COMBATTING HATE CRIMES: THE USE OF CIVIL ALTERNATIVES TO CRIMINAL PROSECUTIONS

I. INTRODUCTION

On a quiet stretch of sand in Laguna Beach, California, a man believed to be gay by a group of youths is nearly beaten to death in an attack that shatters his teeth, tears his left eye from its socket, and causes permanent brain damage.[1] . . . Arson attacks are made on Islamic mosques in California and New York in the aftermath of violence in the Middle East.[2] . . . Jewish schools and religious displays are defaced by neo-Nazis.[3] . . . White supremacists burn crosses and threaten the first black family to move into a Pennsylvania neighborhood.[4]

These grim examples typify hate crimes committed throughout the United States on a daily basis.[5] Most invidious, however, is the commission of hate crimes organized and encouraged by groups actively seeking to disseminate hate.

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[1] *See* Anna Cekola, *Hate Crime Case Hinges on Group Responsibility*, L.A. TIMES, Nov. 27, 1994, at B1.

[2] *See* Leslie Berestein, *Hate Crimes Stir Fear in Islamic Community*, L.A. TIMES, Dec. 4, 1994, at 3.

[3] *See, e.g.*, *Menorahs Vandalized*, WASH. POST, Dec. 5, 1994, at D6; *West Miami Man Arrested in Defacing of Menorah*, MIAMI HERALD, Jan. 5, 1995, at 2B; Chris Graves, *Nazi Activist Charged in Vandalism at Jewish School*, MINNEAPOLIS/ST. PAUL STAR TRIBUNE, Nov. 17, 1994, at 5B.

[4] *See* Rich Henson, *Man Gets 5 Years for Hate Crime — A Black Family Fled Their Home After a Cross-Burning. Seven Others Await Sentencing*, PHILADELPHIA INQUIRER, Dec. 21, 1994, at A1; *See also* Julia C. Martinez, *2 More Sentenced to Prison for Roles in ChesCo Cross-Burning — The Men Apologized for the Incident — They Were Trying to Drive Away a Black Family*, PHILADELPHIA INQUIRER, Jan. 5, 1995, at B5. The family did in fact flee the neighborhood, causing them to forego their security deposit and forcing them into an unsafe housing project due to lack of funds. *See id.*

[5] "Hate" or "bias" crimes have been defined in numerous ways. Perhaps the most comprehensive definition is the one set forth by the California Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence:

> [A hate crime is] any act of intimidation, harassment, physical force, or threat of physical force directed against any person, or family, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution or laws of the United States or the State of California whether or not performed under color of law.

Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 159 (1994) (quoting CALIFORNIA ATT'Y GEN.'S COMM'N ON RACIAL, ETHNIC, RELIGIOUS, AND MINORITY VIOLENCE, FINAL REPORT 4 (1986)).

Unfortunately, statistics show that hate crimes are on the rise.[6] As the nation inexorably becomes more diverse religiously, ethnically, and in virtually every other conceivable manner, eliminating such acts continues to be an issue of increasing urgency.

Obtaining adequate justice and compensation for the victims of hate crimes presents a vexing problem because the distinction between an ordinary crime and a hate crime is not always clear. Because jurisdictions vary in their statutory interpretations of the distinction, convictions for crimes as hate crimes may be difficult to obtain under some statutes.[7] Ironically, statutory penalties for hate crimes are often less severe than for other, more "traditional" crimes that do not cause the types of psychological damage that hate crimes cause.[8] In such cases, if punishment is obtained under a hate crime statute, it may not sufficiently compensate the victim or deter the aggressor.[9]

This Note will analyze legal strategies used in civil litigation intended to effectively eliminate racist and hate groups that deprive individuals of their civil rights. Additionally, it will examine the available remedies for infringements of civil rights and liberties. Section II will review the background of the issue, looking briefly at the development of civil rights legislation following the Civil War, the lack of success of such governmental measures, and its reintroduction in the Twentieth Century with the rise of the civil rights movement. Section III

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[6] *See, e.g.*, Maureen O'Donnell, *Race Leading Factor in Hate Crimes Increase*, CHI. SUN-TIMES, Mar. 12, 1995, at 11 (reporting an increase in hate crimes in Chicago from 1986 to 1994, and noting that approximately equal numbers of blacks and whites were victims); *Editorial: The Face of Hate in Pennsylvania, Preate Reports, It's a Young Face*, PITTSBURGH POST-GAZETTE, Mar. 10, 1995, at B2 (noting a 130% rise in hate crimes in Pennsylvania from 1988 to 1993); *Bias Crime Called Serious in Maine*, BOSTON GLOBE, Dec. 23, 1994, at 27 (reporting that the Commission to Promote the Understanding of Diversity in Maine determined that the commission of hate crimes is more serious than Maine's citizens realize, and stating that the state should allocate additional money to prosecute violators and protect victims).

[7] Many state and federal hate crime statutes require specific evidence of a bias beyond the actual commission of the act to qualify for such punishment. *See, e.g.*, FLA. STAT. ANN. § 775.085 (West 1991). For a general overview of this problem, see O. Marie Palachuk, *Malicious Harassment Statutes: A Constitutional Fight Against Bias-Motivated Crime*, 29 GONZ. L. REV. 359 (1993/94); Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165 (1992-1993).

[8] *See* Chris Graves, *Nazi Activist Charged in Vandalism at Jewish School*, MINNEAPOLIS/ST. PAUL STAR TRIBUNE, Nov. 17, 1994, at 5B (noting that while graffiti sprayed on the school clearly was a hate crime, the penalty for criminal damage to property is more severe than that for a hate crime in Minnesota); *see also* Brian Levin, *Bias Prosecutions are Constitutional, But Difficult*, 27 PROSECUTOR 14 (1993) [hereinafter *Bias Prosecutions*].

[9] *See* Clifford Pugh, *Violence Against Gays Prompts Outcry; Senator Ellis' Bill Seeks Harsher Sentencing for Hate Crimes*, HOUST. POST, Apr. 2, 1995, at A1. For instance, while Texas did have a hate-crime statute, it was widely considered inadequate for providing protection to victims, for it only referred to "prejudice and bias," which was vague and difficult to enforce. *Id.*

will take a closer look at recently enacted hate and bias crime legislation, the options it presents victims, and the tension between criminal and civil litigation pertaining to hate crimes. Section IV will narrow the focus to a few recent cases that demonstrate civil litigation techniques used as alternatives or supplements to criminal proceedings. Section V will present proposals for methods to further the goals of attacking hate organizations, such as the use of principles found in civil Racketeer Influenced and Corrupt Organizations Act (RICO)[10] actions and group responsibility theories. Finally, this Note will conclude that the most effective and comprehensive means of eliminating hate groups requires a combination of more effective data compilation, legislation based on civil RICO, and the expansion of traditional tort doctrine.

II. BACKGROUND

A. *Civil Rights Legislation Following the Civil War*

Following the Civil War, Congress introduced a series of legislation as part of Reconstruction designed to protect the rights given to newly freed slaves under the Thirteenth,[11] Fourteenth,[12] and Fifteenth[13] Amendments. Congress' concern was to protect the civil rights of both the newly freed slaves and the Southern Reconstruction politicians from private and governmental discrimination. In contrast, Southern state courts, chafing under the imposition of Reconstruction poli-

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[10] Enacted in 1970, RICO allows victims of organized crime to sue those responsible for punitive damages.

[11] U.S. CONST. amend. XIII, §§ 1, 2. The Thirteenth Amendment provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth Amendment was ratified and took effect in 1865.

[12] U.S. CONST. amend. XIV, §§ 1, 5. The Fourteenth Amendment provides in relevant part:

> Section 1. [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fourteenth Amendment was ratified and took effect in 1868.

