

STUDENT WORKS: Free Speech on the Internet: Does the First Amendment Protect the “Nuremburg Files”?

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I. INTRODUCTION

Few, if any, political debates kindle stronger convictions and more impassioned activism than abortion.¹ Every year, approximately 50,000 abortion activists assemble at the annual “March for Life” in Washington.² Members of Congress are inundated with calls and letters from constituents expressing their views on abortion.³ The entrances of abortion clinics across the country are routinely blockaded by picket lines of protesters.⁴ Still other activists channel their convictions through service, ranging from volunteering at pro-life counseling clinics to caring for foster children.⁵ While most abortion activists choose peaceful demonstration, the sad reality is that a small group of extremists consider aggression to be the most desirable solution. This growing proclivity toward aggression has given rise to a disturbing increase in violence against abortion providers and clinics in recent years.

Concomitantly, society has undergone another phenomenon: the growth of the Internet.⁶ The number of Internet users has doubled in every year since 1993⁷ and today has burgeoned to

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¹ See, e.g., DONALD P. JUDGES, *HARD CHOICES, LOST VOICES*, 4 (1993) (describing abortion as one of the most divisive issues of our time, with some viewing the act as slaughter and others as a test of society’s commitment to individual liberty, personal autonomy, and women’s welfare); Allen Buchanan, *Ethical Responsibilities of Patients and Clinical Geneticists*, 1 *J. HEALTH CARE L. & POL’Y* 391, 393 (1998) (identifying the morality of abortion as “one of the most divisive issues our society has known”). For example, a 1998 poll conducted by Market Strategies revealed that 40% of respondents would not vote for a presidential candidate who had different views on abortion. See MARKET STRATEGIES, *Abortion, Elections*, Mar. 30, 1998 (“Would you vote for a candidate whose position on abortion is different from your own?” Yes: 38%; No: 40%; Depends (voluntary response): 18%; Don’t know: 3%; Refused to answer: 1%).

² See Tamara Jones, *The Children’s Crusade; They Are Young, Spirited and Deeply Committed, and They Think of Abortion as a Holocaust. But Will the New Generation of Activists Repeat the Mistakes of Their Elders?*, WASH. POST, Apr. 18, 1999, at W7 (describing the events surrounding the annual “March For Life” in Washington, D.C.); Joyce Price, *Violence-sparked Tension Won’t Stop ’95 March for Life*, WASH. TIMES, Jan. 22, 1995, at A3 (previewing “March for Life” and explaining why “tension between the sides in the abortion debate is at an all-time high”).

³ See *What’s Ahead in the Battle Over Abortion*, GANNETT NEWS SERVICE, Jan. 19, 1998 (noting that Catholic churches will distribute 11 million postcards for parishioners to mail to senators this year urging the Senate to ban “partial-birth” abortions); Dave Williams, *Mail Gives Congressmen Pipeline to Voters*, STATES NEWS SERVICE, Oct. 31, 1997 (discussing the influx of constituent mail received by Members of Congress).

⁴ See Kevin Fagan, *Battle Over Right to Choose; Abortion Clinic in Redding Stirs Up Fervor on Both Sides of Issue*, S.F. CHRON., May 4, 1999, at A1 (discussing the activities of pro-life and pro-choice protestors outside an abortion clinic in Redding, California).

⁵ See Jamie Tobias Neely, *Terrorism Deserves No Handmaidens*, SPOKESMAN-REV., Mar. 11, 1999, at (referring to volunteering in a pro-life clinic and caring for a foster child as constructive ways to express conviction against abortion).

⁶ The Internet can be described as a large environment, composed of a patchwork of thousands of smaller networks across the world. These networks are able to communicate with each other by employing a consistent suite of software protocol. See Michael Johns, *Comment, The First Amendment and Cyberspace: Trying to Teach Old Doctrines New*

approximately 200 million worldwide.⁸ Like many controversial debates, abortion has found its way into cyberspace.⁹ A quick Internet search will reveal countless newsgroups, listserves, and websites championing pro-life and pro-choice propaganda.¹⁰ Another consequence of the Internet, however, has been the emergence of websites and discussion groups presenting views that many find abhorrent.¹¹ According to the Southern Poverty Law Center, a leading monitor of hate speech on the Web, the number of websites featuring hate speech has ballooned from one in 1995 to 250 today.¹² These developments test our commitment to the First Amendment, an essential cornerstone upon which our democracy rests,¹³ as they may force us to tolerate websites that most find repulsive in the name of free speech.¹⁴

These two forces, the increase in violence toward abortion providers and the constitutional call to protect cyberspace speech, recently came to a head in a lawsuit surrounding a controversial anti-abortion website. This website, commonly known as the “Nuremburg Files,” provided a list of abortion doctors with personal information in a manner that some have considered tantamount to a “hit list.”¹⁵ In response, a coalition of pro-choice organizations and physicians listed on the “Nuremburg Files” brought action against several pro-life organizations and individuals associated

Tricks, 64 U. CIN. L. REV. 1383, 1383 n.7 (1996); see also generally DOUGLAS E. COMER, THE INTERNET BOOK 69-70 (1994).

⁷ See Sarah B. Hogan, Note, To Net or Not to Net: Singapore’s Regulation of the Internet, 51 FED. COM. L.J. 429, 432 (1999) (citing Arul Louis, Answernet, DAILY NEWS, Oct. 27, 1996, at 46, available in LEXIS, News Library, DLYNWS File).

⁸ See Hogan, *supra* note 7, at 432 (citing *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff’d*, 117 S. Ct. 2329 (1997)).

⁹ The term, “cyberspace,” was coined by science fiction author, William Gibson. See WILLIAM GIBSON, NEUROMANCER 51 (1984). “Cyberspace” encompasses all electronic messaging and information systems, including the Internet. See Johns, *supra* note 6, at 1386 (citing Anne M. Fulton, Cyberspace and the Internet: Who Will Be the Privacy Police?, 3 COMM. LAW CONCEPTS 63, 63 (1995)).

¹⁰ See, e.g., National Abortion and Reproduction Rights Action League (NARAL) (visited May 18, 1999) <<http://www.naral.org>>; People for Life (visited May 18, 1999) <<http://www.peopleforlife.org>>; Pro-Woman, Pro-Life (visited May 18, 1999) <<http://www.gargaro.com/noabort.html>>.

¹¹ For example, one particularly nauseating website displays the head of Mathew Shephard, a young man brutally murdered because of his sexuality, bouncing in a sea of flames while visitors are updated on how many days he has been in hell. See Dennis McCafferty, *Www.hate.comes To Your Home: Is It Free Speech? Or Does It Incite Violence?*, USA TODAY, Mar. 28, 1999, at 6.

¹² See *id.*

¹³ See U.S. CONST. amend. I (“Congress shall make no law abridging . . . the freedom of speech”); see also, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“Each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rests upon this ideal.”); *NAACP v. Button*, 37 U.S. 415, 433 (1963) (freedom of speech is “supremely precious in our society”).

¹⁴ Justice Anthony Kennedy articulated this challenge well in his concurrence in *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the First Amendment protected the defendant’s burning an American flag during a protest rally): “sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.” *Id.* at 420-21 (Kennedy, J., concurring). It is a well-established tenet of constitutional law that the distaste we may feel toward the content or message of a protected expression “cannot detain us from discharging our duty as guardian of the Constitution.” *United States v. U.S. Dist. Court for Cent. Dist. of Cal.*, 858 F.2d 534, 541 (9th Cir. 1988) (citing *Cohen v. California*, 403 U.S. 15 (1971) (vulgar expression displayed in a public courthouse), *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ku Klux Klan cross-burning), *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir. 1978) (neo-Nazi march through a Jewish neighborhood), cert. denied, 439 U.S. 916 (1978)).

