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BANKRUPTING THE FIRST AMENDMENT: USING TORT LITIGATION TO SILENCE HATE GROUPS

*"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."*¹

I. INTRODUCTION

The desire to speak and be heard has a long tradition in western civilization.² This tradition comes in contrast to an equally long tradition of suppressing unpopular views. Plato's *Apology*, concerning the trial of Socrates, gives us one of the first examples in western civilization of an individual being persecuted for his views.³ Part of Socrates' unpopularity stemmed from his attempts to get Athenians to reexamine their preconceptions and untested beliefs by challenging those beliefs through a "dialogue." This dialogue consisted of ever narrowing questions aimed at "getting clear ideas."⁴ According to Will Durant, "[t]o every vague notion, easy generalization, or secret prejudice [Socrates] pointed the challenge, 'What is it' and asked for precise definitions."⁵ Modernly, most would find Socrates' dialogue a mere nui-

1. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Franfurter, J., dissenting). Justice Franfurter's observation is a poignant one in that society are currently faced with such a dilemma. We are faced with the decision to protect the rights of those we despise in order to protect the civil liberties of all, or to give up a portion of our rights to punish our nemesis.

2. After being sentenced to death, Socrates spoke to his accusers telling them that "[he] would rather die having spoken after [his] manner, than speak in [their] manner and live" because to him "the unexamined life is not worth living." PLATO, *Apology*, reprinted in PLATO: FIVE GREAT DIALOGUES 56 (Louis Rope Loomis eds., 1942).

3. See generally *id.* According to Alexander Meiklejohn, "[p]resent-day Americans who wish to understand the meaning, the human intention, expressed by the First Amendment, would do well to read and to ponder again Plato's *Apology*, written in Athens twenty-four centuries ago." ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 20 (1948). Meiklejohn includes a discussion of Socrates' trial and execution to demonstrate the difference between the creation of laws and consent to law made by common consensus. See *id.* While my purpose in including this discussion of Socrates' trial and execution differs from Meiklejohn's I agree that great insight into the First Amendment can be garnered by reading Plato's *Apology*.

4. WILL DURANT, *THE STORY OF CIVILIZATION: THE LIFE OF GREECE* 367 (1939). See PLATO, *Crito*, reprinted in PLATO: FIVE GREAT DIALOGUES 65-79 (Louis Rope Loomis eds., 1942). Socrates conversation with Crito prior to his execution provides an example of the "Socratic method" that made Socrates famous. See *id.*

5. DURANT, *supra* note 4, at 367.

sance. To the average Athenian, however, Socrates was “the most dangerous of the Sophists.”⁶ Socrates’ supporters, both ancient and modern, offer the view that Socrates’ downfall was his compulsion to walk the streets of Athens as the “gadfly” of Athens.⁷ Socrates’ accusers, such as Meletus, called Socrates a “doer of evil, who corrupts the youth; and who does not believe in the gods of the state, but has other new divinities of his own.”⁸ Meletus’ charges, however, do not identify the true reason for suppressing Socrates’ speech.

Nevertheless, modernly some argue that contributing more to Socrates’ ultimate execution may have been his politically incorrect views. Socrates’ promotion of the aristocratic model of government was seen as intolerable in the cradle of Democracy.⁹ At that moment in time it was seen as a necessary evil that Socrates drink the Hemlock in order to save Athens from possible destruction.¹⁰

The United States, like ancient Greece, has an ugly history of repressing unpopular speech.¹¹ The infamous Alien and Sedition Acts of 1789 are ex-

6. See *id.* In a society that was a democracy, Socrates argued for an aristocracy. *Id.* Authors such as I.F. Stone have argued that his political philosophy was his down fall. See generally I.F. STONE, *THE TRIAL OF SOCRATES* (1989).

7. PLATO, *supra* note 2, at 49 (“I am that gadfly which God has attached to the state, and all day long and in all places am always fastening upon you, arousing and persuading and reproaching you.”).

8. *Id.* at 41. See also DURANT, *supra* note 4, at 371; Xenophon, *Memorabilia*, § 20, <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Xen.+Mem.+1.1.1> (last visited Nov. 27, 2000). According to Xenophon:

I wonder, then, how the Athenians can have persuaded that Socrates was a free-thinker, when he never said or did anything contrary to sound religion, and his utterance about the gods and his behaviors toward them were the words and actions of a man who is truly religious and deserves to be thought so.

Id. For those interested in Greek history the Persus Project can provide access to a wealth of primary and secondary sources. See generally The Persus Digital Library, <http://www.perseus.tufts.edu> (last visited Nov. 27, 2000).

9. See generally STONE, *supra* note 6. It was likely that Socrates was punished for his views because he was an outspoken supporter of the implementation of an aristocracy. See DURANT, *supra* note 4, at 372-73. This is not meant to analogize Socrates and those who preach racial hatred in order to suggest that the present day hate-monger will later become great philosophers. Instead, this should show that as a society we all lose liberty when another is silenced. Socrates’ anti-democratic views were to Athenians, as dangerous as racist views are considered by modern Americans. See generally STONE, *supra* note 6. Cf. Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322-23 (1989).

10. Intolerable as the notion of an aristocracy in ancient Athens is the notion of racist speech in America. As a society we repeat the sins of antiquity by silencing our foes with repressive measures rather than with the force of our arguments.

11. Michael Kent Curtis, *Critics of “Free Speech” and the Uses of the Past*, 12 CONST. COMMENTARY 29, 34-42 (1995). Finding examples of men and women who fought to be heard abound in history. In modern times we need only look to the civil rights movement to see some of the most valiant examples of men and women fighting to be heard in a hostile environment. See generally MARTIN LUTHER KING, JR. *WHY WE CAN’T WAIT* (1964). See also HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492 – PRESENT* 435-59 (1995).

amples of early attempts by our country to suppress unpopular speech.¹² The Sedition Act of 1789 was intended to silence critics of the Federalist Party. Supporters of the act claimed that criticism of the fledgling representative government could lead to its demise.¹³ Thomas Jefferson, a critic of the act, realized that the statute was merely an attempt by the Federalist Party to hold on to power by shielding itself from criticism.¹⁴ In a letter to Abigail Adams, Jefferson denounced the Sedition Act as being, "as palpable as if Congress had ordered us to fall down and worship a golden image."¹⁵ Fortunately for Jefferson, the Sedition Act failed to stop him from becoming president. After becoming president Jefferson pardoned those convicted under the Act.¹⁶

Today, our nation faces a threat to free speech that is much more inconspicuous than the Sedition Act. This threat to free speech is crushing tort liability. The Southern Poverty Law Center (SPLC) has found great success in using crushing tort liability to silence hate groups. Morris Dees, co-founder of the SPLC, has led this movement to silence hate groups by bankrupting them.¹⁷ Utilizing the garden-variety tort theories of aiding and abetting and civil conspiracy, Dees has crippled a number of outspoken hate groups.¹⁸ The tort theories used by Dees have allowed him to hold the main organization

12. MICHAEL LES BENEDICT, *THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 100-01* (1996). The Alien act allowed the government to deport immigrants that it felt were dangerous. *Id.* The Sedition Act, on the other hand, was an outright suppression of free speech. Used against members of the Jeffersonian Republicans, the Sedition act of 1789 punished:

[F]alse, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them]; or to bring them [into] contempt or disrepute; or to excite them against [the] hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combination therein, for opposing or resisting any law of the United States, or any [lawful] act of the President of the United States.

Sedition Act of 1789 1 Stat. 596 *reprinted in* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW 1077* (3d ed. 1996).

13. See Michael T. Gibson, *The Supreme Court and Freedom of Expression From 1791 to 1917*, 55 *FORDHAM L. REV.* 263, 273 (1986). An indication that the Sedition act was intended to protect only the Federalist party and not the entire nation for sedition was that it ended immediately after the term of the Federalist president John Adams. *Id.*

14. *Id.*

15. *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

16. See *id.* In the midst of these prosecutions for sedition, the Supreme Court remained partisanly silent on the matter. See Gibson, *supra* note 13, at 273-74. Congress' refusal to renew the act and Jefferson's pardons of those prosecuted effectively ended this ugly chapter in American history. *Id.*

17. See Morris Dees & Ellen Bowden, *Hate: Taking Hate Groups to Court*, *TRIAL*, Feb. 1995, at 24.

18. See *id.* The tort theories employed by Dees are valid. See generally Damon Henderson Taylor, *Civil Litigation Against Hate Groups Hitting the Wallets of the Nations Hate-Monger*, 18 *BUFF. PUB. INTEREST L.J.* 95 (2000). This Comment does not seek to contest elementary basis of his tort theories, but rather to balance the interests of these tort suits against First Amendment rights; the latter may in some circumstances outweigh the former.

vicariously liable for the acts of members who purportedly act out the racial dogma espoused by these groups and their leaders.¹⁹ “Dees’ alternative strategy” has prospered where other efforts to silence supremacy groups have failed because his strategy “both sidesteps the barriers blocking federal and state legislation’s effectiveness and overcomes the constitutional barriers that protect freedom of speech.”²⁰ By bankrupting both the speaker and any organization that supports or associates with the speaker, the SPLC seeks to silence hate groups by taking away the infrastructure and capital needed to disseminate their views.²¹ These lawsuits have demonstrated that whether by tort or by force, it is equally possible to silence distastefully belligerent speech.

A recent victory by Dees against the Aryan Nation, a group headed by Richard Butler, highlights this issue.²² Aryan Nation security guards attacked Victoria Keenan and her son after the Keenens’ car backfired.²³ The guards purportedly believed that the backfiring car was gunfire. The guards chased the Keenens until the Keenens’ car was forced into a ditch.²⁴ An altercation ensued with Victoria’s life being threatened, and her son being beaten. Based on a garden-variety tort action, the Aryan Nation was held liable for \$330,000 in compensatory damages and \$6 million in punitive damages.²⁵ By holding the main organization liable for the acts of its security guards, Dees’ suit halted the Aryan Nations ability to spread its message by emptying the coffers of the organization.