[13] U.S. CONST. amend. XV, §§ 1, 2. The Fifteenth Amendment provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment was ratified and took effect in 1870.

cies, were not inclined to grant protection to either group.[14] Many Southern states enacted restrictive state codes aimed at freed slaves to undermine Reconstruction policies which encouraged full societal participation. These codes typically limited black ownership of property, regulated wages, and required blacks to obtain permission to travel.[15] Frequently, facially neutral criminal laws were enforced more severely against blacks. In extreme cases, governmental bodies themselves were responsible for attacks on black citizens.[16] Other serious problems arose as a result of vigilante action taken by private groups, such as the Ku Klux Klan, that resented the changed society.[17] Thus, in the immediate post-Civil War Era, Congress made several attempts to ameliorate the backlash against Reconstruction.

To further the post-War amendments Congress enacted legislation designed to give victims both civil and criminal means to protect themselves. For example,

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[14] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Enforcement Act of 1870, ch. 114, 16 Stat. 140, *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). For a general overview of this period, see generally Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 204-07 (1993); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2126-46 (1993).

[15] *See, e.g., An Act to Confer Civil Rights on Freedmen, and for Other Purposes, in* AMERICAN LEGAL HISTORY 232-33 (Kermit L. Hall et al. eds., 1991) (enacting the Mississippi Black Codes of 1865). While Section 1 permitted all "freedmen, free negroes and mulattoes" the right to sue, be sued, and acquire and dispose of property, it did not permit them to rent or lease any lands except in incorporated townships, where corporate authorities had control. Section 3 held that "it shall not be lawful for any freedmen [etc.] . . . to intermarry with any white person," or vice versa, on pain of being deemed guilty of committing a felony requiring life imprisonment. Section 6 stated that any freedman who contracted for a year's labor, and quit prior to the completion of the term, forfeited the entire year's wages. Section 7 provided that any person could "arrest and carry back to his or her legal employer any freedman" who quit prior to the expiration of a labor contract. Section 9 provided that any person found to have encouraged a freedman to leave his employment was guilty of a misdemeanor, punishable by fines and imprisonment. Additionally, under terms of *An Act to Amend the Vagrant Laws of the State*, Section 2, freedmen with "no lawful employment or business, or found unlawfully assembling themselves . . . and all white persons so assembling with freedmen . . . on terms of equality . . . shall be deemed vagrants," subject to fines and imprisonment. Section 7 of the amended Vagrancy Laws held that a freedman's refusal to pay any tax or levy as required by the state was prima facie evidence of vagrancy; any person so found could be hired out to a [white] person who would pay the tax on the freedman's behalf. Thus, while black men and women were no longer in an actual state of slavery, they were confined to *de facto* slavery imposed by the virtual impossibility of movement to other locales or jobs.

[16] *See* Beermann, *supra* note 14, at 205.

[17] *See generally* Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 534-36 (1985), *cited in* Beermann, *supra* note 14, at 205.

Congress passed the Civil Rights Act of 1866 to establish citizenship for "all persons born in the United States" regardless of race; it required equal protection under state laws and set up enforcement mechanisms.[18] Within a few years, however, it became apparent that the 1866 Act had done little to change southern attitudes; indeed, a rising tide of violence against blacks and carpetbaggers alarmed Congress.[19] The shortcomings of the 1866 Act led to the enactment of the Enforcement Act of 1870, which made it a crime, punishable by a $500 fine, to prevent or discourage individuals from voting.[20]

Even the Enforcement Act achieved only limited success, however.[21] Thus, Congress responded by passing the broader Ku Klux Klan Act of 1871, which levied federal criminal sanctions for many types of conspiracies that deprived individuals of civil rights.[22] However, some members of Congress worried that the bill (as originally introduced) gave too much power to the federal government at the states' expense, in effect incorporating a large body of state civil law into federal law. The Supreme Court seized upon these concerns and interpreted this legislation to require state action.[23] In effect, the Court declared that the only legitimate federal interest implicated by the Thirteenth, Fourteenth, and Fifteenth Amendments was the abolition of involuntary servitude, therefore federal excursions into relationships among private individuals threatened the proper separation of powers between the federal and state governments.[24] Thus, grounds for prosecution under the Act were reduced to a specifically and narrowly defined set of rights.[25]

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[18] *See* Lawrence, *supra* note 14, at 2130; *see also* Civil Rights Act of 1866.

[19] *See id.* at 2133-35 (discussing restrictions inflicted by use of the Black Codes, and riots in New Orleans and Memphis that left scores of blacks dead).

[20] *See* Enforcement Act of 1870 § 4, ch. 114, 16 Stat. 140, *amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433. The goals of the Enforcement Act were to protect the voting rights of blacks; to create remedies for the official deprivations of Federal rights; to give blacks the right to make and enforce contracts, fully participate in court proceedings, and receive equal payment; and to grant all citizens of the United States the same rights as "white citizens" regarding contracts, the right to own property, and the right to use public accommodations. The Act was the precursor of today's 42 U.S.C. § 1981.

[21] *See* Lawrence, *supra* note 14, at 2140-41. Despite the enactment of the Enforcement Act, reported incidents of violence in the South reached levels that had earlier prompted Congress to enact the Civil Rights Act of 1866.

[22] *See id.* at 2140-45. *See infra* note 25 for some of the enumerated rights.

[23] *See* Beermann, *supra* note 14, at 207.

[24] *See id.* at 207-08.

[25] *See* Lawrence, *supra* note 14, at 2143 n.108, 2145 n.109. Section 2 of the Act expressly forbade conspiracies from (i) overthrowing the government and interfering with the execution of the laws of the government; (ii) intimidating federal office holders; (iii) inducing a federal officer to leave a state; (iv) intimidating or injuring someone who will testify or has testified at a federal trial; (v) intimidating a federal juror; (vi) going in disguise to deprive someone of the equal protection of the laws or to deny due process of law in any state or territory; or (vii) preventing a citizen from voting in a federal election. These conspiracies were made felonies, punishable by imprisonment for up to six

The federal government's enthusiasm to enforce both the Ku Klux Klan Act and the Civil Rights Act of 1875,[26] which was passed at the end of the Reconstruction era, steadily declined as the 1870's progressed.[27] The Supreme Court adopted a restrictive interpretation of Congressional intent regarding the Fourteenth Amendment, determining that it only reached state actions: "[i]ndividual invasion of individual rights is not the subject matter of the amendment."[28] The Court also held that the Fourteenth Amendment did not create individual rights, but rather forbade states from taking certain actions against individuals.[29] The Court held unconstitutional those provisions of the statutes that did not fit into the Court's scheme.[30] Furthermore, while the Court recognized that the Thirteenth Amendment did reach private conduct, it also held that the Amendment was designed only to eliminate slavery. Therefore, discrimination by private individuals could not be reached.[31]

B. *Rise of the Civil Rights Movement*

The enforcement of individuals' civil rights by either the federal government or the individual states lay largely dormant from post-Reconstruction times until the rise of the civil rights movement in the late 1950s and early 1960s.[32] Prior to this period, federal statutes had been held to have a narrow focus,[33] and while many states did have criminal legislation against hate crimes on their books — often dating back to the Reconstruction — such laws were seldom enforced.[34] In 1954, the Supreme Court decided *Brown v. Board of Education*,[35] stating that "separate" was not "equal."[36] Desegregation was met by massive resistance on state and local levels in the South. Echoing Reconstruction, the federal government was forced to deploy troops to implement desegregation in some areas,[37]

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years. *See* 17 Stat. 13, 14.

[26] Section 1 of the Act guaranteed equal access to public accommodations to members of every "race and color, regardless of any previous condition of servitude." Section 2 provided for criminal penalties and an automatic civil penalty of $500 for violations of Section 1. Civil Rights Act of 1875 §§ 1, 2, ch. 114, 18 Stat. 335 (1875).

[27] President Grant did not act strongly to push the new federal remedies. Additionally, the Republicans, who favored the Reconstruction acts, lost control of Congress in 1874. *See* Lawrence, *supra* note 14, at 2146-47.

