explaining that the grand jury relied on information uncovered by the Southern Poverty Law Center in indicting Cox and Hays for Donald's murder); *see also* Cox v. State, 585 So. 2d 182, 185 (Ala. Crim. App. 1991) (briefly discussing the indictments against Cox and Hays). Cox was convicted of conspiracy to commit murder and sentenced to ninety-nine years in prison for providing the rope with which Donald was hanged. *Cox*, 585 So. 2d at 184. Hays was also charged with conspiracy to commit murder, but he died of a heart attack before his trial could be completed. *See* Gita M. Smith, *Alabama Case Showed How Father's Sins Were Visited on Son*, ATLANTA J.-CONST., June 8, 1997, at A4.

litigation should be aimed specifically at the elimination of hate groups. The opposition is based primarily on the First Amendment's guarantee of freedom of speech[133] and the perception that tort litigation against hate groups tends to threaten their protected speech. Additionally, the decentralization of hate groups might actually encourage the proliferation of violent leaderless resistance. This Section describes and responds to these arguments.

### *A. The First Amendment*

There are many rationales for the First Amendment's protection of freedom of speech: promotion of the discovery of truth,[134] exposure and restraint of abuses of authority,[135] personal dignity,[136] the promotion of tolerance,[137] and the creation of a "marketplace of ideas."[138] Whatever the basis for its protection, it is well settled that the protection of freedom of speech provided by the First Amendment is not absolute in scope.[139]

Among the limitations on the freedom of speech[140] is the principle that the freedom does not allow speakers to incite imminent violence with impunity.[141] The advocacy of violence by hate groups

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133. *See* U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech ....").

134. *See* KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 16–24 (1989).

135. *See id.* at 25–26.

136. *See id.* at 27–28.

137. *See id.* at 29. *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) (discussing the capacity of freedom of speech to make society more tolerant of diverse ideas).

138. *See* GREENAWALT, *supra* note 134, at 34.

139. *See generally* HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 23–236 (Jamie Kalven ed., 1988) (discussing various restrictions on freedom of speech including libel, obscenity, incitement to violence, and subversive advocacy).

140. For example, the freedom cannot be used for the purpose of inciting violence, see Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), defaming private persons, see Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), or disseminating obscene materials, see Miller v. California, 413 U.S. 15, 23 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* KALVEN, *supra* note 139, at 106–18 (specifically discussing the implications of *Chaplinsky*). Exercise of the freedom is also limited by various time, place and manner restrictions. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (holding that states "may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community"); Glasson v. Louisville, 518 F.2d 899, 904 (6th Cir. 1975) (explaining that "[a]lthough the content of a communication may be protected, the state may, in some circumstances, regulate the time, place and manner of expressing it").

141. *See Brandenburg*, 395 U.S. at 447.

has been one of the central concerns of tort litigation aimed at dismantling the groups.[142] The opponents of this use of tort litigation argue that much of the hate speech that has been targeted for litigation constitutes mere advocacy of, rather than incitement to, violence. Because mere advocacy of violence is protected speech, opponents argue, tort litigation aimed at silencing the violent rhetoric of hate groups violates the First Amendment.[143]

In a report on American case law regarding the civil liability of hate groups that promote violence, Scott Frey addressed several cases that illuminate some of the case law bases for this argument against the use of tort litigation as a tool for decentralizing hate groups.[144] In addition to citing *Brandenburg*'s "incitement to imminent lawless action" standard for restricting hate speech,[145] Frey addressed the more recent case of *NAACP v. Claiborne Hardware Co.*,[146] in which the Supreme Court held that an organization cannot be held liable for violence occurring in reaction to a speech by a member of the group unless the group "authorized—either actually or apparently—or ratified unlawful conduct."[147] *Claiborne Hardware* thus places a heavy burden on plaintiffs wishing to establish speaker liability, and it would seem to leave hate groups with wide latitude to espouse violent rhetoric that stops just short of authorizing violent conduct.

The lower courts have not necessarily been consistent in their application of the *Brandenburg* and *Claiborne Hardware* principles.[148] Frey points to two cases in which district courts "ruled one way on *Brandenburg/Claiborne Hardware* issues, and the appellate court then reversed."[149] In the first case, *Rice v. Paladin Enterprises, Inc.*,[150] the Fourth Circuit Court of Appeals reversed a lower court ruling and held that freedom of speech did not protect a publisher of a book detailing how to commit murders-for-hire from liability for three

142. *See, e.g.*, *supra* notes 28–79 and accompanying text (discussing the connections between hate group rhetoric and the corresponding commission of violent crimes).