¹⁵ See Michele Mandel, *Fanning the Flames of Hatred*, TORONTO SUN, Apr. 4, 1999, at 5.

with the website, alleging that the website constitutes a threat to their safety.¹⁶ On February 2, 1999, the plaintiffs prevailed in the first round of the battle, winning a \$ 107 million jury verdict in *Planned Parenthood v. American Coalition of Life Advocates*.¹⁷ An appeal from the defendants seems imminent.¹⁸ In fact, some believe this case invokes sufficiently serious constitutional implications to make its way to the United States Supreme Court.¹⁹

The aim of this Note is to examine standards of First Amendment scrutiny as applied to the “Nuremburg Files.” This Note argues that the “true threat” standard, as applied by the jury, is an improper standard of review. Although the jury ruled in favor of the plaintiffs, the verdict relied on an erroneously articulated “true threat” standard and thus stands in serious peril of being reversed on appeal. Instead, some have suggested that more appropriate review resides in the incitement standard. Yet, this Note concludes that the “Nuremburg Files” website still survives constitutional muster under the incitement standard. Part II begins by offering a concise history of *Planned Parenthood v. American Coalition of Life Advocates*.²⁰

Then, Part III evaluates the “true threat” standard as developed by *Watts*²¹ and its progeny. This Part proceeds to examine the standard as articulated in the jury instructions. Part III reveals several major errors in the judge’s representation of the “true threat” standard and concludes that, under a properly-articulated “true threat” standard, the website should receive First Amendment protection. In Part IV, this Note turns its attention to an alternative standard for First Amendment scrutiny, *Brandenburg*’s²² incitement standard. Part IV concludes that the incitement standard protects the “Nuremburg Files.” In conclusion, this Note proposes the creation of a modified standard that is responsive to the demands of the Internet.

II. BACKGROUND ON PLANNED PARENTHOOD V. AMERICAN COALITION OF LIFE ACTIVISTS

Pro-life activist Neal Horsley created the “Nuremburg Files” as part of his Christian Gallery website²³ under the purported rationale of maintaining a list of abortion providers to facilitate their

¹⁶ *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1184 (D. Or. Oct. 14, 1998). The lawsuit also cited as threats “wanted” posters of abortion providers and bumper stickers advocating their execution. *Id.* at 1186-87. This Note, however, will focus on the free speech implications of the “Nuremburg Files” website.

¹⁷ Jury Verdict, *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, No. 95-1671-JO (D. Or. filed Feb. 2, 1999).

¹⁸ See Patrick McMahon, Judge Agrees Web Site a Threat, *USA TODAY*, Feb. 26, 1999, at A2 (Defendant Andrew Burnett stating, “[Judge Jones’s permanent injunction] allows us to go ahead and begin the appeal.”).

¹⁹ See *Perspect*, Free Speech and Limiting a Website, *TENNESSEAN*, Feb. 7, 1999, at D2 (“The decision almost definitely will be appealed, and may find its way to the U.S. Supreme Court.”); see also, *ACLU OF OREGON*, Press Release, Statement on Verdict in *Planned Parenthood “Wanted Posters” Case*, Feb. 2, 1999 (“This decision will almost certainly be appealed to the 9th Circuit, and it may eventually reach the U.S. Supreme Court.”).

²⁰ *Planned Parenthood*, 23 F. Supp. 2d 1182 (D. Or. 1998).

²¹ *Watts v. United States*, 394 U.S. 705 (1969) (creating the “true threat” standard for First Amendment review).

²² *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing the incitement standard for First Amendment review).

²³ See Patrick McMahon, Anti-abortion Site Kicked off Web, *USA TODAY*, Feb. 8, 1999, at A2; Lynne K. Varner, Doctor’s Death Leaves Abortion Providers More Fearful Than Ever; Threats from Radicals Force Some to Wear Bulletproof Vests, Carry Firearms, *DALLAS MORNING NEWS*, Nov. 8, 1998, at A14.

prosecution when abortion is criminalized.²⁴ Horsley first posted the ²Nuremburg Files² on the Internet in January 1997,²⁵ and the website eventually listed about 200 “abortionists.”²⁶ Branding these abortion providers as “baby butchers,”²⁷ the website supplied extensive personal information, including pictures, addresses, spouses’ names, and phone numbers.²⁸ This information was situated below what resembled blood dripping from the website’s logo²⁹ and near a bloodied cartoon punctuating its screaming headlines about baby killers.³⁰ When a doctor listed on the page was killed, the website’s operators immediately struck through the doctor’s name; when a doctor was injured, the operators printed the name in gray.³¹

In 1995, two abortion clinics, Planned Parenthood of the Columbia/Willamette and Portland Feminist Women’s Health Center, along with five individual physicians, brought action against pro-life activists claiming their statements in certain posters and other documents constituted “true threats” to the plaintiffs’ lives.³² Alleging that these threats violate the Freedom of Access to Clinic Entrance Act of 1994 (FACE)³³ and the Racketeer Influence and Corrupt Organizations Act (RICO),³⁴ the plaintiffs sought damages and injunctive relief.³⁵ The defendants, who included the

²⁴ The website draws its names from the Nuremburg war criminals. The operators contend that they hope to use the information from the website to prosecute the doctors and pro-choice activists before a Nuremburg-style tribunal. According to the website: “One of the great tragedies of the Nuremburg trials after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. . . . We do not want the same thing to happen when the day comes to charge abortionists with their crimes.” The Nuremburg Files (visited May 9, 1999) <<http://www.lektrik.com/PPvsACLA/home.htm>>. See also Editorial, Free Speech or Threats?, THE PLAIN DEALER, Feb. 5, 1999, at 8B; Elaine Lafferty, Ruling Against Anti-Abortion Website Raises Storm in US over Rights: The Anti-abortionists Who Ran the “Nuremburg Files” Website Were Fined \$ 105 Million This Week, IRISH TIMES, Feb. 4, 1999, at 14.

The original “Nuremburg Files,” as posted by Horsley, was removed from the Internet following the resolution of Planned Parenthood v. American Coalition of Life Advocates. The Lektrik Press has since posted a copy of the “Nuremburg Files” in the name of free speech at <<http://www.lektrik.com/PPvsACLA/home.htm>>. For my discussion of the content of the website, I will be relying on the Lektrik Press posting.

²⁵ Brief for the ACLU of Oregon, supra note 24, at 9.

²⁶ See James C. Goodale, Can Planned Parenthood Silence the Pro-Life Web Site, N.Y. L.J., Apr. 2, 1999, at 3. In addition to these 200 “abortionists,” the site listed another 200 individuals, including the Vice President of the United States, numerous U.S. Senators and Representatives, several Justices of the U.S. Supreme Court, and various federal court judges. See Brief for the ACLU of Oregon, supra note 24, at 9.

²⁷ See Jacqueline Soteropoulos, Florida Doctors Named on Web Site Fear for Lives, TAMPA TRIB., Feb. 3, 1999, at 12.

²⁸ See id. The page further invites readers to send in doctors’ addresses, license plate numbers, and names of their children. See id.

²⁹ See Mandel, supra note 15, at 5; Lynne K. Varner, Tension Rises for Abortion Doctors-N.Y. Slaying Puts Physicians on Edge, SEATTLE TIMES, Oct. 30, 1998, at B1.

³⁰ See Editorial, supra note 24, at 8B.