[28] The Civil Rights Cases, 109 U.S. 3, 11 (1882).

[29] *See* United States v. Harris, 106 U.S. 629, 644 (1882).

[30] *See* Beermann, *supra* note 14, at 207-10.

[31] *See id.* at 209 (citing *The Civil Rights Cases*, 109 U.S. at 24).

[32] For a discussion of the use of federal statutes during this period, see Lawrence, *supra* note 14, at 2166. Applicable state and federal statutes are briefly described in Laurie Pantell, *A Pathfinder on Bias Crimes and the Fight Against Hate Groups*, 11 LEGAL REF. SERV. Q. 39, 55-57 (1991).

[33] *See supra* notes 26-31 and accompanying text.

[34] *See* Pantell, *supra* note 32, at 57.

[35] 347 U.S. 483 (1954).

[36] *Id. at 365.*

[37] For instance, President Eisenhower had to order federal troops to implement deseg-

and the need for federal action to ensure that desegregation took place "with all deliberate speed" became apparent.[38] Galvanized by the mid-1960's spectacle of Southern police brutality against civil rights marchers in Alabama, and the hostile reception encountered by other protesters, Congress began enacting legislation, such as the Civil Rights Act of 1964,[39] designed to prohibit discrimination in new and more comprehensive ways.[40]

This newly enacted federal legislation was matched by the revival and reinvigoration of federal statutes such as 42 U.S.C. § 1983,[41] providing for civil actions for deprivation of rights by persons acting under color of state law, and 42 U.S.C. § 1985(3),[42] providing for civil actions for conspiracy to interfere with an individual's exercise of enumerated federally protected civil rights. The requirement that state officials must be acting "under color of state law" to trigger the use of Section 1983 was relaxed in *Monroe v. Pape*.[43] The Supreme Court held that Congress' purpose in enacting this section was to provide a federal remedy where a state remedy, although theoretically sufficient, was not adequately applied by the state.[44] *Griffin v. Breckenridge*,[45] decided in 1971, held that Congress had the power to provide protection from private as well as government conspiracies, and that Section 1985(3) was intended to have a broad application.[46]

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regation at Central High School in Little Rock, Arkansas in 1957. *See* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 954 (1996).

[38] Brown v. Board of Educ., 349 U.S. 294, 301 (1955). For a brief overview of the rise of the civil rights movement in the 1950's and 1960's, see Marjorie A. Silver, *The Uses and Abuse of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 485-89 (1987).

[39] *See* Pub. L. No. 88-352, 78 Stat. 241 (1964).

[40] Discrimination and segregation were prohibited in places of public accommodation; the Attorney General was permitted to bring civil actions; recipients of federal financial assistance were prohibited from discrimination based on race, color, or national origin; discrimination in employment based on race, color, national origin, sex, or religion was prohibited; provisions were made for a compilation of statistics to monitor compliance. *See id.*; *see also* 42 U.S.C. § 2000a-2000h (1989).

[41] This section codifies Section 1 of the Ku Klux Klan Act of 1871, which provided for liability for injuries caused by deprivations of rights.

[42] This section codified the civil portion of Section 2 of Ku Klux Klan Act of 1871.

[43] 365 U.S. 167 (1961).

[44] The Court stated:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180.

[45] 403 U.S. 88 (1971).

[46] *See id.* For a more complete discussion of the revitalization of § 1985(3), see generally Lisa J. Banks, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Li-*

Notwithstanding these attempts by Congress at achieving equality, drawbacks to the use of federal civil rights statutes as opposed to state statutes do exist. Federal statutes generally do not contain language as specific as state hate crimes statutes. Depending on the particular statute, in a criminal case the federal prosecutor might have to show that the act was part of a conspiracy, that the person violating the right was acting under color of law in an official governmental capacity, or that the victim was engaged in an activity explicitly protected by a federal statute.[47] To prevail in the federal system, a plaintiff often needs to show more than that he was the victim of a hate crime; the *Griffin* Court hinted that the violation of constitutionally protected rights might be required as well in order to allay fears of the "federalization" of state torts.[48]

III. DEVELOPMENTS IN THE LAW COMBATTING HATE CRIMES: THE STATES' APPROACHES

A. *Recently Implemented State Statutes Aimed at Hate Crimes*

A significant result of the advances made by the civil rights movement since the 1960s is the resurgence of state legislation enacted to strike at hate crimes. Since the 1980s, most states have enacted legislation aimed at combatting hate crimes.[49] Generally, these statutes have civil as well as criminal provisions.[50] States have made a point of emphasizing in such statutes that civil remedies are in addition to, and not precluded by, criminal provisions.[51]

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cense for Domestic Terrorism, 71 DENV. U. L. REV. 449, 451-55 (1993); Elizabeth A. Roberge, *Operation Rescue's Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (A.K.A. The Ku Klux Klan Act)*, 26 IND. L. REV. 333, 333-38 (1993).

[47] *See* Pantell, *supra* note 32, at 55-56.

[48] *See* Beermann, *supra* note 14, at 220 (noting that the *Griffin* Court's limitation on the scope of § 1985(3) "was arrived at largely under the influence of constitutional considerations including the desire to avoid transforming a great number of state torts and crimes into federal torts and crimes").

[49] At least 46 states had passed some form of hate crime statutes as of February 1992, according to the Anti-Defamation League of B'nai B'rith ("ADL"). The ADL devised its own model hate-crimes legislation in 1981, which is designed to provide guidance in four areas: institutional vandalism; intimidation; civil action for institutional vandalism and intimidation; and bias reporting and training. *See* Marion Zenn Goldberg, Statutes Combat Hate Crimes in 46 States, ADL Reports, TRIAL, Feb. 1992, at 88.

[50] *See, e.g.*, ILL. REV. STAT. ch. 720, para. 5/12-7.1(c) (1993) (anyone suffering damages may bring civil actions independent of any criminal prosecution); D.C. CODE ANN. § 22-4004(a) (1990) (same).

[51] *See, e.g.*, *Hail Hate Crimes Bills*, MIAMI HERALD, June 28, 1989, at 12A (discussing increase of penalties for Florida under Hate Crimes Act of 1989, including new provision making it easier for victims to collect extra damages through civil lawsuits); Vivienne Walt, *Council Panel OKs Bias Bill*, NEWSDAY, Dec. 17, 1992, at 106 (victims of bias-related crimes may collect civil damages in court in New York City); Darlene Superville, *Senate Approves Bill to Target Hate Crimes — Victims Could Sue Attackers for Injury and Property Damages*, PHILADELPHIA INQUIRER, Dec. 8, 1992, at S01 (New Jersey Senate

The civil causes of action provided by these state statutes afford the victim the opportunity to obtain various remedies. Depending on the forum and the nature of the crime, a victim may receive treble damages,[52] an injunction against the offender to enjoin future conduct,[53] actual or nominal damages for economic, non-economic, or emotional distress,[54] punitive damages,[55] reasonable attorneys' fees and litigation costs,[56] or any other appropriate relief in law or equity.[57]

Despite the good intentions of such programs, there are often serious flaws in state legislation. One common problem is that some hate crime statutes only make hate crimes misdemeanors, carrying little or no punishment, and thus containing little or no deterrence value.[58] This deficiency often causes victims to doubt the value of reporting such crimes to the authorities.[59] In some cases, prosecutors may decide not to file charges under a hate crime statute at all if there are other charges carrying more stringent sentences.[60] As a result, several state hate crime statutes have recently been upgraded to reclassify hate crimes as felonies.[61]

Another difficulty facing efforts to provide adequate remedies is that some hate crime statutes are overly broad, creating First Amendment difficulties. In *R.A.V. v. City of St. Paul*,[62] a divided Supreme Court held that a St. Paul city ordinance prohibiting the use of symbols or burning crosses when they would "arouse anger, alarm, or resentment . . . on the basis of race, color, creed, religion or gender,"[63] impermissibly intruded on protected speech, because it prohib-

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approved bill permitting civil actions by 36-0 vote).

