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JUDGMENT ON "NUREMBERG": AN ANALYSIS OF FREE SPEECH AND ANTI-ABORTION THREATS MADE ON THE INTERNET

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I. INTRODUCTION

In October 1995, two reproductive health service clinics, Planned Parenthood of the Columbia/Willamette and Portland Feminist Women's Health Center, along with several doctors, filed a civil lawsuit against the

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various contributors to an anti-abortion Web site,[1] claiming the site threatened violence against abortion doctors and patients.[2] The jury found for the plaintiffs, awarding them $107 million in damages.[3]

In the past, courts have agreed that to determine whether communications may be designated "true threats," and thus prohibited by law, they must look toward the communications' context.[4] In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition for Life Activists* ("*PPCW*"),[5] two particular elements contributed to the context of the communications via the Web site: the relatively recent increase in anti-abortion violence and the use of the Internet as a medium for these communications.[6] Part II of this article discusses *PPCW* and how it is indicative of the tension between the right to abortion access without threats of violence and the freedom of political speech, especially in the online medium. Part III outlines the history of the courts in determining what elements are necessary to constitute a "true threat." Part IV analyzes how the current climate of abortion clinic violence and the characteristics of the Internet may support or counteract any claim that the communications made by the defendants in *PPCW* were actually "true threats." Finally, Part V argues that the more applicable claim would have been that the Web site incited others to violence. However, even this claim would have failed, considering the lack of any imminent lawless action that the Web site may have incited.

II. PLANNED PARENTHOOD V. AMERICAN COALITION OF LIFE ACTIVISTS

In *PPCW*, the speech in question was the information posted on an anti-

[1] *See* Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1184 (D. Or. 1998) [hereinafter *PPCW II*]; Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 945 F. Supp. 1355, 1362 n.1, 1387 n.33 (D. Or. 1996) [hereinafter *PPCW I*]; *see also* Victoria Rivkin, *Strategy, Contacts and Old Ties Brought Abortion Case to Paul Weiss*, N.Y.L.J., Feb. 4, 1999, *available in* LEXIS, Secondary Legal, Legal News, N.Y.L.J. File. The Web site was called the "Nuremberg Files." *See* Neal Horsley, *The Nuremberg Files* (visited Jan. 26, 1999) <http://www.christiangallery.com/atrocity>. This site has been subsequently shut down. However, a printed copy remains on file with the author.

[2] *See PPCW II*, 23 F. Supp. 2d at 1185; *see also* Patrick McMahon, *Jury Hits Abortion Web Site*, USA TODAY, Feb. 3, 1999, at 1A.

[3] *See* Rivkin, *supra* note 1.

[4] *See infra* notes 33-53 and accompanying text.

[5] *PPCW II*, 23 F. Supp. 2d at 1182.

[6] *See PPCW II*, 23 F. Supp. at 1187-88; Horsley, *supra* note 1. In his opinion and order, Judge Robert Jones said the case should go to a jury because "there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement." *PPCW II*, 23 F. Supp. 2d at 1088.

abortion Web site that included a "Deadly Dozen List,"[7] a "wanted poster" of an abortion doctor,[8] and "The Nuremberg Files."[9] The Web site compared abortion doctors to Nazi war criminals and engaged in the solicitation, collection and display of the doctors' personal information so that one day they could be tried for crimes against humanity if abortion were ever banned.[10] The Web site was also laden with animated dripping blood and infused with more anti-abortion rhetoric.[11] While Neal Horsley in Carrolton, Georgia maintained the Web site,[12] several anti-abortion organizations and other individuals contributed most of its questionable information.[13]

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[7] The "Deadly Dozen List" included the names, addresses or telephone numbers of 12 abortion providers who were "Guilty of Crimes Against Humanity." *See PPCW II*, 23 F. Supp.2d at 1186; *see also* Horsley, *supra* note 1.

[8] This poster claimed that "abortionist" Robert Crist was "Guilty of Crimes Against Humanity." *See PPCW II*, 23 F. Supp. 2d at 1186-87. The poster included a photograph of Robert Crist, his home and work address and other personal information, followed by a monetary award "to any [American Coalition of Life Activists ("ACLA")] organization that successfully persuades [the doctor] to turn from his child killing through activities within ACLA guidelines." *Id.* at 1187; *see also* Horsley, *supra* note 1. Because these ACLA guidelines were not specified, one may reasonably infer that the guidelines may "refer[] to the 'justifiable homicide' position that had previously been publicly advocated by several of the defendants . . . ." ACLU Foundation of Oregon Amicus Curiae Brief, Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (No. 95-1671-JO), *available at* <http://www.aclu-or.org/aclu/ppbrief.htm>.

