"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹

When the late Justice William J. Brennan, Jr. wrote that passage in 1989, admonishing the Texas state legislature to avoid passing a flag-desecration law simply because citizens there objected to burning the national symbol as a form of protest, he reminded the nation that the Constitution was not created to reflect the current consciousness of the majority. Indeed, the powerful nature of the First Amendment⁵ lies in safeguarding minority viewpoints, which at times can be distasteful to mainstream society but should co-exist to ensure a vigorous national discourse.⁶

For a time, the internet appeared to provide a safe haven for both mainstream and radical thoughts whirling together to form a truly "uninhibited, robust, and wide-open"⁴ marketplace of ideas. That notion ended abruptly in February, 1999 when a Portland, Oregon jury ordered over $100 million dollars in damages against the creators of an anti-abortion World Wide Web site,⁵ thus triggering the next major battle over just how much protection speech in cyberspace⁶ deserves.⁷

FREEDOM OF SPEECH V. FREEDOM OF CHOICE

Like so many constitutional skirmishes before it, this one presents some unsavory elements, such as graphic images of botched abortions and fetal parts.⁸ However, the more pernicious political invective found on the challenged web site—The

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² The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law abridging the freedom of speech or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses are incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local governments. U.S. CONST. amend. XIV; Gitlow v. New York, 268 U.S. 652, 666 (1925).
³ See Robert D. Richards, Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment 77 (1998) (observing that "[t]he original intent and purpose of the First Amendment was to protect minority viewpoints" that often are unpopular).
⁵ See Rene Sanchez, Doctors Win Suit over Antiabortion Web Site, WASH. POST, Feb. 3, 1999, at A1 (describing the jury's decision against the Nuremberg Files web site).
⁶ "Cyberspace, originally a term from William Gibson's science-fiction novel Neuromancer, is the name some people use for the conceptual space where words, human relationships, data, wealth, and power are manifested by people using CMC [computer-mediated communication] technology." Howard Rheingold, The Virtual Community 5 (1993).
⁸ The site includes "a photograph of what seem to be
Nuremberg Files—includes additional chilling ingredients: names, addresses, photographs, and license plate numbers of those who aid the cause of abortion and their family members, making it appear as a virtual hit list for the violently inclined. Doctors who perform abortions are dubbed "baby butchers."10

For the pro-choice activists who filed the lawsuit,11 the message of the web page was clear. Gloria Feldt, president of the Planned Parenthood Federation of America, issued a statement shortly after the verdict declaring, "Whether these threats are posted on trees or on the internet, their intent and impact is the same: to threaten the lives of doctors who courageously serve women seeking to exercise their right to choose abortion." Even U.S. District Court Judge Robert Jones instructed the eight jurors to consider the violence against abortion doctors in recent times and use their common sense to determine if the site was threatening.12

The web page, created by Neal Horsley of Carrollton, Georgia14 and maintained by anti-abortion advocates including defendants American Coalition of Life Activists and Advocates for Life Ministries,15 solicited site visitors for information about abortion doctors. Varying type fonts and colors designated whether a particular physician on the list of over 200 was still alive, wounded or dead.16 The names of attorneys, judges, politicians, and celebrities unsympathetic to the anti-abortion cause appeared on the site as well.17

Planned Parenthood of Columbia/Willamette, Inc., along with several physicians who perform abortions, alleged that the disputed web site violated the 1994 Freedom of Access to Clinics Entrances Act.18 This federal law prohibits, among other things, the threat of force that intimidates or interferes with individuals or groups seeking access to abortion clinics.19 The language makes clear, however, that the Act shall not be construed "to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed."20 The messages on the Nuremberg Files site contained no explicit threat of, or direct incitement to, violence, raising the question of whether new remedies were indeed construed by the jury in its application of this law. If no explicit threat was made against abortion doctors on the web page, the question

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10 Jules Crittenden, Jury Clampdown on Anti-abortion Web Site, Boston Herald, Feb. 3, 1999, at A1. After the Oregon jury's decision, the controversial web page was shut down by MindSpring Enterprises, an Atlanta-based internet service provider. Patrick McMahon, Anti-abortion Site Kicked Off Web, USA Today, Feb. 8, 1999, at 2A. A MindSpring executive announced that it was determined that the site "was not consistent with our appropriate use policy." Id. The site, however, did not disappear for long. It resurfaced within a matter of weeks on a computer server in the Netherlands. Karen Kaplan, Technology Shuttered Antiabortion Site Surfaces on Dutch Server, L.A. Times, Feb. 23, 1999, at C3.