[52] *See* FLA. STAT. ANN. § 775.085(2) (West 1989).

[53] *See, e.g.*, ARK. CODE ANN. § 16-123-106(a) (Michie 1993); D.C. CODE ANN. § 22-4004(a)(1) (1990); FLA. STAT. ANN. § 775.085(2) (West 1989); ILL. REV. STAT. ch. 720, para. 5/12-7.1(c) (1993); IOWA CODE § 729A.5 (1992).

[54] *See, e.g.*, D.C. CODE ANN. § 22-4004(a)(2) (1990); ILL. REV. STAT. ch. 720, para. 5/12-7.1 (1993).

[55] *See, e.g.*, ARK. CODE ANN. § 16-123-106(b) (Michie 1993); D.C. CODE ANN. § 22-4004(a)(3) (1990); ILL. REV. STAT. ch. 720, para. 5/12-7.1(c) (1993).

[56] *See, e.g.*, ARK. CODE ANN. § 16-123-106(b) (Michie 1993); D.C. CODE ANN. § 22-4004(a)(4) (1990); FLA. STAT. ANN. § 775.085(2) (West 1989); ILL. REV. STAT. ch. 720, para. 5/12-7.1(c) (1993); IOWA CODE § 729A.5 (1992).

[57] *See, e.g.*, FLA. STAT. ANN. § 775.085(2) (West 1989).

[58] For a general discussion concerning the problems facing prosecutors in such circumstances, see *Bias Prosecutions*, *supra* note 8.

[59] *See generally* Lee Fisher, *How Ohio Hate Crime Law Differs*, CLEVELAND PLAIN DEALER, Jan. 15, 1992, at 5C (hate crimes are severely underreported); Duke Helfand, *Attacks on Gays Explored*, L.A. TIMES, Dec. 12, 1991, at 1 (same).

[60] The prosecutor handling the 1987 Howard Beach case — in which bat-wielding white youths chased a black youth into traffic, where he was then struck by a car and killed — did not choose to use New York's bias crime statute, because that classified the offense as a misdemeanor. *See Bias Prosecutions*, *supra* note 8, at 15.

[61] *See id.* at 15 (regarding recent changes to statutes in Illinois and Texas).

[62] 505 U.S. 377 (1992).

[63] *Id.* at 380.

ited the expressive part of the act, in addition to the cross burning itself.[64] The Court's decision threw the legality of numerous anti-bias laws into doubt.[65]

Those fears were allayed to some extent by the Court's subsequent decision in *Wisconsin v. Mitchell*,[66] a unanimous decision in which the conviction of a black youth for inciting others to attack a white youth was upheld.[67] The *Mitchell* Court found a difference between protected speech and otherwise criminal conduct.[68] The Wisconsin statute increased the sentence for individuals who expressly selected a victim based on "race, religion, color, disability, sexual orientation, national origin or ancestry."[69] Because the attack held no protected expressive value — as opposed to the act of burning a cross, which may — and the enhanced sentence resulted solely from the defendant's conduct (the beating), the statute was deemed constitutional.[70] The *Mitchell* Court's decision thus cleared up the confusion resulting from *R.A.V.*[71]

In several cases, the use of civil sanctions in newly enacted state anti-bias statutes has proved highly productive in vindicating the rights of individuals who had faced unjust discrimination. Use of the civil aspect of the Illinois statute[72] has been particularly effective in several instances where criminal sanctions failed to provide adequate compensation to the victim. In one case, a man who had been intimidating his Jewish neighbors since 1985 was found guilty of assault and disorderly conduct in a criminal trial, but was acquitted of ethnic intimidation.[73] The neighbors then filed a civil suit, which resulted in an award of $1.8 million in damages in 1991.[74] A black woman was awarded over $300,000 in damages after four white young men threw Molotov cocktails through her kitchen window in 1987.[75] A black man attacked in his truck received a $475,000 award in 1990.[76] A black bus driver was awarded $1.75 million in punitive and compensatory damages stemming from a 1990 assault by a young white man.[77] These suits demonstrate that in some situations, aggressive use of

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[64] *See id.* at 391-95.

[65] *See, e.g.*, Glen Elsasser, *Court to Review Legality of Hate Crime Law*, CHI. TRIB., Dec. 15, 1992, at 6; Brian Dickinson, *In Land of the Bill of Rights, When Is Hate a Crime?*, PROVIDENCE J., June 14, 1991, at 23A.

[66] 508 U.S. 476 (1993).

[67] *See id.* at 483.

[68] *See id.* at 484.

[69] WIS. STAT. ANN. § 939.645(1)(b) (West 1989).

[70] *See Mitchell*, 508 U.S. at 478.

[71] *See* Palacnuk, *supra* note 7, at 363-65.

[72] *See* ILL. REV. STAT. ch. 720, para. 5/12-7.1(c) (1993).

[73] *See* Cheryl Lavin, *The People Next Door: A Real-life Horror Story of Bigotry and Torment*, CHI. TRIB. SUNDAY MAGAZINE, Aug. 4, 1991, at 14.

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See* Susan Kuczka, *'Skinhead' Kills Self After Bias Suit Ruling*, CHI. TRIB., May 11, 1992, at 1.

the civil provisions of hate crimes statutes can provide compensation for the victims of hate crimes.

There is a significant difference, however, between vindication of individual rights and attempts to eliminate an organization that incites hatred. State statutes providing civil remedies often only hold the actual perpetrator of the crime liable for damages.[78] This calls into question whether state statutes will always serve to vindicate victims' rights. Similarly, federal statutes, because of the focus on state actors rather than private actors, are of only limited use. State and federal statutes are not geared towards wider-ranging problems hate groups cause, such as the enlistment and incitement of recruits. Additionally, these statutes are not directed at organizational aspects of hate organizations, such as fundraising and communication. As a result, groups such as the Ku Klux Klan, neo-Nazi groups, and other supremacist organizations that are not always physically present when an individual or a small group commits a hate attack escape punishment. Such failings in many existing statutes necessitates the use of other legal strategies to combat hate organizations. The use of civil RICO and other, more traditional legal causes of action to address hate group attacks will be evaluated later in this Note.

B. *The Benefits and Disadvantages of Civil Versus Criminal Actions*

The growing use and success of civil actions by both the government and private individuals have generated debate among commentators regarding the wisdom of choosing between either criminal or civil sanctions, or finding an accommodation between the two.[79] Damages available through civil actions are vitally important to assure the vindication of victims' civil rights, whereas obtaining satisfaction for the victim through the criminal justice system can be difficult, if not impossible. One major difference between criminal and civil prosecutions is the burden of proof required to prevail. A criminal conviction for a civil rights violation requires proof beyond a reasonable doubt, which often can be difficult to prove.[80] On the other hand, to prevail in a civil suit, the plaintiff only needs to show a preponderance of the evidence.[81] Thus, there have been instances in which individuals have been acquitted of criminal charges, but found liable in a

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[78] *See* OKLA. STAT. ANN. tit. 21, § 850D (West Supp. 1995).

[79] *See generally* Goldberg, *supra* note 49, at 88; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (regarding the increasing willingness of government to punish antisocial behavior with civil remedies).

[80] For example, there may be no direct witnesses or evidence of a sufficient nature to bring an individual or organization to justice.