143. *See, e.g.*, Saccuzzo, *supra* note 27, at 398 (arguing that the use of tort litigation aimed at bankrupting hate groups is unconstitutional because it tends to chill speech protected by the First Amendment); *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that advocacy of violent action at some indefinite point in the future is insufficient to allow the State to punish the speech).

144. *See* FREY, *supra* note 80, at 53 (discussing some of the cases regarding freedom of speech and the advocacy and/or incitement of violence).

145. *See Brandenburg*, 395 U.S. at 447.

146. 458 U.S. 886 (1982).

147. FREY, *supra* note 80, at 53.

148. *See id.*

149. *Id.*

150. 128 F.3d 233 (4th Cir. 1997).

brutal murders committed in conformity with the book.[151] The Ninth Circuit Court of Appeals took the opposite position in *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*,[152] and held that a website equating abortion doctors with war criminals and listing the names and addresses of doctors supporting abortion (with the names of those doctors who had been murdered by anti abortion activists struck through) was protected by the First Amendment because it "merely encouraged unrelated terrorists," rather than threatening that ACLA members themselves would do violence.[153]

Despite the inconsistencies across the circuits, it is clear that the First Amendment protects speech falling short of inciting imminent lawless action.[154] Although the First Amendment may protect hateful rhetoric to a certain extent, it loses this protection when a plaintiff shows that hate groups have taken physical steps to prepare for violence.[155] By pointing to such preparations for violence, tort litigants have been able to sidestep the inevitable First Amendment defenses raised by hate group defendants in lawsuits alleging a connection between hateful rhetoric and the commission of a violent crime. Because such tort doctrines as conspiracy and aiding and abetting require some action in addition to speech, the hate groups' First Amendment argument is inapposite. It is undoubtedly true that hate groups cannot be held liable for merely advocating violence, because precedent has amply established that this speech is protected.[156] But, it is equally true that liability can be imposed if such incitement leads to actual violence facilitated by group members trained or encouraged to commit violent acts. Tort litigation against hate groups does not seek to punish their speech but rather the violent acts causally flowing from their speech. As Morris Dees and Ellen Bowden state, "People have a right to hate in our country, but not a right to lead others to hurt."[157] To the extent that the argument

151. *Id.* at 267.

152. 244 F.3d 1007 (9th Cir. 2001).

153. *Id.* at 1015.

154. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

155. Dees & Bowden, *supra* note 24, at 27. *See generally* Noto v. United States, 367 U.S. 290 (1961) (stating that abstract advocacy of violence is different than preparation for violent activities).

156. *See, e.g.*, *Brandenburg*, 395 U.S. at 447 (explaining that the First Amendment protects advocacy of the use of force except to the extent that it incites or produces imminent lawless action or is likely to do so); Planned Parenthood of the Colombia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1072 (9th Cir. 2002) (acknowledging that the First Amendment protects the advocacy of violence).

157. Dees & Bowden, *supra* note 24, at 28.

against tort litigation focuses on speech alone, it fails to encompass the full range of activities such litigation seeks to curtail: speech which facilitates some manner of instruction or encouragement to commit a violent crime.

### *B. Leaderless Resistance*

In addition to the First Amendment-based counterargument, there is a legitimate argument that decentralizing hate groups through financially crippling tort litigation may drive hate groups underground and lead to an explosion in the violence arising from leaderless resistance. Leaderless resistance first found a voice in the white supremacist movement in 1992 with the publication of an essay by Louis Beam in his self-published periodical, *The Seditionist*.[158] Beam described leaderless resistance as an organizational structure in which "all individuals and groups operate independently of each other, and never report to a central headquarters or single leader for direction or instruction."[159] In the essay, Beam advocated the use of a "cell" organizational structure rather than the traditional pyramid organization of hate groups, in which a leader occupies the top of the pyramid and delegates duties to foot soldiers at the bottom.[160] Under the "phantom cell" mode of organization advocated by Beam, there is no central leader of resistance groups; rather, like-minded individuals respond to information distributed by the independent cells as they see fit.[161]

Several prominent recent crimes have been carried out under the theory of leaderless resistance, most prominently the April 19, 1995, bombing of the Murrah Federal Building in Oklahoma City, in which 168 people were killed.[162] Throughout his trial and incarceration for the bombing, Timothy McVeigh never implicated any of the paramilitary groups he had been affiliated with in the past; rather, he claimed sole responsibility for carrying out the bombing.[163] McVeigh

158. *See supra* note 67 (describing Beam's essay and his position of influence within the white supremacist movement).

