

The Vindication of Hate Violence Victims Via Criminal and Civil Adjudications

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I. PRE-CIVIL WAR: SUPREME COURT DECREES THAT AFRICAN-AMERICANS HAVE

“NO RIGHTS THE WHITE MAN IS BOUND TO RESPECT”

Attempts by victims of hate violence to vindicate their claims through

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civil courts have a long history in the United States that predates the Civil War. The most notorious Supreme Court decision in American history commenced auspiciously in a St. Louis, Missouri county circuit court in two racially based tort actions on April 6, 1846. Slaves Dred and Harriet Scott petitioned Judge John Crum for permission to sue their owner and for “reasonable liberty” to effectively pursue their case. In an action remarkable for its time, Judge Crum granted the motions and stipulated that neither slave be removed from the jurisdiction or be subject to additional penalty as reprisal for their litigation.

Because the two slaves were illiterate, they could only sign their legal papers with the letter “X.” The plaintiffs sought damages in the amount of ten dollars for the torts of assault and unlawful imprisonment. They also sought their freedom. Their complaints alleged that on April 4, 1846 the couple was assaulted and imprisoned for twelve hours against their will.¹

The issue of the Scotts’ status as slaves or free persons was central to the resolution of all their claims. If the Scotts were classified as slaves they would have no right to access the Courts, pursue any tort claims, and most importantly, no liberty. Dred and Harriet Scott were a married couple transported between slave and free states by various owners and custodians. In 1847 a St. Louis county circuit court jury ruled in favor of their current owner Mrs. Irene Emerson on a technicality, but a judge allowed the Scotts to refile their claims. In 1850 a decision in a second trial granted the Scotts their freedom on the grounds that their previous residency in the free states of Wisconsin and Illinois altered their status to that of free persons.

In 1852, Mrs. Emerson pursued an appeal to the Missouri Supreme Court, which overturned the jury decision granting the Scotts freedom. Counsel for all parties stipulated that all appeals would relate to Mr. Scott’s case only, with the understanding that the final resolution be applicable to both plaintiffs. After ownership of the Scotts was transferred to Mrs. Emerson’s brother, New Yorker John Sanford, in 1853, Dred Scott overcame jurisdictional obstacles and pursued his action in federal court which ruled against him in 1854.

By the time Dred Scott’s abolitionist lawyers appealed the case to the United States Supreme Court in December 1854, the case had already become one of tremendous national import. What started out as a simple tort case in a county court in St. Louis was now transformed into a pitched legal confrontation before the United States Supreme Court on the parameters of slavery.

Four consecutive days of oral argument commenced on February 11, 1856 followed by reargument ten months later. After much internal debate the Court

1. Washington University Libraries: The Dred Scott Case, *available at* <http://library.wustl.edu/vlib/dredscott/index.html>.

released its opinion on March 6, 1857. The decision was highly anticipated, as slavery had been the most divisive political issue in the 1856 presidential campaign. Chief Justice Roger Taney's majority opinion, by a vote of 7-2, held that blacks, owing to their inferior nature, were incapable of being citizens of the United States and thus not subject to the privileges and immunities of citizenship. The Court did recognize, however, the Fifth Amendment Constitutional right of masters not to be deprived of their property without due process. The majority also took the unusual step of stripping Congress of any authority to regulate slavery by declaring the repealed Missouri Compromise unconstitutional.²

Pulitzer prize winning author Richard Kluger noted that the opinion "sealed the stamp of white supremacy" upon the Declaration of Independence by stating that its proclamation of equality excluded blacks.³ Judge A. Leon Higginbotham observed that Chief Justice Taney made twenty-one references in his opinion to the inferiority of African Americans.⁴ While the Constitution carefully avoided any explicit discussion of racial inferiority, Justice Taney's opinion explicitly embraced the notion as an indelible part of the American social and legal tradition:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.⁵

Justice Taney continued:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.⁶

The Supreme Court's pronouncement did not prevent Dred Scott and his family from gaining freedom. After the Court's decision, the Scotts were transferred to the custody of a prior owner, who immediately freed them. Dred Scott, died shortly thereafter in 1858 of tuberculosis, a free man.⁷

II. POST-CIVIL WAR RACIAL VIOLENCE CASES:

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2. *Id.* Scott v. Sanford, 19 How. 393 (1857).
 3. R. KLUGER, *SIMPLE JUSTICE* 39 (1977).
 4. A.L. HIGGINBOTHAM, *SHADES OF FREEDOM* 65 (1996).
 5. *Scott*, at 407.
 6. *Id.* at 426.
 7. Washington University Libraries: The Dred Scott Case, *available at* <http://library.wustl.edu/vlib/dredscott/index.html>.

THE SUPREME COURT UNDERMINES
CIVIL RIGHTS PROTECTIONS

The Civil War's aftermath left four million Southern blacks in a state of legal limbo.⁸ While the Emancipation Proclamation of January 1863 legally abolished slavery in Confederate held areas, slaves were not actually freed until those areas came under Union control.⁹ It was not until the December 1865 ratification of the Thirteenth Amendment that slavery was finally proscribed throughout the whole of the nation.¹⁰ The next action to protect these newly freed slaves was the Civil Rights Act of 1866, a precursor to the Fourteenth Amendment, which attempted to secure citizenship for blacks and provide them equal protection of the laws. The statute provided criminal penalties against government officials who deprive inhabitants of civil rights. It also sought to punish any person who obstructed the enforcement of civil rights.

Specifically, it decreed that all non-Indians born in the United States were citizens of the United States. It further declared:

that citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .¹¹

The Civil Rights Act of 1866 appeared, at least initially, to open the courts up to blacks in a way that was previously denied. In 1866, in *United States v. Rhodes*,¹² Noah Swayne, a Supreme Court Justice temporarily sitting on a lower federal court, upheld federal court jurisdiction in efforts by federal authorities to prosecute whites who preyed on blacks. Justice Swayne explained why the Civil Rights Act was crucial to the integrity of the civil and criminal justice system:

8. E. FONER & J. GARRATY, *THE READER'S COMPANION TO AMERICAN HISTORY* 185 (1991).

9. EMANCIPATION PROCLAMATION (1863).

10. U.S. CONST. amend. XIII.

11. Civil Rights Act of 1866, 14 Stat. 27 (1866).

12. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

The difficulty was that where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit.¹³

It was in 1868, however, that the most monumental substantive change in civil rights materialized with the passage of the Fourteenth Amendment. The Amendment unequivocally overturned the holding of the *Scott* case by guaranteeing both state and national citizenship to newly freed slaves.¹⁴ While the Civil Rights Act of 1866 also extended citizenship and other rights, many contended that Congress lacked the authority to overturn key provisions of the *Scott* decision absent a Constitutional Amendment. The Fourteenth Amendment's designation of blacks and other Americans as state and national citizens was of great significance. Previously, the Constitution's protections extended only to deprivations by the federal government against citizens, leaving the states unrestricted authority to interfere with individual civil rights. The Amendment's conferring of national citizenship now inoculated those who possess it, at least in theory, with protection from state interference with civil rights.

At the federal level another constitutional amendment dealing with suffrage and several Ku Klux Klan related criminal civil rights statutes were enacted during the Reconstruction era. The last piece of Civil Rights legislation for the next 75 years was the Civil Rights Act of 1875, which guaranteed "full and equal enjoyment to all citizens of public accommodations, places of public amusement, and conveyances regardless of their race, color, or previous condition of servitude."¹⁵ The post-Civil War laws and constitutional amendments, for the first time, codified the government's obligation to combat race-based discrimination and criminality.

Unfortunately, contemporary prejudices of the day extended to the United States Supreme Court and lower courts which undermined the coverage and potency of these newfound guarantees. By the time the Supreme Court overturned the Civil Rights Act of 1875 in 1883, in the *Civil Rights Cases*,¹⁶ it

13. *Id.* at 787.

14. U.S. CONST. amend. XIV.

15. Civil Rights Act of 1875, §1, ch. 114, 18 Stat. 335 (1875).

16. 109 U.S. 3 (1883) (Thirteenth and Fourteenth Amendment did not expand Congress' authority to pass a law banning acts of private discrimination). This decision was overturned in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Congress has authority under the Commerce Clause to prohibit discrimination in privately owned public establishments that had a nexus to interstate commerce.).

was clear the courts would deny many of the promised protections granted to American blacks. The Supreme Court was particularly retrograde when it came to providing blacks access to the Courts and protecting them from acts of racial violence.

