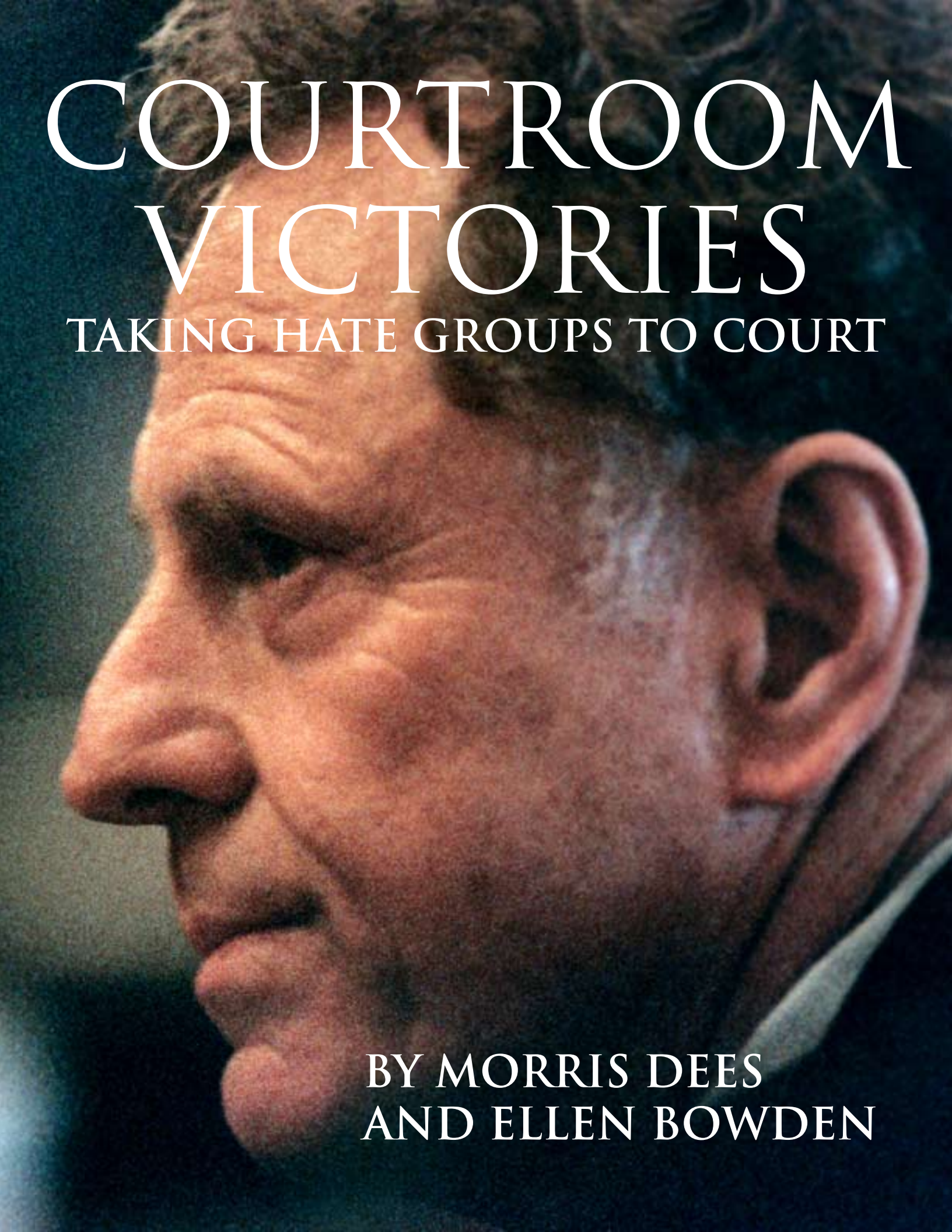

COURTROOM VICTORIES

TAKING HATE GROUPS TO COURT

BY MORRIS DEES
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Courtroom Victories: Taking Hate Groups To Court

by Morris Dees and Ellen Bowden

NOTE: This article first appeared in the February 1995 issue of Trial, a publication of the American Trial Lawyers Association.