[81] For a general discussion of the benefits of civil actions, see Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 294-303 (1990) (also noting in a comparison between criminal and civil standards in Massachusetts that the criminal statute requires that the perpetrator act with "specific intent").

civil action on the same facts.[82]

Encouraging civil suits in conjunction with criminal prosecutions serves an important value. Despite victim compensation funds provided by some statutes,[83] a criminal action usually does not remedy the actual damages done to the victim. Permitting civil suits allows plaintiffs to sue for a variety of damages, including actual damages, emotional distress, and forfeiture.[84] Perhaps even more importantly, such suits make punitive damages available, which sends a clear deterrence signal to those tempted to engage in the forbidden conduct.[85] The strength of this principle has become well-established as a means to control transgressors.[86] These suits even have a deterrent effect against those who have little or few assets, as it is becoming generally known that future earnings can be garnished.[87]

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[82] A prime example is the criminal and civil trials resulting from the Greensboro, North Carolina incident in 1979. A Communist group organized a rally, and notified the local Klan and neo-Nazi groups of their intentions. The Klan members arrived to counter-demonstrate, and a melee ensued, in which several Klan members opened fire on the Communists, killing five people and wounding others. The Klan members were acquitted on the criminal charges, but were found liable in a subsequent civil suit. *See generally* Ronald J. Bacigal & Margaret Ivey Bacigal, *When Racists and Radicals Meet*, 38 EMORY L.J. 1145 (1989); Michael Hirsley, *8 Convicted on Civil Charges in Slayings of 5 Communists*, CHI. TRIB., June 8, 1985, at 4.

[83] For a discussion of various state programs and eligibility requirements for compensation, see Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN'S J. LEGAL COMMENT. 107 (1992).

[84] *See supra* text accompanying notes 50, 52-57.

[85] For further evaluation of this principle, see Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993), which argues that punitive damages serve an important purpose by allowing recovery not available via criminal sanctions, thus providing a useful means for social control by sanctioning offending individuals.

[86] For example, Ku Klux Klan members involved in civil suits filed by the Southern Poverty Law Center (discussed in Section III, *infra*) have repeatedly stated that damage awards in civil suits have curtailed their activities and reduced their membership due to the fear of suffering significant monetary loss. Imperial Wizard James Venable of the National Knights of the Ku Klux Klan said that "Robert Shelton and the UKA [United Klans of America] have all but been put out of business . . . . All these suits have everybody afraid to turn around for fear we'll be taken to court. This past summer was one of the quietest, as far as Klan activity goes, I can ever remember." Dave Holland, Grand Dragon of the White Knights of Georgia, stated that "These are bad times for us. We've lost some people and we haven't been very active of late . . . ." Strat Douthat, *Ku Klux Klan Influence Declining; Finances Tied Up in Court Cases*, MIAMI HERALD, Oct. 18, 1987, at 4B.

[87] Joe Roy, chief inspector for Klanwatch, a civil rights monitoring group run by the Southern Poverty Law Center, noted the effect of a $900,000 settlement of a civil suit filed against the Invisible Empire, Knights of the Ku Klux Klan: "When these guys [Klansmen] have to pay somebody they detest $25 a week for the rest of their lives, and they lose their home, their pick-up, it has an effect on the movement." Curtis Wilkie,

IV. Case Studies of Recent Civil Litigation

> [The Ku Klux Klan has] become obsessed with being sued by us . . . . We never thought we'd eliminate hatred in America, but I think there's a marked decline of Klan-inspired violence, especially in the South. [A] former leader of Aryan Nation privately told [Southern Poverty Law Center] officials . . . that the fear of lawsuits was "something we thought about every day."[88]

A. *The Use of Agency and Civil Conspiracy Theories*

While civil litigation resulting from hate crime statutes has garnered some success, in order to strike decisively at organizations that encourage hate crimes, it is necessary to go beyond the constraints of both federal and state statutes. None of these statutes have provisions aimed at an entire organization; rather, they are aimed only at the actual perpetrator of the hate crime.[89] Thus, in many cases, those masterminding the violations can escape civil penalties to strike again another time.

In light of this reality, to date the most effective strategy used to cripple groups encouraging hate crimes has been to bring suit using a combination of agency and civil conspiracy principles. The existence of agency is established by either direct or circumstantial evidence; the focus is on the intent of the parties, as indicated either by agreement or acts.[90] Evidence of a course of dealing regarding similar acts with the principal's knowledge or permission can create an agency.[91] If sufficient relations exist, an agency exists whether the parties understood that to be the case or not.[92] Generally, a principal may be charged with and bound by actions of an agent, even without direct knowledge, if the agent

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Lawsuits Prove to be a Big Gun in Anti-Klan Arsenal, Boston Globe, June 17, 1993, at 1. The suit resulted from an attack on civil rights marchers in Forsyth County, Georgia, in 1987. *See id.*

For general applications of the principle of garnishment, see Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (1969) (holding that garnishment is acceptable where due process principles of notice and hearing exist); United States v. Ahmad, 2 F.3d 245, 247 (7th Cir. 1993) (stating that restitution in the form of garnished wages is preferred even where doubts exist regarding the defendant's ability to pay); United States v. Logar, 975 F.2d 958, 962 (3d Cir. 1992) (same). *See also* Frank, *supra* note 82.

[88] Wilkie, *supra* note 87, at 1 (quoting Richard Cohen, legal director of the Southern Poverty Law Center). Cohen was discussing the successful use of civil suits to destroy the infrastructure and drain the assets of Klan factions.

[89] *See, e.g.*, Ark. Code Ann. § 16-123-106 (Michie 1993); D.C. Code Ann. § 22-4004 (1990); Fla. Stat. Ann. § 775.085(2) (West 1989); Ill. Rev. Stat. ch. 720, para. 5/12-7.1(c) (1993); Iowa Code § 729A.5 (1992).

[90] *See* 3 Am. Jur. 2d *Agency* § 21 (1986).

[91] *See id.* § 362.

[92] *See supra* note 89.

acts within the scope of his or her authority.[93] A principal is also liable for any tortious acts committed by the agent within the scope of the agent's delegated authority.[94]

Civil conspiracy is defined as "a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means, to the injury of another."[95] The essence of a civil conspiracy claim is the desire for damages arising out of the acts committed as a result of the conspiracy.[96] A civil conspiracy requires the following elements: "an object to be accomplished, a meeting of minds on the object or course of action, one or more overt acts, and damages as the proximate result thereof."[97] Additionally, under the theory of civil conspiracy, each of the conspirators is jointly and severally liable for damages, regardless of whether the participant played a significant or minor role.[98]

B. *The Michael Donald Murder*

Agency and civil conspiracy theories were used to devastate the financial and organizational abilities of the Alabama Klan in the civil suit filed following the murder of Michael Donald in 1981.[99] Donald was a nineteen-year-old black man who went out one night from his home in Mobile, Alabama to buy a pack of cigarettes. At the same time, two white men, James Knowles and Henry Hays, fresh from a gathering of Klansmen angry over the impending acquittal of a black man accused of killing a white police officer, cruised the streets in their car, looking for a black man "to show Klan strength in Alabama."[100] Hays and Knowles encountered Donald, abducted him, beat and strangled him, slit his throat, and hanged him from a tree.[101] Knowles and Hays were convicted in separate criminal trials, but the Southern Poverty Law Center (SPLC) filed a civil suit on behalf of Donald's surviving mother with a twofold purpose: to compensate Mrs. Donald for her son's murder, and to try to destroy the Klan's organiza-

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[93] *See* 3 AM. JUR. 2D *Agency* § 281 (1986).

[94] *See id.* § 251.

[95] 16 AM. JUR. 2D *Conspiracy* § 49 (1979).

[96] *See id.*

[97] *Id.* § 50.

[98] *See id.* § 56.

[99] For a comprehensive discussion of the application of agency and civil conspiracy theories, see MORRIS DEES & STEVE FIFFER, HATE ON TRIAL: THE CASE AGAINST AMERICA'S MOST DANGEROUS NEO-NAZI 10-13, 20-21, 97, 112-13, 145-46 (1993) [hereinafter HATE ON TRIAL], and MORRIS DEES & STEVE FIFFER, A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES 215-22 (1991) [hereinafter A SEASON FOR JUSTICE].