This Comment considers whether Dees’ “side step[ping]” of the First Amendment through tort litigation violates the First Amendment right to freedom of speech.²⁶ The thesis of this paper contends civil litigation aimed specifically at bankrupting hate groups is unconstitutional because of its tendency to chilling protected speech. In order to avoid the self-censorship of

19. See Dees & Bowden, *supra* note 17, at 24-26; Taylor, *supra* note 18, at 100-01; David G. Braithwaite, *Combatting Hate Crimes: The Use of Civil Alternatives to Criminal Prosecutions*, 6 B.U. PUB. INT. L.J. 243, 255-58 (1996). Some of the tort theories employed by Dees include civil conspiracy, and aiding and abetting. Dees & Bowden *supra*. Recently, Dees used the theory of respondeat superior in his suit against Aryan Nations. Complaint for Damages and Injunctive Relief and Demand for A Jury Trial, Keenan v. Aryan Nations, Idaho Dist. Ct., County of Kootenai, (1999) (No. CV99-441) [hereinafter *Complaint*].

20. See Taylor, *supra* note 18, at 143.

21. See BILL STANTON, *KLANWATCH: BRINGING THE KU KLUX KLAN TO JUSTICE* 205 (1991).

22. See Kim Murphy, *Jury Verdict Could Bankrupt Aryans*, L.A. TIMES, Sept. 8, 2000, at A1.

23. *Id.*

24. *Id.*

25. *Id.*

26. In writing this Comment I find myself in the dilemma set forth by David R. Fine: “Traditionally, liberals have been thought to be the strongest proponents of free speech and free expression. Likewise, they have urged societal tolerance and struggled to abolish hate. When the two goals clash, liberal groups find themselves in a quandary.” David R. Fine, *Beware That False First Step*, 82 KY. L.J. 731, 748-49 (1994).

these groups, they must be afforded additional procedural safeguards when faced with politically charged civil litigation aimed at bankrupting them. Part II of this Comment will look at three applicable philosophical bases for vigorous protection of free speech: the marketplace of ideas, sovereignty of the people, and futility of suppression. Part III will examine the Supreme Court's ever changing view of the First Amendment. In an attempt to demonstrate the dangers of limiting free speech, this section will survey the historical abuses of the First Amendment prior to *Brandenburg v. Ohio*. Then this Comment will look at *Brandenburg* and the subsequent evolution of post-*Brandenburg* decisions giving greater protection to free speech. This section will also consider *New York Times*²⁷ and *Hustler*²⁸ to see how the Supreme Court has protected free speech from tort litigation. Part IV will consider Morris Dees' successes in silencing particular groups through civil litigation and some of the issues raised by such litigation. Finally, Part V proposes that procedural safeguards to better balance the competing interests involved in civil litigation against hate groups.

II. A BRIEF INQUIRY INTO THE PHILOSOPHICAL UNDERPINNINGS OF THE RIGHT TO FREE SPEECH

A. *The Marketplace of Ideas*

Amidst the industrial revolution that was radically altering Europe in 1859, John Stuart Mill published *On Liberty*, his groundbreaking essay defending freedom of speech.²⁹ According to Mill, "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."³⁰ This eloquent statement is supported by powerful justifications. The commentator Frederick Schauer has described Mill's argument as a variation of the "survival theory of truth."³¹ The survival theory as described by Schauer proffers that opinions and ideas are to be tested against one another and that "the elimination of suppression would consequently increase the likelihood of exchanging error for truth."³²

In addition to exchanging error for truth, Mill theorized that both good and bad opinions have a place in society. The rationale is "if the opinion is right," but suppressed, "[society is] deprived of the opportunity of exchange-

27. 376 U.S. 254 (1964).

28. 485 U.S. 46 (1985).

29. PETER N. STEARNS, *THE INDUSTRIAL REVOLUTION IN WORLD HISTORY 1* (1993).

30. JOHN STUART MILL, *ON LIBERTY* 18 (David Spitz ed., W.W. Norton & Co. Inc. 1975).

31. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 21 (1982).

32. *See id.* at 15. According to Schauer a weakness of the survival theory of truth is that it lacks any objective test of truth. *See id.* at 20.

ing error for truth: if wrong, [society] lose[s], what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."³³ Therefore, under Mill's theory, false opinions serve the purpose of crystallizing in the minds of those exposed to them the truth of the correct opinion. A caveat by Mill explains this position: even a true idea needs to be "vigorously and earnestly contested" otherwise "it will, by most of those who receive it, be held in the manner of prejudice, with little comprehension or feeling of its rational grounds."³⁴ The great fear is that the true idea will be "deprived of its vital effect . . . becoming mere formal profession."³⁵ Thus, even racist viewpoints have a place in a society of tolerance if the people are to truly understand the meaning of tolerance.

While Mill was not the first to make an argument for free speech,³⁶ Mill's essay would greatly influence some of the Supreme Court's most influential judges. These judges would later reformulate Mill's ideas into the doctrine of the "marketplace of ideas."³⁷ Justice Holmes' dissenting opinion in *Abrams v. United States*³⁸ was the first articulation of the marketplace of ideas doctrine. In *Abrams*, Holmes proclaimed that:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.³⁹

Essentially an economic theory "rooted in laissez-faire economics,"⁴⁰ the market place of ideas doctrine places trust in the average citizen that when given two competing ideas contrasted against each other, the correct idea will become apparent, and the false idea will fortify the understanding of the correct idea.⁴¹

Nonetheless, the market place of ideas doctrine, like any philosophical doctrine, has its weaknesses. According to Schauer, "[t]he predominant risk is that false views may, despite their falsity, be accepted by the public, who

33. See MILL, *supra* note 30, at 18.

34. See *id.* at 50.

35. See *id.*

36. See SCHAUER, *supra* note 31, at 15 ("Milton's *Areopagitica*, the earliest comprehensive defense of freedom of speech, is based substantially on the premise that absence of government restrictions on publishing . . . will enable society to locate truth and reject error.").

37. See *id.* at 16.

38. 250 U.S. 616, 624-31 (1919).

39. *Id.* at 630.

40. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984). Professor Ingber argues that the marketplace of ideas theory is fundamentally flawed because the dominant culture tends to control the market. *Id.* at 17. While Professor Ingber makes a forceful argument, he does not offer viable alternatives to the market place of ideas theory. *Id.* at 50-71. However, I agree with Professor Ingber that more diverse perspectives need to be given access to the channels of societal communication. *Id.* at 86. Compare Curtis, *supra* note 11, at 34.

41. See SCHAUER *supra* note 31, at 21.

will then act in accordance with those false views.”⁴² Race relations have historically been subject to this weakness.⁴³ This has led some to argue for civil and criminal restrictions on so-called “hate” speech.⁴⁴ Most rational people would agree that the ideas espoused by groups such as the Ku Klux Klan and Aryan Nation are clearly false.⁴⁵ However, the falseness of these groups’ ideas does not warrant their abolition, even though some would ignore the truth.⁴⁶ Furthermore, those seeking to limit the First Amendment in order to punish hate-speech have largely ignored the power of counter-speech.⁴⁷ Real world examples of counter-speech ameliorating the racial problem on college campuses have demonstrated that the marketplace of ideas doctrine is not merely armchair philosophy, but rather a viable doctrine to be utilized to its fullest extent.⁴⁸

B. *The Sovereignty of the People*

The abuses of the British monarchy led the founding fathers to adopt the principle that the ultimate power should be vested with the people and not with any government organization.⁴⁹ This concept, that the people and not

42. See *id.* at 28.

43. See *id.* Hitler’s ability to fool the masses with the idea of the German racial superiority is the best example of the failure of the argument for truth. See generally ERNST NOLTE, *THREE FACES OF FASCISM: ACTION FRANCAISE, ITALIAN FASCISM, NATIONAL SOCIALISM* (Leila Vennewitz trans., 1965).

44. See Matsuda, *supra* note 9, at 2379 (arguing that hate speech can be outlawed without abandoning First Amendment principles). See generally Richard Delgado & David H. Yun, *Essay II. Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objectives to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994).

45. See generally JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* (1993); WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* (1987).

46. See Curtis, *supra* note 11, at 50 (arguing that exceptions to the free speech doctrine will likely lead society down a slippery slope).

47. See generally Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249 (1995). Professor Calleros offers some real world examples where counter speech was an effective tool in the fight against hate-speech. *Id.* at 1259, 1265.

48. See *id.* The SPLC’s use of civil litigation to silence supremacist groups has completely undermined any possible utilization of this doctrine, and has thus undermined a central pillar of modern First Amendment doctrine.

49. Jefferson in writing the declaration of independence took great pains to enumerate the abuses of the King of England. THE DECLARATION OF INDEPENDENCE para. 3-19 (U.S. 1776). See also *U.S. Term Limits v. Thornton*, 514 U.S. 779, 794 (1995) (“[W]e recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting James Madison) (“The people, not the government, possess the absolute sovereignty”). The power of ideas has been known even since ancient times such as what prompted the Spartans to fear outsiders. PLUTARCH, *PLUTARCH ON SPARTA* 40 (Richard J. A. Talbert ed. & trans. Penguin Books 1988) (“By definition foreigners must bring foreign ideas with them, and novel ideas lead to novel attitudes. Hence inevitably many emotions and preferences emerge which—if the exist-

the king or the federal government hold the ultimate sovereignty, is embodied in the Preamble of the Constitution that states, “[w]e the people of the United States, in [o]rder to form a more perfect Union.”⁵⁰ The sovereignty of the people has important implications for First Amendment jurisprudence because if the channels of free speech are manipulated, so is the sovereignty of the people.⁵¹ A democratic society based on the sovereignty of the people demands the free flow of ideas in order to operate.⁵² Anything less is not sovereignty, let alone democracy.⁵³

According to Alexander Meiklejohn, “[t]he First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”⁵⁴ It is ironic that Meiklejohn argues that freedom to speak is not what the First Amendment seeks to protect, but rather it protects freedom of speech.⁵⁵ Meiklejohn’s argument and his subtle distinction clearly seek to elevate freedom of speech to a higher level in the hierarchy of rights protected by the Constitution.⁵⁶ Meiklejohn forcibly argues that because we the people are sovereign, ideas must flow freely so that that people can make educated choices concerning self-government.⁵⁷ Essentially, “[f]reedom of speech is a way for the people to communicate those wishes to the government, and any suppression of the public’s stated demands is inconsistent with the notion of government’s existing for the precise purpose of responding to the demands of the population.”⁵⁸

ing government be likened to a piece of music—are out of tune with it.”).