Judge Higginbotham noted:

Without using the explicit terms of slavery jurisprudence, the Supreme Court nevertheless gave those slavery precepts [of black racial inferiority] renewed vitality in the post-Civil War era. . . . Hostile Supreme Court decisions abandoned the prior thoughtful jurisprudence that had established that the Constitution sanctioned federal protection of the citizenship rights of African Americans. . . . As African Americans were killed, mutilated, and oppressed for exercising their rights of citizenship, the courts denied redress for African Americans by drawing -- for them -- meaningless distinctions.¹⁷

In 1872, for example, in *Blyew v. United States*,¹⁸ the United States Supreme Court sent a clear message that access to the federal courts by black victims of violence would, henceforth, be severely restricted. The Supreme Court majority reversed the federal murder convictions of two white defendants convicted of hacking an innocent black family to death in Kentucky as a preemptive strike in a future race war. Kentucky state law did not at the time allow the statements of African American witnesses to be used against white defendants, so prosecutors relied on the Civil Rights Act of 1866 to assert jurisdiction in federal court where the witness statements of blacks would be allowed. The federal statute permitted federal courts to be accessed when people are denied enforcement of their rights in state courts.

The Supreme Court reversed the homicide conviction, holding that it was the white defendants who were affected by the enforcement, rather than the dead black victims or the witnesses, and that the Civil Rights Act was not applicable. The contorted reasoning of the decision evidenced that the Supreme Court was not enthusiastic about federal intervention in the area of racial violence. In a spirited dissent, Grant appointee, Justice Joseph Bradley, joined by Justice Swayne, maintained the following:

To deprive a whole class of the community of this right [to court access], to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to

17. HIGGINBOTHAM, at 90.

18. 80 U.S. 581 (1872).

rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not “causes affecting the persons” who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view. If, in such a raid as I have supposed, a colored person is merely wounded or maimed, but is still capable of making complaint, and on appearing to do so, has the doors of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope. Let us read it once more: “The District Courts shall, concurrently with the Circuit Courts, have cognizance of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act.”¹⁹

Judge Higginbotham observed about post-Civil war cases, “[T]here comes a point where it is obvious that the justices deliberately disregarded the facts they knew as men about the violence that led to these cases . . . The undiluted message to hoodlums and other vigilante groups was that they would be free to keep African-Americans ‘in their place.’”²⁰ Nowhere was this point more obvious than in the cases *United States v. Reese*²¹ and *United States v. Cruikshank*²² where the Supreme Court turned a blind eye to corruption and mob violence in voting rights cases. As Professor Robert Kaczorowski noted, “The public reacted to the [Court’s restrictive opinions in] Reese and Cruikshank as welcome correctives to the centralization of power that was brought about by Congressional Reconstruction. Republican and Democratic Conservative newspapers applauded the Reese and Cruikshank decisions for their alleged judiciousness, impartiality and wisdom.”²³ In commenting on an 1883 Supreme Court decision Richard Kluger observed: “[I]t did not much seem to mind that black men were being seized and beaten and killed by

19. *Id.* at 599.

20. HIGGINBOTHAM, at 89.

21. 92 U.S. 214 (1875). In *Reese*, the Supreme Court invalidated portions of the 1870 Enforcement Act, which punished state officials who interfered with black voting rights, by holding that the federal government lacked the enforcement authority under the Fifteenth Amendment, which purportedly guaranteed suffrage to blacks. However, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court finally held that Congress did in fact have the authority under the Fifteenth Amendment to pass legislation protecting suffrage. The Court affirmed the convictions of Klansmen who attempted to prevent a black man from voting.

22. 92 U.S. 542 (1876) (Supreme Court unanimously invalidated indictments against the three white defendants accused of murdering black voters in Louisiana).

23. HIGGINBOTHAM, at 90.

lawless thugs. And so they kept being seized and beaten and killed and could not turn to the Fourteenth Amendment, which had been passed for that express purpose.”²⁴

When violent bigots failed to prevent Blacks and other minorities from exercising their civil rights, the Courts frequently completed the tasks for them. This became unmistakably apparent when the United States Supreme Court affirmed the notion that “separate but equal” treatment on the basis of race was not a violation of the equal protection clause of the Fourteenth Amendment. The *Plessy v. Ferguson*²⁵ decision validated separation of races in virtually all aspects of life, and solidified de jure discrimination as a part of the American experience for decades to come. With rare exceptions the post-Civil War 19th century Supreme Court decisions relied on certain rationales as a method to ignore the clear intent of the post Civil War constitutional amendments and civil rights statutes. Whenever possible the Supreme Court denied protection to the oppressed by holding (1) that the available legal protections were extremely narrow or, (2) that the protections did not apply to the actions of state and local governments or private parties.²⁶ The Court frequently curtailed civil rights protections by holding that federal protections of minorities interfered with the authority of state governments.²⁷ Lastly, the Court embraced the notion that the broad legal enforcement of equal treatment for minorities represented ill conceived social engineering outside the scope of the law.²⁸

III. LEGAL INITIATIVES TO COMBAT HATE VIOLENCE IN THE TWENTIETH CENTURY

During the early twentieth century, civil rights lawyers continued to press the federal courts to improve the position of disenfranchised groups with

24. R. KLUGER, at 64-65.

25. 163 U.S. 537 (1896).

26. *The Butchers' Benevolent Association of New Orleans v. The Crescent City Livestock Landing and Slaughterhouse Co.*, *Esteben v. Louisiana* (Slaughterhouse Cases), 16 Wall. 36 (1873) (upholding the rights of a state authorized monopoly and rejecting the argument that the right to engage in a lawful business was protected by the Fourteenth Amendment); *Bradwell v. Illinois*, 16 Wall. 130 (the Fourteenth Amendment does not protect an otherwise qualified woman from being barred by a State from practicing law); *Virginia v. Rives*, 100 U.S. 313 (the Fourteenth Amendment does not protect individuals from deprivations committed by private malefactors); *Civil Rights Cases*, 109 U.S. 3 (1883) (privately owned public accommodations cannot be prevented by government from discriminating against people).

27. *Louisville, New Orleans and Texas Railway Co. v. Mississippi*, 133 U.S. 587 (1890).

28. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

mixed results. During the first half of the century the courts frequently upheld separation of the races,²⁹ but as time passed they became increasingly skeptical about the equality of these separations.³⁰ In *Brown v. Board of Education*,³¹ the Supreme Court finally overturned *Plessy* in the area of public education, when it held that separate schools for children of different races were inherently unequal in violation of the Fourteenth Amendment. The civil rights court victories that followed *Brown* relied upon an expansive interpretation of both the Fourteenth Amendment and of federal authority.

Minorities found increased protection from discrimination not only through an expansive interpretation of the Fourteenth Amendment's Equal Protection Clause,³² but from Article I's Commerce Clause as well.³³ The Supreme Court embraced the theory that Congress had extensive constitutional authority to address discrimination through its power to regulate interstate commerce.³⁴ By the latter half of the twentieth century African Americans and other historically oppressed groups had the protection of newly enforced Constitutional amendments, court decisions, and state and federal laws. As popular opinion became more tolerant and access to courts and legislatures increased for the previously disenfranchised, victims of hate violence soon began to have more options for redress.

IV. THE EMERGENCE OF HATE VIOLENCE CRIMINAL LAWS

After the first era Klan finally disbanded in the early 1870s, thousands of African Americans were still brutalized by lynchings. Lynchings are those crimes where violent mobs fatally attack someone who is thought to have violated the law or social mores of a particular locality. American lynchings were usually exercises in public mob torture where victims were mutilated, burned or hung until they died. Before being co-opted by racists, lynching had previously emerged as a punishment of choice by frontier vigilantes from the revolutionary era into the late 1800s. Thereafter there were a variety of targets

29. *Corrigan v. Buckley*, 271 U.S. 323 (1926) (upholds the constitutionality of restrictive covenants in deeds that bar interracial home sales).

30. *Shelley v. Kramer*, 334 U.S. 1 (1948) (declares restrictive covenants to be unenforceable under the Fourteenth Amendment's Equal Protection Clause); *Sweat v. Painter*, 339 U.S. 629 (1950) (state may not bar entry of a Black law applicant to a white law school, if its segregated black law school has inferior resources).