159. *See* Beam, *supra* note 67, at 4.

160. *Id.* at 3 (describing the deficiencies of the pyramid organization of hate groups).

161. *Id.* at 4. The assumption is that the like-minded individuals will have a common goal, i.e., white supremacy, opposition to the federal government, etc. The individuals or cellular groups of individuals are then expected to respond to messages originating from many sources, which would presumably include the violent mandates of organized hate groups with beliefs similar to their own.

162. *See Last 3 Victims Pulled from OKC Rubble*, CHATTANOOGA FREE PRESS, May 30, 1995.

163. *See* Katherine Seligman, *Lone Wolf Activism; Those Who Once Haunted Hate*

practiced textbook leaderless resistance: he acted with the assistance of a single accomplice,[164] at least partly in response to the raid on David Koresh's compound in Waco, Texas.[165]

In another frightening pattern of leaderless resistance, a fugitive named Eric Rudolph is believed to have planted several bombs in public places throughout the Southeast. Rudolph was sought in connection with at least four bombings: the bombing of Atlanta's Centennial Park during the 1996 Olympics; the 1997 bombing of a gay bar in Atlanta; the 1997 bombing of an Atlanta family planning clinic; and the 1998 bombing of an abortion clinic in Birmingham, Alabama.[166] Although Rudolph was linked to both the Army of God and the Christian Identity movement in the past, for several years law enforcement authorities were unable to use these connections to locate him.[167]

To the extent that tort litigation succeeds in breaking apart hate groups and the individual members of those hate groups who choose to commit acts of violence on their own under a strategy of leaderless resistance, there is a strong argument that decentralizing hate groups may actually increase rather than decrease the incidence of hate motivated violence. One of the advantages of organized hate groups is that they are easier to identify and monitor than are the "lone wolves"[168] that populate the ranks of leaderless resistance. Hate groups may come to rely on leaderless resistors in lieu of their own members for purposes of carrying out violence in accordance with their rhetoric. What is abundantly clear is that leaderless resistance allows hate groups to be bolder in their advocacy of violence because they can expect unaffiliated persons to carry out that violence, rather than members of their own group. Thus, while the goal of tort

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*Groups Blend Dangerously Into Society*, S.F. CHRON., June 4, 2001, at A3.

164. McVeigh's accomplice was Terry Nichols, an old army friend. MORRIS DEES & JAMES CORCORAN, GATHERING STORM: AMERICA'S MILITIA THREAT 152 (1996); *see also id.* at 158–60 (describing the actions McVeigh and Nichols were said to have taken in preparation for the bombing).

165. *See id.* at 156 (describing McVeigh's strong reaction to the FBI's raid on David Koresh's compound in Waco).

166. Quintin Ellison, *Bombing Victim Keeps Searching for Justice*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), Jan. 29, 2001, at A1.

167. *Id.* Rudolph was apprehended in May 2003 by a Murphy, North Carolina, police officer who spotted him looking for food behind a local grocery store. Richard Whitt, *Rudolph Captured: N.C. Mountains Provided Refuge*, ATLANTA J.-CONST., June 1, 2003, at 1B. He will first stand trial for the abortion clinic bombing that took place in Birmingham in 1998. *See* Amended Scheduling Order at 5, United States v. Rudolph, No. CR-00-S-422-S (N.D. Ala. entered Dec. 30, 2003) (scheduling Rudolph's trial for August 2, 2004).

168. *See* Seligman, *supra* note 163.

litigation is to hold hate groups accountable for the outcomes of their advocacy of violence, it may ultimately function to foster leaderless resistance, a system of hate-motivated violence in which hate groups could potentially be totally insulated from liability.