³¹ See id.

³² See Planned Parenthood, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998).

³³ FACE, in pertinent part, makes liable for civil and criminal penalties whoever:

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.

³⁴ RICO, in pertinent part, states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

³⁵ See Planned Parenthood, 23 F. Supp. 2d at 1184.

American Coalition of Life Activists, the Advocates for Life Ministries, and individuals active in those organizations,³⁶ responded by asserting First Amendment protection.³⁷ Horsley, the creator of the “Nuremburg Files,” was not named in the suit, although the individual defendants were alleged to have been associated with the website and to have helped operate it.³⁸ For that reason, the “Nuremburg Files” was included as part of the alleged threats against the plaintiffs.

In his jury instructions, U.S. District Judge Robert Jones relied on the “true threat” standard. In short, Judge Jones informed the jury that to move on to the issue of FACE and RICO violations, the jury must first conclude that the posters and website were “true threats,” hence unprotected by the First Amendment.³⁹ Applying these instructions, the jury concluded that the defendants’ actions constituted “true threats” that violated FACE and RICO, and awarded a \$ 107 million judgment.⁴⁰ Immediately following the verdict, the defendants vowed to appeal to the Court of Appeals for the Ninth Circuit.⁴¹

On February 25, 1999, Judge Jones upheld the jury verdict in a strongly worded endorsement, proclaiming that the “Nuremburg Files” and the anti-abortion posters were “blatant and illegal communications of true threats to kill.”⁴² Concluding that the plaintiffs lacked an adequate remedy of law,⁴³ Judge Jones issued a permanent injunction banning the defendants from threatening the doctors and clinics in any manner, including contributing to the website or producing additional posters.⁴⁴ Judge Jones defended the need for injunctive relief by contending, “Each day, plaintiffs’ lives are endangered because of defendants’ unlawful threats against them.”⁴⁵ According to the judge, “Monetary relief alone cannot address this harm.”⁴⁶

III. THE “NUREMBURG FILES” AND THE “TRUE THREAT” STANDARD

This Part considers whether the “Nuremburg Files” should be constitutionally protected under the “true threat” standard. First, it takes a close look at Judge Jones’s articulation of the standard in his jury instructions. Next, this Part examines the “true threat” standard as created by the Supreme

³⁶ See Judy L. Thomas, Area Doctor Pressing Abortion Lawsuit: He’ll Join Others Around the Country Trying to Rein in Militant Opponents, KANSAS CITY STAR, Jan. 4, 1999, at B1.

³⁷ See Planned Parenthood, 23 F. Supp. 2d at 1185.

³⁸ Free Speech and Limiting a Website, TENNESSEAN, Feb. 7, 1999, at D2; Lafferty, supra note 24, at 14.

³⁹ Jury Instructions at 14-16, Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998) [hereinafter Jury Instructions].

⁴⁰ See Jury Verdict, Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998); see also, e.g., Patrick McMahon, Doctors Unlikely To Collect Jury Award: Web Site Will Stay, Creator Says, USA TODAY, Feb. 3, 1999, at A3.

⁴¹ See, e.g., Abortion Foes Lose Web Site Suit / Jury Says Tactics Threaten Doctors, NEWSDAY, Feb. 3, 1999; Robert MacMillan, Wanted Posters: Free Speech or Death Threat?, NEWSBYTES, Feb. 3, 1999.

⁴² Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists, No. 95-1671-JO (D. Or. Mar. 16, 1999); see also Associated Press, Anti-abortion Web Site, Posters ‘Blatant’ Threats, Judge Writes, FLA. TODAY, Feb. 26, 1999; Lauren Dodge, Abortion Foes Banned from Web Site, AP ONLINE, Feb. 26, 1999.

⁴³ Planned Parenthood, No. 95-1671-JO (citing Continental Airlines, Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1104 (9th Cir. 1994)).

⁴⁴ Id.; see also McMahon, supra note 18.

⁴⁵ Planned Parenthood, No. 95-1671-JO.

⁴⁶ Id.

Court and developed subsequently by lower courts. A comparison of the jury instructions with the appropriate standard reveals several serious flaws in Judge Jones's instructions. These flawed instructions may have adversely influenced the jury; this Part concludes that a properly-articulated "true threat" standard affords constitutional protection for the ²Nuremberg Files.²

A. The Standard Articulated in the Jury Instructions

In his jury instructions, Judge Jones defined a "true threat" as occurring "when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault."⁴⁷ The judge stressed that this standard does not look at the intent or motive of the defendants, but what a reasonable person would have foreseen:

Even if you believe that the defendants did not intend the statements to be threatening, you must still find those statements to be threats if you conclude that a reasonable person would have foreseen that those statements, in their entire factual context, would have been interpreted as statements of an intent to bodily harm or assault.⁴⁸

In other words, the "test is not the subjective view of the defendants, but the objective view of a reasonable person."⁴⁹

Judge Jones's instructions particularly emphasized the need to evaluate the total context and circumstances of the statements.

The judge offered a very broad definition of context:

The word "context" means all of the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it. The context in this case may include other posters you heard about, other statements and actions by defendants and others, the history of anti-abortion violence, and the reaction of the listeners. . . . The context also includes evidence of the defendants' motives or intent in creating, preparing or disseminating the statement at issue.⁵⁰

This generously broad definition of context enlarged the scope of activities that could classify as threats.

Judge Jones noted that "even a statement that is ambiguous, subtle or conditional can amount to a threat in light of the factual context in which the statement was made."⁵¹

⁴⁷ Jury Instructions, *supra* note 39, at 14.

⁴⁸ *Id.* at 14.

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⁵⁰ *Id.* at 14-15.

⁵¹

B.

The Supreme Court established the “true threat” standard in 1969 in *Watts v. United States*.⁵² Robert Watts was convicted of violating an anti-threat statute which prohibited any person from “knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States.”⁵³ Watts’s alleged threat targeted the life of President Lyndon B. Johnson during an anti-war protest.⁵⁴ The Court emphasized that the statute must be interpreted within the constraints of the First Amendment, with the distinction made between what is a threat and what is constitutionally-protected speech.⁵⁵

In forging this distinction, the Court examined the context of Watts’s statement, and determined that Watts’s words were political hyperbole that fell short of a “true threat.”⁵⁶ Explaining this political hyperbole exception, the Court emphasized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁵⁷ Moreover, the Court noted that the language used in the political arena is often “vituperative, abusive, and inexact.”⁵⁸ The Court concluded that, taken in context and regarding the expressly conditional nature of the statement and the reaction of the listeners, Watts’s statements must be interpreted as nothing more than “a kind of very crude offensive method of stating a political opposition to the President.”⁵⁹

A concise, per curiam opinion, Watts did not elaborate further on the specifics of the “true threat” standard.⁶⁰ At the very least, however, the Court’s protection of a statement explicitly expressing a desire to shoot the president reveals that the “true threat” standard imposes a lofty hurdle to overcome.

⁵² 394 U.S. 705 (1969).

⁵³ The statute, in pertinent part, provides that:

Whoever knowingly and willfully deposits for conveyance . . . any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President . . . , or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President . . . shall be fined not more than \$ 1,000 or imprisoned not more than five years, or both.

(a).

⁵⁴ Watts stated:

They always holler at us to get an education. And I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

⁵⁵ See *id.* at 707.

⁵⁶ See *id.* at 708.

⁵⁷ *Id.* at 708 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotations omitted).

⁵⁸ See *id.* at 708.