50. U.S. CONST. pmbl.; see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 3 (1948) (“If men are to be governed, we say, then that governing must be done, not by others, but by themselves.”).

51. See SCHAUER, *supra* note 31, at 35 (“The argument for democracy views freedom of speech as a necessary component of a society premised on the assumption that the population at large is sovereign.”).

52. See MEIKLEJOHN, *supra* note 50, at 27:

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.

Id.

53. See Dana Moon Dorsett, *Hate Speech and Free Expression*, 5 S. CAL. INTERDISC. L.J. 259, 274 (1997) (“In order to realize self-governance, the public’s right of free expression must exist as a requisite precondition.”). See also Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundation Paradigms of Free Expression*, 40 UCLA L. REV. 103, 117 (1992).

54. See Alexander Meiklejohn, *The First Amendment as an Absolute*, in *FREEDOM OF EXPRESSION: A COLLECTION OF BEST WRITINGS* 63, 75 (Kent Middleton eds., 1981).

55. See MEIKLEJOHN, *supra* note 50, at 19.

56. Meiklejohn, *supra* note 54, at 75.

57. *Id.*

58. SCHAUER, *supra* note 31, at 35.

The danger in silencing speech in a society based on the sovereignty of the people is that the people will no longer be sovereign.⁵⁹ The rationale is that without uncensored information, the people will not be able to form their judgments, and therefore will not be able to exercise their sovereign power.⁶⁰ According to Meiklejohn, this is because “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”⁶¹ Additionally, freedom of speech “makes possible holding government officials, as public servants, properly accountable to their masters, the population.”⁶² Therefore, without freedom of speech we are no longer sovereign because once that right is given up, the very decisions we make can no longer be ours.

For example, imagine if in the world of ideas only three ideas existed – A, B and C. If the people were truly sovereign, they would have the ability to speak freely about all three ideas. Fully informed as to A, B and C, the people, as the “masters” of government, could cast their ballots as to which idea they wanted their elected representatives to effectuate. However, if the government or some other organization suppressed idea A, the people would lose sovereignty. The people could no longer express their will because with knowledge of only B and C the people are denied their sovereign power to choose A if they wish.⁶³

59. See MEIKLEJOHN, *supra* note 50, at 68 (“If, by suppression, we attempt to avoid lesser evils, we create greater evils. We by temporary and partial advantage at the cost of permanent and dreadful disaster. That disaster is the breakdown of self-government.”).

60. See SCHAUER, *supra* note 31, at 35; Meiklejohn, *supra* note 54, at 75.

61. Meiklejohn, *supra* note 54, at 75.

62. SCHAUER, *supra* note 31, at 35. See also MEIKLEJOHN, *supra* note 50, at 65-66:

We, the People, as we plan for the general welfare, do not choose to be ‘protected’ from the ‘search for truth.’ On the contrary, we have adopted it as our ‘way of life,’ our method of doing the work of governing for which, as citizens, we are responsible. Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our actions must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

Id.

63. SCHAUER, *supra* note 31, at 39:

If the people are sovereign it is not for government to decide what is true and what is false . . . [an] [i]nherent ideal of self-government is the proposition that it is for the people alone to distinguish between truth and falsity in matters relating to broad questions of government policy.

Id.

C. *The Futility of Suppression*

The history of the world has many examples of the futility of suppressing ideas. History has repeatedly shown that suppression often leads to martyrdom,⁶⁴ or at least to greater exposure of the would-be martyr's cause.⁶⁵ Ironically, some dissidents have actively sought political persecution in order to give greater exposure to their views. Our courts have seen many instances where political dissidents have manipulated the proceedings as a forum for expounding their views.⁶⁶

Additionally, by attempting to suppress the views of dissidents, these views may be given some legitimacy. According to Schauer this occurs because:

[B]y taking [ideas] seriously, by bothering to suppress them, we acknowledge that they have enough strength and popularity to constitute a danger. Therefore, it can be argued, we admit their presence as a substantial force by the act of suppression, providing an aura of respectability and thus increasing the probability of their gaining new adherents.⁶⁷

The argument for the futility of suppression, regardless of its many behavioral assumptions, is certainly in accord with both history and experience.

In the situation at hand, Dees' lawsuits aimed at silencing white supremacists may also encounter the futility of suppression. The civil actions by Dees, while bankrupting certain groups, have nevertheless fortified their resolve to expound their racist views. This resolve is evident from an underground website for the Aryan Nation that has triumphantly proclaimed "whatever transpires at Aryan Nations Hayden Lake, Idaho [the] Aryan Nations will continue!"⁶⁸ Ominously, but maybe prophetically, Michael Teague, who was one of the security guards involved in the assault on the Keenans, stated, "[t]hey think there's some magic little pill they can swallow that will

64. See NORMAN F. CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* 519 (1993). Throughout history examples of individuals who were persecuted, then executed, later only to arise to martyrdom abound. Joan of Arc is a prime example of this phenomenon. After being burned at the stake, "posthumously, [she was] exonerated, and canonized. Her dedication to the French nation symbolized the spirit of the French effort to drive the English out of France." *Id.* Early saints of the Christian church were those executed in the Roman arenas. Execution was seen as a way to demonstrate God's glory. See St. Perpetua, *The Passion of Saint Perpetua and Felicity* (203), reprinted in READINGS IN MEDIEVAL HISTORY 58-64 (Patrick J. Geary ed. 2d ed 1997). See also MICHAEL GRANT, *JESUS: AN HISTORIAN'S REVIEW OF THE GOSPELS* 175 (1977) ("Yet after [Jesus'] death, total failure turned into enormous triumph.")

65. See generally AMERICAN POLITICAL TRIALS (Michal R. Belknap ed. 1994).

66. *Id.*

67. SCHAUER, *supra* note 31, at 76.

68. Aryan Nations, <http://www.christian-aryannation.com> (last visited October 12, 2000). Hayden Lake is the site of the Aryan Nation headquarters where Victoria Keenan and her son were attacked. *Metro Desk*, L.A. TIMES, Feb. 8, 2001, at A17. Because of Dees' lawsuit the Aryan Nation has been forced to sell their compound. *Id.*

make Aryan Nations go away.”⁶⁹ Dees’ attempt to silence the hate-mongers by bankrupting them has given them resolve, and a feeling of victimization that may offer some legitimacy to an illegitimate idea.⁷⁰

III. THE SUPREME COURT’S VIEW OF THE FIRST AMENDMENT

A. *Pre-Brandenburg—The Court Shall Strike Down no Law That Punishes Communists or Malcontents*

The First Amendment has a long history.⁷¹ For our purposes, however, we will begin our brief inquiry into the First Amendment jurisprudence with the case of *Schenck v. United States*.⁷² We begin with *Schenck* because it was here where Justice Holmes first articulated the “clear and present danger test” and where modern First Amendment jurisprudence began.⁷³ The *Schenck* case involved the infamous Espionage Act of 1917, under which the Court permitted the punishment of malcontents of the First World War who fought the draft.⁷⁴ At issue in *Schenck* were leaflets, which in “impassioned language” attempted to create resistance to the draft in the form of a proletarian uprising.⁷⁵ Holmes felt that the First Amendment did not protect this speech because it was of “a nature as to create a clear and present danger” that would “bring about substantive evils.”⁷⁶ To illustrate his argument, Holmes gave his now famous analogy: “The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.”⁷⁷

In subsequent decisions, the Court continued to view First Amendment rights narrowly, especially with regard to socialists and anarchists.⁷⁸ In *Schenck*, Holmes justified the restrictions placed on speech because the

69. Kim Murphy, *Jury Verdict Could Bankrupt Aryans*, L.A. TIMES, Sept. 8, 2000, at A1.

70. See Dorsett, *supra* note 53, at 292 (“[S]ilencing attempts will only fuel public resentment. Public sentiments matured on the doctrine of free expression will inevitably react against state-sponsored silencing.”). State sponsored silencing would clearly be more invidious than the silencing that has been undertaken by Morris Dees. However, one need only go on the internet to see the reaction that Dees’ lawsuits have evoked among the various hate groups. See generally Aryan Nations, <http://www.christian-aryannation.com> (last visited October 12, 2000).

71. See generally Michael T. Gibson, *The Supreme Court and Freedom of Expression From 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986) (an in-depth review on freedom of expression from 1791 to 1917).

72. 249 U.S. 47 (1919).

73. *Id.* at 52. In starting with *Schenck* this article admittedly ignores a substantial body of First Amendment jurisprudence.

74. *Schenck*, 249 U.S. at 49.

75. *Id.* at 51.

76. *Id.* at 52.

77. *Id.*

78. See, e.g., *Debs v. United States*, 249 U.S. 211 (1919). See *Froherk v. United States*, 249 U.S. 204 (1919).

country was in the middle of World War I. According to Holmes, “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitution right.”⁷⁹ World War I ended with the Treaty of Versailles; however, the majority of the Supreme Court continued its war against free speech and the malcontents of society. Holmes’ bitter dissent in *Abrams v. United States* would not stop the majority of the Court in its prosecution of socialists and its rejection of the clear and present danger test.⁸⁰

In *Abrams*, the Supreme Court, in a familiar theme, upheld convictions of a group of socialists that published anti-war, pro-communist leaflets.⁸¹ The leaflet, signed “The Rebels,” implored workers to “spit in the face of false, hypocrite [sic], military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to prosecution of the war.”⁸² Holmes, in his dissent, which was characterized by Rodney A. Smolla as a “haunting, poetic masterpiece,”⁸³ chastised the majority for its treatment of this group.⁸⁴ Holmes stated that “[i]n this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much a right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.”⁸⁵ Holmes’ felt there was little danger in publication of the defendant’s leaflets.⁸⁶ This provoked Holmes to belittle the majority of the Court in its treatment of this group by saying, “[n]obody can suppose that surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger.”⁸⁷

While protections under the First Amendment may have been at their nadir after *Adams*, the merciless abuse of the First Amendment would continue. Under the “bad tendency” test the Court took a narrow view of the First Amendment punishing speech that had the “natural tendency and probable effect to bring about the substantial evil.”⁸⁸ The use of the bad tendency

79. *Schenck*, 249 U.S. at 52. It should be noted that all these violation to the espionage act occurred while our country was engaged in the First World War.