## V. THE LEGITIMACY OF HATE GROUP DECENTRALIZATION AS A GOAL OF TORT LITIGATION

Because there is no archetypal tort case,[169] there similarly can be no exclusively acceptable set of goals of tort litigation. If asked to identify the goals of tort litigation, it is unlikely that legal scholars would specifically mention the bankrupting and disbanding of hate groups. It is important, however, to acknowledge that the goals of tort litigation are not formulated in a vacuum. Rather, those goals will vary from plaintiff to plaintiff. For example, while an automobile accident victim might be primarily concerned with receiving compensation for medical expenses or time lost from work, the parent of a child who died as a result of medical malpractice might be more concerned with exacting retribution or ensuring that medical practices are carried out with more care in the future.[170] Like these grieving parents, the victims of hate crimes may also be concerned with exacting retribution and taking actions to ensure that the hate groups responsible for their injuries will not be able to hurt anyone else. Decentralization of hate groups as a goal of tort litigation therefore can be justified in light of both this already accepted tort litigation goal of retribution and the constitutional rights of tort litigants to petition the civil courts for a redress of grievances.

It is difficult not to automatically equate the retributive goal of tort litigation with the primal urge to "get even."[171] However, the retributive goal of tort litigation is defensible on broader and more constructive grounds. In an article critiquing the law of torts, Professor Richard Abel identified three general purposes of the body of law: "to pass moral judgment on what has happened, respond to the victim's need for compensation, and encourage future safety."[172]

169. *See* SHAPO, *supra* note 26, ¶ 1.01 (noting that "[t]ort cases are as varied as [the] human activities that create risks of injury").

170. Each of these goals of tort litigation has been acknowledged as legitimate. *See generally* AMERICAN BAR ASSOCIATION, *supra* note 116, at 4-1 to 4-222 (describing the purposes and goals of tort law); SHAPO, *supra* note 26, ¶ 71.03 (listing some of the rationales for compensatory damages).

171. *See generally* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305, 313–18 (2001) (providing a general discussion of the distinction between retribution and revenge).

172. Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791 (1990).

Each of these purposes is relevant to the context of hate group accountability for hate crimes,[173] but it is the first purpose, passing moral judgment on what has happened, that most supports the legitimacy of hate group decentralization as a goal of tort litigation. This purpose of tort litigation fully authorizes victims of hate crimes and their families to call into question the violent and immoral actions of hate groups and to ask juries, as representatives of the judgment of the community at large, to condemn those actions by imposing financially crippling money damages.[174] That tort litigants would desire such an outcome is not a new concept, and it need not be defended on novel grounds. For example, it would not be shocking for the parents of a child who died as a result of gross medical malpractice to seek revocation of the responsible doctor's medical license, in addition to compensation for the loss of their child. Analogously, it is not shocking that hate crime victims would file lawsuits not only to obtain compensation for their damages, but also to decommission the party responsible for those damages.

While retribution is not often the only goal of a tort lawsuit, it is oftentimes at least an ancillary goal. The retributive urge has already been acknowledged, and incorporated to a certain extent, in the criminal law.[175] Professor Jean Hampton described retributive punishment as a means of adjusting the relative positions of victims and wrongdoers after a crime unbalances them.[176] Inherent in this

173. Victim compensation is a central concern of the law of torts in general and to hate crime victims in particular. *See, e.g.*, VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 1 (10th ed. 2000) (identifying restoring "injured parties to their original condition, insofar as the law can do this, by compensating them for their injury" as one of the four primary purposes of tort law); *see also* AMERICAN BAR ASSOCIATION *supra* note 116, at 4-1 to 4-222 (describing the purposes of tort law); SHAPO, *supra* note 26, ¶ 1.01 (discussing rationales for compensatory damages). However, the purpose of encouraging future safety is less relevant in this context. While one could easily make an argument that decentralizing hate groups makes for a safer environment for those whom hate groups targeted for violence, the safety-encouraging purpose as articulated by Abel seems more tailored to the realm of negligence, worker and consumer safety, and product liability. *See* Abel, *supra* note 172, at 808–22 (arguing that the law of torts does a poor job of encouraging future safety).

174. *See* Bender, *supra* note 122, at 259 (discussing tort law's ability to empower victims to invoke the judgment of community members).

175. *See, e.g.*, Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?* 88 MICH. L. REV. 1448, 1451–53 (1990) (discussing the theory of retributivism as it relates to the criminal law context).

176. *See* Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 124–28 (1988). Hampton explains that the retributivist desire for punishment is motivated by something larger than the personal satisfaction of seeing the offender suffer the consequences of his offense.