31. 347 U.S. 483 (1954).

32. U.S. CONST. amend. XIV.

33. U.S. CONST. art. I.

34. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Congress has authority under the Commerce Clause to prohibit discrimination in privately owned public establishments that had a nexus to interstate commerce).

and motives for lynchings, but most were directed against African Americans. Of the 4,743 Americans known to have been lynched 3,446 were black.³⁵

While sixteen states passed anti-lynching laws from the 1890s to the 1930s, the laws were rarely enforced in a meaningful way. The N.A.A.C.P. proposed national legislation beginning in 1918 as a way to give federal courts jurisdiction. It was hoped that federal prosecutions would bring perpetrators to justice in cases where local officials were either aiding, or sympathetic to, the killers. Congressional bills passed the House of Representatives in 1922, 1937 and 1940 but failed to become law owing to Senate opposition.³⁶

In addition to individual lynchings, race riots directed against blacks also gained notoriety with 23 taking place from 1910-1920 alone. One race riot in East Saint Louis, Illinois left 47 people dead.³⁷

Illinois became one of the first states in the Union to enact a “group-libel” statute in 1917 after violent race riots took place in East St. Louis. The Illinois “hate speech” statute criminalized bigoted “defamatory” statements directed against racial, religious or ethnic groups. Various other jurisdictions followed suit with New Jersey passing a similar law in 1934.³⁸ The New Jersey Supreme Court overturned its state law in 1941 on state and federal Constitutional grounds. The case involved a prosecution of German-American Bund officials.³⁹ While Massachusetts passed a group-libel law in 1943 and Indiana passed one in 1947, attempts in other states and at the federal level failed. Even in states where group-libel laws existed, they were rarely used.⁴⁰

The rebirth of the second era Ku Klux Klan from 1915-1925 also had an influence on hate violence and legislation. In 1915 the scope of Klan bigotry expanded to include new enemies in addition to African American: Catholics, Jews, and new immigrants. Klan ideology embraced the trappings of Protestant fundamentalism, extreme patriotism, social conservatism and xenophobia. By the mid 1920s, the Klan had 4.5 million members throughout the East and Northwest, with a disproportionate representation in Indiana. Across the nation the Ku Klux Klan members held positions as governor, state legislators and Congressmen. During this same period rampant Klan violence was publicized in Congressional hearings and intensive newspaper coverage.⁴¹ As a response to Klan violence, various jurisdictions passed laws designed to specifically combat the Klan. Anti-masking laws, which prohibited the non-

35. FONER & GARRATY, at 685-86.

36. *Id.*

37. RACE RIOTS, FAMILY ENCYCLOPEDIA OF AMERICAN HISTORY 919 (1975).

38. S. WALKER, HATE SPEECH 56 (1994).

39. *State v. Klapprott*, 22 A. 2d. 877 (1941).

40. WALKER, at 83.

41. D. CHALMERS, HOODED AMERICANISM (1981).

theatrical wearing of masks in public, were passed in various states. Local authorities with substantial Catholic populations from New England to the Great Lakes region confiscated Klan materials or banned the group from meeting or parading.⁴²

In 1923 New York enacted a sweeping anti-Klan statute that compelled various “oath-bound” groups deemed illegitimate by the state to register with authorities and disclose their membership. The statute also banned wearing masks in public. In 1928 the United States Supreme Court upheld New York’s restrictions on governmentally disfavored organizations, like the Klan, on the grounds that it was proper to do so as a legitimate exercise of state authority.⁴³ Anti-lynching, group libel, and anti-Klan laws had limited impact at the time, but they provided further foundation to the concept that the criminal law should be used to combat various manifestations of bigotry—a key development that led to the more refined hate crime laws of today.

In *Beauharnais v. Illinois*,⁴⁴ the United States Supreme Court affirmed Illinois’ group libel statute. While never technically overturned, subsequent United States Supreme Court decisions have clearly rejected all the foundational arguments that were relied upon in the *Beauharnais* decision and the case is no longer regarded as sound law. Illinois’ group libel law was repealed in 1961.⁴⁵

With the advent of the Civil Rights Era in the 1950s and 1960s white supremacists increasingly turned to violence to prevent blacks from exercising the newly protected rights granted to them by the Courts and the legislatures. In the 1960s the federal government finally launched a series of criminal law counter attacks to combat a brutal wave of Klan violence in the South. Interestingly, some prominent early federal cases involved civil rights workers or northerners who were targeted for attack. Federal criminal civil rights convictions were obtained against the killers of civil rights workers Michael Schwerner, Andrew Goodman, and James Chaney in Mississippi. Other indictments were issued in Georgia for those who killed Washington, D.C. native and Army reserve officer Lemuel Penn; and in Alabama against those who killed a white Michigan housewife and activist named Viola Liuzzo. While dozens of other innocents were killed during the civil rights movement, the federal prosecution of those responsible for the killings of those five innocents is of legally historic significance. After a state jury twice failed to convict, federal authorities successfully prosecuted several Klansman on civil

42. WALKER, at 23-26.

43. *Bryant v. Zimmerman*, 278 U.S. 63 (1928).

44. 343 U.S. 250 (1952).

45. WALKER, at 100.

rights conspiracy charges for their role in Viola Liuzzo's murder.⁴⁶ The cases involving the four other homicides eventually ended up before the United States Supreme Court which upheld the federal prosecution of the killers and their conspirators on criminal civil rights charges.⁴⁷

In *United States v. Guest*,⁴⁸ the Supreme Court upheld criminal indictments, pursuant to 18 USC 241, against those involved in the murder of Lt. Col. Lemuel Penn. Penn was an African-American educator from Washington, D.C. who was indiscriminately murdered by Klansman as he drove back home from Army reserve duty in Georgia. In *Guest*, the Court upheld the validity of 18 USC 241: Conspiracy to Interfere With Civil Rights, enacted in 1870 to counter Klan terrorism. A companion case, *United States v. Price*, decided the same day as *Guest*, upheld the same statute. The Court urged a broad application of its protections, stating it should be given a "sweep as broad as its language."⁴⁹ These two cases affirmed the proposition that Fourteenth Amendment Due Process rights and Equal Protection rights were within the purview of rights protected by 18 USC 241.

The Court held that only those criminal conspiracies where there is a specific intent to interfere with a federally protected right are covered by the statute, although a defendant does not actually have to be aware that the right he seeks to limit is a federally protected one.

In addition, the Court observed that the statute's wording does not require that the conspiracy be racially motivated. The Court further held that, since conspiracies can have multiple goals, it is not necessary to prove that the sole goal of interfering with a particular civil right is the main goal of the conspiracy. With regard to the federal case relating to Lemuel Penn, the Supreme Court found that the trial court erred in dismissing the part of the indictment that alleged an interference with Penn's right to interstate travel and use the instrumentalities of interstate commerce such as highways. Subsequent federal cases found rights covered by the statute are the rights not to be killed without due process, to testify at a federal trial, to vote, and to exercise housing rights.⁵⁰

Congress responded to Klan violence in the South during the civil rights era by enacting 18 USC 245: Federally Protected Rights, in 1968. That statute prohibits interference with voting, obtaining government or federally funded benefits or services, accessing federal employment, or participation on a

46. S. BULLARD, *FREE AT LAST* 81 (1993).

47. *United States v. Guest*, 383 U.S. 745 (1966); *United States v. Price* 383 U.S. 787 (1966).

48. 383 U.S. 745 (1966).

49. 383 U.S. 787, 801 (1966).

50. WASHINGTON, D.C. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW & HOGAN AND HARTSON, *STRIKING BACK AT BIGOTRY* 12-13 (1986).

federal jury. Among other things, the law also punishes the interference with six other federally protected activities, but only when they are committed on the basis of race, color, religion or national origin. Those protected activities include enrollment in public education, participation in state programs, obtaining private or state employment, participation in state and local jury service, interstate travel, and the benefits of various types of public accommodations. The death penalty is available if death to a victim results. Another federal criminal statute, Title IX of the 1968 Civil Rights Act, 42 USC 3631 punishes those who forcibly interfere with a person's ability to purchase, sell, lease, or finance a residence on the basis of someone's race, color, religion, sex, or national origin.