⁵⁹ *Id.*

⁶⁰ In a dissenting opinion, Justice Fortas criticized the Court’s refusal to hold a hearing for this case. Fortas wrote that the Court was wrong to “not decide the case on its merits and to adjudicate the difficult questions that it presents.” *Id.* at 712 (Fortas, J., dissenting).

Although the Supreme Court has never directly returned to the definition of a “true threat,”⁶¹ various lower court decisions have continued to indicate that all but the most egregious threats receive constitutional protection. One of the most significant decisions in this regard is the Second Circuit’s ruling in *United States v. Kelner*.⁶² Russell Kelner was convicted for transmitting in interstate commerce a communication containing a “threat to injure the person of another,”⁶³ when he threatened to assassinate Yasser Arafat prior to Arafat’s visit to New York City.⁶⁴ Kelner made his threat unambiguously clear during a television interview, boasting that his men were armed and ready to assassinate Arafat. Kelner even made the bold promise, “We are planning to assassinate Mr. Arafat”⁶⁵ and explained that “everything is planned in detail”⁶⁶ and “it’s going to come off.”⁶⁷

Affirming Kelner’s conviction, the Second Circuit elucidated the requirements of the “true threat” standard. Although the court held that Kelner’s actions did not fall under the protective umbrella of the First Amendment, the Second Circuit’s definition of a threat set a high standard to overcome. Rejecting the argument that Kelner was expressing mere ideas, the court held that his actions were not protected under the political hyperbole exception of *Watts*.⁶⁸ The Second Circuit further noted that Kelner fully comprehended his threats, transmitting them “knowingly and willfully.”⁶⁹ Perhaps Kelner’s most useful pronouncement was its definition of threats that transgress the bounds of the First Amendment as those “so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution”⁷⁰

Since *Kelner*, other courts have offered modest modifications to the “true threat” standard. The Fifth Circuit, first in *United States v. Bozeman*⁷¹ and later in *United States v. Myers*,⁷² held that, to constitute a

⁶¹ While the Court has cited *Watts* on occasion, the Court has failed to further develop the “true threat” standard in other opportunities. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (holding a “hate crime” ordinance facially invalid under First Amendment and writing that, under *Watts*, threats of violence have special force when directed toward the President); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 911 n.46 (1982) (holding that the First Amendment protected a nonviolent civil rights boycott and noting that the Court recognized in *Watts* that “offensive” and “coercive” speech is protected by the First Amendment); see also Robert Kurman Kelner, Note, *United States v. Baker; Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 289 n.13 (1998) (“The Court has cited *Watts* on occasion, but has not engaged in an extended effort to develop its true threat doctrine.”).

⁶² 534 F.2d 1020 (2d Cir. 1976), cert. denied, 429 U.S. 1022 (1976).

⁶³ The statute, in pertinent part, provides that:

Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than \$ 1,000 or imprisoned not more than five years or both.

(c).

⁶⁴ See *Kelner*, 534 F.2d at 1020-21.

⁶⁵ *Id.* at 1021.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1025

⁶⁹ *Id.* at 1025

⁷⁰ *Id.* at 1027

⁷¹ 495 F.2d 508, 510 (5th Cir. 1974) (holding that defendant’s statement, “I will kill him,” when taken in context, “would have a reasonable tendency to create apprehension that its originator will act according to its tenor” and constituted a threat), cert. denied, 422 U.S. 1044 (1975).

⁷² 104 F.3d 76, 79 (5th Cir. 1997) (affirming the district court’s finding of a threat and noting that, pursuant to *Bozeman*, a threat must be considered in context), cert. denied, 520 U.S. 1218 (1997).

threat, a statement in context must “have a reasonable tendency to create apprehension that its originator will act according to its tenor.”⁷³ Most recently, in 1997 the First Circuit set forth a clear rule for defining a threat in *United States v. Fulmer*,⁷⁴ a case reviewing a conviction for threatening a federal agent.⁷⁵ In *Fulmer*, the First Circuit wrote that “the appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that statement . . . would be taken as a threat by those to whom it was made.”⁷⁶

Of particular relevance to the “Nuremburg Files” is the recent federal district court decision in *United States v. Baker*,⁷⁷ one of the first cases to raise First Amendment issues in relation to the Internet.⁷⁸ At issue in *Baker* was a story posted on a newsgroup by a University of Michigan student named Jacob Alkhabaz⁷⁹ and electronic correspondences between Alkhabaz and another individual.⁸⁰ These postings described the rape, torture and murder of a woman, and discussed in detail Alkhabaz’s plans to commit rape at the University of Michigan.⁸¹ Indicted with violating 18 U.S.C. § 875 (c),⁸² Alkhabaz argued that application of this federal anti-threat statute to his email transmissions pushed the boundaries of the statute beyond the limits of the First Amendment.⁸³

District Court Judge Avern Cohn set forth standards to determine what actions constitute “true threats.” Like prior decisions, *Baker* demonstrated the high hurdle required under the “true threat” standard, as well as the reluctance of courts to punish all but the most egregious threats.⁸⁴ Judge Cohn reiterated *Kelner*’s standard, writing that, under *Watts*, “only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished.”⁸⁵ Applying this standard, the court held that Alkhabaz’s actions were constitutionally protected. In particular, Judge Cohn wrote that the electronic messages expressing a desire to commit rape were too indeterminate, as they failed to “refer to a sufficiently specific class of targets.”⁸⁶ Similarly, the court held that the

⁷³ Myers, 495 F.2d at 79 (quoting Bozeman, 495 F.2d at 510 (internal quotation marks omitted)).

⁷⁴ 108 F.3d 1486 (1st Cir. 1997).

⁷⁵ See *id.* at 1489-90.

⁷⁶ *Id.* at 1491.

⁷⁷ 890 F. Supp. 1375 (E.D. Mich. 1995), *aff’d*, 104 F.3d 1492 (6th Cir. 1997).

⁷⁸ See *Baker*, 890 F. Supp. at 1379 n.3 (citing Megan Garvey, Crossing the Line on the Info Highway: He Put His Ugly Face on the Underneath. Then He Ran Smack into Reality, WASH. POST, Mar. 11, 1995, at H1; Joan Lowenstein, Perspective: How Free is Free Speech in Cyberspace?, CHI. TRIB., Mar. 12, 1995, at 1); *Kelner*, *supra* note 61.

⁷⁹ Jacob Alkhabaz’s alias is Jacob Baker. See *Kelner*, *supra* note 61. The district court used the name Baker, while the Sixth Circuit used the name Alkhabaz. For this Note, I will refer to the defendant as Alkhabaz.

⁸⁰ See *Baker*, 890 F. Supp. at 1379.

⁸¹ See *id.* at 1379.

⁸² 18 U.S.C. § 875(c); see *supra* note 63.

⁸³ See *Baker*, 890 F. Supp. at 1375.

⁸⁴ See Sally Greenberg, Threats, Harassment, and Hate On-line: Recent Developments, 6 B.U. PUB. INT. L.J. 673, 680 (1997) (*Baker* “illustrated the reluctance of courts to punish all but the most egregious of threats under this ‘true threat’ standard.”).

⁸⁵ *Baker*, 890 F. Supp. at 1382.