[9] The "Nuremberg Files" is a list including the names of over 200 doctors with their addresses. *See PPCW II*, 23 F. Supp. 2d at 1187-88. Those on the list who have been injured have their names listed in gray text while those who have been murdered have their names crossed out. *See* Neal Horsley, *Abortionists on Trial* (visited Jan. 26, 1999) <http://www.bestchoice.com/atrocity/aborts.html>. This site has subsequently been shut down. However, a printed copy remains on file with the author.

[10] *See PPCW II*, 23 F. Supp. 2d. at 1187-88.

[11] *See id*. at 1188.

[12] Neal Horsley was not named as a defendant in the case. *See id.* at 1185-86; *Free Speech or Hit List? Anti-abortion Activists' Use of Web Site Goes on Trial*, FREEDOM FORUM ONLINE, Jan. 7, 1999, *available at* <http://www.freedomforum.org/speech/1999/1/7orabortionsite.asp> [hereinafter *Free Speech*]; *see also* Patrick McMahon, *Doctors Unlikely to Collect Jury Award, Web Site Will Stay, Creator Says*, USA TODAY, Feb. 3, 1999, at 3A.

[13] The organizations included the American Coalition of Life Activists (ACLA), a nationwide anti-abortion umbrella group, and the Advocates for Life Ministries (ALM), a radical Portland-based anti-abortion group. *See PPCW II*, 23 F. Supp. 2d at 1185. There were also 14 other individuals named as defendants. *See id.* at 1184; Horsley, *supra* note 1; Horsley, *supra* note 9. "The jury held all defendants accountable for threatening the plaintiffs. All were found guilty of violating or conspiring to violate [the Freedom of Access to Clinics Act ("FACE")]; all but two individual defendants were found guilty of

In response to the Web site content, the plaintiffs asserted that the list of doctors was actually a "hit list."[14] The credibility of this assertion increased when Barnett Slepian was assassinated and his name was subsequently crossed off the Web site list, sparking criticism that the site was marking abortion providers for murder.[15]

The plaintiffs asserted that the Web site contributors violated two federal statutes: the Racketeer Influenced Corrupt Organizations Act ("RICO")[16] and, more notably, the Freedom of Access to Clinic Entrances Act ("FACE"),[17] a law that protects reproductive health clinics and their staff and patients from violent threats, assault, vandalism and blockade.[18] "While the 1994 FACE

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violating or conspiring to violate [the Racketeer Influenced Corrupt Organizations Act ("RICO")]." *PPCW vs. ACLA Fact Sheet* (last modified Mar. 8, 1999) <http://www.ppcw.org/trialfct.htm> [hereinafter *Fact Sheet]*. The district court issued a permanent injunction, finding that Horsley was an agent of some of the named defendants and that he had conspired with the defendants in the preparation of the "Nuremberg Files." *See* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1152, 1155-56 (D. Or. 1999) (hereinafter "*PPCW III*").

[14] McMahon, *supra* note 12; *see also PPCW III*, 41 F. Supp. 2d at 1133-36.

[15] Barnett Slepian was an abortion doctor who was killed at his home near Buffalo, N.Y. by a sniper, on Oct. 23, 1998. *See PPCW III*, 41 F. Supp. 2d at 1136; *Free Speech*, *supra* note 12; McMahon, *supra* note 12.

[16] *See PPCW II*, 23 F. Supp. 2d at 1184; 18 U.S.C. §§ 1961-68 (1994 & Supp. IV 1999). RICO was originally intended to provide remedies against organized mafia operations:

> The Congress finds that . . . organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption . . . [and that] organized crime activities in the United States weaken the stability of the Nation's economic system . . . .

The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

[17] *See PPCW II*, 23 F. Supp. 2d at 1184; Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994). FACE punishes:

> [w]hoever . . . 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 person or any class of persons from, obtaining or providing reproductive health services . . . .

18 U.S.C. § 248(a)(1).

According to Judge Jones, to sustain a claim under FACE, the plaintiffs in *PPCW* must "prove that the defendants violated or conspired to violate FACE, which, as relevant to [*PPCW*], proscribes 'threats of force' that intentionally 'intimidate' a person from providing reproductive health services." *PPCW II*, 23 F. Supp. 2d at 1188. FACE defines "intimidate" to mean "plac[ing] a person in reasonable apprehension of bodily harm to him or herself or to another." 18 U.S.C. § 248(e)(3). *PPCW* "appears to be the first attempt to use the law against individuals who did not pose direct physical threats." Rivkin, *supra* note 1.