On a quiet evening in November 1988, Mulugeta Seraw, an Ethiopian graduate student, was being dropped off by two friends. Three skinheads from a racist group, East Side White Pride, spotted them. Wearing steel-toed boots and military jackets, the skinheads blocked the Ethiopians' path and ordered them to move. When the Ethiopians did not respond immediately, one of the skinheads took a baseball bat and smashed their car windows. Another skinhead then turned the baseball bat on Seraw. With repeated blows, the angry skinhead crushed Seraw's skull. Seraw was dead before the paramedics arrived on the scene.

Unfortunately, stories like Seraw's are not uncommon. Hate crimes have reached epidemic proportions. Hate has motivated over 100 murders since1990. According to the FBI, 7,684 incidents of hate crime took place in1993 alone. The saddest fact is that these figures do not come close to measuring the true number of hate crimes in the United States. For every reported hate crime, as many as nine others may go unreported.

Hate crimes know no geographic boundaries. Once most often associated with violence in the South, hate crimes have touched every region of the country in recent years. No group is immune. Once most often associated with violence against blacks by whites, hate crimes now count Asian-Americans, Hispanics, Jews, gays, lesbians, blacks and whites among their victims.

Hate crimes pose unique threats. Victims of hate crime are much more likely to endure severe physical and psychological harm than victims of other violent crimes. Compounding the problem, hate crimes have the potential to convulse an entire community. The Rodney King beating illustrates how one hate-motivated crime can quickly become a focal point for venting long-simmering grievances. The social strife that often accompanies hate crime can irreparably damage a community's cohesion.

The lawyer's role

What can we as attorneys do to reduce hate crimes? One step is to encourage local prosecutors and lawmakers to take all hate-motivated crimes seriously by increasing prosecutions and enacting tougher laws. Another step is to pursue civil remedies for victims.

A hurdle facing most civil hate crime suits is that the defendants are penniless. Hate crimes are typically committed by youths who are only marginally employed at best and have no resources of their own to speak of. Those with assets before the crime are likely to expend them on the costs of legal defense at their criminal trials. As a result, the victim and his or her lawyer frequently have no defendant worth suing.

Even if a defendant has deep pockets, an individual lawsuit is unlikely to make a dent in the rate of hate crimes committed each day. The typical reckless youth who commits these crimes is not going to be deterred by the threat of liability even if he happens to hear about a successful civil lawsuit against someone like himself.

The key to finding a defendant who can both pay his debts on a judgmen tand have an impact on hate crimes overall often lies in locating those whose behind the scenes actions might render them vicariously liable for the perpetrator's actions. Those persons are often the leaders of hate groups.

Organized hate groups commit 15 percent of all hate crimes. They also influence many more persons to follow their violent example. Racist skinheads, for instance, often depend on hate groups for their slogans and leadership. As hate crime experts Jack Levin and Jack McDevitt have noted, "[t]here may be thousands of alienated youngsters looking for a role model who will encourage them to express their profound resentment. Such impressionable youths may not actually join some hate group. They may not be willing to shave their heads and don the uniforms of skinheads, but they are nonetheless *inspired* by the presence of such groups and

intrigued by the use of their symbols of power."

In Mulugeta Seraw's case the youths who killed Seraw belonged to a local racist skinhead group, East Side White Pride. One of the skinheads, David Mazzella, actually belonged to a much larger hate organization, the White Aryan Resistance (WAR). The leader of WAR, Tom Metzger, and his son John, head of WAR Youth, recruited Mazzella in California when he was only 16. They initiated Mazzella into the world of racist violence and trained him to organize skinheads to commit racist attacks. To that end, they sent Mazzella to Portland and introduced him to East Side White Pride, where he spurred the group on to commit the brutal assaults that culminated in Seraw's murder.

Southern Poverty Law Center civil suit

Focusing on the link between Mazzella and the Metzgers, the Southern Poverty Law Center brought a civil suit on behalf of Seraw's family against the Portland skinheads, Tom and John Metzger, and WAR. Lawyers from the Anti-Defamation League assisted us.

Our goal in the Portland case and similar lawsuits has been to hold the leaders of hate groups responsible for the violent actions of their members. First, we aim to bankrupt the organizations or individuals responsible for hate crimes. Second, we seek to separate the foot soldiers from the leaders, whose combined charisma and intelligence make them less replaceable. Through these means, we hope not only to put the hate groups themselves out of business, but to stop their leaders from encouraging so many youths to perpetrate hate violence.