⁸⁶ *Id.* at 1387-88.

discussion of kidnapping was not “an unequivocal and specific expression of intention immediately to carry out the actions discussed.”⁸⁷

A glance at Ninth Circuit jurisprudence would also be instructive.⁸⁸ The common thread in Ninth Circuit “true threat” decisions is the need to demonstrate specific intent to threaten. In 1988, the Ninth Circuit addressed the issue of threats in *United States v. Twine*,⁸⁹ a case involving conviction for specific telephone threats of rape and kidnapping.⁹⁰ The court upheld the conviction, and held that 18 U.S.C. §§ 875(c)⁹¹ and 876⁹² require a showing of specific intent.⁹³ Soon after, in *United States v. King*,⁹⁴ a case involving the alleged mailing of threatening communication, the Ninth Circuit again held that proof of specific intent is required for conviction.⁹⁵ A final important feature of Ninth Circuit jurisprudence has been its consideration of the factual context of the alleged threat.⁹⁶

C. The Failure of the Jury Instructions to Reflect This “True Threat” Standard

Judge Jones’s representation of the “true threat” standard has sparked concerns from both sides of the aisle. Several legal experts fear that the judge interpreted the threats too literally.⁹⁷ The American Civil Liberties Union, which authored an amicus curiae brief in the district court supporting the plaintiffs, has expressed concerns that the decision could serve to prevent other advocacy groups from expressing their views.⁹⁸ In fact, the ACLU plans to join in an appeal, saying that the decision impinges on the First Amendment guarantee of free speech.⁹⁹ In particular, the ACLU believes that

⁸⁷ Id. at 1389. Baker was ultimately appealed to the Sixth Circuit. The Sixth Circuit, however, never addressed the First Amendment issue since the court held that the indictment failed, as a matter of law, to reach the threshold requirement for an allegation of violation of § 875(c). See *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997).

⁸⁸ The Ninth Circuit has controlling jurisdiction over the U.S. District Court for Oregon.

⁸⁹ 853 F.2d 676 (9th Cir. 1988).

⁹⁰ *Twine*, 853 F.2d at 677.

⁹¹ See *supra* note 82.

⁹² Section 876 provides that:

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communications with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than \$ 1,000 or imprisoned not more than five years, or both.

⁹³ *Twine*, 853 F.2d at 680. Courts have repeatedly relied on the “specific intent” element as a safeguard against suppressing protected speech. See *Kelner*, *supra* note 61, at 304-07.

⁹⁴ 122 F.3d 808 (9th Cir. 1997).

⁹⁵ See *id.* at 811 (affirming *Twine*’s requirement of a showing of specific intent and writing that the court’s “conclusion in *Twine* that § 876 requires specific intent to threaten . . . is *Twine*’s central holding”).

⁹⁶ See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (stressing the need to evaluate alleged threats in light of the entire factual context), cert. denied, 518 U.S. 1048 (1996); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990) (“Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.”); *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 2382) (applying 42 U.S.C. § 3631, a statute prohibiting interference with housing rights by threat of force), cert. denied, 493 U.S. 1082 (1990).

⁹⁷ See *Lafferty*, *supra* note 24, at 14.

⁹⁸ See *id.*

⁹⁹ See *id.* While Judge Jones’s instructions focused on determining whether a reasonable person administering the website and directing its content would have known that those named persons would feel threatened, the ACLU of Oregon believes that “the defendants’ intent to threaten the abortion providers must also be proven.” ACLU OF OREGON, Press Release, Statement on Verdict in Planned Parenthood “Wanted Posters” Case, Feb. 2, 1999.

the standard to limit speech must not be a mere threat, but clear evidence that there was intent to carry out the threat.¹⁰⁰

Certain aspects of Judge Jones's instructions were consistent with the established case law. Judge Jones was right to instruct that the standard for a "true threat" evaluates the defendant's behavior in relation to the circumstances, rather than looking at the defendant's subjective state of mind.¹⁰¹ Similarly, the judge noted that the evaluation must consider the actions from the perspective of a reasonable person.¹⁰²

The judge was also correct, in part, to note the need for the jury to consider the context of the statement made. The factual context of an alleged threat has been a major focus of the Supreme Court¹⁰³ and the Ninth Circuit.¹⁰⁴ Yet, Judge Jones defined context too broadly such that his definition clearly abetted the plaintiffs. According to Judge Jones, "The word 'context' means all of the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it."¹⁰⁵ Judge Jones continued to broaden this definition, "The context in this case may include the other posters you heard about, other statements and actions by the defendants and others, the history of anti-abortion violence, and the reactions of the listeners."¹⁰⁶ As such, Judge Jones's definition of context incorporated virtually any event remotely related to the abortion debate and actions committed by individuals completely unrelated to the defendants.

No other decision has relied on nearly such a vast conception of context. In *Watts*, for example, context was limited to a public rally, not to the history of violence against the President.¹⁰⁷ Similarly, the context used to evaluate the threat in *Kelner* was limited to Kelner's television interview and the specific and imminent event of Arafat's visit to New York City.¹⁰⁸ By relying on a definition of context that incorporated virtually any event, past or present, that occurred in the abortion debate, Judge Jones far exceeded prior restrictions on context.

Another major flaw is Judge Jones's failure to mention the political hyperbole exception to the jury. An important part of the consideration of context is whether the statement is political hyperbole, and thus entitled to First Amendment protection. In *Watts*, the Court overturned Watts's conviction because it viewed his statement concerning President Johnson as political hyperbole, hence not a

¹⁰⁰ See *id.*

¹⁰¹ See Jury Instructions, *supra* note 39, at 14; Greenberg, *supra* note 84, at 680.

¹⁰² See Jury Instructions, *supra* note 39, at 14.

¹⁰³ See *Watts*, 394 U.S. at 708.

¹⁰⁴ See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996), cert. denied, 518 U.S. 1048 (1996) ("Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners."); see also *United States v. Orozco-Santillan*, 903 F.3d 1262 (9th Cir. 1990).

¹⁰⁵ Jury Instructions, *supra* note 39, at 14-15.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ See *Watts*, 394 U.S. at 708.

¹⁰⁸ See *United States v. Kelner*, 534 F.2d 1020, 1022-1025 (2nd Cir. 1976).

threat.¹⁰⁹ *Kelner* reiterated this point, noting that political hyperbole does not fall under the category of a “true threat.”¹¹⁰ At the very least, the political hyperbole exception merited consideration by the jury, since the alleged threats revolve around a highly political issue, abortion.¹¹¹

Yet another problem lies in the judge’s instruction that “even a statement that is . . . conditional can amount to a threat in light of the factual context in which the statement was made.”¹¹² This assertion that a “conditional” statement can constitute a threat is flawed. In *Watts*, the Court held that the “expressly conditional nature of the statement” indicated that *Watts* did not make a threat.¹¹³ The Second Circuit reiterated the need for an unconditional statement in *Kelner*, defining a threat unprotected by the First Amendment as one “unequivocal, unconditional, immediate and specific.”¹¹⁴ Similarly, Judge Cohn wrote in *Baker* that “only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished.”¹¹⁵

Additional problems arise from Judge Jones’s instruction that a statement that is “ambiguous . . . [or] subtle can amount to a threat.”¹¹⁶ This instruction stands irreconcilable with *Kelner*’s requirement that an unprotected threat must be “unequivocal, unconditional, immediate, and specific.”¹¹⁷ Likewise, *Baker*’s standard that “only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished”¹¹⁸ conflicts with Judge Jones’s instruction that ambiguous or subtle statements can constitute threats.

The jury instructions further included the troubling statement that “even if [the jurors] believe that the defendants did not intend the statements to be threatening,”¹¹⁹ the jury can still find the statements to constitute threats. Judge Jones further stated that the jury “need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that a statement was, in fact, a threat.”¹²⁰ These instructions severely conflict with prior court decisions relying on the “specific intent” element as a safeguard against suppressing protected speech.¹²¹ In particular, the Ninth Circuit has been clear that intent is essential. Both *Twine*¹²² and *King*¹²³ held that a showing of specific intent is required for conviction.