[18] *See* 18 U.S.C. § 248 (a)(1); Freedom of Access to Clinic Entrances Act of 1994 § 2,

statute makes it illegal to incite violence against doctors who perform abortions and their patients, until now it has been used only against those who have actually attacked doctors or tried to destroy abortion clinics."[19] This is the first time that the FACE statute has been used against an indirect threat,[20] in a borderless medium.[21] In this suit, the jury agreed with the plaintiffs that the Web site content constituted "true threats"[22] and accordingly awarded them more than $107 million in damages.[23] Although the court did not force the defendants to remove the Web site, its Internet Service Provider (ISP), MindSpring Enterprises, later stopped its service.[24]

PPCW is a significant case "because it may redefine what is considered constitutionally protected political speech."[25] Generally, *PPCW* is indicative of the increasing tension between anti-abortion political activism and the rights of abortion providers and patients to be free from threats of violence.[26] More specifically, this case represents how surrounding political climates and the medium used to communicate information can affect the determination of whether the communications are indeed "true threats."

Pub. L. No. 103-259, 108 Stat. 694, 694 (1994); *see also* Rivkin, *supra* note 1.

[19] Rivkin, *supra* note 1. FACE permits "[a]ny person aggrieved by reason of the conduct prohibited by subsection (a)" to commence a civil action for injunctive relief, compensatory damages, and punitive damages. 18 U.S.C. § 248 (c)(1)(A)-(B).

[20] Sam Howe Verhovek, *Anti-abortion Site on Trial, U.S. Jury To Consider The Limits of Constitutionally Protected Free Speech on the Web*, GLOBE & MAIL (Toronto), Jan. 21, 1999, at D2, *available in* WL GLOBEMAIL File.

[21] While many argue that laws should apply regardless of the medium, several jurisdictional and conflict of law problems may emerge. The FACE statute and the First Amendment are United States laws and may not apply to similar sites posted on the Internet from servers in other countries. *See Electronic Freedom*, *in* MONDO 2000'S USER'S GUIDE TO THE NEW EDGE 88, 88-92 (1992); David J. Loundy, *Constitution Protects All Modes of Speech*, CHI. DAILY L. BULL., May 11, 1995, at 6, 20.

[22] *See* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1131 (D. Or. 1999); *see also Fact Sheet*, *supra* note 13. *See infra* notes 33-53 and accompanying text.

[23] *See* McMahon, *supra* note 2; *see also* Rivkin, *supra* note 1.

[24] *See PPCW* III, 41 F. Supp. 2d at 1155-56 (granting injunction); Patrick McMahon, *Anti-abortion Site Kicked Off Web*, USA TODAY, Feb. 8, 1999, at 2A (confirming that in stopping service to the Christian Gallery site, MindSpring Enterprises stated they "evaluated it and determined it was not consistent with [their] appropriate use policy").

[25] Rivkin, *supra* note 1.

[26] *See* Jill W. Rose & Chris Osborne, *FACE-ial Neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act*, 81 VA. L. REV. 1505, 1505 (1995). "[FACE] is a regulation of expressive conduct that is impermissibly content- *and* viewpoint-based in violation of the freedom of speech guarantied by the First Amendment." *Id.*

III. Boundaries of Free Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[27] The Framers integrated such strong language into the Constitution because they believed that the freedom of speech was a cornerstone of liberal democracy.[28] A democratic state relies on the free marketplace of ideas because it presumes absolute truth cannot be "attained by any fallible human being."[29] Within such a system, the likelihood of approximating truth becomes much greater.[30] Thus, the Constitution has been interpreted to generally protect the content of speech.[31] For example, the First Amendment protects opinionated views even if the statements are motivated by factors of hate and prejudice.[32]

Some have argued that "no law" in the First Amendment means *no law*.[33] However, in the interest of balancing free speech rights with other legitimate competing interests,[34] the courts have allowed legislators to proscribe certain

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[27] U.S. CONST. amend. I.