[100] *Klansman Receives Death Sentence*, WASH. POST, Feb. 3, 1984, at A20 (testimony of Defendant Henry Francis Hays).

[101] *See* Eric Harrison, *Klan Itself on Trial in Civil Murder Case*, DETROIT FREE PRESS, Feb. 12, 1987, at 11A.

tion in Alabama.[102]

The SPLC, through its lead attorney, Morris Dees, used an agency theory in its lawsuit against the Klan. The SPLC first sought to prove that the United Klans of America, as an organization, had purposely engaged in acts of violence over a number of years to further its white supremacy goals. The SPLC then demonstrated that the Klansmen who had conspired to plan and carry out the murder acted within the scope of the Klan's authority.[103] More specifically, the SPLC demonstrated that the organizers, by encouraging the actual perpetrators, had engaged in a civil conspiracy.[104] The jury, persuaded that the Klan was not a group of "good old boys," but a "very complex, highly financed" corporation, awarded Mrs. Donald $7 million in damages.[105]

C. *The Mulugeta Seraw Murder*

Similar legal success was repeated by using agency, civil conspiracy, and vicarious liability theories in the case which arose from the beating death of Ethiopian immigrant Mulugeta Seraw in Portland, Oregon in 1988.[106] Tom Metzger, a nationally known white supremacist and leader of the White Aryan Resistance (WAR), contacted a group of local skinheads calling themselves East Side White Pride (ESWP) through WAR's subsidiary, the Aryan Youth Movement (AYM).[107] From his base of operations in California, Metzger sent several AYM representatives up to Oregon with pamphlets and the promise to help ESWP achieve common goals.[108] Soon after the arrival of Metzger's lieutenants, ESWP's racist activities picked up noticeably;[109] shortly thereafter, following a night of partying, a group of ESWP members came upon Seraw and two of his Ethiopian companions, and beat him to death by hitting him with baseball bats and stomping on him repeatedly.[110]

At the trial, Dees and the SPLC worked to establish that the local skinheads were agents of Metzger and WAR. They demonstrated that WAR had initiated

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[102] *See* A SEASON FOR JUSTICE, *supra* note 99, at 218-23.

[103] *See id.* at 219; *see also* Harrison, *supra* note 101, at 11A (statement of Dees to the jury) ("This is not a typical social club like the Kiwanis and the Rotary. This organization did more than espouse white supremacy. It encouraged its members to kill and lynch black people.").

[104] *See* A SEASON FOR JUSTICE, *supra* note 99, at 223.

[105] *Klan Told to Pay $7 Million in Killing*, DETROIT FREE PRESS, Feb. 13, 1987, at 14A. The plaintiffs, Donald's family and the Alabama NAACP, were later awarded the Klan's headquarters as partial payment of the award. *See* William E. Schmidt, *Klan Property Awarded to Lynched Man's Mother*, DETROIT FREE PRESS, May 20, 1987, at 10A.

[106] Berhanu v. Metzger, No. A8911-07007 (Or. Cir. Ct.) (1989), *aff'd*, 850 P.2d 373 (Or. App.), *review denied*, 865 P.2d 1296 (Or.), *cert. denied*, 114 S. Ct. 2100 (1993).

[107] *See* HATE ON TRIAL, *supra* note 99, at 17-19.

[108] *See id.* at 20.

[109] *See id.* at 63.

[110] *See* Wayne King, *See Civil Rights Groups Sue Racist Father, Son; Say They Incited Murder*, MIAMI HERALD, Oct. 25, 1988, at 3B.

direct contact with the skinheads, that WAR had encouraged the skinheads to carry out WAR's "business," that WAR's "business" was to engage in racially motivated violence, and that WAR had encouraged the violence that led to Seraw's murder.[111] Once agency had been established, Dees convinced the jury that because Metzger and WAR had intentionally, recklessly, or negligently selected agents known to have dangerous propensities, Metzger and WAR were vicariously liable for the foreseeable harm that followed.[112] The jury subsequently awarded Seraw's estate $12.5 million in punitive and compensatory damages from Tom Metzger, Metzger's son John, WAR, and the two Oregon skinheads convicted of the murder.[113]

V. PROPOSALS

A. *More Efficient Compilation and Use of Hate Crime Data*

Individual victories have been gained by families of victims such as Michael Donald and Mulugeta Seraw, but only in piecemeal fashion. In the *Donald* and *Metzger* cases, the existence of formal or quasi-formal corporate structures within the Ku Klux Klan and WAR made it comparatively easy to demonstrate that an agency relationship existed between the perpetrator of violence and the organization, and that corporate assets of some sort existed to compensate the victims. However, many hate crimes, while committed with some degree of support from an umbrella organization, are not as easily traced.

A recent set of incidents in suburban Chicago illustrates this point. Randall Anderson, a twenty-year-old self-styled white supremacist and skinhead, committed two hate crimes in a span of two days. The first was the spray-painting of swastikas and threatening messages on a synagogue; the second involved throwing a pipe bomb through a window of a rollerskating rink, because the rink owner made it available to blacks on Sunday nights.[114] Following his conviction on federal civil rights conspiracy charges,[115] Anderson was sentenced to nine

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[111] *See* HATE ON TRIAL, *supra* note 99, at 21.

[112] *See id.* at 97, 145-46. Under Oregon law, if two or more persons (here, Metzger's agent and ESWP) agree on a common objective (in this case, achieving white supremacist goals through violent means), and overt acts occur (such as the attack on Seraw), then a civil conspiracy exists, and all actors are held accountable. Metzger was found to have incited ESWP through his agent, and thus was liable under the theory of vicarious liability. *See id.*

[113] *See Civil Rights Group Victorious Again*, CHI. TRIB., Nov. 25, 1990, at 3. The damages were broken down as follows: $5 million against Tom Metzger, $1 million against John Metzger, $3 million against WAR, $500,000 each against the skinheads, and $2,475,000 in general compensatory damages not specifically linked to any one defendant. *See id.*

[114] *See* Matt O'Connor, *9 Years for Rink Bomber, Who Now Disavows Racism*, CHI. TRIB., Dec. 14, 1994, at 1.

[115] It appears that federal rather than state civil conspiracy charges were brought because Anderson drove to a neighboring state to pick up materials for the explosive. *See id.*

years and two months in prison, and ordered to pay $2679 to cover the damage he had caused.[116] It was noted at the trial that the police found "hundreds of articles from Ku Klux Klan and white supremacist publications, as well as neo-Nazi paraphernalia and correspondence from white supremacist organizations" at Anderson's apartment.[117]

In such situations, it is necessary to establish a link between criminals such as Anderson and the Klan and the white supremacist organizations who supply the publications. The source of the presumably encouraging correspondence sent to Anderson was not taken into account by prosecuting authorities, largely because there are few existing tools to pursue such information. It is possible that other young skinheads, falling prey to similar propaganda or advice, also acted out as Anderson did, in what could well have appeared to authorities in other jurisdictions as random incidents. If a more effective and comprehensive statutory scheme existed, it might be possible for authorities to establish a link. Through such rules, in conjunction with statutes requiring the compilation of hate crime data, the possibility of tracking down and eliminating some of the more active and effective hate organizations would greatly increase.[118]

B. *Enact Legislation Equating Violations of Civil Rights with Violations of Civil RICO Statutes*

To date, the relatively few sizable awards won by civil rights litigators have been the result of large punitive damage awards. It is necessary to devise a statutory plan that would place less reliance on the munificence of a jury's award of punitive damages and also serve as a greater deterrent to organizations promoting violent assaults on individuals. An effective means towards this end is to adapt existing civil RICO provisions, contained in the Racketeer Influenced and Corrupt Organizations Act of 1970,[119] and make them applicable in civil rights situations.