V. RECENT FEDERAL LEGISLATION TO COMBAT HATE VIOLENCE

Four new pieces of legislation were introduced at the federal level over the last decade. The first was the Hate Crime Statistics Act signed into law by President Bush in April 1990.⁵¹ The bill, initially introduced in 1985, is widely credited for adding the term "hate crime" to the American lexicon.⁵² The Act initially required the Attorney General to collect data on crimes motivated by race, religion, sexual orientation, and ethnicity and was subsequently amended to include disability. The FBI was assigned the task of collecting the data and will continue to do so on a permanent basis.

In 2000 the FBI enumerated 8,063 bias crime incidents in the United States; 4,337 based on race; 1427 based on religion; 1299 based on sexual orientation; 911 based on ethnicity; and 36 based on disability.⁵³

In 1994 the Hate Crime Sentencing Enhancement Act ("HCSEA") was enacted. The statute, a penalty enhancement law, increases the sentence for underlying federal offenses by about 30% when the fact finder establishes beyond a reasonable doubt that the target is intentionally selected because of the race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of another.⁵⁴ The law's limitation is that it is only applicable to a relatively small number of substantive underlying federal offenses. In 1996 Congress enacted new legislation broadening coverage and increasing the penalties for Church arsons. That legislation followed a series of well

51. Hate Crime Statistics Act, Pub. L. 103-322, 28 U.S.C. 534 (1990).

52. J. JACOBS & K. POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998).

53. FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2000 7 (2001).

54. Hate Crime Sentencing Enhancement Act, § 280003 of the Violent Crime Control and Law Enforcement Act of 1994; Pub. L. 103-322.

publicized church arsons that disproportionately targeted African American institutions.⁵⁵

Initially introduced in 1998, the Hate Crime Prevention Act twice failed to come to a vote in the House of Representatives despite affirmative votes in the Senate as late as June 2000. The bill, now called the Local Law Enforcement Enhancement Act would alter the main federal criminal civil rights statute, 18 USC 245, in two significant ways. First, the bill would extend federal legal protection on the basis of gender, disability and sexual orientation -- but only in cases involving interstate commerce. The interstate commerce qualification for those categories is necessary to provide federal jurisdiction under the Commerce Clause. The other statutory reform the bill provides is a broadening of the circumstances protected. Currently, 18 USC 245 requires that prosecutors establish both that the victim was attacked because of his status and because of his exercise of a particular protected activity listed in the statute. The proposed statute would expand protections beyond the limited number of activities listed in the current statute.⁵⁶

VI. RECENT STATE LEGISLATION TO COMBAT HATE VIOLENCE

In addition to federal initiatives, by 2001 45 states and the District of Columbia have enacted statutes punishing offenses involving the discriminatory selection of crime victims,⁵⁷ up from only 28 a decade before.⁵⁸ Contemporary hate crime laws reflect a broad category of offenses including cross-burnings prohibitions, desecration to houses of worship, anti-masking laws, penalty enhancements and stand alone civil rights or intimidation statutes. However, it is the penalty enhancements and the stand-alone statutes that are the most broadly applicable to the widest range of criminal conduct, and the ones that are most commonly referred to as "hate crime" statutes. All 45 states cover such categories such as race, national origin and religion, while a lesser number address gender, sexual orientation, and disability.⁵⁹

Since the *Guest*⁶⁰ case in 1966, the United States Supreme Court has examined the issue of hate crime punishments in a variety of other cases. In

55. The Church Arson Prevention Act, 18 U.S.C. 247 (1996).

56. Local Law Enforcement Enhancement Act, S. 625, 107th Cong., 1st Sess. (2001).

57. National Gay & Lesbian Task Force, Hate Crime Laws in the United States: June 2001, available at <http://www.ngltf.org/downloads/hatemap0601.gif>.

58. Anti-defamation League, Hate Crime Statutes: a 1991 Status Report (1991)

59. National Gay & Lesbian Task Force, *supra* note 57.

60. 383 U.S. 745 (1966).

Dawson v. Delaware,⁶¹ the Supreme Court overturned a death sentence imposed in part on the basis of a convict's membership in a white supremacist group in a murder case where his racist beliefs and associations were not relevant to the crime. The Court found that a defendant's abstract beliefs were an impermissible basis to impose criminal punishment. The Court did point out however, that the "Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations simply because those beliefs and associations are protected by the First Amendment."⁶²

In a 1983 case, *Barclay v. Florida*,⁶³ the Court held that a defendant's anti-white racial animus and motivation to ignite a race war were relevant in determining punishment in a race murder case. While the government may not penalize abstract bigoted beliefs, it may introduce evidence of a defendant's constitutionally protected beliefs to show motive or to establish intentionality. The general rule requires that the evidence not only be relevant, but its value be more probative than prejudicial.⁶⁴

In *R.A.V. v. St. Paul*,⁶⁵ a 1992 case, the Supreme Court invalidated a municipal "hate speech" ordinance used to prosecute a teenage skinhead for burning a cross in the yard of an African American family with several young children. While the justices unanimously rejected the statute, they were sharply divided as to their rationales. The statute read in relevant part:

Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor.⁶⁶

All the justices found the law impermissibly overbroad by punishing speech that merely evoked anger or resentment. The First Amendment has consistently been held to protect extremely offensive speech and political discourse that fails to rise to the level of a threat, immediate incitement to criminality, or solicitation of a crime. The mere offensiveness of a belief is an impermissible basis for the government to punish its expression.

61. 503 U.S. 159 (1992).

62. *Id.* at 165.

63. 463 U.S. 939 (1983).

64. FED. R. EVID. 403.

65. 505 U.S. 377 (1992).

66. St. Paul, Minn., Legis. Code § 292.02 (1990) (held unconstitutional in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)).

Four of the justices supported the contention that it was constitutional to punish expression whose severity went beyond merely offending someone. Since threats and so-called fighting words were traditionally held to be unprotected by the First Amendment, these justices maintained that it was constitutional for the government to selectively punish bigoted speech within these narrow categories on the basis of content. In his opinion Associate Justice John Paul Stevens argued:

Conduct that creates special risks or harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous, such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . such conduct may be punished more severely than threats against someone based on, say, his support of a particular athletic team.⁶⁷

The controlling opinion, authored by Associate Justice Antonin Scalia, disagreed. These justices believed that even traditionally unprotected areas of speech must be punished without taking into account the content of the idea expressed. They held that punishing certain types of threatening cross-burnings such as those based on racial supremacy, but not others, such as those degrading the mentally ill, violated that principle. The *R.A.V.* decision invalidated those hate crime laws where the criminality hinged solely on the idea expressed. The ruling also had the additional effect of invalidating speech codes at public universities throughout the United States. While the case did not overtly overturn the *Beauharnais* decision, the Court's rationale would not support the constitutionality of group libel statutes.⁶⁸

In 1996, the Court, without comment, refused to grant review of a challenge to a Florida state law that criminalized all hostile cross-burning on the property of another. That law, unlike St. Paul's ordinance, did not differentiate cross-burnings on the basis of the hateful idea expressed.⁶⁹

The issue of the overall constitutionality of hate crime laws as a category was settled in 1993 in *Wisconsin v. Mitchell*.⁷⁰ There, the Court unanimously upheld the constitutionality of another type of hate crime statute—a penalty enhancement law. Specifically, the enhancement law at issue punished an offender's intentional selection of a victim or property based on the status characteristics of another person. The characteristics covered by Wisconsin's

67. 505 U.S. at 416.

68. 505 U.S. 377 (1992).

69. *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

70. 508 U.S. 476 (1993).

law included race, religion, color, national origin, and ancestry. Todd Mitchell was a nineteen year old African American Kenosha, Wisconsin resident angered over a scene in the movie *Mississippi Burning*, where an African-American child was beaten by white supremacists as he knelt to pray. Mitchell incited a crowd to viciously beat Gregory Riddick, a white fourteen year old passerby. He urged the mob to action by stating: “Do you all feel hyped up to move on some white people? You all want to fuck somebody up? There goes a white boy. Go get him.”⁷¹

Mitchell was convicted of aggravated battery- party to a crime and sentenced to two years for the underlying assault. He was assessed another two year term for intentionally selecting his victim on account of race, for a total of four years incarceration out of a possible seven year term.