80. *Abrams v. United States*, 250 U.S. 616 (1919). Holmes dissent in *Abrams* seems to be an attempt to limit the court’s witch hunts against socialist. *Id.* Additionally, in this dissent Holmes articulated the “market place of ideas” theory. *Id.*

81. *Id.* at 624.

82. *Id.* at 620.

83. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY*, 101 (1992). According to Professor Smolla “Holmes began to doubt his own premises” in the *Schenck*, *Debs*, and *Frohwerk* cases. *Id.* This led to his attempt to bridle the majority in the *Abrams* case. *Id.*

84. *Abrams*, 250 U.S. at 628-29.

85. *Id.* at 629.

86. *Id.* at 628.

87. *Id.*

88. *Gitlow v. People of New York*, 268 U.S. 652, 671 (1925); *see also Debs v. United States*, 249 U.S. 211, 216 (1919).

test as the measure of First Amendment protection led Justices Holmes and Brandeis to continually chastise the majority of the Court for its weak measure of First Amendment rights during this period.

In *Whitney v. California*,⁸⁹ the Supreme Court again demonstrated its hostility toward radical speech when it in a unanimous decision upheld the conviction of a communist leader accused of violating California's Criminal Syndicalism Act of 1919.⁹⁰ This statute, tailor made to punish communists, made it a felony to advocated force as a "means of accomplishing a change in industrial ownership."⁹¹ While Brandies technically concurred in this opinion, he was forced to do so due to the defendant's failure to assert a First Amendment challenge to the statute.⁹² Constrained to reach the same result at the majority, Brandies nonetheless embraced the marketplace of idea theory in his concurrence and warned the Court about the ills associated with suppressing free speech:

But [the founding fathers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁹³

Irrespective of any lesson that should have been learned during the First Red Scare,⁹⁴ the Supreme Court demonstrated twenty four years later its hostility toward free speech in the decision of *Dennis v. United States*.⁹⁵ In *Dennis*, the culprit statute was the Smith Act, which was similar to California's Criminal Syndicalism law in *Whitney*, but was actually challenged with a First Amendment claim and not decided on a technicality as was *Whitney*.⁹⁶

89. 274 U.S. 357, 360-61 (1927).

90. *Id.* at 360. The defendants in this case sought to organize workers into pro-communist unions and use the power of the strike as their weapon to bring about a proletarian state. *Id.* at 363-64.

91. *Id.* at 360.

92. *Id.* The importance of this case does not lie with the result, but rather with Brandeis' concurrence. While Brandeis does technically concur, his concurrence sounds more like a dissent. The defendants in this case failed to challenge the California Criminal Syndicalism law on a First Amendment basis, thus the issue was never raised forcing Brandies to base his decision on the equal protection clause. *Id.* at 360-61. Under the equal protection clause the state merely had to prove that the Syndicalism Act was not overly vague and uncertain of definition. *Id.* at 368.

93. *Id.* at 375-76 (1927) (citations omitted).

94. See BENEDICT, *supra* note 12, at 270-71.

95. 341 U.S. 494 (1951).

96. Compare *Dennis*, 341 U.S. at 496-97, with *Whitney*, 274 U.S. at 359.

The defendants in *Dennis* were indicted under the Smith Act for, “conspiring (1) to organize as the Communist Party . . . [a] group, who teach[es] and advocate[s] the overthrow and destruction of the Government of the United States by force and violence, and (2) . . . advocat[ing] and teach[ing] . . . of overthrowing . . . of the United States by force and violence.” While the government’s indictment seems menacing it was Justice Black’s dissent that shows the true crime of the defendants:

These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the *future* to teach and advocate the forcible overthrow of the Government.⁹⁷

As *Dennis* indicates, at the height of the Second Red Scare the First Amendment was a wooden shield against a steel sword.⁹⁸ The interpretation by the Supreme Court with respect to the First Amendment “[was] not likely to protect any but those ‘safe’ or orthodox views which rarely need its protection.”⁹⁹ Therefore, despite an utter impossibility of the communist group in *Dennis* of overthrowing the United States government through its communist teachings, the Supreme Court upheld the convictions of these defendants under the Smith Act.¹⁰⁰ Viewed through the lens of modern First Amendment Jurisprudence, the decisions of the Court during this period are seen as an overreaction and an affront to civil liberties. It remains to be seen whether history will judge Dees’ attempts to suppress supremacist groups through civil litigation just as harshly.

B. Brandenburg—A First Amendment Resuscitation

As indicated by *Schenck, Abrams, Debs, Gitlow*, and *Dennis*, the United States Supreme Court has not always interpreted the First Amendment such that “Congress shall make no law . . . abridging the freedom of speech.”¹⁰¹ One could blame the Red Scares of the 1920s and 1950s for the Supreme Court’s conservative take on the First Amendment. However, by the 1960s a new attitude was gripping the nation, and it was no better expressed than through the liberal Warren Court.¹⁰² In *Brandenburg v. Ohio*, the leader of a

97. *Dennis*, 341 U.S. at 579 (Black, J., dissenting).

98. Cf. BENEDICT, *supra* note 12, at 314.

99. *Dennis*, 341 U.S. at 580.

100. *Id.* at 571.

101. U.S. CONST. amend. I.

102. Cf. Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 66, 128 (1998) (arguing that while the Warren Court is often associated with liberalism it was “downright conservative” when the First Amendment

Ku Klux Klan group invited a reporter to come film a Klan rally.¹⁰³ During the rally, the leader of the Klan group made a speech, stating, “[w]e’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.”¹⁰⁴ The Klan leader was convicted under an archaic 1919 Criminal Syndicalism statute, which prohibited “voluntarily assembly[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism.”¹⁰⁵ Reversing the conviction, the Supreme Court in a per curiam decision pronounced the modern rule for the First Amendment interpretation with respect to speech that advocates violence.¹⁰⁶ Dispensing with the “clear and present danger test,” the new rule under *Brandenburg* held: “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to incite or produce imminent lawless action and is likely to incite or produce such action.”¹⁰⁷ Therefore, under *Brandenburg*, speech may not be suppressed according to Professors John E. Nowak and Ronald D. Rotunda unless, “[t]he speech provokes, incites, an unthinking reaction.”¹⁰⁸ Where there is an unthinking reaction there is no time for more speech to quell the violent tendencies of those hearing the speech.

The new rule pronounced in *Brandenburg* was intended to protect the First Amendment with a firm and clear rule that was not subject to judicial gerrymandering as the “clear and present danger” test had been.¹⁰⁹ The Court’s desire to discard the clear and present danger test is evident from Justice Douglas’s concurrence.¹¹⁰ Douglas wanted a test that could not be manipulated as the “clear and present danger” test had been in *Dennis*.¹¹¹ According to Douglas there is “no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.”¹¹² In

rights of war protesters were involved).

103. *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam).

104. *Id.* at 446.

105. *Id.* at 445.

106. *Id.* at 447.

107. *Id.*; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.6, at 1090 (6th ed. 2000) (“The new *Brandenburg* test . . . now is the proper formula for determining when speech that advocates criminal conduct may constitutionally be punished.”).

108. NOWAK & ROTUNDA, *supra* note 107, at 1089.

109. *Brandenburg*, 395 U.S. at 454 (1969) (Douglas, J. concurring) (argues that the “clear and present” danger test was “so twisted and perverted in *Dennis*” and in other pre-*Brandenburg* cases that the Court should totally discard the test); NOWAK & ROTUNDA, *supra* note 107, at 1089 (“[Douglas] was distrustful of that test, which he believed could be easily manipulated . . .”).

110. See *Brandenburg*, 395 U.S. at 449-50.

111. *Id.* at 454 (“When one reads the opinions closely and sees when and how the ‘clear and present’ danger test has been applied, great misgivings are aroused.”).

112. *Id.*

essence, the new *Brandenburg* test was intended to give some teeth to First Amendment protections.

C. Post-Brandenburg—The Court Gets Serious About Protecting Free Speech

Post-*Brandenburg* decisions would re-affirm the values committed to in *Brandenburg*. The lessons learned in *Adams*, *Whitney*, and *Dennis* were not to be repeated. In *Cohen v. California*,¹¹³ decided amidst the turmoil of the Vietnam War,¹¹⁴ the Court reaffirmed the principles of *Brandenburg* by vigorously protecting the First Amendment from the powerful conservative current of the “silent majority.”¹¹⁵ On April 26, 1968, while in a corridor outside of a municipal court, Paul Cohen had been seen wearing a jacket that stated, “Fuck the Draft.”¹¹⁶ The lower court, using a breach of peace statute, convicted Cohen and sentenced him to 30 days in jail.

The state sought to support the validity of California’s breach of peace statute based on the “fighting words” doctrine.¹¹⁷ The “fighting words” doctrine, first laid out in *Chaplinsky*, holds that: “‘fighting words’ [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹¹⁸ “Fighting Words,” according to the *Chaplinsky* Court, “have never been thought to raise any Constitutional problem,” such that punishment for their utterance may readily be doled out.¹¹⁹ Finding justification on this basis, the Court of Appeals upheld the conviction stating: “it was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.”¹²⁰

113. 403 U.S. 15 (1971).

114. B. Franklin Cooling, *The Vietnam War, 1962-1973*, in *AGAINST ALL ENEMIES: INTERPRETATIONS OF AMERICAN MILITARY HISTORY FROM COLONIAL TIMES TO THE PRESENT* 352-56 (Kenneth J. Hagan & William R. Roberts eds., 1986) (“By the summer of 1971 more than 70 percent of the American people thought it wrong to have sent American troops to Vietnam and only 31 percent approved of Nixon’s handling of the war.”).