11 The plaintiffs included Planned Parenthood of the Columbia/Willamette, Inc., Pordland Feminist Women's Health Center, and five individual physicians who perform abortions as part of their medical practices. Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp.2d 1182 (D. Or. 1998). The plaintiffs contended that the Nuremberg Files web page, along with several printed posters and a bumper sticker urging readers to execute abortionists, constituted true threats and violated the Freedom of Access to Clinic Entrances Act of 1994. Id. at 1186-88. The defendants—fourteen individual anti-abortion activists, along with the American Coalition for Life Activists and the Advocates for Life Ministries—won a motion for summary judgment as to the bumper sticker and several posters but the dispute over whether the Nuremberg Files web page violated the Freedom of Access to Clinic Entrances Act was allowed to proceed to trial. Id. at 1195.


14 See McMahon, supra note 10, at 2A.

15 See Saunders, supra note 8, at 7.

16 The site "crossed off the names of those murdered and shaded over those who were wounded." Kim Murphy, Jury Says Web Site Threatens Safety of Abortion Doctors, Buffalo News, Feb. 3, 1999, at A1.

17 Saunders, supra note 8, at 7.


19 The Freedom of Access to Clinic Entrances Act penalizes anyone who:

by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons, from obtaining or providing reproductive health services.


becomes why did the jury reach its conclusion and award such a massive amount of damages?

NEW MEDIUM, NEW FEARS?

The magnitude of the verdict arguably reflects the jury’s discomfort with or perhaps apprehension of the internet as a communications medium. Perhaps the jury has overvalued the powerfulness and importance of this new technology when it comes to mobilizing individuals to commit bad acts.

New media often have powerful effects. For instance, motion pictures were believed to have powerful effects on children in the 1920s, triggering the Payne Fund studies. Today, many people see the internet as lawless and immoral.

Courts, too, have relatively little experience with internet communications and what they have is recent. The most celebrated case, Reno v. American Civil Liberties Union, illustrated a reluctance on the part of the United States Supreme Court to construct new models of regulating speech specifically applicable to this new medium. The U.S. District Court in Philadelphia that heard the original challenge to the Communications Decency Act suggested that “[a]s the most participatory form of mass speech yet developed, the internet deserves the highest protection from governmental intrusion.” Instead of differential treatment, courts have left the impression that the full panoply of First Amendment protections are available to communications transmitted across the internet.

However, the Planned Parenthood case reflects a departure from traditional First Amendment analysis. The jury clearly viewed the Nuremberg Files web site as an implicit invitation to do violence to the individuals listed.

INCITEMENT TO VIOLENCE AND TRUE THREATS

Incitement to violence has a long history in American jurisprudence, dating back to 1919 when the Supreme Court announced what is known as the clear and present danger test. At that time, Justice Oliver Wendell Holmes opined that speech could not be punished absent a consideration of the circumstances in which it was uttered. In other words, the words standing by themselves are not problematic unless they are likely to “bring about the substantive evils that Congress has a right to prevent.”

The modern refinement of the clear and present danger test was articulated in 1969 by the Supreme Court in Brandenburg v. Ohio. In Brandenburg, the Court solidified what had been developing in a line of cases throughout much of the century and concluded that the government cannot forbid even the advocacy of force or illegal action “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Court thus made clear that the mandate of Brandenburg goes beyond mere advocacy, which was not even present in the Nuremberg Files, to require immediate incitement to illegal action that is likely to be carried out. No one has suggested that the site encouraged anyone to commit violent acts against the abortion doctors or others. To the contrary, the site’s alleged purpose is to profile abortion providers in the event that abortion becomes illegal and “does not tell its visitors

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27 Id. Holmes wrote:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

30 Brandenburg, 395 U.S. at 447.
that they should kill abortion providers, or harass them, or even force them out of [the] business."33

While courts are still groping their way around new technology law, they appear to have less trouble applying established law to the new technology. One example instructive in analyzing Planned Parenthood involves the use of private e-mail to convey threats. Federal law prohibiting threatening communications through interstate commerce has been around for nearly seventy years.34 The law makes it a crime, punishable by fine and up to five years in prison, to convey "any communication containing any threat" to kidnap or injure another person.35 Because of the implications for speech, courts that have considered the law have been forced to wade carefully through First Amendment doctrine to develop precise tests for determining what constitutes a threatening communication.