¹⁰⁹ See *Watts*, 394 U.S. at 708 (“We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term [of a true threat].”).

¹¹⁰ In *Kelner*, the Second Circuit held that the defendant’s actions were not protected by the political hyperbole exception articulated in *Watts*. See *Kelner*, 534 F.2d at 1025.

¹¹¹ Judge Jones acknowledged the political nature of this case, making special mention in the jury instructions that the merits of abortion is not an issue. In the words of Judge Jones to the jury, “your consideration of plaintiffs’ claims in this case should not be influenced in any way by your own personal views on abortion.” Jury Instructions, *supra* note 39 at 11.

¹¹² Jury Instructions, *supra* note 39, at 15-16.

¹¹³ See *Watts*, 394 U.S. at 708.

¹¹⁴ See *Kelner*, 534 2d. at 1027.

¹¹⁵ See *United States v. Baker*, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995).

¹¹⁶ Jury Instructions, *supra* note 39, at 15-16.

¹¹⁷ See *Kelner*, 534 2d. at 1027.

¹¹⁸ See *Baker*, 890 F. Supp. at 1382.

¹¹⁹ Jury Instructions, *supra* note 39, at 14.

¹²⁰ *Id.* at 16.

¹²¹ See, e.g., *Kelner*, 534 F.2d at 1025; *Baker*, 890 F. Supp. at 1389; see also *Kelner*, *supra* note 61, at 304.

A final flaw in the jury instructions is more amorphous: the tone of the instructions stands in stark tension with the spirit of the “true threat” standard. The Supreme Court and other courts have been clear that the “true threat” standard imposes a high hurdle. For example, Professor Sally Greenberg has observed that *Baker* illustrated the reluctance of courts to punish all but the most egregious of threats under the “true threat” standard.¹²⁴ Yet, Judge Jones’s language undoubtedly gave the jury the impression of a far more lenient standard. Certain statements, such as “even a statement that is ambiguous, subtle or conditional can amount to a threat”¹²⁵ and “even if you believe that the defendants did not intend the statements to be threatening,”¹²⁶ suggest leniency and excuses to avert First Amendment protection that are absent in prior decisions and hardly reflect the tenet that all but the most egregious threats receive constitutional protection.

D. Why the “True Threat” Standard Protects the “Nuremburg Files”

Since it appears that Judge Jones misrepresented the “true threat” standard to the jury, the next logical question is whether the “Nuremburg Files” should be afforded protection under a properly articulated “true threat” standard. Careful consideration of the standard and the specifics of the website indicates that the “Nuremburg Files” should receive protection.

A paramount reason for constitutional protection lies in the simple fact that the website never explicitly communicated a threat. In *Baker*, the Court determined that since the electronic message lacked specific language indicating *Baker*’s intention to follow through with the rape, *Baker*’s statement was protected by the First Amendment.¹²⁷ In the words of Judge Cohn, “the constitutional standard enunciated in *Kelner* requires, at the very least, that a statement . . . contains some language construable as a serious expression of an intent imminently to carry out some injurious act.”¹²⁸ Not only did the website lack specific language indicating intent to follow through with a threat, but the website lacked specific language of a threat.

Indeed, the creators of the “Nuremburg Files” seemed to take great caution to avoid using language that expresses a threat. The mission statement of the “Nuremburg Files,” found on the first page of the website, stated quite the opposite intention: “The American Coalition of Life Activists (ACLA) is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity.”¹²⁹ Throughout the website, the operators reiterated this purpose, with headings such as “We Need Your Help!” and “How You Can Help.”¹³⁰

¹²² See *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988).

¹²³ See *United States v. King*, 122 F.3d 808, 811 (9th Cir. 1997).

¹²⁴ See Greenberg, *supra* note 84, at 680.

¹²⁵ Jury Instructions, *supra* note 39, at 15-16.

¹²⁶ *Id.* at 14.

¹²⁷ *Baker*, 890 F. Supp. at 1389.

¹²⁸ *Id.* at 1385-86.

¹²⁹ The Nuremburg Files (visited May 9, 1999) <<http://www.lektrik.com/PPvsACLA/home.htm>>.

¹³⁰ *Id.*

In contrast, all prior cases denying constitutional protection under the “true threat” standard involved an explicit statement of a threat toward another individual.¹³¹ Judge Cohn summarized this requisite well in *Baker*, identifying unprotected threats as “unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished.”¹³² In fact, courts have even invoked the “true threat” standard to protect explicit threats.¹³³

The “Nuremburg Files” website also receives protection under the “true threat” standard because of the want of a specified target.¹³⁴ In *Baker*, Judge Cohn held that the First Amendment protected Alkhabaz’s expressions because they lacked a specific target. Similarly, all decisions declining protection under the “true threat” standard involved a threat targeted at a specific individual.¹³⁵ At first glance, the target would seem to be the abortion providers listed on the site. Once again, however, the creators of the site used careful language to avoid listing the doctors in a manner that constituted a threat against them. The website did not purport to communicate with these abortion providers; rather, the website sought to communicate with individuals sympathetic to their cause. The abortion providers are listed so that they one day can be brought to trial for their crimes.¹³⁶ The website is careful throughout to address all statements to the general population, not to the abortion providers. For example, the “Nuremburg Files” has a section entitled “How You Can Help,” which informs readers on how they can help gather evidence on abortion providers.¹³⁷

A final source of protection for the “Nuremburg Files” under the “true threat” standard resides in the political hyperbole exception. Both *Watts* and *Kelner* have instructed that if, after evaluating the context of the situation, a statement is determined to be political hyperbole, then it falls short of constituting a threat.¹³⁸ In the absence of an explicit threat, and given the intended persuasive nature of the website and the inherently political nature of the abortion debate, the content of the “Nuremburg Files” stands much closer to being political hyperbole than to constituting a threat.

IV. THE “NUREMBURG FILES” AND THE INCITEMENT STANDARD

Although the “Nuremburg Files” should receive protection under the “true threat” standard, the website is not necessarily bereft of First Amendment concerns. Another standard for First

¹³¹ See, e.g., *United States v. Francis*, 164 F.3d 120, 121 (2d Cir. 1999) (involving a threat to “blow the victim’s head off, cut the victim up into a thousand tiny pieces, slit the victim’s throat, and kill the victim”); *United States v. Hoffman*, 806 F.2d 703, 704 (7th Cir. 1986) (involving a threat to President Reagan stating, “Ronnie, listen chump! Resign or you’ll get your brains blown out.”); *United States v. Sovie*, 122 F.3d 122, 124 (2d Cir. 1997) (involving an abusive relationship in which the defendant made threatening calls and statements such as “I’m gonna kill you. Got it? One way or another. You’re dead.”).

¹³² See *Baker*, 890 F. Supp. at 1382.

¹³³ See, e.g., *Watts v. United States*, 394 U.S. 705 (1969); *Baker*, 890 F. Supp. at 1379.

¹³⁴ See *Baker*, 890 F. Supp. at 1388-90.

¹³⁵ See, e.g., *Francis*, 164 F.3d at 121 (2d Cir. 1999) (threat to a specific victim); *Hoffman*, 806 F.2d at 704 (threat to President Reagan); *Sovie*, 122 F.3d at 124 (threat to former girlfriend); *United States v. Kelner*, 534 F.2d 1020, 1020-21 (2d Cir. 1976) (threat to Yasser Arafat).

¹³⁶ See *Lafferty*, supra note 24, at 14.