115. *Cohen* was decided on different reasoning than *Brandenburg*; however, the *Cohen* decision indicates the Courts willingness to protect First Amendment rights. ALAN BRINKLEY & ELLEN FITZPATRICK, *AMERICA IN MODERN TIMES: SINCE 1941*, 508 (1997). Nixon’s 1968 campaign was run on the premise that Nixon was to be the mouthpiece of the “Silent Majority.” *Id.* The silent majority were those Americans who were “tired of hearing about their obligations to the poor, tired of hearing about the sacrifices necessary to achieve racial justice, tired of judicial reforms that seemed designed to help criminals.” *Id.* Most importantly the “Silent Majority” sought “peace with honor” in Vietnam. *Id.*

116. *Cohen*, 403 U.S. at 16.

117. *Id.* at 20.

118. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

119. *Id.* at 571-72.

120. *Cohen*, 403 U.S. at 16.

Conversely, the Supreme Court in *Cohen* decided to take a restrictive view of the “fighting words” doctrine¹²¹ and reversed the Court of Appeals, holding that a “State may not . . . make the simple public display . . . of this single expletive a criminal offense.”¹²² According to the Supreme Court in *Cohen*, “the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech.”¹²³ The Court in *Cohen*, noting that “free expression is powerful medicine” in our society, was prepared to uphold Cohen’s right to wear a jacket with this “distasteful” four-letter word.¹²⁴ The Court was distrustful that the government could ever “make principled distinctions in this area,” thus “the Constitution leaves matters of taste and style . . . to the individual.”¹²⁵

Two years after *Cohen*, the Supreme Court again demonstrated its commitment to the stringent protections laid down in *Brandenburg* in the case of *Hess v. Indiana*.¹²⁶ Hess’s conviction involved an anti-war demonstration that erupted due to the invasion of Cambodia.¹²⁷ Throughout this time the nation protested the Vietnam War.¹²⁸ As an indication of the intensity of the times, one of these college campus anti-war demonstrations protesting the invasion of Cambodia resulted in four dead students at Kent State University after the National Guard opened fire on them.¹²⁹ The Vietnam War, coupled with massive protests, created such violent times that the Supreme Court probably could not have been faulted in applying a restricted version of the First Amendment as Holmes did in *Schenck*.¹³⁰

The anti-war demonstration that Hess was involved in included 100 to 150 demonstrators, not including the spectators that were observing the demonstration.¹³¹ Responding to street congestion caused by the demonstration the police attempted to disband the crowd.¹³² Hess, apparently angered

121. NOWAK & ROTUNDA, *supra* note 107, at 1095. (“The *Cohen* limitations weakened *Chaplinsky* substantially.”). In *Chaplinsky* a Jehovah’s Witness was convicted of a statute similar to the one involved in *Cohen*. *Chaplinsky*, 314 U.S. at 569 According to the complaint in *Chaplinsky* the appellant called an officer “‘a God damned racketeer’ and ‘a damned Fascist.’” *Id.*

122. *Cohen*, 403 U.S. at 26.

123. *Id.* at 21.

124. *Id.* at 24.

125. *Id.* at 25.

126. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Compare *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973).

127. See *Hess v. Indiana*, 414 U.S. 105 (1973).

128. Cooling, *supra* note 114, at 352-53. Operation Rockcrusher was the name given to the invasion of Cambodia. *Id.*

129. *Id.*

130. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is . . . at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

131. *Hess*, 414 U.S. at 106.

132. *Id.*

by what the police were doing shouted in a "loud voice. . . 'We'll take the fucking street later.'"¹³³ The Supreme Court, instead of upholding the conviction under the disorderly conduct statute,¹³⁴ stated, "[a]t best . . . the statement [by Hess] could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."¹³⁵ Therefore, the Court in *Hess* reaffirmed the central idea in *Brandenburg* that only speech that produced imminent lawless action could be punished; the key being that there would be no time for counter speech.¹³⁶

The result after *Brandenburg* suggests that only in the most narrow of circumstances may speech, even violent speech, be suppressed. This standard is not likely to be met where the complaint is merely that of advocating racism. Often the violent acts of racism as alleged by Morris Dees and the SPLC occur long after the alleged violent speech.¹³⁷ However, by using tort theories this problem is avoided and even speech that occurred months prior to the racial incidents may be punished.¹³⁸

D. New York Times & Hustler—*Recognizing the Chilling Effect of a Tort Suit*

The fact that the actions brought by Dees against groups such as the Aryan Nation are tort actions instead of criminal suits should not diminish First Amendment protections.¹³⁹ Both tort suits and statutes have the same potential to inhibit free speech.¹⁴⁰ The Court recognized this problem in *New York*

133. *Id.* at 107. It is not clear whether Hess said, "We'll take the fucking street later," or whether he said, "We'll take the fucking street again." *Id.* These facts were stipulated to. *Id.*

134. *See id.* at 105; *Contra* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 18 (1994) ("because its emphasis of imminent law violations, coupled with the defendant's statement that the street would be taken 'later,' seems to immunize even the most brazen incitement, if the crime is to take place a few moments in the future."). The article argues against the approach taken by the majority in *Hess*. *Id.*

135. *Hess*, 414 U.S. at 108.

136. *Id.* at 108-09.

137. *See generally* Taylor, *supra* note 18, at 95.

138. Dees & Bowden, *supra* note 17, at 28. Dees' tort theories do not implicate the First Amendment per se, but the chilling effects of these suits on free speech raise first amendment issues.

139. *See generally* *New York Times v. Sullivan* 376 U.S. 254 (1964). *Compare* *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997). The Fourth Circuit allowed plaintiffs to hold Paladin Enterprises civilly liable for aiding and abetting. *Id.* The defendants published a manual on how to commit murder for hire entitled *Hit Man: A Technical Manual for Independent Contractors*. *Id.* This case may signify a step back from the principles of *Brandenburg* and *New York Times*, or it may just be a reaction to the extreme nature of the speech in that case. The publishers involved in this case stipulated that they "actually intended to provide assistance to murderers and would-be murderers." *Id.* at 242.

140. Tort suits have become increasingly dangerous to First Amendment rights. *See* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 664-70 (arguing that unchecked tort ac-

Times v. Sullivan: “[t]he fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.”¹⁴¹

The *New York Times* case involved the tort of libel.¹⁴² L. B. Sullivan, the commissioner in Montgomery, Alabama, claimed that an advertisement critical of the Montgomery Police Department libeled him in his official capacity.¹⁴³ Even though the advertisement never mentioned Sullivan by name, nor were the alleged libelous statements more than minor mistakes, Sullivan was awarded \$500,000 in damages by an Alabama jury.¹⁴⁴ Prior to this case libel was considered low value speech, thus outside the protections of the First Amendment.¹⁴⁵ The Supreme Court in *New York Times* realized the grave danger to free speech if superficial tort actions were permitted against those with differing views.¹⁴⁶ These tort actions lacked the traditional protections afforded to defendants in criminal actions.¹⁴⁷ Essentially, the Supreme Court feared that high civil awards could render First Amendment rights impotent through a process of “self-censorship.”¹⁴⁸ Justice Douglas in his concurrence recognized that this large verdict was a result of the hostility toward “outside agitators.”¹⁴⁹ The Court, in an effort to prevent “self censorship,” required that “public officials” in a defamation suit prove “actual malice” on the part of the publisher.¹⁵⁰ In coming to its decision to add constitutional protections to the law of defamation, the Court recognized the differences

tions against media defendants could have a chilling effect on free speech.)

141. *New York Times*, 376 U.S. at 277.

142. *Id.* at 256.

143. *Id.* at 256-57.

144. *Id.* at 294. One of the alleged libelous statements was that the Montgomery police had ringed the campus of Alabama State when in actuality they had not ringed the campus, but merely were present in large numbers. *Id.* at 259.

145. *Beauharnais v. Illinois* 343 U.S. 250, 257, 266 (1952) (holding that libel was not protected by the First Amendment because “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”). See generally Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995). Professor Shaman provides a thorough analysis of low value speech and the approaches taken by the Supreme Court.

146. *New York Times*, 376 U.S. at 294 (Black, J., concurring) (“There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials.”).

147. See *id.* at 277-78 (1964). See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law*, 42 HASTINGS L.J. 1325, 1389 (arguing that civil actions lack the procedural protections afforded to the criminal defendants.)

148. *New York Times*, 376 U.S. at 294.

149. *Id.* at 295. This decision occurred in the middle of the civil rights movement. See BENEDICT, *supra* note 12, at 317-18. L.B. Sullivan was a key figure in the fight against desegregation. According to Sullivan, “Not since Reconstruction have our customs been in such jeopardy . . . We can, will and must resist outside forces hellbent on our destruction.” WADE, *supra* note 45, at 306.

150. *New York Times*, 376 U.S. at 279-80.

between civil and criminal actions.¹⁵¹ In a criminal suit the defendant would at least get the benefit of the requirements of “an indictment and of proof beyond a reasonable doubt.”¹⁵² Additionally, in a civil suit there is “no double-jeopardy limitation.”¹⁵³

In essence, *New York Times* demonstrates that civil lawsuits have the same potential to inhibit free speech, as do criminal statutes, and therefore should receive constitutional protections when free speech is threatened.¹⁵⁴ Additionally, the Court did not restrict the rationale of *New York Times* was to the law of defamation, but was also adapted to the tort of intentional infliction of emotional distress in *Hustler v. Falwell*.¹⁵⁵ *Hustler* involved a parody depicting Jerry Falwell, a well-known minister, in a “drunken incestuous rendezvous with his mother in an outhouse.”¹⁵⁶ While the parody was “doubtless[ly] gross and repugnant in the eyes of most,”¹⁵⁷ the Court nevertheless applied the protections announced in *New York Times* in order to protect the “robust political debate encouraged by the First Amendment.”¹⁵⁸ According to Justice Rehnquist, “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”¹⁵⁹ Justice Rehnquist went on to say, “[t]he First Amendment recognizes no such thing as a ‘false’ idea.”¹⁶⁰ Both *New York Times* and *Hustler* demonstrated a willingness by

151. *Id.* at 277-278.

152. *Id.* at 277.

153. *Id.* at 278.