The Seraw case presented a complicated factual picture. The Oregon defendants were like so many other disenchanted, violent youths one reads about in newspapers every day. We could easily link them to the crime, but they were penniless and replaceable in the world of bias violence. The California defendants, on the other hand, were 1,500 miles away when the crime occurred and did not even know it was happening. Still, their actions and guidance led the skinheads to kill Seraw.

Taking aim at hate groups

As the Seraw case demonstrates, hate groups can spawn violence even when they do not directly participate in the crimes. This reality suggests that we, as lawyers, must take aim at hate groups. In addition to helping to combat the 15 percent of hate crimes for which hate groups are directly responsible, these suits also have an effect on the remaining 85 percent by eliminating the poisonous impact hate groups have on the rest of society. Moreover, hate groups and their leaders are much more apt to have resources than the youths whose actions they direct. Thus, successful civil suits against hate groups and their leaders also provide victims a remedy they would otherwise not have.

Prior to the Seraw case, the Southern Poverty Law Center has taken hate groups to court on numerous occasions. In 1981, we enjoined the Ku Klux Klan from harassing and intimidating Vietnamese fishermen in the exercise of their legal rights to fish in Galveston Bay, Texas. In 1987, the Center won a $7 million verdict for the mother of a black youth lynched by the Klan. In 1988, the Center secured a criminal contempt conviction against the Klan for violating a consent decree designed to protect black person sin North Carolina. The following year we won a $1 million verdict against two Klan groups, several Klan leaders and numerous Klan members for a violent assault against our clients during their peaceful civil rights march in all-white Forsyth County, Georgia. In 1995, we obtained a $1 million default judgment for a mother whose son was killed by a "Reverend" of a white supremacist group, the Church of the Creator, that we intend to use to collect "Church" assets held by other neo-Nazi leaders.

Civil remedies

If a victim wants to bring a civil action, several sources of law may afford a remedy. Federal law provides civil remedies for discriminatory interferences with federally protected rights. Thirty-five states have enacted their own hate crime statutes. Twenty-two of these statutes provide special civil remedies for victims. Some of the statutes make attorney fees or treble damages available. Remedies like assault and battery and wrongful death actions also exist in every state.

The trend towards enacting hate crime statutes has been important in expressing community attitudes against hate crime. The laws have also led police departments to take these crimes more seriously. But we at the Southern Poverty Law Center have not relied on the state statutes for two reasons. First, some of these statutes have yet to be tested. Second, we believe that other theories can work as effectively. Although the leaders of hate groups often have assets, the damages we seek in these cases would bankrupt the groups 10 times over. Under these circumstances, trebling the damage award and collecting attorney fees would serve little purpose.

In our suit against the leaders of WAR for Mulegeta Seraw's death, we used Oregon's wrongful death statute in conjunction with traditional principles of vicarious liability: aiding and abetting and civil conspiracy. Most frequently associated with criminal law, these theories have long been utilized to attribute fault to persons who did not directly cause the victim's harm.

These principles underlie many common law tort claims. Civil conspiracy, for example, can make both drivers in a high speed auto chase liable to someone injured in a collision with just one of the cars. Similarly, an aiding and abetting theory can render persons who furnish a minor with alcohol civilly liable for injuries caused by the minor's drunk driving. Applied in the hate crimes context, aiding and abetting and civil conspiracy theories can each give victims a solid basis for establishing a case of vicarious liability.

Aiding and abetting

The aiding and abetting theory assigns liability to defendants who did not carry out the racist attack, but who "provided substantial assistance or encouragement" to those who did. This principle allows the law to catch defendants whose indirect involvement might otherwise allow them to escape unpunished and remain free to promote future hate crimes. The theory works well in practice because it fits the facts of many hate crimes.

The *Restatement (Second) of Torts* illustrates aiding and abetting with the classic example of incitement. A encourages B to throw rocks, while throwing none himself. When one of the rocks strikes C, a bystander, A becomes liable to C. This scenario depicts incitement that occurs immediately prior to violence. Although it mirrors the facts of some hate crimes, it is not analogous to cases like our Portland lawsuit because the California defendants did not urge the Portland skinheads to kill Seraw at the time or place of the killing.

Another example from the restatement, however, describes an additional category of potentially liable defendants. When a policeman "advises other policemen to use illegal methods of coercion upon B," the policeman is liable to B "for batteries committed in accordance with the advice."