¹³⁷ See *The Nuremburg Files* (visited May 9, 1999) <<http://www.lektrik.com/PPvsACLA/home.htm>>.

¹³⁸ See *Watts v. United States*, 394 U.S. 705, 708 (1969) (“We do not believe that the kind of political hyperbole indulged in by petitioners fits within that statutory term [of a true threat]”); *Kelner*, 534 F.2d 1025 (2d Cir. 1976) (rejecting *Kelner*’s argument that his statement was merely political hyperbole).

Amendment scrutiny, the incitement standard, may merit consideration.¹³⁹ In the same term the Court created the “true threat” standard in *Watts*, it articulated the incitement standard in *Brandenburg v. Ohio*.¹⁴⁰ This Part looks at the incitement standard, as developed by *Brandenburg* and its progeny, to determine whether the “Nuremburg Files” warrants constitutional protection.

A. The Incitement Standard

The Supreme Court first established the incitement standard in *Brandenburg*,¹⁴¹ a case reviewing the conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute¹⁴² after he made several hateful remarks at a televised rally.¹⁴³ Reversing his conviction and striking down the statute, the Court created the incitement standard:

The 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 inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁴⁴

As such, the Court drew a critical distinction between the “mere advocacy of violence” and “incitement to imminent lawless action.”¹⁴⁵

Although *Brandenburg*, like *Watts*, was a brief, per curiam opinion, the standard articulated therein has become a cornerstone of First Amendment jurisprudence. *Brandenburg* substantially revised¹⁴⁶ freedom of speech scrutiny by eliminating Justice John Marshall Harlan’s distinction between

¹³⁹ For example, Robert O’Neil of the Thomas Jefferson Center for the Protection of Free Expression has suggested that higher courts may evaluate the “Nuremburg Files” under *Brandenburg*. O’Neil believes that higher courts might side with the defendants because the government may not punish words advocating illegal action unless the words incite or produce “imminent lawless action” or are “likely to incite or produce such action.” See McMahon, *supra* note 40, at A3.

¹⁴⁰ 395 U.S. 444 (1969).

¹⁴¹ Prior to *Brandenburg*, the Court had recognized that the right of free speech does not protect utterances that tend to incite a crime. See, e.g., *Musser v. Utah*, 333 U.S. 95 (1948) (vacating convictions for conspiring to commit acts injurious to public morals by counseling, advising, and practicing polygamous or plural marriage and holding that it was impossible to determine whether convicted on the grounds that the conspiracy was intended to incite immediate violation of the law); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (reversing conviction for violating the Criminal Syndicalism Law of Oregon and holding that the defendant was not inciting to violence or crime).

¹⁴² The Ohio Criminal Syndicalism statute, in pertinent part, criminalized:

advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . [and for] voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Ohio Rev. Code Ann. § 2923.13.

¹⁴³ The speech included statements such as “bury the n****” and “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.” See *Brandenburg*, 395 U.S. at 446.

¹⁴⁴ *Id.* at 447.

¹⁴⁵

¹⁴⁶ See John F. Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 *DRAKE L. REV.* 1, 48 (1994).

“good” and “bad” advocacy of unlawful conduct in *Dennis v. United States*¹⁴⁷ and adopting a formulation that more closely mirrored that of Justices Oliver Wendell Holmes’s and Louis D. Brandeis’s dissents, complete with the imminence requirement.¹⁴⁸

Subsequent Supreme Court applications of the incitement standard have stressed the imminent lawless action requirement and indicated that the standard imposes a lofty hurdle to overcome. In 1973, the Court applied the incitement standard in *Hess v. Indiana*,¹⁴⁹ a ruling which reinforced Brandenburg’s causation principle.¹⁵⁰ Gregory Hess was convicted for violating an Indiana disorderly conduct statute¹⁵¹ when he proclaimed to a crowd, “We’ll take the f**** street later,” after the police tried to break up an antiwar demonstration.¹⁵² The trial court applied Brandenburg and found that Hess’s speech was “intended to incite further lawless action on the part of the crowd in the vicinity . . . and was likely to produce such action.”¹⁵³ The Court reversed Hess’s conviction, holding that his statement fell short of incitement because it was not directed to any person or group of persons, and therefore it was not advocating any action,¹⁵⁴ and because his words were not intended to produce, or likely to produce, imminent disorder.¹⁵⁵ More specifically, the Court noted that Hess’s words, “We’ll take the f**** streets later,” could be taken, at best, as “counsel for present moderation” or, at worst, as advocating “illegal action at some indefinite future time.”¹⁵⁶ According to the Court, neither of these interpretations was sufficient to constitute a present threat of imminent disorder.¹⁵⁷

The Court again applied the incitement standard in *NAACP v. Claiborne Hardware Company*.¹⁵⁸ During a civil rights boycott, Charles Evers, the Field Secretary of the NAACP, allegedly threatened violence against boycott breakers.¹⁵⁹ The Court held that Evers’s speeches did not transcend the bounds set forth by *Brandenburg* because he was making an impassioned plea for black citizens to

¹⁴⁷ 341 U.S. 494 (1951). *Dennis*, the penultimate step before the creation of the Brandenburg standard, upheld the conviction of organizers of the Communist Party under the Smith Act. See *id.* at 507. In doing so, a plurality of the Court accepted the formulation of Judge Learned Hand in the district court and adopted a clear and present danger test that examined the gravity of the conduct: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *Id.* at 510 (quoting *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950)).

¹⁴⁸ See *Wirenius*, *supra* note 146. For example, in *Abrams v. United States*, 250 U.S. 616 (1919), Holmes’s dissent, joined by Brandeis, argued that “the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.” *Id.* at 627 (Holmes, J., dissenting).

¹⁴⁹ 414 U.S. 105 (1973).

¹⁵⁰ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 111 (1992).

¹⁵¹ The statute provided that:

Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct. . . .

Ind. Code 35-27-2-1, (1971), *Ind. Ann. Stat.* § 10-1510 (Supp. 1972).

¹⁵² See *Hess*, 414 U.S. at 105-07.

¹⁵³ *Hess v. Indiana*, 297 N.E.2d 413, 415 (1973).

¹⁵⁴ See *Hess*, 414 U.S. at 108-09.

¹⁵⁵ See *id.* at 109.

¹⁵⁶ See *id.* at 108.

¹⁵⁷ See *id.*

¹⁵⁸ 458 U.S. 886 (1982).

¹⁵⁹ See *id.* at 898.

unify.¹⁶⁰ Moreover, the Court noted such appeals are naturally spontaneous and emotional.¹⁶¹ Unless these appeals incite lawless action, they receive First Amendment protection.¹⁶²

Lower courts have been rather reticent to further develop the incitement standard. In particular, the Ninth Circuit has offered very little guidance.¹⁶³ The Ninth Circuit's main pronouncement on the incitement standard came in *United States v. Medenbach*,¹⁶⁴ a ruling that mainly reiterated *Brandenburg*'s holding. Among the issues in that case was a challenge to a magistrate's pretrial detention order based on the fear that the defendant posed a risk to the safety of other persons because he acknowledged intimidation practices, made references to "Ruby Ridge" and "Waco, Texas," and would not follow the conditions of his release.¹⁶⁵ The defendant alleged that this order violated his constitutional rights by punishing him for the "mere advocacy of unpopular political beliefs."¹⁶⁶ After reviewing the record, which included evidence that Medenbach armed his forest campsite with extensive explosives and that he had warned Forest Service officers of potential armed resistance, the Ninth Circuit concluded that Mendenbach's statements evinced the type of incitement to imminent lawless action that is not protected by the First Amendment under *Brandenburg*.¹⁶⁷

B. Why the Incitement Standard Protects the "Nuremburg Files"

Since the plaintiffs never alleged that the defendants' actions constituted incitement, Judge Jones instructed the jury to ignore the incitement standard.¹⁶⁸ Therefore, the next logical question asks whether, under *Brandenburg*, the "Nuremburg Files" would receive constitutional protection. An examination of this standard leads to the conclusion that the "Nuremburg Files" website still receives protection.