154. *Id.* at 279-80 (1964). *Cf.* *Hustler v. Falwell*, 485 U.S. 46 (1988).

155. *Hustler*, 485 U.S. at 46.

156. *Id.* at 48. The facts as discussed by the court:

The inside front cover of the November 1983 issue of *Hustler Magazine* featured a ‘parody’ of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled ‘Jerry Falwell talks about his first time.’ This parody was modeled after actual Campari ads that included interviews with various celebrities about their ‘first times.’ Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of ‘first times.’ Copying the form and layout of these Campari ads, *Hustler’s* editors chose respondent as the featured celebrity and drafted an alleged ‘interview’ with him in which he states that his ‘first time’ was during a drunken incestuous rendezvous with his mother in an outhouse. The *Hustler* parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, ‘ad parody—not to be taken seriously.’ The magazine’s table of contents also lists the ad as ‘Fiction; Ad and Personality Parody.’

Id.

157. *Id.* at 50.

158. *Id.* at 51.

159. *Id.*

160. *Id.*

the Court to be creative in order to protect free speech from large civil awards.¹⁶¹

In sum, the cases of *New York Times* and *Hustler* recognize that tort suits may chill free speech.¹⁶² The crucial importance of free speech requires that breathing space be provided to the First Amendment. In some instances individual plaintiffs seeking redress may have to suffer the consequences of this need to protect free speech. However, as *New York Times* and *Hustler* indicate, a proper balance of interests proper may be found. Courts and legislatures will have to fashion protections that act in to preserve both the individual's interest, and societal interests. Additional procedural protections placed upon civil suits aimed at bankrupting unpopular hate groups may be the only way of balancing the interests involve.

IV. MORRIS DEES' STRATEGY

In the 1960s, sit-ins, protests, and a call for legislative change were seen as the preferred method for changing society for the better. Today, however, guided by people such as Dees, civil litigation is seen as the "primary weapon" to bring about change.¹⁶³ Using civil litigation, Dees, the co-founder of the Southern Poverty Law Center, has attained incredible success by financially hobbling supremacist groups such as the Ku Klux Klan and the Aryan Nation.¹⁶⁴ Using theories such as aiding and abetting, civil conspiracy and respondeat superior Dees has been able to hold the heads of hate groups vicariously liable for the acts of their members and do what federal and state statutes have failed to accomplish.¹⁶⁵ This section will briefly survey three of the SPLC's most successful civil victories.¹⁶⁶

The case that established the true potency of civil litigation in silencing unpopular groups was the Michael Donald suit.¹⁶⁷ Donald, an Ethiopian

161. The addition of the "actual malice" issue to claims of defamation involving public officials and public figures is a creative way to protect free speech. See *New York Times*, 376 U.S. at 280; *Hustler*, 485 U.S. at 56.

162. *New York Times*, 376 U.S. at 277-80; *Hustler*, 485 U.S. at 56.

163. STANTON, *supra* note 21, at 12 ("[the] primary weapon [of the Southern Poverty Law Center], the lawsuit rather than the sit-in."). Martin Luther King, Jr. advocated "nonviolent direct action" as a way to bring about a bloodless revolution in the area of civil rights. KING, *supra* note 11, at 77-79. The purpose of nonviolent direct action was to bring the racial disparity issue to those who wished to avoid it. *Id.* King likened nonviolent direct action to Socrates' constant questioning of the Athenians. *Id.*

164. See generally Taylor, *supra* note 18.

165. Dees & Bowden, *supra* note 17, at 24-27; Taylor, *supra* note 18, at 104. See generally JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 195 (1993).

166. The examples given are only a few of the many lawsuits that Morris Dees has brought against various hate groups. For a good chronological rendition of the lawsuits brought by Morris Dees and the Southern Poverty Law Center see <http://www.splcenter.org/legalaction/la-idex.html> (last visited October 12, 2000). Often these lawsuits settle before going to trial. *Id.*

167. See STANTON, *supra* note 21, at 205-46.

graduate student, was brutally murdered by Ku Klux Klan members Henry Hays and Tiger Knowles; both of whom were virtually penniless, and therefore judgment-proof in any civil suit.¹⁶⁸ The main organization under which Hays and Knowles were taught their racist views was not judgment-proof. From the beginning, the “goal was to take the United Klans of America (UKA) for every asset it had.”¹⁶⁹ To accomplish this goal Dees had to “borrow from the world of corporate law,” and argue “an agencylike [sic] theory.”¹⁷⁰ A lawsuit merely implicating Hays and Knowles would do little to stop the UKA from spreading its views. Therefore, according to Damon Henderson Talyor, “[t]he SPLC wanted to use civil conspiracy and aiding and abetting to show how the two murderers were acting on behalf of the UKA when they brutally killed Michael Donald, thereby making the UKA itself liable for the actions of its members.”¹⁷¹ Essentially, Dees was able to find vicarious liability by demonstrating that the United Klans of America preached violence to its members, and thus prepared them to commit violent acts against minorities.¹⁷² As a result of this suit Dees was able to hold the UKA liable for seven million dollars.¹⁷³ The suit was so devastating to the UKA that they had to surrender their headquarters to the victim’s mother in order to satisfy the judgment.¹⁷⁴

The next major victory achieved by the Southern Poverty Law Center using civil litigation was against Tom Metzger.¹⁷⁵ Metzger, a militant bigot who openly advocated racial violence, became an easy target for Dees’ civil litigation strategy. Again, Dees employed garden-variety tort theories of aiding and abetting and civil conspiracy to destroy the infrastructure of this group.¹⁷⁶ The basis of Dees’ theory was that the racist teachings of Metzger’s White Aryan Resistance (WAR), coupled with the paramilitary training of skinheads, created the required “substantial assistance or encouragement” necessary to create vicarious liability after members of WAR murdered an Ethiopian student.¹⁷⁷ Inflammatory evidence demonstrating Metzger’s advocacy of violence included an issue of his “Aryan Youth Movement” news-

168. Taylor, *supra* note 18, at 129.

169. STANTON, *supra* note 21, at 205-46.

170. *Id.* at 199.

171. Taylor, *supra* note 18, at 130.

172. STANTON, *supra* note 21, at 120. At the center of Dee’s case was a “drawing of a white man addressing the reader, accompanied by the caption ‘It’s Terrible The Way Blacks Are Being Treated! All Whites Should Work To Give The Blacks What They Deserve.’” *Id.* The drawing featured a picture of a black man who was hung by the neck. *Id.*

173. *Id.* at 246.

174. *Id.*

175. *Berhanu v. Metzger*, 850 P.2d 373 (Or. 1993), *cert. denied*, 511 U.S. 1106 (1994). *See also* Taylor, *supra* note 18, at 129.

176. *Berhanu*, 850 P.2d at 376.

177. Restatement (Second) of Torts § 876 (1979); LEVIN & MCDEVITT, *supra* note 165, at 102-03. *See also* Taylor, *supra* note 18, at 138-39.

paper that had titles such as “Clash and Bash.”¹⁷⁸ As a result of the trial, WAR was held civilly liable for \$12.5 million.¹⁷⁹ The result, according to Taylor, was that “[a]rguably, the judgment against WAR’s leader Tom Metzger rendered him ineffective as a preacher of hate. He has lost his main source of income—donations from WAR members, as well as his meeting hall, video equipment, a personal computer, printer and fax machine, and his home.”¹⁸⁰ Metzger attempted to argue that, under *Brandenburg*, his speech was protected because of the attenuated link between his speech and the racial violence. However, Dees’ use of the theories of civil conspiracy and aiding and abetting enabled him to avoid the constitutional protections.¹⁸¹

To prove civil conspiracy one must show that the defendants acted “pursuant to a common design.”¹⁸² This is a broad and malleable theory is tailor to finding vicarious liability in hate crime cases. The speech in the Metzger case was that of violence and racial separatism.¹⁸³ The dogma espoused to obtain this empire often involved advocacy of violence.¹⁸⁴ Therefore, when members of Metzger’s group, trained in racial violence, attacked and killed an Ethiopian student, it was not hard for a jury to find civil conspiracy.

For a plaintiff to prove aiding and abetting it must be shown that the defendant “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”¹⁸⁵ An example in the restatement illustrates the tort: “A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice.”¹⁸⁶ According to Dees, “[d]efendants may be held liable without having planned or known about the specific injurious action.” Therefore, when aiding and abetting is used against hate groups, juries are likely to see the politically incorrect rhetoric of the group’s leaders as providing for the substantial assistance necessary to satisfy the elements of the tort.

The constitutional protections of *Brandenburg* are avoided under the theories of civil conspiracy and aiding and abetting because of characterization of the speech in question. Ostensibly these lawsuits should be objectionable based on *Brandenburg*. In both cases the violent acts occurred long after the racist speech. While it is true according to Dees, “that a crime . . . committed by words alone does not immunize it from being unlawful,”¹⁸⁷ we

178. LEVIN & MCDEVITT, *supra* note 165, at 102-03.

179. Southern Poverty Law Center, *Legal Action* at <http://www.splcenter.org/legalaction/la-idex.html> (last visited October 12, 2000).

180. Taylor, *supra* note 18, at 138-39.

181. *Berhanu*, 850 P.2d at 376.

182. Restatement (Second) of Torts § 876 (1979).

183. See LEVIN & MCDEVITT, *supra* note 165, at 101-02.

184. *Id.*

185. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

186. *Id.*

187. Dees & Bowden *supra* note 17, at 28.

must be careful not to ignore the rationale of *Brandenburg* in order to find a more palpable result.¹⁸⁸ Allowing the use of civil conspiracy and aiding and abetting in these cases may in the final analysis be intellectually dishonest.¹⁸⁹

The most recent case by Dees, as discussed earlier, resulted in a stunning victory against the Aryan Nation.¹⁹⁰ Once again using tort theories, Dees was able to impute the tortious conduct of the members of a hate group to the main organization.¹⁹¹ The Idaho judge who presided over the hearing for a new trial stated, "the organization knowingly retained individuals with a propensity for violence as security guards and then failed to adequately oversee them."¹⁹² The attorney for the Aryan Nation, astounded by the enormous punitive damage award told reporters, "[f]ree speech was put to rest today in a rural courtroom in the back country of Idaho."¹⁹³

In this case liability was not directly based on the speech as in the Michael Donald and Metzger suit. Instead liability was based on the employment relationship that the security guards had with the Aryan Nation.¹⁹⁴ Therefore, in this case *Brandenburg* is not even an issue because the tort is not based on speech. Nevertheless, important free speech issues still remain. Suits such as these will tend to chill free speech because the fear such lawsuits generate among hate groups. Other hate groups may engage in self-censorship because of a worry about becoming the next victim of Dees. Additionally, the high amount of punitive damages in this case tends to indicate that it was the views of the Aryan Nation being punished and not the actual act. Such use of punitive damages may be an unconstitutional form of content discrimination.