A plaintiff must satisfy two basic requirements to bring a RICO action. First, the defendant must be associated with an "enterprise," defined broadly as "any individual, partnership, corporation, association, or other legal entity, and any

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[116] *See id.*

[117] *Id.*

[118] An existing statute providing a starting point for an expanded statutory scheme is the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 (1994)) (HCSA). The HCSA directs that the U.S. Attorney General shall gather data "about crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property." *Id.* While this directive has given prosecutors more information to work with, underreporting and different modes of reporting have produced incomplete and somewhat ineffective data. *See* Levin, *supra* note 7, at 171-72.

[119] *See* 18 U.S.C. §§ 1961-1968 (1994).

union or group of individuals associated in fact although not a legal entity."[120] Second, the defendant must be involved in a "pattern of racketeering activity," defined as at least two acts of racketeering activity occurring within ten years of a previous act of racketeering activity.[121] Examples of prohibited activities under existing RICO provisions include deriving income from a pattern of racketeering activity related to interstate commerce, acquiring or maintaining control of an enterprise engaged in racketeering activities related to interstate commerce, and other crimes generally considered to be "white collar" crimes.[122]

The predicate criminal acts must be found under sections 1961 and 1962 in order to institute a civil RICO action.[123] "Any person injured in his business or property by reason of a violation of § 1962 . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[124] RICO also provides that any final judgments rendered in the government's favor in any criminal proceeding estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.[125]

It would be eminently possible to amend RICO to include in its definition of "racketeering activities" such activities as violent assaults or threats designed to deprive individuals of their civil rights. Section 1962, which lists prohibited activities, could be amended to include hate crimes. To a certain extent, a RICO strategy was used successfully in the *Donald* case to prove that the United Klans of America had engaged in acts of violence over an extended period of time to achieve their supremacist goals. The SPLC constructed a time-line during their preparation for filing the *Donald* matter, finding predicate acts of Klan violence in 1961, 1963, 1965, and 1979 prior to the 1981 murder of Donald. In this respect the agency theory used tracks a possible use of civil RICO.[126]

The major benefit of using civil RICO to pursue damages in hate crime cases is that all RICO awards are trebled.[127] In contrast, regular civil suits might not always result in an award of punitive damages. This would not only fail to provide adequate redress to the victim for any suffering, but would also fail to serve as an adequate deterrent.[128] Additionally, because offenders under a RICO standard would have by definition engaged in continuous criminal activity,

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[120] *Id.* § 1961(4).

[121] *Id.* § 1961(5). For purposes of this Note, the pertinent definition of racketeering is any of several specified acts or threats, such as murder or arson. *Id.* § 1961(1)(A).

[122] *See id.* § 1962.

[123] *See* Christopher M. Maine, Note, *The Standard of Proof in Civil RICO Actions for Treble Damages: Why the Clear and Convincing Standard Should Apply*, 22 IND. L. REV. 881 (1989).

[124] 18 U.S.C. § 1964(c).

[125] *See id.* § 1964(d).

[126] *See* A SEASON FOR JUSTICE, *supra* note 99, at 219-22.

[127] *See* 18 U.S.C. § 1964(c).

[128] *See generally* Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 834-35 (1987).

awarding treble damages delivers an appropriately strong message from society to the offenders.[129] With the government's increased use of a RICO-style statute to punish hate crimes, even shadowy and informal hate organizations would quickly become aware of the possible penalties for infringing on individuals' civil rights.

Another benefit of using civil RICO is the use of procedural benefits that are not usually available in civil suits.[130] Section 1965 provides liberal venue and service of process provisions; a civil action may be filed against an offender in any district court in which the accused lives, "is found, has an agent, or transacts his affairs."[131] More importantly for purposes of tracking down scattered members of hate organizations, RICO also provides that "in any action under § 1964 . . . in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court," the court may add that person to the proceedings.[132] At the very least, using a RICO rule could provide increased incentives to defendants to settle with plaintiffs;[133] while this might not serve society's interest in publicizing and obtaining a judgment against the hate organization, it could benefit victims by not subjecting them to lengthy, and possibly costly, litigation. Thus, RICO would provide victims with increased access to the perpetrators, allow for treble damages to serve deterrence and compensatory functions, and promote judicial economy by streamlining the pursuit of hate groups.[134]

The practical use of a civil RICO standard is apparent from reviewing the situation surrounding the plight of Vietnamese fishermen subjected to Klan intimidation in Texas in the late 1970's. Klan members rode out among the fishermen wearing robes and hoods, carrying weapons, and making intimidating statements; they also burned several Vietnamese owned and/or operated boats, and burned crosses.[135] The District Court for the Southern District of Texas, analyzing the facts, found that the fishermen proved that the defendants constituted an "enterprise" under section 1961(4).[136] However, the court interpreted the "pattern of racketeering activity" required by section 1961(5) strictly, and found no substantive showing of a "pattern" within the confines of those sections.[137] The crimes indictable under this section — such as drug violations and forgery — could easily be expanded to encompass civil rights violations; the Klan's actions would more than satisfy the racketeering requirement if broadened. This is a clear case

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[129] *See id.* at 835 n.37.

[130] *See id.* at 835-37.

[131] 18 U.S.C. § 1965(a).

[132] *Id.* § 1965(b).

[133] *See* Maine, *supra* note 123, at 885.

[134] *See* Goldsmith, *supra* note 128, at 835-37.

[135] *See* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1001-05 (S.D. Tex. 1981).

[136] *See id.* at 1014.

[137] *Id.*

where a slight expansion of the rule would provide an enormous benefit to victims specifically and society generally.

The use of existing legal theories of agency, vicarious liability and civil conspiracy have led to the seizure of the United Klans' headquarters,[138] the yielding of assets and even its name by the Invisible Empire Knights,[139] and the forfeiture of personal, as well as organizational, assets of perpetrators.[140] Although large punitive damage awards have been successful in some cases, suing under an equivalent of civil RICO would make it easier procedurally to trace the links between the organizers and the actual perpetrators of violence. Because so many existing hate groups go to great lengths to remain underground, and are thus hard to trace, proving agency can be more difficult than finding two acts of violence within a designated statutory period of time committed by a hate organization or "enterprise." Relying on a statutory scheme would also serve to remove the uncertainty of obtaining a punitive damages award in favor of the more publicized treble damages rule.

C. *Legal Responsibility of Bystanders/Duty to Rescue*

An alternative legal theory to the use of civil RICO in the prosecution of hate crimes which is gaining acceptance in civil suits involves situations in which bystanders have either encouraged or incited the hate crime, or by their presence emboldened the attacker. This legal theory is based somewhat loosely on accomplice liability, but is also rooted in notions of group responsibility and the fact that in certain cases, a duty to rescue exists.

Historically, tort law has been unwilling to go beyond certain specified relationships to require affirmative protection or duties to render assistance to others.[141] However, there is also a long-standing principle that a duty to act does exist, either when the actor has created an unreasonable risk of physical harm,[142] or where the actor by his conduct has rendered another helpless and subject to

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[138] *See* Schmidt, *supra* note 105, at 10A.

[139] *See* Lynne Duke, *Klan Unit Gives up Assets in Rights Suit Settlement — Forsyth County, Ga., Marchers Were Beaten*, WASH. POST, May 20, 1993, at A1. The Invisible Knights not only gave up their name, but also their mailing and subscription lists and all assets ranging from their printing press to cash. *See id.*

[140] *See* Alan Abrahamson, *Victim's Estate Allowed to Seize Gifts to Hate Group*, L.A. TIMES, Mar. 30, 1991, at A18 (for instance, Tom Metzger's home was seized and auctioned; also, to satisfy unresolved portions of the judgment against Metzger and WAR, the California court enforcing the judgment permitted WAR's post office boxes to be searched for donations).

[141] *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (realization that action is required for another's aid or protection does not impose a duty to take action on part of actor); *See id.* § 314A (listing common carriers, innkeepers, possessors of land, and those taking custody of another either voluntarily or by law — i.e., a parent-child relationship — as the only exceptions to § 314).