This hypothetical assumes no close temporal link between the advice and the battery. Instead, it rests on the close relationship between the speaker and the actor, both of whom are policemen.

When the speaker occupies a higher position than the actor, the argument for liability becomes even stronger because the speaker knows that the actor will probably act on his advice. When an organized crime boss orders one of his henchmen to kill someone, for example, the crime boss becomes vicariously liable for his subordinate's acts. The fact that the henchman waited a month to execute the killing does not negate his boss' liability for the murder. Although that temporal lapse would be fatal to an incitement claim, it has no bearing on other aiding and abetting theories.

Despite the fact that the Metzgers were in California when East Side White Pride members murdered Seraw, two elements helped make them legally accountable for their actions. First, they had a pre-existing relationship with the perpetrators. They had known Mazzella for years and trained him to lead others in committing racist violence. They also wrote a letter to East Side White Pride that offered to work with them and introduced them to Mazzella. Second, the Metzgers sat in positions of authority over the Portland skinheads, through the Metzgers' leadership of WAR and WAR Youth. Like the ties between the crime boss and his henchman, the relationship between the Portland and California defendants pointed to the significance of the Metzgers' role in causing the murder.

As the Metzger case illustrates, the aiding and abetting theory fits the facts of many hate crimes. It depicts two or more independent actors, at least one of whom encouraged the other(s) to act. There is also a tremendous

body of law concerning the aiding and abetting theory in civil suits, allowing lawyers to invoke the theory with relative ease.

Elements of proof: To prove an aiding and abetting claim, lawyers must establish several elements. The defendant must have provided the actor with substantial assistance or encouragement with the intention that the actor commit hate-motivated violence. The encouragement must have been a substantial factor in causing the violent conduct. The crime must also have been a foreseeable result of the assistance. Cases involving an agent, such as Mazzella in the Portland case, require additional proof that the defendant authorized the agent to provide the rendered assistance.

Civil conspiracy

Victims can also use a civil conspiracy theory to assign liability to all those responsible for bias crimes. When the relationship between two or more persons is close enough, one can infer that a conspiracy exists. Two persons, for example, who join in planning and burning a cross in front of an African-American family's home, have presumably conspired to burn the cross.

Instead of invoking the aiding and abetting assumption of two independent actors, civil conspiracy envisions an agreement between two or more persons. That agreement, rather than the assistance that one gives the other, forms the basis for liability. A meeting of the minds occurs, transforming the acts of one defendant into the acts of the other(s).

Some cases can be viewed both as conspiracy cases and aiding and abetting cases. For example, we presented both theories in our Portland trial. To prove the conspiracy claim, we stressed the direct ties between the Metzgers and the skinhead group, East Side White Pride, during the trial. Before Mazzella, the WAR export, arrived in Portland, John Metzger sent a letter to the skinhead group introducing Mazzella and offering to work with the group. After Seraw's killing, the skinhead who wielded the bat called Tom Metzger from jail. Facts such as these helped to establish the close linkage between the Metzgers and the Portland skinheads that ultimately led thej ury to find that a civil conspiracy existed.

As every criminal lawyer knows, conspiracy law is extremely broad. The conspirators need not know the identity or even the existence of all other conspirators. A defendant need not have been involved throughout the conspiracy, nor know the details of the illegal plan. Defendants may be held liable without having planned or known about the specific injurious action. As a practical matter, one can prove civil conspiracy by showing that the defendants contemplated hate violence from the outset and that the violent incident was a foreseeable result of their plan.

Elements of proof: The plaintiff must prove several elements. The defendants must have agreed on a course of action. The primary purpose of that agreement must have been to promote incidents of hate violence. This violence must have occurred in furtherance of the agreed on course of action, and it must have been illegal or independently tortious.

First Amendment issues

Although hate mongers are no friend to civil rights, there is one right they all know: the right to freedom of speech under the First Amendment. Klan groups have often filed lawsuits to protect their right to picket and march. They can be expected to raise a First Amendment challenge to the claim in any lawsuit that seeks to hold the groups or leaders liable for the actions of their members.

Of course, our Constitution offers widespread freedom to say what you want. It has protected the NAACP's speech during an economic boycott that erupted in violence, and it ought to protect neo-Nazi groups' speech as well. In the pro-life movement, persons who advocate the killing of doctors who perform abortions receive First Amendment protection.