All three cases demonstrate how tort litigation can cripple free speech. Criticizing these cases is morally difficult because of violent nature of the defendants and the presence of innocent victims. In fact, the tort theories employed by Dees are not unique and are framed in terms of compensating victims and punishing undesirable conduct. At first glance, these suits do not appear to differ from the countless other torts suits litigated in American courts. However, they are different because the objective is not to make the plaintiffs whole, but to silence white supremacists that offer American teens a mixture of racism, rebellion and violence. Silencing these supremacists

188. Civil conspiracy requires the plaintiff to prove that the defendant acted "pursuant to a common plan." RESTATEMENT (SECOND) OF TORTS § 876. Aiding and Abetting requires the plaintiff to prove that the defendant "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Id.*

189. This is an argument for a later date. The focus of this article is on the general use of civil litigation to chill free speech, not to analysis any one theory used in such civil litigation.

190. Kim Murphy, *Jury Verdict Could Bankrupt Aryans*, L.A. TIMES, Sept. 8, 2000, at A1.

191. *See id.*

192. Kim Murphy, *White Supremacist Defy Rain, Jeers in Idaho*, L.A. TIMES, Oct. 29, 2000, at A1, A16.

193. Murphy, *supra* note 190, at A1.

194. *See Complaint, supra* note 19.

through tort litigation is no less dubious as if a statute were passed making such speech illegal.

V. CHILLING FREE SPEECH: SIDESTEPPING THE FIRST AMENDMENT WITH TORT LITIGATION

Morris Dees' strategy of using the mundane theories of tort litigation to silence white supremacists has succeeded where statutes intended to have the same effect have failed. Statutes that prohibit certain types of speech based on content are now typically unconstitutional after *R.A.V. v. City of St. Paul Minnesota*.¹⁹⁵ One might ask, why should a tort be permitted where a statute would not be permitted? The difference may be as Professor Delgado points out, "[i]n tort law it is the intent and injury that matter, not the content of the speech."¹⁹⁶ Therefore, by framing the issue in benign terms of merely compensating for injury and punishing socially unreasonable conduct, promoters of these tort actions diminish free speech issues and allow damage to be done to First Amendment rights.¹⁹⁷ In essence they seek to narrow the time

195. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding a statute that prohibits even unprotected fighting words is unconstitutional if it discriminates based on content). Compare *Wisconsin v. Mitchell* 508 U.S. 476, 486-90 (1993) (holding that penalty-enhancements based on the racial motive of the crime do not violate the First Amendment because they punish conduct not speech). See also Craig Peyton Gaumer, *Punishment For Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 27-48 (arguing that penalty enhancements such as those permitted under *Wisconsin v. Mitchell* run afoul of constitutional protections.); Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses*, 28 SETON HALL L. REV. 1230, 1246 ("The Supreme Court apparently sounded the death knell for hate-speech legislation in *R.A.V. v. City of St. Paul*.").

196. Richard Delgado & David H. Yun, *Essay II. Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objectives To Hate Speech Regulation*, 82 CAL. L. REV. 871, 890 (1994); see also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89, 109-10 (Charles R. Lawrence et al. eds., 1993). Professor Delgado suggests that an analysis of racial insults under the criteria set forth by Professor Thomas Irwin Emerson places racial insults outside First Amendment Protections. *Id.* at 106-09. Delgado proposes a new tort action for racial insults. *Id.* In order to succeed a plaintiff must prove, "language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." *Id.* at 109. Delgado's tort action is different in kind from what Morris Dees is doing because it seeks to hold the individual speaker liable, not the entire group. See *id.* Furthermore, under Delgado's theory only those who actually address hate speech toward a specific person could be liable. *Id.* at 109-10. Dees' lawsuits are far more inclusive because the actual speakers of hate may not have communicated anything to the victim. Dees & Bowden, *supra* note 17, at 24-26.

197. See, e.g., Dees & Bowden, *supra* note 17, at 27. The purposes of tort actions do not directly implicate any First Amendment issue because of the rationale of a tort action. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 6 (5th ed. 1984) (arguing that liability is "based upon conduct which is socially unreasonable," and that the "common thread" of all torts is that they seek to remedy "unreasonable interference

frame and focus solely on the tangible injury. They ignore the chilling effect that such tort suits have on speech in general.¹⁹⁸ Underlying these garden-variety tort actions is a vigorous effort to silence a specific group because of the content of its message.¹⁹⁹ There is danger in singling out one type of speech. As Professor James Weinstein notes: “the American experience has shown that any attempt to microsurgically remove even small categories of ‘worth-less’ speech from public discourse can seriously damage the vitality of the free expression crucial to democracy.”²⁰⁰

A. *Balancing the Interests Looking for Principles*

As the forgoing has demonstrated there are important concerns on both sides of the issue. The optimum balance between society’s right to be free from racial violence and the right of hate-mongers to be free from oppressive civil litigation is not clear from any perspective. What is clear is that the liberties of the First Amendment are among our most fundamental.²⁰¹ The interplay of ideas in the “Market Place” is essential in order for a diverse society such as ours to evolve toward the better.²⁰²

with the interests of others.”).

198. Morris Dees’ analysis of the First Amendment focuses solely on the *Brandenburg* test, and ignores any possible chilling effect his tort actions may have on free speech. Dees & Bowden, *supra* note 17, at 27.

199. After Morris Dees’ victory against the Aryan Nation he told reporters that, “[w]e intend to take every single asset from the Aryan Nations now and forever.” Jess Walter, *Jury Awards \$6.3 Million to Woman, Son in Aryan Nation Case*, WASH. POST, Sept. 8, 2000, at A34 In article dubiously attributed to Edgar J. Steele posted on the internet, Steele commented on a supposed conversation he had with Morris Dees. According to the article attributed to Steele: “Dees told me last week that this was no free speech case, as I have repeatedly observed. My response? ‘Well then, Mr. Dees, why are you here, all the way from the deep South, to push a case that really involves nothing more than a two-bit assault, and that by people other than the ones you publicly claim you are out to bankrupt?’” Edgar J. Steele, *Teaching Resistance*, at <http://www.deswatch.com/stinkin.html> (last visited November 27, 2000). Regardless of whether this interaction ever occurred it points out an important point: the reason for the suit is the group viewpoint not the underlying tort. Thus the award is an attempt to punish a viewpoint.

200. James Weinstein, *An American’s View of the Canadian Hate Speech Decisions*, in FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 175, 203 (W.J. Waluchow eds., 1994). Professor Weinstein criticizes the Canadian Supreme Court for its decision in three hate propaganda cases. *Id.* at 218-20. According to Weinstein, the Canadian Supreme Court found the anti-hate propaganda laws constitutional in each case. *Id.* at 176. Weinstein in particular criticizes the Canadian Supreme Court in its misuse of United States law in order to come to its decision. *Id.* at 177-201. *See also* Curtis, *supra* note 11, at 54-57 (arguing that those who would restrict speech in order to protect minorities fail to heed the lessons of history).

201. Robert B. McKay, *The Preference for Freedom*, in FREEDOM OF EXPRESSION: A COLLECTION OF BEST WRITINGS 21, 61 (Kent Middleton eds., 1981) (“The freedoms of the First Amendment, particularly the freedoms of speech and thought, are so vital to the tradition of the free society that their primacy must be recognized in sufficiently varied ways to accommodate to the various contexts in which these crucial rights may be challenged.”)

202. *Abrams v. United States* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

A nation built on the sovereignty of the people cannot survive if ideas are artificially withheld from the people.²⁰³ Suppression of even illegitimate ideas often leads to their strengthening, and it is often better to allow these illegitimate ideas to wither away due to their failure in the market place of ideas.²⁰⁴ Society must also not forget the lessons of history that demonstrate the perils in silencing free speech. Past mistakes of meeting dissidence with suppression must be avoided and replaced with the force of our arguments.²⁰⁵ In our quest to build “a more perfect union” we must not do damage to the very institutions that make our country so great.

Accordingly, in crafting any proposed limitation on speech we must be careful to avoid limitations that discriminate based on content.²⁰⁶ Discrimination based on content inherently leads to arbitrary decisions.²⁰⁷ Furthermore in a society that values freedom of speech as ours even advocacy of violence is permissible, and it is only when such advocacy leads to imminent lawless action is it permissible to silence such speech. Protectors of civil liberties must be aware that private lawsuits can be just as damaging to the rights of free speech as government regulations.²⁰⁸ Therefore, in allowing such tort suits to proceed courts must be vigilant in not allowing important First Amendment principles to be trampled.

Nevertheless, before courts can apply constitutional protections to tort suits aimed at silencing hate speech, some state action must be present. Constitutional protections apply—with the exception of the Thirteenth Amendment—solely to the actions of the state.²⁰⁹ Individuals unsupported by the state may generally silence other citizens without running afoul of the First Amendment. However, because the lawsuits at hand rely on the power of courts to silence hate groups, state action may be found.²¹⁰ In *Edmonson v. Leesville Concrete Co.* a party’s use of preemptory challenges to exclude jurors based on race formed a basis for state action because the court’s role in the trial process.²¹¹ Likewise, Dees is using the courts as a tool to violate constitutional rights with his tort suits and such suits rely on the court’s inherent power and its exercise of that authority. Therefore, the actions of

203. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (“The people, not the government, possess the absolute sovereignty.” (quoting James Madison)); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 77 (1982).