In United States v. Baker,36 the defendant was charged with violating 18 U.S.C. § 875, the federal threats statute, after the FBI learned of communications he posted to an internet newsgroup and conveyed in private e-mails to another individual. The messages "graphically described the torture, rape, and murder of a woman who was given the name of a classmate" of the defendant at the University of Michigan.37 A superseding indictment narrowed the charges to only private e-mail communications expressing a "sexual interest in violence against women and girls"38 rather than those messages posted on the newsgroup. The defendant moved to quash the indictment, claiming that his e-mail transmissions were protected speech under the First Amendment.39 The government responded that the First Amendment does not protect what it called "true threats."40

The district court recognized that at times speech can be so entwined with proscribed conduct that it is difficult to separate them.41 However, punishment for the threat itself would be constitutionally permissible only if "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."42

Moreover, the court stressed that any such analysis must be considered in light of the foreseeable recipients.43 In other words, if a foreseeable receiver of the message would not interpret it as a "serious intention to injure or kidnap," then it does not constitute a threat.44 In dismissing the charges against the defendant, the court found that the e-mail communication could not reasonably be interpreted as a threat but was, at most, "only a rather savage and tasteless piece of fiction."45

On appeal, the Sixth Circuit Court of Appeals affirmed the district court's ruling, concluding the indictment failed as a matter of law for want of a threat. The court held that to be considered a threat under Section 875(c), "a communication must be such that a reasonable person: (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea); and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (actus reus)."46 Planned Parenthood's position is factually distinguishable from Baker in a manner that places it in an even weaker constitutional posture. In Baker, the e-mail was targeted to a specific recipient. The message suggesting violence toward women and girls was sufficiently detailed, and it was received. Despite these facts, the court still found that the communication did not rise to the level and the Second Circuit Court of Appeals in United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976), cert. denied, 429 U.S. 1022 (1976).

33 Free Speech or Threat?, PLAIN DEALER, Feb. 5, 1999, at 8B.
35 18 U.S.C. § 875(c).
37 Id. at 1379.
38 Id.
39 See id. at 1380.
40 Id. Here the government relied on the constitutional dimensions of "true threats" discussed the United States Supreme Court in Watts v. United States, 394 U.S. 705 (1969), and the Second Circuit Court of Appeals in United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976), cert. denied, 429 U.S. 1022 (1976).
41 "[A] coercive or extortionate threat is particularly likely to be a constitutionally prosecutable 'true threat' because it is particularly likely to be [intimately] bound up with proscribed activity." Baker, 890 F. Supp. at 1384.
42 Id. at 1382 (quoting United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976)).
43 See id. at 1384.
44 Id.
45 Id. at 1390.
46 United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997).
needed to overcome First Amendment protection.

In contrast, to access the Nuremberg Files on the World Wide Web, a visitor must know that it exists, obtain its URL or site address, and then take affirmative steps to seek it out.\footnote{47}{The affirmative-steps scenario involved in seeking out a web page is similar to individuals who seek out indecent telephone messages known as dial-a-porn. As the United States Supreme Court observed about dial-a-porn, "[i]n contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication." Sable Communications v. F.C.C., 115, 127-28 (1989). This language later was cited with approval by the United States Supreme Court in striking down the Communications Decency Act. Reno v. ACLU, 521 U.S. at 869-70.} Once there, the visitor viewing the dossiers of the abortion doctors must infer that the site is advocating violent action (because the message does not openly encourage any violent behavior). Moreover, under a \textit{Brandenburg} analysis, the visitor must be inclined to immediately carry out the violent act.\footnote{48}{See supra note 30 and accompanying text (setting forth the \textit{Brandenburg} standard).} Clearly, the "true threats" analysis, which builds on notions of "clear and present danger" and \textit{Brandenburg}, must also fail because the profiles of the abortion doctors cannot be construed as "so unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution."\footnote{49}{See supra note 42.} Applying this analysis, the Nuremberg Files page fails to convey a "true threat" and thus is protected speech.

CONCLUSION

Throughout history, as new communications technologies emerge, society experiences both excitement and apprehension. The internet's debut into everyday life is no exception. The battle cry for some who fear unchecked growth is to demand new regulation.\footnote{50}{This is not surprising given that "[c]ensorship is a social instinct." RODNEY A. SMOLLA, \textit{FREE SPEECH IN AN OPEN SOCIETY} 4 (1992).} For others, harsh and tortured application of existing law is a sufficient mechanism to quell fear as it arises. Nevertheless, First Amendment protections were purposely designed to grow and mature with society.

The freedoms embodied in the Constitution have been tested and provide courts with guidance that appears as fresh today as when first articulated. The Nuremberg Files case may indeed have struck fear in the abortion doctors profiled in the on-line dossiers. That fear clearly resonated with the Portland jury. Yet, fear alone cannot justify dissolving First Amendment protections, especially when speech pertains to issues of public concern like abortion. What Justice Louis Brandeis wrote more than seventy years ago is true today and should guide future courts handling \textit{Planned Parenthood} and its progeny: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent."\footnote{51}{Whitney v. California, 274 U.S. 357, 376 (1927).}