A retributivist's commitment to punishment is not merely a commitment to

general theory of retribution is the idea that punishment should be inflicted on wrongdoers in order to " 'plant the flag' of morality,"[177] and thereby facilitate the imposition of moral judgment for its own sake.

This idea of retributivism also has applications in the civil context, although it has met with considerable criticism.[178] Opposition to the retributive goal of tort litigation is largely based on the idea that such an objective is rooted in a primitive urge for revenge, rather than in a healthy desire for punishment and deterrence of the underlying harmful conduct.[179] While this is a sound argument, it fails to take into account the more constructive application of retribution:

> It provides a mediate useful outlet for the community sense of justice at a level of intensity below that which typically provokes judgments of crime, and one proportionate to culpability.... Part of our reason for believing that it will remain on active service, if sometimes behind the scenes, is implied in a remark by Sir Arthur Goodhart, a distinguished English jurisprudence scholar and critic of tort doctrine: "[W]ithout the sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if [this] retribution is not given recognition this disapproval may also disappear."[180]

Retribution, then, seems to serve the useful purpose of keeping society on notice of what is and is not acceptable behavior. Just as the sense of retribution may motivate a jury to condemn the conduct of individual criminal defendants as morally wrong, it may similarly motivate juries to condemn the conduct of hate groups who incite crimes as morally wrong. The desire to dismember the hate groups responsible for hate crimes may therefore be included under the umbrella of the retributive goal of tort litigation.

In a more general sense, hate crime victims as potential tort litigants may also justify their decentralization goals in light of their right to court access, as implied by the Petition Clause of the First

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> taking hubristic wrongdoers down a peg or two; it is also a commitment to asserting moral truth in the face of its denial. If I have value equal to that of my assailant, then that must be made manifest after I have been victimized.

*Id.* at 125.

177. *Id.* at 130 (quoting C.S. LEWIS, THE PROBLEM OF PAIN 45 (1944)).

178. *See* AMERICAN BAR ASSOCIATION, *supra* note 116, at 4-171 (describing some of the arguments opposing the punitive and retributive rationales for tort litigation).

179. *Id.*

180. *Id.* at 4-172 to 4-173 (quoting ARTHUR GOODHART, ENGLISH LAW AND MORAL LAW 92–93 (1953) (alterations in original)).

Amendment.[181] A primary purpose of the Petition Clause is to preserve the right of citizens to bring their grievances to the attention of the government.[182] Recent legal scholarship has explored the relatively dormant Petition Clause as a means of supporting a general right of court access.[183] In her articles regarding the right of court access via the Petition Clause, Professor Carol Rice Andrews defined the right as "[t]he right of an individual or group to file a winning claim within the court's jurisdiction."[184] Professor Andrews stressed that her definition of the right of access is narrow in that it protects only the right to access the courts in order to *file* a *winning* claim.[185] As such, plaintiffs are not guaranteed that the courts will respond to the claim, they are simply guaranteed the right to assert the claim as an initial matter. As to the "winning" aspect of the definition, Andrews pointed out that because winning claims have the greatest potential to achieve the goal of bringing social or political problems to the attention of the government for the purposes of bringing about changes in law or solving social problems, they are afforded protection under the Petition Clause to the exclusion of losing claims.[186]

Part of Professor Andrews's analysis questioned whether a plaintiff's motive for filing a winning claim should factor into the determination of whether the claim is protected by the Petition Clause.[187] In discussing whether the right of court access should be limited by plaintiffs' motives for filing lawsuits, Professor Andrews specifically addressed the *Donald* civil case against the United Klans.[188] She pointed out that Donald and her attorneys may have had motives for filing the civil claims that would have been

181. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances").

182. *See* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 674 (2000) (arguing that the right to petition includes petitioning the judiciary, and that this right is supported by the text, history, and policies of the Petition Clause).

183. *See id.* (examining the relationship between the Petition Clause and a variety of laws restricting court access based on motive); *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 691 (1999) (concluding that the Petition Clause includes a right of court access).

184. Andrews, *supra* note 182, at 681.

185. *Id.*

186. *Id.* at 768 (stating that "[t]he First Amendment protects petitions for the further reason that they inform the government and thus create the potential for advancement of the law and cure of societal problems").

187. *Id.* at 767–68.