204. SCHAUER, *supra* note 31, at 76.

205. We must not repeat the mistakes made by the Supreme Court in earlier decisions. *See generally* *Debs v. United States*, 249 U.S. 211 (1919); *Frohck v. United States*, 249 U.S. 204 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *Dennis v. United States*, 341 U.S. 494 (1951).

206. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

207. *See generally* Geoffrey R. Stone, *Content Regulation and The First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

208. *New York Times*, 376 U.S. at 279-80; *Hustler v. Falwell*, 485 U.S. 46, 56-57 (1988).

209. *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883).

210. *See Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 624 (1991); *Shelley v. Kraemer*, 334 U.S. 1, 21-22 (1948).

211. *Edmonson*, 500 U.S. at 624.

Dees and the SPLC should be found to involve adequate governmental action such that the protections of the First Amendment are applicable.

B. Measures to Prevent Chilling of Free Speech With Tort Litigation

Framing the interests involved within the above guidelines would be the most basic step courts could take to protect free speech. Additionally, there are more commonplace measures courts can take to insure that free speech is not chilled by tort suits aimed specifically at silencing certain types unpopular speech.

One procedural safeguard that would help prevent chilling of speech would be an increased burden of proof in cases where suppression of speech is an underlining motive in bringing the suit. An increase in the burden of proof to the "clear and convincing evidence" standard from the current "preponderance of the evidence" standard would help solve the problem.²¹² It is not unprecedented to increase the burden of proof where fundamental rights are involved. The Supreme Court "has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."²¹³ Such a standard may help tame juries that might give plaintiffs the benefit of the doubt in order to punish these hate groups for their views. The current measure of proof by a preponderance of the evidence places juries, already barely able to apply the law to the facts, in a position where emotions may supplement legal principles.²¹⁴ Therefore, in cases where free speech is imperiled by tort suits, courts must apply a standard of proof that will do justice to the weighty issues.²¹⁵

In addition, Courts would be well advised to look to the jurisprudence that has arisen in response to "Strategic Lawsuits Against Public Participation," or better known as (SLAPP) suits. The jurisprudence arising out of

212. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

213. *Id.*

214. Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and In the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1001 (1992); Douglas G. Smith, *Structural and Functional aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 498-90 (1997). Common Problems with Juries in the United States:

(1)[the jury system] results in lengthy, expensive trials; (2) it results in decisions that are contrary to the principles of law that judges would apply; (3) jurors are more likely to be prejudiced than professional judges; (4) jurors give no reasons for their decisions; and (5) jury decision making leads to legal uncertainty.

Id. at 490. The author points out that these flaws may be mitigated by other factors. *Id.*

215. *New York Times*, 376 U.S. at 277-78. The court in *New York Times* noted that the damages awarded in the civil defamation suit were greater than those awarded under a Alabama criminal statute regulating criminal libel. In particular the unfairness result in that the civil defendant did not receive the same protections as the criminal defendant, but the civil defendant was subjected to much higher damages. *Id.* at 277.

SLAPP suits could help courts determine when the interest of a plaintiff in a tort suit may be overcome by the need to give breathing space to the First Amendment.²¹⁶ Professor Pring, a leading authority on SLAPP suits, argues that SLAPP suits are “attempts to use civil tort action to stifle political expression.”²¹⁷ The torts involved in SLAPP suits vary, but typically SLAPP suits are brought against citizens who attempt to influence governmental bodies that make policy by exercising their first amendment rights.²¹⁸ One of the main dangers of SLAPP suits, much like the tort suits utilized by Dees, is their chilling effect on free speech.²¹⁹ In dealing with SLAPP suits, courts have had to balance the interests of free speech with the interests of deserving plaintiffs seeking remedies for valid injuries.²²⁰

California was one of the first states to enact SLAPP legislation in response to “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”²²¹ To combat the chilling effect of such SLAPP suits, California provided defendants with the “strongest medicine yet to discourage the filing of SLAPP suits.”²²² Plaintiffs that bring civil suits involving issues of freedom of speech are required to “establish that there is a probability that [they] will prevail on the claim.”²²³ Failure to meet this burden would subject the plaintiff to a “special motion to strike.”²²⁴ While enacting statutory protections to protect hate-mongers is an unlikely proposi-

216. The suits brought by Dees involve many competing interests. There are the interests of the plaintiffs seeking redress and the weighty interest of the First Amendment. It is beyond this Comment to find the mark where this line must be drawn.

217. George W. Pring, “SLAPPS”—*Strategic Lawsuits Against Public Participation—A New Ethical, Tactical, and Constitutional Dilemma*, C534 A.L.I.-A.B.A. 937 (1990).

218. See generally Alice Glover & Marcus Jimison, *S.L.A.P.P. Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122 (1995). The most common tort theories advanced by SLAPP plaintiffs are defamation, business torts, civil rights violations, and conspiracy to commit tortious acts. *Id.* at 129-32. Victor J. Cosentino, *Strategic Lawsuit Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 402 (1990-91) (“Unlike legitimate lawsuits, SLAPPs are not filed to seek compensation or to make right a perceived wrong. Rather they are filed for any of four motives: retaliation for successful opposition, discouraging future opposition, intimidation, and as a strategic tool in a political battle.”).

219. Cosentino, *supra* note 218, at 403-05.

220. Waldman, *supra* note 214, at 985-86. The main difference between the defendants in SLAPP suits and the defendants in the tort suits brought by Morris Dees is that the SLAPP plaintiff’s speech is clearly protected. Often in the case of hate-mongers it is not as clear whether they have violated the *Brandenburg* test in that their speech advocates imminent violence.

221. Cal. Civ. Proc. Code § 425.16(b) (1) (Deering 2000). See generally Jerome I. Braun, *Increasing SLAPP Protection Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965 (1999). In addition to giving a good overview of this area of law, Braun’s article provides a detailed legislative history of California’s SLAPP statute. *Id.* at 1001-09.

222. Glover & Jimison, *supra* note 218, at 141.

223. Cal. Civ. Proc. Code 425.16(b) (1).

224. *Id.*

tion in our day and age, such protections would certify our commitment to freedom of speech to protect even an undesirable viewpoint.²²⁵

C. Who Will Receive This Added Protection?

Determining who should be entitled to these added protection presents some difficult problems. After all, the theories used by Dees are merely garden-variety tort actions. One might ask why hate groups faced with a tort suit should be given any extra protection than a common business or individual. Furthermore, while Dees' use civil conspiracy and aiding and abetting at least have objections based on *Brandenburg*, his use of negligent hiring, as in the Aryan Nation case, facially raises no free speech issues. Nevertheless, hate groups should be given extra protection from politically targeted civil suits, regardless of its form, because of the purpose of hate groups.

A two-prong test could be used to determine whether groups should get additional procedural safeguards in civil litigation such as the special motion to strike or a higher burden of proof. First, courts must determine whether the group's main purpose is expressive activity. Second, a court must determine whether there is a nexus between the group's expressive activity and the lawsuit. The civil cases brought by Dees' against these hate groups would satisfy the test. Hate groups, despite the distastefulness of their message, have as their main purpose the expression of a particular point of view—white superiority. Additionally, the main point of the suits is to bankrupt these groups because of this message. Therefore, to insure that First Amendment rights are given due respect additional procedural safeguards need to apply to these suits.

VI. CONCLUSION

Freedom of speech is not merely a luxury to be defended in times of peace and plenty, but rather a delicate tool that facilitates understanding. In the Market Place of Ideas, propaganda of racial hatred will certainly fall prey to its own inherent fallacies. History should serve as a reminder that tolerance can only be taught by example and not force. A literal implementation of the First Amendment's provision that "no law shall be made" may not seem to be a feasible proposition in an age where verbal acts arguably pro-

225. Curtis, *supra* note 11, at 29 (arguing that "the idea of a broadly defined right to free speech is under siege."). Professor Curtis points out that many of the social ills associated with racism have solutions other than by limiting free speech. *Id.* Curtis notes that "law professors often devote more attention to advancing equality by limiting speech than to advancing equality through economic change, access to education, guaranteed employment, or for redistribution of wealth." *Id.* at 33. Limiting free speech in an effort to solve these social ills is considered "cheap" in comparison to other possible methods. *Id.* at 34.

duce harms as great as physical acts. Nevertheless, we must not abandon this principle merely because those that it protects are those that we despise.

Ending racism should be a cause that we all undertake to accomplish; therefore, I commend Dees in his commitment to this proposition. Arguably, hate speech is more than “offensive or disagreeable,” because it is often harmful to the victim.²²⁶ Nonetheless, Dees, in his passion to end racism by bankrupting hate-mongers, has introduced dangerous side effects. The side effects are the chilling of free speech and content discrimination. Commendable as the goal of ending racism may be, civil litigation’s dangerous side effect may not justify the end.²²⁷ Civil litigation against hate groups may produce short gains such as bankrupting a few head hate-mongers, but it will do little to address the underlining problem. Racism is a problem of people. As a problem of people, it must be solved by promoting greater understanding among racial groups.²²⁸ The First Amendment and its protections of free speech are the tool to bring about that understanding. Freedom of speech is a core value not because it is a luxury, but because it facilitates understanding in diverse societies as our own. Civil litigation of the type pursued by Dees can only pull people apart. Suppression of free speech by civil litigation is no less dubious than a governmental statute to the same effect. Courts must be vigilant to prevent such abuses; otherwise the price to speak one’s mind may become too high for all of us. Therefore, we must heed the lessons both ancient and modern and not allow tort litigation to become the modern-day hemlock.

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226. See Matsuda, *supra* note 9, at 2379-81 (arguing that the victims of hate speech need to be given more consideration in the decision whether or not to permit racist speech. The rights of victims require suppression of racist speech, “not because it isn’t really speech . . . because it is wrong.”).

227. See also Curtis, *supra* note 11, at 52. Professor Curtis in writing about the good intentions of those who would place restrictions on speech to protect minorities notes: “The road to Hell is paved with good intentions.” *Id.*

228. Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1257-63 (1995). Speech is often the best method to bring about understanding among people. Professor Calleros offers some real world examples where speech was able to bring about solutions where punishment would have surely failed. *Id.*

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