But preparing organized groups for violence is quite different than delivering a speech at a public gathering. The Supreme Court's decision in *Brandenburg v. Ohio* explicitly protected the abstract advocacy of violence. But in *Noto v. United States*, the Court explained that preparing a group for violence does not come within the

First Amendment. Subsequent Court decisions, including *Brandenburg*, have cited the *Noto* rule with approval. Thus, someone who secretly makes violent plans with his loyal comrades and then carries those plans out leaves the First Amendment's protection far behind him.

In an aiding and abetting claim, the question becomes whether the substantial assistance given to the perpetrator is more similar to preparations for violence than to abstract advocacy. Training persons to commit racist violence can involve physical demonstrations or even the use of words alone. The trainer need not know what particular crimes will be committed to be liable for them, but only that his efforts are preparing foot soldiers to commit racist violence.

In the case of civil conspiracy claims, the First Amendment is much less of an issue. Under conspiracy law, the act of one defendant is the act of all the defendants. Thus, once a civil conspiracy has been proven, nothing in the First Amendment blocks the imposition of liability. The critical factor here lies simply in establishing that the conspiracy existed, a showing made by proving that there was both an agreement to commit hate violence and an act in support of that agreement.

Neither aiding and abetting nor civil conspiracy claims conflict with the First Amendment. The First Amendment clearly anticipates that the defendants' words can be used against them to establish their liability. Holding someone's words against him or her is commonplace in our legal system. The Supreme Court has always recognized that the fact that a crime was committed by words alone does not immunize it from being unlawful. No one, for example, seriously questions whether the state can prosecute someone for price fixing based on words alone. Similarly, the Court in *NAACP v. Claiborne Hardware Co.* made clear that the speeches of an NAACP leader could be used as evidence that he instructed others to commit violence. Thus, the First Amendment does not present significant barriers to lawsuits that claim that hate groups leaders are vicariously liable for hate violence. One has a right to hate in our country, but not a right to lead others to hurt.

The trial

Trying persons accused of committing hate crimes poses unique obstacles. An extraordinary level of pre-trial preparation is required because discovery has only limited value in these kinds of cases. Terrorist groups do not keep records of the crimes they have committed. Interrogatories will not work, because defendants will not admit to perpetrating past attacks. The value of discovery is often limited in these cases to uncovering information in the hands of third parties, such as phone records that can show contacts between actors and leaders. Lawyers can also use depositions to allow defendants to paint themselves into a corner.

To compensate for the weaknesses of discovery, we have had to turn to alternative sources of information. We perform our own detective work. We also try to cultivate ties to an insider who wants to come clean and do something to make up for his past racist acts. In the Portland case, Mazzella cooperated with us and testified against the defendants.

The trial itself demands great attention to detail. Although there are often numerous state and common law causes of action available, we winnow down the number of claims to simplify issues for jurors. We also try to give jurors a sense of the importance of the case for both the victim and society.

The Metzger case demonstrates that theories of vicarious liability, like aiding and abetting and civil conspiracy, can work successfully in the context of hate crime litigation. Using them, we can fix blame where it belongs and give the victim a greater recovery--both in dollar and emotional terms. The Portland jury returned a verdict which found all of the defendants guilty on all counts and awarded Seraw's family $12.5 million in damages. (The U.S. Supreme Court refused to hear Metzger's appeal.)

Winning a judgment against hate mongers is often only the first step in putting hate groups out of business. Unlike a corporation, neo-Nazi organizations are not in the habit of paying their legal debts to their victims. They can be expected to hide their property. Painstaking follow-up work is usually required to identify and seize a defendant's assets. Lawyers can learn considerable information about a group's assets simply by collecting white supremacist literature and monitoring the group's activities and public statements. We once located additional assets by tracing a defendant's bank accounts through third party contributions. Although

difficult, enforcing judgments against hate groups helps to compensate current victims and prevent these groups from finding new Mulugeta Seraws to harm.

We as lawyers cannot literally stop hate violence before it occurs. But we can penalize both the leaders and foot soldiers who provoke racist confrontations. In so doing, we can give victims a measure of recovery and hopefully deter the leaders who incite hate-motivated violence from continuing down that deadly, racist path.

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