In reversing the Wisconsin Supreme Court, Chief Justice William Rehnquist cited three basic reasons for upholding the statute. First, while the government may not punish abstract beliefs, it can punish a vast array of depraved motives. The Court further found that penalty enhancement laws, unlike the statute at issue in *R.A.V.* did not prevent people from expressing their views or punish them for doing so. Lastly, the Court pointed to the severity of hate crimes, stating that they are “thought to be more likely to provoke retaliatory crimes, inflict distinct emotional harm on their victims and incite community unrest.”⁷²

While a vast consortium ranging from police fraternal organizations to the ACLU filed briefs supporting the decision, not everyone was pleased with the outcome. Some prominent legal scholars contended that punishing discriminatory crimes more severely than other crimes was merely a subtly disguised legalistic end run to punish disfavored thoughts. New York University Law Professor James Jacobs and attorney Kimberly Potter criticized the Mitchell decision: “The very facts of that case present a defendant who is punished more severely, based on viewpoints.”⁷³ Conservative commentator George Will referred to hate crime laws as “moral pork barrel” and an “imprudent extension of identity politics.”⁷⁴

After the *Mitchell* decision, the intentional selection model, presumably because of its affirmation by the Court, became the preferred model for new hate crime legislation. Following a one-year hiatus that commenced with the *R.A.V.* decision, state legislatures once again enacted hate crime laws—using

71. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *rev'd*, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

72. 508 U.S. at 487-88.

73. J. JACOBS & K. POTTER, at 129.

74. George Will, *No Need to Broaden Federal Hate Crime Law*, ASBURY PARK PRESS, Oct. 15, 1988, A13.

Wisconsin's model.⁷⁵ State courts also upheld similar stand-alone laws modeled after traditional federal civil rights statutes. Laws like these, such as California Penal Code §422.6, do not require the charging of an additional crime. They generally punish the status-based interference with the civil rights of others through force or threat.

While judicial decisions upheld the two most popular types of hate crime laws, important definitional issues remained unresolved. Courts and legislatures still had to address not only what groups to cover, but precisely how much of a role the victim's racial, religious or other status characteristic played in the offense. In *In re M.S.*,⁷⁶ the California Supreme Court addressed the latter issue by reviewing two of the state's primary hate crime statutes -- one a stand alone law and the other a penalty enhancer. Each law, enacted in 1987, punished the selection of a victim "because of" a status characteristic. The Court ruled that "because of" meant "the prohibited bias must be a substantial factor in the commission of the crime."⁷⁷ In order to punish offenders who mistakenly attack victims from status groups that they had not intended for attack, legislatures included the language "actual or perceived" before listing status characteristics.⁷⁸

In June 2000, the United States Supreme Court struck down a New Jersey hate crime law in *Apprendi v. New Jersey*.⁷⁹ The hate crime law at issue allowed a judge, rather than a jury, to increase the sentence of a convicted defendant beyond the maximum enumerated in the criminal code for the underlying offense on a showing of racial bias by a preponderance of the evidence. The Court held 5-4, that when a factor impacts a sentence as substantially as racial bias did in *Apprendi*, it must be established to a jury by a higher standard—beyond a reasonable doubt. The impact of the decision in the area of hate crime law was limited because the overwhelming majority of hate crime statutes already meet the Court's standards.

VII. HATE VIOLENCE CIVIL REMEDIES: FEDERAL STATUTORY PROVISIONS

Traditional crimes, and newer more specific criminal statutes, such as hate crime and civil rights statutes provide important, but incomplete tools to

75. See, e.g., New York Hate Crimes Act of 200, 2000 N.Y. ALS 107; 2000 N.Y. Laws 107; 2000 N.Y. S.N. 4691.

76. 10 Cal. 4th 698, 896 P.2d 1365 (1995).

77. *Id.* at 716.

78. See, e.g., Code of Ala. §13A-5-13 (1997); D.C. Code § 22-4004 (1998) (civil remedies); 720 ILCS 5/12-7.1 (1998); La. R.S. 14:107.2 (1998); MINN. STAT. § 609.595 (1997); MISS. CODE ANN. § 99-19-301 (1997); NEV. REV. STAT. ANN. § 193.1675 (1997); NY CP §485.10; 13 Vermont S.A. § 1455 (1998); 14 Virgin Island C. § 707 (1998)

79. 530 U.S. 466 (2000).

combat acts of discriminatory violence. The ultimate decision as to whether a crime is charged rests with a prosecutor, who ultimately represents the interests of the entire citizenry, not particular individual victims. Other issues such as prosecutorial priorities and resources impact case treatment.

Criminal statutes also require a higher burden of proof than do civil suits - proof beyond a reasonable doubt as opposed to a mere preponderance of the evidence in civil cases. Criminal statutes usually require a showing of a defendant's intentionality, thus limiting proceedings to a more narrow group of malefactors who actually intended the commission of particular crimes. While the criminal law can punish those who aid and abet crime, as a practical matter, it often ignores others whose recklessness or negligence contributes to a victimization. Lastly, criminal law traditionally has focused on offenders. Criminal law has primarily been concerned with incapacitating, deterring, punishing and sometimes rehabilitating offenders. Only recently has criminal law begun to seriously address the restorative issues of empowerment, notification and restitution for victims. This section analyzes the use of civil remedies for victims. While civil suits do not result in incarceration of defendants, they do allow victims greater involvement in the proceedings and the ability to benefit from available civil remedies. Hate violence civil suits fall under two broad categories, specific statutory civil rights remedies and traditional tort remedies. In civil cases actual damages cover losses and expenses incurred by victims. Punitive damages are an additional sum for the victim assessed against the defendant to punish particularly egregious behavior. Injunctive relief is a non-monetary remedy that compels a defendant to perform or refrain from a specified act.

The United States Congress has enacted various protections that give victims of various civil rights deprivations private causes of action in civil proceedings in federal district courts. One of the oldest civil remedies is found in the companion statute to criminal provision 18 USC 241. The statute, 42 USC 1985 (3), was originally enacted as part of the Civil Rights/Ku Klux Klan Act of 1871. The act punishes conspiracies that deprive "either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." A conspiracy is an agreement between two or more individuals to engage in unlawful conduct.

The United States Supreme Court in *Griffin v. Breckinridge*,⁸⁰ held that the statute requires proof of "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action."⁸¹ In *United Brotherhood of Carpenters & Joiners v. Scott*,⁸² the Supreme Court

80. 403 U.S. 88 (1971).

81. *Id.* at 102.

82. 463 U.S. 825 (1983).

suggested that the statute might be limited to racial deprivations only. However, lower federal appellate courts have held that the statute also protects on the basis of sex, ethnicity, religion, and political association.⁸³

The statute does not create any new substantive right, but rather allows a remedy when a statutory or constitutional right is interfered with by a conspiracy. While some courts of appeals have allowed it, there has never been a definitive high court decision delineating whether state law deprivations, including state hate crime laws, are covered. The Court has held however, that the Constitutional rights to travel, and the Thirteenth Amendment right to be free from the “badges and incidents of slavery” are protected. Claims for violations of the First Amendment’s guarantees or the Fourteenth Amendment’s equal protection clause may be pursued, but only in cases where the malefactor is acting under governmental authority. Courts have held that actions involving detentions, threats, batteries, and residential firebombings can satisfy the statute’s requirements.⁸⁴ Because many hate violence cases take place at residences or on streets, the constitutional right to travel, or federal statutory housing protections can be invoked to permit a claim under 42 USC 1985 (3).

Another important post-Civil War statutory civil protection is found in 42 USC 1982, enacted first as part of the Civil Rights Act of 1866, and then later in the Civil Rights Act of 1870. The statute requires that a plaintiff prove: (a) the defendant discriminated; (b) against him or her; (c) because of his or her race; (and d) and the discriminatory act deprived the plaintiff of the right to inherit, purchase, lease, sell, hold or convey either real or personal property. The statute’s text limits protections to discriminatory acts committed on the basis of race. The Supreme Court has held, however, that Jews and Arabs, are covered by the statute because at the time of the law’s ratification Jews and Arabs were regarded as distinct “races.”⁸⁵ Because Congress has failed to designate a statute of limitations period for 42 USC 1982, judges have relied on the laws of the state where the case arose for guidance. Compensatory and punitive damages, as well as injunctive and declaratory relief, are permitted under the statute.⁸⁶

A more recent statute, the Fair Housing Act of 1968, codified at 42 USC 3617, provides a federal civil claim for those whose housing rights are coerced, threatened, intimidated, or interfered with because of race, color,

83. CHICAGO LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC., REPRESENTING VICTIMS OF BIAS CRIMES: A MANUAL FOR ATTORNEYS 78 (1992).