188. *Id.* at 768–70.

considered improper under some court rules,[189] but she also acknowledged that society might have been denied beneficial changes had Donald's right to file her claim depended solely on her motive for doing so.[190] She concluded that, assuming a lawsuit states a winning claim, it serves the other aims of the Petition Clause irrespective of the plaintiff's intent to use the process as a weapon.

Winning claims will inform the government of problems, may advance the state of the law, and may help other persons who might suffer similar wrongs at the hands of the defendant or others. They serve these aims even if the plaintiff himself wants to use the prosecution of his winning claim to harass the defendant. To use the Klan example, the benefits of ultimately winning would be the same, regardless of whether the plaintiffs originally intended only to use the suit as a form of harassment or weapon to harm the Klan.[191]

Professor Andrews further reasoned that the concept of neutrality applied to restrictions on the freedom of thought should also apply to restrictions on the freedom of access to the courts via the Petition Clause.[192] She ultimately concluded that a plaintiff's bad motive in filing a winning claim does not remove the claim from the protection of the Petition Clause; so long as the lawsuit advances a winning claim, it is considered a legitimate exercise of the right of court access implied by the First Amendment.[193]

The legitimacy of hate group decentralization as a goal of tort litigation is thus defensible on two major grounds. First, the goal falls neatly within the existing retributive rationale for tort litigation. Under this rationale, tort litigants may pursue their claims for the purpose of inviting community condemnation of a defendant's conduct and equalizing the relative positions of hate crime victims and their assailants. Second, the filing of a winning claim for the purpose of bringing a social wrong to the attention of policymakers is an act protected by the Petition Clause of the First Amendment.[194] That the motive for filing the claim may be objectively improper is of no consequence if the claim is likely to succeed in capturing the attention of policymakers with the power to make changes in

189. *Id.* at 769 (including among the goals of the *Donald* litigation "a desire to burden and destroy the defendant financially.").

190. *Id.* at 768–69.

191. *Id.* at 772.

192. *Id.* at 769 (stating that "[i]mplementation of the Petition Clause, like the Speech Clause, demands neutrality. Use of motive to restrict exercise of the right to petition courts creates the risk of imposing community preferences").

193. *Id.* at 773.

194. U.S. CONST. amend. I.

response to it.[195]

## CONCLUSION

The First Amendment and leaderless resistance counterarguments are compelling, but not so compelling that they justify the conclusion that decentralizing hate groups is an illegitimate and unconstitutional goal of tort litigation. The area of tort law exists to compensate victims,[196] to vindicate their need for retribution,[197] and to facilitate the imposition of the moral judgment of the community.[198] The decentralization goal of hate crime tort litigants is entirely reasonable in light of the retributive rationale for tort litigation and the constitutional right under the Petition Clause to use the courts to bring grievances to the attention of policymakers.[199] That tort litigation of this kind has the potential to improperly silence hate groups is not a strong criticism because the assets of the groups cannot be reached by a civil judgment unless something more than mere protected speech is alleged to have given rise to the commission of violence. As such, there is no true threat to protected speech. Finally, while it is possible that decentralizing hate groups will drive more extremists to commit violent acts of leaderless resistance, it is also quite possible that breaking apart hate groups will actually result in a decline in such violence. Because extremists who engage in this highly unpredictable form of violence tend to "draw ideological inspiration from"[200] more organized terrorist or hate groups, decentralizing these groups may in fact staunch the flow of the hateful ideologies that inspire violent leaderless resistance.

In sum, hate crime victims who make it a goal of their civil lawsuits to disband the hate groups ultimately responsible for motivating the crimes committed against them should not be dismissed as merely vindictive. The desire of victims to play a part in bringing to justice all parties responsible for their victimization is a natural and constructive one, and there are no solid legal or social grounds on which to altogether condemn it. While this use of tort

195. *See* Andrews, *supra* note 182, at 773.

196. *See* Abel, *supra* note 172, at 791 (describing victim compensation as a purpose of tort litigation).

197. *See* AMERICAN BAR ASSOCIATION, *supra* note 116, at 4-171.

198. *See* Bender, *supra* note 122, at 259.

199. *See supra* notes 181–95 and accompanying text (describing the right of court access implied by the Petition Clause of the First Amendment).

200. U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES 1999, at 25 (1999), *available at* www.fbi.gov/publications/terror/terror99.pdf.

litigation may never permeate the civil system, it should be allowed to stand as a valid complement to the relief granted hate crime victims by the criminal legal system.

DESIRÉ EDWARDS