Courts have typically construed the *Brandenburg* test as requiring the fulfillment of three elements: (1) the speaker subjectively intended incitement; (2) in context, the words used were likely to produce imminent lawless action; and (3) the words used by the speaker objectively encouraged and

¹⁶⁰ See *id.* at 928.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ Most of the Ninth Circuit's mentions of *Brandenburg* have been unrelated to the holding of the court. See, e.g., *Scott v. Ross*, 151 F.3d 1247, 1250 (9th Cir. 1998) (mentioning that a KKK leader cannot be arrested for organizing a protest); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (discussing activities not protected under the First Amendment and mentioning the incitement standard); *U.S. v. Hoff*, 22 F.3d 222, 224 (9th Cir. 1994) (noting that where the speaker is likely to foment an attack on or by a third party, his words are not protected by the First Amendment).

¹⁶⁴ 116 F.3d 487, No. 96-30168, 1997 WL 206437, Table (June 5, 1997).

¹⁶⁵ See *id.* at 1.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 2.

¹⁶⁸ See Jury Instructions, *supra* note 39, at 13 ("You are not to consider any evidence that the three statements allegedly 'incite' violence against plaintiffs. You are to consider only whether the statements are 'true threats' . . .").

urged incitement.¹⁶⁹ While the “Nuremburg Files” arguably satisfies the first and third elements, it does not satisfy the second element.

Herein lies the main reason why the website receives protection under the incitement standard. Since *Brandenburg*, courts have regarded “imminent, lawless action” as the primary focus of the incitement standard.¹⁷⁰ Yet, any incitement that potentially resulted from the “Nuremburg Files” did not imminently follow the posting of the website.

As held in *Hess*, a delay in time defeats imminence. In *Hess*, the Court regarded the words of the defendant as, at worst, advocating “illegal action at some indefinite future time.”¹⁷¹ As a result, the words failed to constitute a present threat of imminent disorder.¹⁷² Although violence occurred against abortion providers, that violence took place well after the creation of the “Nuremburg Files.” Under *Hess*, this delay between the posting of the website and any resulting lawless action frees the website of incitement concerns.

Moreover, *Brandenburg* created a speaker-audience relationship that is analogous to that of a principal and agent, as liability only attaches when the speaker knows the audience will act as a result of the speech and intends that it should do so.¹⁷³ Under such circumstances, and given the imminence requirement, the audience can be said to be acting under the direction of the speaker and in fulfillment of the speaker’s will.¹⁷⁴ Yet with a website, the existence of a similar speaker-audience relationship simply does not exist. The creators of the website were not engaging in a conversation with specific individuals, since they did not know exactly who would be viewing the website and anyone with Internet access could read their postings.

V. CONCLUSION

A lenient “true threat” standard, such as the one articulated by Judge Jones, poses very serious dangers to freedom of speech. The ACLU, who submitted an amicus curiae brief in the district court on behalf of the plaintiffs, agrees that the ramifications of Judge Jones’s standard are frightening.¹⁷⁵ The standard adopted in this case will undoubtedly guide many future cases involving free speech on the Internet.¹⁷⁶ If Judge Jones’s standard is adopted, the bar for what constitutes a “true threat” will

¹⁶⁹ See John L. Diamond & James L. Primm, Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine, 10 HASTINGS COMM. & ENT. L.J. 969, 972 (1988).

¹⁷⁰ See *supra* text accompanying notes 149-162.

¹⁷¹ See *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

¹⁷² See *id.* at 108.

¹⁷³ See Wirenius, *supra* note 146, at 48-49.

¹⁷⁴ See *id.* at 49 (citing WILLIAM O. DOUGLAS, THE SUPREME COURT AND THE BICENTENNIAL 23 (1978); John F. Wirenius, Giving the Devil the Benefit of Law: Pornographers, the First Amendment and the Feminist Attack on Free Speech, 20 FORDHAM URB. L.J. 27, 70-71 (1992)).

¹⁷⁵ See Lafferty, *supra* note 24, at 14.

¹⁷⁶ See, e.g., ACLU OF OREGON, Press Release, Statement on Verdict in Planned Parenthood “Wanted Posters” Case, Feb. 2, 1999 (“The standard which is finally adopted in this case will apply in many future cases.”).

be lowered significantly. One result could be the chilling of constitutionally protected speech, thereby jeopardizing the free and robust exchange of ideas.¹⁷⁷

Unlike the “true threat” standard, whose cyberspace implications were evaluated in *Baker*,¹⁷⁸ the incitement standard has yet to be considered in the context of the Internet.¹⁷⁹ As such, the incitement standard represents one of the many constitutional inquiries that remains vacuous in the context of the relatively new phenomenon of cyberspace.

While free speech in cyberspace has received some attention from courts and academia, this attention has largely focused on the need to regulate obscenity and pornography on the Internet. Yet, no attention has been paid to extending the incitement standard to cyberspace.

While incitement, the “Nuremburg Files” is not the type of incitement that is currently outlawed under the existing standard. This does not mean that the potential for incitement from the “Nuremburg Files” is any less real or any more worthy of constitutional protection. Perhaps the flaw with applying the incitement standard to the “Nuremburg Files” lies not in this particular website but in the nature of the Internet. It may be that when the Supreme Court developed the incitement standard in 1973, the justices did not foresee the new demands that the Internet would bring a couple of decades later. If the incitement standard does not mesh well with cyberspace, the courts need to modify the standard to adapt to the demands of modern technology. Under the present standard, however, the website would be afforded protection.

¹⁷⁷ See *id.* (The standard “must be carefully drawn to safeguard against any chilling effect on free speech while still preventing the First Amendment from being used as a shield by those who make true threats of violence.”).

¹⁷⁸ See *supra* text accompanying notes 77-87.

¹⁷⁹ The Supreme Court addressed free speech on the Internet in *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, the Court struck down the Communications Decency Act (“CDA”), which imposed criminal liability on anyone who knowingly distributed “indecent” or “patently offensive” material on the Internet to anyone under the age of eighteen. See *id.* at 858-60. While supporting the goal of the CDA, the Court held that the Act went too far because it would also prevent adults from accessing certain websites. See *id.* at 868, 874-79. Soon after *Reno*, Congress passed and President Clinton signed the Child Online Protection Act (“COPA”), which requires, under penalty of criminal conviction and heavy civil fines, that those engaged in selling materials on the Web that is harmful to minors restrict access to such material by anyone under the age of seventeen. See Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. §§ 230-31). It remains unclear whether COPA will survive constitutional scrutiny. The vast literature on free speech in cyberspace has examined similar topics, focusing on government regulation of indecent material on the Internet. See, e.g., Johns, *supra* note 6 (examining the legal doctrines of obscenity and “true threats” in relation to cyberspace); Timothy Zick, Congress, the Internet, and the Intractable Pornography Problem: The Child Online Protection Act of 1998, 32 CREIGHTON L. REV. 1147 (assessing the constitutionality of COPA and proposing an approach for future legislation seeking to protect children from harmful material on the Internet); Wirenius, *supra* note 174, at 70-71 (discussing pornography on the Internet).