84. *See, e.g.*, *Stirgus v. Benoit*, 720 F. Supp. 119, 122 (N.D. Ill. 1989).

85. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 604 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 615 (1987).

86. CHICAGO LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC., REPRESENTING VICTIMS OF BIAS CRIMES: A MANUAL FOR ATTORNEYS 91-99 (1992).

religion, sex, familial status, handicap and national origin. Sexual orientation is not a protected class under this statute, but individuals who have HIV or AIDS qualify as handicapped under the law. The statute's definition of housing rights covers the right to purchase, sell, rent, finance, and utilize brokerage assistance. Actions arising under 42 USC 3617 are limited to a two year statute of limitations that runs from the time of the discriminatory event. The statute permits compensatory and punitive damages, as well as injunctive relief. The federal government may also litigate cases under 42 USC 3613, but only for injunctive relief.⁸⁷

Recent decisions, however, have placed limits on the extent to which victims of hate or extremism can go in civil suits. In *United States v. Morrison*,⁸⁸ the United States Supreme Court invalidated a provision of the Violence Against Women Act which allowed women alleging acts of sexual assault to sue their assailants in federal court. The case involved a female college student who alleged a sexual assault at the hands of a popular football player. The five person majority held that Congress lacked the authority to pass such a law because there was not a sufficient connection between interstate commerce and the newly enacted gender violence federal civil remedies. In another case, the United States Court of Appeals for the Ninth Circuit initially overturned a \$107 million judgment awarded to abortion providers and advocates from a group of anti-abortion activists. Among other things the activists published on the Internet detailed personal information on abortion providers, incendiary rhetoric and a list of doctors who were differentiated by whether they were well, injured, or murdered. While the Court of Appeals held that the expression constituted speech protected by the First Amendment, it has since vacated the decision and ordered a new en banc hearing.⁸⁹

VIII. HATE VIOLENCE CIVIL REMEDIES: STATE STATUTORY PROVISIONS

In addition to federal law, at least 29 states, including California, New York, Florida, Pennsylvania, Illinois, and Washington State, offer specific civil statutory provisions relating to hate violence.⁹⁰ California, for example, has a variety of such statutes, including the Ralph Civil Rights Act, and the Bane Civil Rights Act.

87. *Id.* at 100.

88. 529 U.S. 598 (2000).

89. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *vacated, en banc hearing ordered*, 268 F. 3d 908 (9th Cir. 2001).

90. Lieberman & Rosenberg: ANTI-DEFAMATION LEAGUE: 1999 HATE CRIME LAWS 20-21 (1998).

The Ralph Act states that it is a civil right for a person to be free of violence or threat against his or her person or property, because of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age or disability or position in a labor dispute. The characteristics are intended to be illustrative rather than restrictive. Private attorneys, the California Department of Fair Employment & Housing (“DFEH”), State Attorney General, District Attorneys and City Attorneys may all bring actions on behalf of hate violence victims. In cases where a private attorney pursues a case, a victim can recover actual and punitive damages, an additional civil penalty of \$25,000, attorney’s fees and injunctive relief. If the DFEH brings a claim, a victim can only recover up to \$150,000 in actual damages and injunctive relief. When the State Attorney General, District Attorney, or City Attorney brings a civil action the available remedy is generally limited to affirmative relief and a civil penalty of up to \$25,000. Liability under the Ralph Act reaches anyone who denies a right covered by the statute, as well as those who aid, incite, or conspire in that denial.⁹¹

California’s Bane Act protects people from interference by threats, intimidation, or coercion or for attempts to interfere with a person’s state or federal statutory or constitutional rights. These protected rights include association, assembly, due process, education, employment, equal protection, expression, formation and enforcement of contracts, holding of public office, housing, privacy, speech, travel, use of public facilities, voting, worship, and protection from bodily restraint or harm, from personal insult, from defamation, and from injury to personal relations. While hate violence cases may be brought under the Bane Act, it is unnecessary to allege bias motivation to successfully pursue a claim. Private attorneys may pursue actual and punitive damages, attorneys fees and injunctive relief. The DFEH has no jurisdiction, while other government attorneys are limited to injunctive and equitable remedies. District and city attorneys are also able to seek a civil penalty on behalf of victims in the amount of \$25,000.⁹²

IX. TORT LAW REMEDIES

Modern hate violence civil suits are often pursued through traditional tort claims. Torts are wrongful acts for which the law recognizes a civil remedy—usually, but not always, a compensatory one in the form of money damages assessed against the wrongdoer. Unlike the situation in most contract or family law cases, tort law imposes a duty upon people to conduct themselves in a reasonable manner in their dealings with the public at large, including

91. CAL. CIV. CODE §51.7.

92. CAL. CIV. CODE §52.7.

people who the defendant does not necessarily know. All tort claims require the breach of an existing duty that results in the causation of harm to a person or property. Most of the primary tort actions derive from centuries-old common law—that is, judge made law, rather than legislative enactment. Nearly every American state has since codified these traditional tort claims into statutes.⁹³

Unlike American criminal cases, any competent person can bring a tort law case against a wrongdoer—as long as the claimed wrongdoing fits into a particular cause of action recognized as a tort claim. Sometimes, as noted above, there may also be a particular federal or state statute which specifically recognizes a right to sue in cases where someone is victimized because of group status.

Traditionally torts can be divided into three areas, two of which are relevant to hate violence cases: intentional and negligent torts. Intentional torts generally require a purposeful act by the wrongdoer to cause a harmful result, while negligence actions involve the absence of the exercise of reasonable care where a harm is foreseeable from the conduct. Intentional tort claims are pursued against those who directly and purposely cause a harm.⁹⁴

Among the more traditional tort claims which might potentially apply to hate violence cases are the following: *Assault* (an intentional act or threat which creates apprehension of imminent harmful or offensive contact.); *Battery* (intentional, harmful or offensive touching of a person); *False Imprisonment* (Intentional confinement or restraint of an individual to a bounded area); *Intentional Infliction of Emotional Distress*, sometimes known as *Outrage* (extreme and outrageous conduct which intentionally or recklessly causes severe emotional distress); *Trespass to Real or Personal Property* (intentional invasion of or interference with the real or personal property of another); *Conversion* (intentional serious or extreme interference with possession of personal property, e.g. theft).⁹⁵

Tort cases against perpetrators of hate violence have been litigated on behalf of victims by both private attorneys and civil rights groups. The first modern cases began in the early 1980s against Ku Klux Klan groups by organizations such as the Southern Poverty Law Center (“SPLC”) and the Center for Constitutional Rights. Civil rights organizations such as Lawyers’ Committees for Civil Rights in major metropolitan areas have also played a role in hate violence litigation over the last twenty years, particularly those in the housing or employment context.

Of all the hate violence related civil cases, it is those against hate

93. SCAROS, ALL ABOUT TORTS (2000).

94. *Id.*

95. *See generally* D. DOBBS, THE LAW OF TORTS (2000).

groups that have gotten most of the publicity. Under the doctrine of vicarious liability a person or group can be held liable for the conduct of another person by virtue of their relationship. The two most applicable foundations for hate violence claims against hate groups are aiding and abetting and civil conspiracy.

To establish aiding and abetting in civil cases it must be shown that a “defendant provided the actor with substantial assistance or encouragement with the intention that the actor commit hate motivated violence.”⁹⁶ Not only must the encouragement have constituted a substantial factor in causing the harm, the harm must of been a foreseeable outcome of the aid rendered. When an agent of a hate group defendant renders the aid, it must be further established that the agent was authorized to render the aid by the defendant. Hate groups, in particular, have suffered crushing legal losses when they went beyond rhetoric to aiding or negligently supervising their agents in the commission of violent acts. Appellate courts, however, have ruled that the first amendment protects disturbing speech by extremists.⁹⁷

In civil conspiracy cases it must be established that the defendants agreed to commit an act. The plaintiffs must further establish that the agreement supported an act of hate violence. The violence itself must have been related to the agreement, and constitute a separate crime or tort, such as a battery.⁹⁸

The SPLC pioneered a strategy of suing hate groups civilly under traditional tort law claims for their part in promoting hate violence. In 1987 the SPLC obtained a \$7 million wrongful death judgment against the United Klans of America (“UKA”) for their supporting role in the 1981 lynching murder of Michael Donald, an innocent 19 year old African-American pedestrian kidnapped off a Mobile, Alabama street. The UKA had been implicated in the Civil Rights era assault on Freedom Riders, the murder of Viola Liuzzo, and a bomb attack on Birmingham’s 16th Street Baptist Church that left four young black girls dead in 1963.⁹⁹

In November 1991, the SPLC, with the assistance of the Anti-Defamation League, obtained a \$12.5 million judgment against White Aryan Resistance, its leaders, Tom and John Metzger, and two Oregon skinheads in a wrongful

96. E. BOWDEN & M. DEES, *Taking Hate Groups to Court*, TRIAL 24 (Feb. 1995).

97. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (while imminent incitement to criminality can be punished, abstract advocacy in support of violence is protected expression.); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *vacated, en banc hearing ordered*, 268 F. 3d 908 (9th Cir. 2001) (political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party).