[142] *See id.* § 321.

future harm.[143]

This traditional view, that, barring a special relationship, no person has a responsibility for another, is slowly changing. Several states, including Vermont, Rhode Island, and Wisconsin, have adopted criminal statutes imposing an affirmative duty to act to assist persons in grave danger; Minnesota has imposed civil liability in similar situations by statute.[144] As one pundit notes, "[T]he vision being promoted is one of responsible social interaction."[145]

The judiciary recently has been more willing to take a variety of factors into account when determining when to impose a duty. The District Court for the Northern District of California in *Lincoln Alameda Creek v. Cooper Industries*[146] set forth the following criteria to consider:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of the injury suffered, (3) the degree of certainty the plaintiff was injured, (4) the connection between the defendant's conduct and the injury, (5) the moral blame attached to the conduct, and (6) the policy of preventing future harm.[147]

The Third Circuit has stated that liability for nonfeasance depends on the finding of a relationship between the parties of such a character that social policy justifies the imposition of a duty to act.[148] Additionally, if the injury is the result of the negligence of multiple parties, each of the parties may be jointly and severally liable. This may be true even for those parties who were not the principal actors.[149] Further, the First Circuit has held that if a plaintiff can prove that some harm was a foreseeable result of the defendant's conduct, then the defendant is liable "for the natural and probable consequences of his conduct."[150] Based on these and similar pronouncements, a duty to act that considers morality and social policy, as well as the concept of joint and several liability, should be applied to individuals acting in concert to deprive victims of their civil rights. Actions by groups should be subject to criminal and civil sanctions similar to those already embodied in hate crime statutes.

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[143] *See id.* § 322.

[144] *See* Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 5-6 (1993) (listing the state statutes, and noting that some additional states impose liability by statute for failure to undertake "easy rescues").

[145] Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 150 (1992).

[146] 829 F. Supp. 325 (N.D. Cal. 1992).

[147] *Id.* at 328 (citing Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)). These factors are generally indicative of what courts nationwide consider when determining the existence of a duty. They vary from jurisdiction to jurisdiction, largely because the Supreme Court has not issued an opinion in this area. Thus, courts rely on state law principles to develop and expand notions of when duties should be imposed. *See supra* notes 137-39.

[148] *See* LaFountain v. Webb Indus. Corp., 951 F.2d 544, 548 (3d Cir. 1991).

[149] *See* Stifle v. Marathon Petroleum Co., 876 F.2d 552, 556 (7th Cir. 1989).

[150] Jorgensen v. Massachusetts Port Auth., 905 F.2d 515, 523 (1st Cir. 1990) (citing Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978)).

The legal theory of group responsibility, or the duty to act, was successfully used for the first time in a civil suit arising out of the beating of Loc Minh Truong. Truong was assaulted by two men, Jeff Raines and Christopher Cribbins, who were cruising areas known as gay havens in Laguna Beach, California. With them were eight other men, who had earlier heard Raines say words to the effect of "[L]et's go down . . . and beat up a fag."[151] Raines and Cribbins came upon Truong on a stretch of beach, and nearly killed him in an attack that shattered his teeth, tore his left eye from its socket, and left the back of his head impaled on a rock.[152] Each of the other eight men were present for all or part of the beating, but did not directly participate in the attack.[153]

The attack left Truong unable to work and saddled with enormous medical bills. While Raines and Cribbins, the actual perpetrators, were quickly apprehended and convicted,[154] the others were not charged, and Truong did not receive any compensation.[155] Truong subsequently filed a civil suit against all ten men, basing the case against the eight non-participants on the legal theory that their presence while Raines spoke of "looking for fags," and their presence at the time of the attack, had emboldened Raines and Cribbins, leading to the assault.[156]

Seven of the eight non-participants settled for a total of over $400,000 prior to the trial in March 1995.[157] After a jury trial, Raines and Cribbins were found liable for the damage they inflicted on Truong. The jury also determined that the sole non-settling bystander, Edward DaCosta, was negligent in his actions the night of the attack, and found him partially liable for the $1.1 million verdict awarded Truong.[158]

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[151] Kristina Horton, *Suspect in Beach Attack to Stand Trial*, ORANGE CO. REGISTER, Feb. 3, 1993, at B1.

[152] *See* Cekola, *supra* note 1.

[153] *See id.*

[154] *See 2 Guilty in Beating Gay*, SACRAMENTO BEE, Aug. 3, 1993, at B3.

[155] Truong did file a claim for damages against Laguna Beach, alleging that the city failed to provide adequate security; he sought $86,438 for initial medical treatment plus an additional unspecified amount. *See Beating Victim Files Claim Against City*, L.A. TIMES, Sept. 13, 1993, at B12. The City Council quickly and unanimously rejected Truong's claim. *See* Leslie Earnest, *Beating Victim's Claim Is Rejected*, L.A. TIMES, Sept. 21, 1993, at B3.

[156] *See* Cekola, *supra* note 1.

[157] *See* Anna Cekola, *Hate Crime Victim's Suit Seeks $2 Million*, L.A. TIMES, Mar. 1, 1995, at B1.

[158] *See* Susan Marquez Owen & Anna Cekola, *Jury Awards $1.1 Million to Man Beaten in Hate Crime Court*, L.A. TIMES, Mar. 15, 1995, at B1. According to the court's formula for deciding liability, Raines, Cribbins, and DaCosta are to share full responsibility for $325,000 in economic damages, including out-of-pocket expenses, medical bills, and loss of earnings. For the $775,000 of non-economic damages, such as pain and suffering, Raines was found 50% liable ($387,500), Cribbins 30% liable ($232,500), and DaCosta 20% liable ($155,000). *See id.*

The success obtained in the *Truong* case points to an effective way for victims to make substantial recoveries for their physical and mental suffering. Victims can utilize courts' growing sensitivity to moral and ethical considerations, combined with notions that an individual's presence can provoke or worsen an attack, to increase the likelihood of successful suits against hate groups. The application of such a legal theory, based on traditional tort law, has a greater potential for positive results than existing hate crime statutes because it requires a lower burden of proof to establish accomplice liability. While the creation of an overall statutory scheme, such as one based on civil RICO principles, is ultimately preferable, the theory of group responsibility provides victims with additional means to strike forcefully against hate associations and organizations.

VI. CONCLUSION

The history of the first one hundred years following the Civil War demonstrates the difficulties inherent in fighting organized hate groups. The flowering of the civil rights movement over the past forty years, and resulting legislation designed to protect vulnerable minorities, has provided significant hope that hate groups can be eradicated. Americans have been educated that they must take strong measures to preserve their rights, but they must also expand existing statutory schemes. The increase in violence of the past decade, despite ever-increasingly effective state hate crime statutes, clearly indicates that additional measures are necessary to attack hate crimes at their roots.

The most effective means of pursuing this goal is to adopt a coherent, permanent, and highly publicized program that recognizes the difficulties of eliminating hate crimes and provides additional means to counteract determined hate groups. While agency and conspiracy standards have achieved a certain measure of success, these principles are not specifically designed to target hate organizations. Hate crime legislation modeled on RICO would provide a much more satisfactory regime. Sufficient evidence of unlawful activity would still be required to protect the rights of defendants, while victims would have a greater chance to obtain both vindication of their civil rights, and adequate compensation for the injuries or indignities they have suffered.

In the alternative, new theories such as group responsibility provide courts the opportunity to identify and punish perpetrators who are currently outside the jurisdiction of the criminal law, due to their lack of direct participation. In addition, creating more comprehensive and effective data compilation systems, in conjunction with the use of civil RICO principles and theories of group responsibility, would send a strong message of deterrence to potential lawbreakers. When potential perpetrators are aware of the risks they run by persecuting others, they tend to reduce or halt their activities. Public awareness of measures such as these will serve to help prevent the tragic attacks that destroyed the lives of Michael Donald, Mulugeta Seraw, and Loc Minh Truong.

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