98. BOWDEN & DEES, at 25-26.

99. *Beulah Mae Donald et al. v. United Klans of America et al.*, No. 84-0725-C, S.D. Al, Feb. 12, 1987).

death action for the estate of murdered Ethiopian immigrant Mulegetta Seraw. The Metzgers, through their WAR organization, trained an agent who encouraged Portland skinheads to engage in racial attacks. Because of this the plaintiffs were able to establish liability under both a civil conspiracy and aiding and abetting principles. The judgment represented the highest jury award in Oregon history and the largest hate violence verdict in American history to that time.¹⁰⁰

The racist Church of the Creator (“COTC”) lost a \$1 million lawsuit filed by the SPLC on behalf of the relatives of an African-American sailor, Harold Mansfield, who was murdered by COTC “Reverend” George Loeb in Mayport, Florida in 1991.¹⁰¹ In 1995, the SPLC won another lawsuit against neo-Nazi William Pierce for his role in fraudulently attempting to transfer COTC assets to prevent Mansfield’s relatives from recovering it. “The jury’s verdict sent the message that the law will not allow hate groups to evade responsibility for the violent actions of their members,” said SPLC legal director Richard Cohen after trial in 1996.¹⁰²

In July 1998 the SPLC won another victory against a North Carolina Klan group for its role in encouraging its members to commit arson against a 138 year old African American church in South Carolina. A state jury imposed damages against the Klan group in the amount of \$37.8 million, although an appeals court subsequently lowered this to \$21.5 million. Klan leaders apparently stated to their underlings that “The only good nigger church is a burned nigger church,” and “Hell, let’s burn a church. There’s one right down the road.” Klan leaders also gave advice about when a church arson should take place and promised assistance to would-be arsonists if they were caught.¹⁰³

Most recently, the SPLC prevailed in a case against the Aryan Nations, a quarter century year old neo-Nazi organization led by an aging, but influential bigot named Richard Butler. The SPLC and local attorneys represented motorists who were assaulted by Aryan Nations’ security staff outside group’s Hayden Lake, Idaho compound after their car muffler backfired. The \$6.3 million judgment bankrupted the organization and represented one of the only cases pursued by the SPLC against a hate group that did not involve a hate

100. Berhanu and Seraw v. Metzger, White Aryan Resistance et al., No. A8911-07007 (Cir. Ct. Multnomah, Or., Oct. 25, 1990); *aff’d*, 850 P.2d 373 (Or. Ct. App.), *review denied*, 865 P. 2d 1296 (Or. 1993); *cert. denied*, 114 S. Ct. 2100 (1994).

101. Mansfield v. Church of the Creator, No. 94-345-CA (Cir. Ct. Escambia County, FL., May 2, 1994).

102. Southern Poverty Law Center, *Supreme Court Denies Neo-Nazi’s Appeal of Judgment*, available at splcenter.org.

103. Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan et al., No. 96-CP-14-217 (C.P. Clarendon County, So. Carolina, July 24, 1998).

crime. The lawsuit alleged that the main defendant failed to adequately select, control, and supervise security staff who committed violent intentional torts against the plaintiffs.¹⁰⁴

A list of prominent hate violence lawsuits is appended to this article together with a list of the names and addresses of hate violence law related resources.

X. CONCLUSION

Many of today's most influential extremists leaders and groups have suffered a series of disastrous criminal and civil judgments over the past several decades. As a result, the likelihood of them committing on-going acts of hate inspired violence may have significantly diminished. The sad fact, however, is that the overwhelming majority of hate crimes are not committed by organized hate group members or hardcore hate-mongers.¹⁰⁵

Still, those who commit discriminatory violence, whether as individuals or in groups, face civil action and prosecution that would have been impossible in earlier times. Not only are existing civil and criminal laws being enforced with renewed vigor, hate crime statutes and other new laws are providing additional avenues for hate violence victims to seek justice against those who act against them and our democratic ideals.

XI. APPENDIX

A. *Prominent Civil Lawsuits Against Hate Groups*

1982 Justice Knights of the Klu Klux Klan (Tennessee). *Crumsey, et. al. v. The Justice Knights of the Ku Klux Klan, et. al.* (E.D. Tn., 1982). In the first recovery of its kind for victims of Klan violence, a Tennessee Klan and its members were sued in connection with cross burnings and shootings that injured five elderly black women. The Court awarded over \$500,000 in damages and issued a broad injunction against further intimidation.

1982 Texas Emergency Reserve, Knights of the Ku Klux Klan. *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (1982). Injunction disbanded Klan paramilitary group that harassed Vietnamese refugees and violated state prohibition on paramilitary activities.

104. Keenan and Keenan v. Aryan Nation v. Aryan Nations et al., No. CV99-441(D. Ct., Kootenai County, Id., September 8, 2000).

105. B. LEVIN & McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY & BLOODSHED (1993).

1987 United Klans of America, Mobile Alabama. *Beulah Mae Donald et al. v. United Klans of America et al.*, No. 84-0725-C, S.D. Al., Feb. 12, 1987). Alabama Klan group was bankrupted in federal civil case after members lynched Michael Donald, 19-year old black man in 1981.

1989 Alabama Klansmen. *People's Association of Decatur et al. v. Invisible Knights et al.*, No. CV80 C 1449S (N.D. Al., Filed Nov. 3, 1980). SPLC settled its first hate violence case from 1980 with payments to Black plaintiffs and KKK members required to undergo sensitivity training.

1990 White Aryan Resistance ("WAR"), Portland, Oregon. *Berhanu and Seraw v. Metzger; White Aryan Resistance et al.*, No. A8911-07007 (Cir. Ct. Multnomah, Or., Oct. 25, 1990); *aff'd*, 850 P.2d 373 (Or. Ct. App.), *review denied*, 865 P. 2d 1296 (Or. 1993); *cert. denied*, 114 S. Ct. 2100 (1994). \$12.5 million tort verdict assessed against WAR, its leaders, and agents in connection with the killing of Mulegatta Seraw, an Ethiopian immigrant in Portland, Oregon in 1989.

1994 Church of the Creator. *Mansfield v. Church of the Creator*, No. 94-345-CA (Cir. Ct. Escambia County, Fl., May 2, 1994). The Church of the Creator, a white supremacist organization that preaches racial holy war, assessed \$1 million in a wrongful death civil judgment in favor of the family of a murdered black sailor.

1993 Invisible Knights of the Ku Klux Klan. *Mckinney v. Farrands*, No. 92-CV-2376-CAM, N.D. Ga., case settled May 1993). A notorious Klan group was forced to disband and pay \$37,500 to a group of civil rights marchers who were attacked in Forsyth County, Georgia in 1987.

1996 Knights of the Ku Klux Klan-Texas Realm. *Texas Commission on Human Rights v. Lowe and the Knights of Ku Klux Klan-Texas Realm* (D. Ct. Orange County, Tx., March 19, 1996). A Texas Klan group agreed to cease a variety of activities that intimidated black public housing residents.

1998 Christian Knights of the Ku Klux Klan, South Carolina. *Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan et al.*, No. 96-CP-14-217 (C.P. Clarendon County, So. Carolina, July 24, 1998). A South Carolina Klan group and its leader were found liable in the amount of \$37.5 for the arson destruction of a black church. The amount was later reduced to \$21 million.

2000 Alpha, HQ. *Jouhari and Horton v. Wilson and Alpha HQ*, HUDALJ No. 03-98-0692-8, (Housing and Urban Dev., Admin. Law Judge, July 19, 2000)/*Commonwealth v. Wilson et al.*, Berks County (PA), Court of Common Pleas, Oct. 21, 1998). The publisher of a neo-Nazi website, Ryan Wilson, assessed \$1.1 million in an administrative Housing and Urban Development proceeding for terrorizing a fair housing worker and her daughter through threatening postings on his website. The website was previously removed in a civil action pursued by the Pennsylvania Attorney General's office.

2000 Aryan Nations, Idaho. *Keenan and Keenan v. Aryan Nation v. Aryan Nations et al.*, No. CV99-441(D. Ct., Kootenai County, Id., Sept. 8, 2000). A state court jury awarded \$6.3 million to two motorists assaulted by Aryan Nations security operatives outside the group's compound, effectively bankrupting the organization.

B. *Prominent Civil Lawsuits Against Individual
Hate Violence Perpetrators*

1991 *Del Dotto v. Olsen*, No. 85 CH 08155 (Cir. Ct., Cook County, Il. 1991). A man and his mother who subjected their neighbors to a year long barrage of anti-Semitic intimidation and vandalism ordered to pay \$1.8 million by a jury in Cook County, Illinois.

1992 *Dodds v. Scalfaro*, No. 90 C 0681 (N.D. Il. 1992). A federal jury awarded \$1.2 million dollars in the case of a racial hate crime in Cicero, Illinois.

1992 *Lampkin v. Vanderpluym*, No. 91 C 4959 (N.D. Il. 1992). A federal jury in Chicago assessed \$1.75 million against two neo-Nazi skinheads who beat a female African-American bus driver.

1995 *Troung v. DaCosta*, No. 715851 (Orange County., Ca. Super. Ct., March 14, 1995). An Orange County, California jury awarded a gay Asian man \$1.1 million from three assailants who nearly killed him in a brutal rock attack that left him with permanent brain damage. Seven other teenage defendants settled for \$430,000.

1995 *Rodriguez v. Spencer*, 902 S.W. 2d 37 (Tex. Ct. App., 1995). Nancy Rodriguez, the mother of Paul Broussard, a gay man who was murdered by a mob of teenagers in Houston in 1991, commenced a lawsuit against her sons' attackers, their parents and the parents' homeowners insurers. The parents

were alleged to have been negligent. Ms. Rodriguez eventually settled the case with the insurance companies.

1996 *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). Former student Jamie Nabozny settled with three school administrators for over \$900,000. Mr. Nabozny alleged that his equal protection and due process rights were violated. For years school officials allowed ongoing homophobic abuse that included severe physical and sexual attacks. The settlement occurred after a jury found the administrators liable.

1998 *Arroyo v. Killian*, No. 97L 263 (Cir. Ct. Lake County, Il. 1998). A Lake County, Illinois jury awarded the parents and estate of a 15 year old Latino boy \$6 million after he was beaten following a car accident.

1999 *Jane Doe No. 1, et al., v. The City of Boston and The Boston Housing Authority*, No. 96-12540 RCL (D. Mass. 1999). The Boston Housing Authority settled a class action lawsuit filed by tenants of color who were victimized by racially motivated violence and intimidation. The BHA agreed to implement employee training and policies relating to hate violence and to pay a total of \$1.5 million. The plaintiffs sued pursuant to the Fair Housing Act (42 U.S.C. §3601), the Civil Rights Act of 1866 (42 U.S.C. § 1981), the Civil Rights Act of 1871 (42 U.S.C. § 1983), Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Thirteenth and Fourteenth Amendments of the United States Constitution and state statutes.

2000 *United States v. Morrison*, 529 U.S. 598 (2000). In a 5-4 decision in *United States v. Morrison*, the United States invalidated a provision of the violence against women act which allowed women alleging acts of sexual assault to sue their assailants in federal court. The majority held that the Commerce Clause does not empower Congress to pass such a law.

2000 *Mendes v. Sullivan*, No. 99-CV-11468-NG (D. Mass. filed July 9, 1999). A white assailant who assaulted his neighbor with a cinder block was restrained from living next door to his victim until a pending hate violence lawsuit is resolved.

2001 *Brandon v. County of Richardson*, 261 Neb. 636, 261 Neb. 636, 624 NW.2d 604 (2001) (Supreme Court of Nebraska, April 20, 2001). The Nebraska Supreme Court increased the damages awarded to the family of a cross dressing woman against a Nebraska sheriff in a tort suit. The court found that the sheriff failed to take appropriate action to protect Brandon Teena, 21,

after she reported being raped in 1993. Her assailants murdered her a week later. The Court criticizes the sheriff's abuse as, "extreme and outrageous, beyond all possible bounds of decency, and is to be regarded as atrocious and utterly intolerable in a civilized community." The case is still ongoing as the trial court has failed to abide by the Nebraska's Supreme Court's ruling.

C. Hate Violence Law Related Resources

ABA (American Bar Association)
750 North Lake Shore Drive
Chicago, IL 60611
Tel. (312) 988-5465

American Jewish Committee
New York, NY 10022
Tel. (212) 751-4000
www.ajc.org

Anti-Defamation League (ADL)
823 United Nations Plaza
New York, NY 10017
Tel. (212) 885-77
www.adl.org

American Prosecutors Research Institute (APRI)
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
Tel. (703) 549-4253
www.ndaa.org/apri/Index.html

Asian Pacific American Legal Center of Southern California
1010 S. Flower Street
Suite 302
Los Angeles, CA 90015
Tel. (213) 748-2022

(Boston) Lawyers' Committee for Civil Rights Under Law of the
Boston Bar Association, Inc.
294 Washington, St., Ste. 443
Boston, MA 02108
Tel. (617) 482-1145

California Fair Employment and Housing Commission
455 Golden Gate Avenue, Suite 14500
San Francisco, CA 94102
Tel. (415) 557-2325

Center for the Study of Hate & Extremism
California State University, San Bernardino
5500 University Pkwy
San Bernardino, CA 92407
Tel. (909) 880-7711
www.fighthate.org

Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel. (212) 614-6464
www.ccr-ny.org

Chicago Lawyers' Committee For Civil Rights Under Law, Inc.
100 North LaSalle Street, Suite 600
Chicago, IL 60602-2403
Tel. (312) 630-9744
www.clccrul.org/

Disability Rights Advocates, A Non-Profit Organization
449 15th Street, Suite 303
Oakland, CA 94612
Tel. (510) 451-8644 TTY (510) 451-8716
www.dralegal.org

Gonzaga University Institute for Action Against Hate
Spokane, WA 99258
www.gonzaga.edu/againsthate

Lambda Legal Defense and Education Fund, Inc.
120 Wall St., Ste. 1500
New York, NY 10005
www.lambdalegal.org

Lawyers' Committee for Civil Rights Under Law (D.C.)
1401 New York Av., NW- Ste 400
Washington, DC 20005
Tel. (202) 662-8600
www.lawyerscomm.org

Mexican American Legal Defense And Education Fund
National Headquarters
Los Angeles Regional Office
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
Tel. (213) 629-2512

NAACP Legal Defense & Education Fund, Inc. (NAACP-LDEF)
99 Hudson Street, 16th Floor
New York, NY 10013
Tel. (212) 219-1900

National Asian Pacific American Legal Consortium (NAPALC)
1629 K Street, NW, Suite 522
Washington, DC 20006
Tel. (202) 296-2300

National Association for the Advancement of Colored People (NAACP)
4805 Mount Hope Drive
Baltimore, MD 21215
Tel. (410) 358-8900

National Bar Association
1225 11th Street, NW
Washington, DC 20001
Tel. (202) 842-3900

National Center for Victims of Crime
2111 Wilson Blvd., Ste. 300
Arlington, VA 22201
Tel. (703) 276-2889
www.nvc.com

NOW Legal Defense and Education Fund
395 Hudson Street
New York, NY 10014
Tel: (212) 925-6635

Public Counsel Law Center
P.O. Box 76900
Los Angeles, CA 90076
Tel. (213) 385-2977
www.publiccounsel.org

Southern Poverty Law Center (SPLC)
Box 548, 400 Washington Avenue
Montgomery, AL 36104
Tel. (334) 956-8200
www.splcenter.org

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Criminal Section, PHB
Washington, D.C. 20530
Tel. (202) 514-2000
www.usdoj.gov