[28] According to Justice Cardozo, the protection of speech is a fundamental liberty in part because "our history, political and legal," recognized "freedom of thought . . . and speech" as "the matrix [and] the indispensable condition of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (Cardozo, J.). The protection of free speech serves three principle values: "advancing knowledge and 'truth' in the 'marketplace of ideas,' facilitating representative democracy and self-government, and promoting individual self-expression and self-fulfillment." GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1025 (13th ed. 1997) [hereinafter GUNTHER & SULLIVAN]; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970) (noting four purposes of free speech: assurance of "individual self-fulfillment;" advancement of knowledge and the discovery of truth; it allows participation of all citizens in decision making; and provides a more adaptable and stable community).

[29] FRANKLYN HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 7 (1981); *see also* JOHN STUART MILL, ON LIBERTY 18 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) ("Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for the purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.").

[30] *See* HAIMAN, *supra* note 29, at 7; MILL, *supra* note 29, at 18.

[31] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)).

[32] *See id.* at 392 (holding that St. Paul's desire to confront "bias-motivated" hate speech does not justify selectively "silencing speech on the basis of its content").

[33] Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he First Amendment's unequivocal command . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.").

[34] *See* GUNTHER & SULLIVAN, *supra* note 28, at 1031-34; *see also Konigsberg*, 366 U.S. at 51 ("Whenever . . . constitutional protections are asserted against the exercise of valid

types of speech.[35] For example, the First Amendment does not always protect threats of violence.[36]

In *Watts v. United States*,[37] the Supreme Court held that a "true threat," unlike political hyperbole or other protected speech, is not protected under the First Amendment.[38] In *Watts*, the Court reversed, per curium, a conviction under a 1917 law prohibiting threats to kill or injure the President of the United States.[39] The petitioner, after receiving his draft card, announced at a public rally, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[40] In reversing the conviction, the Court stated that the context must be taken into account when determining whether speech is threatening, and thus distinguishable from constitutionally protected speech.[41]

The Court has relied on the *Watts* decision in several subsequent cases,[42] but

governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.").

[35] *See, e.g.*, *R.A.V.*, 505 U.S. at 401 (White, J., concurring) (noting that fighting words can be banned under the First Amendment). Threatening communications are not invitations to a dialogue towards truth, which is an important concern in the philosophy of the freedom of speech. *See id.* According to Justice Byron White's concurring opinion, "[f]ighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury." *Id.*

[36] Speech may be proscribed when the "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth . . . ." Chaplinski v. New Hampshire, 315 U.S. 568, 572 (1942). When a speaker's "message so outrages the audience that some listeners are likely to resort violence in response," First Amendment protection no longer applies. GUNTHER & SULLIVAN, *supra* note 28, at 1076.

[37] 394 U.S. 705, 705-08 (1969) (reversing a conviction for a threat made against the President in that it did not constitute a "true threat," but rather political hyperbole).

[38] *Id.* at 708.

[39] *Id.* at 705. The petitioner had been convicted under 18 U.S.C. § 871(a) (1994), which provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . shall be fined under this title or imprisoned not more than five years, or both.

Id.

[40] *Watts*, 394 U.S. at 706.

[41] *See id.* at 708.

[42] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment [to protect] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur . . . ."); NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 926 (1982) (holding that those "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused").

has not fully articulated a "true threats" test.[43] Instead, the circuit courts of appeal have primarily developed the "true threats" doctrine.[44]

To determine whether a "true threat" exists, the Ninth Circuit has adopted "an objective, speaker-based test."[45] In order to distinguish a "true threat" from First Amendment protected speech, the court asks "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[46] Factors that bear on whether specific statements can be taken as "true threats" include the statement's context, whether the statement was conditional and the listeners' reaction.[47]

As this objective test does not expressly call for proof that a defendant intended to threaten,[48] some argue that an additional subjective test should also be required in order to protect the free speech interests of the communicator.[49] However, courts have confirmed that an objective speaker-based test that considers all the circumstances sufficiently permits the trier of fact to distinguish between a "true threat" and constitutionally protected speech.[50]

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[43] ACLU Foundation of Oregon Amicus Curiae Brief, Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (No. 95-1671-JO), *available at* <http://www.aclu-or.org/aclu/ppbrief.htm>.

[44] *See id.*

[45] *Id.*; *see* United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (holding that "[a]lleged threats should be considered in light of their entire factual context, including surrounding events and the reaction of the listeners").

[46] *Id*.

[47] *See* Watts v. United States, 394 U.S. 705, 708 (1969); *Orozco-Santillan*, 903 F.2d at 1265; United States v. Baker, 890 F. Supp. 1375, 1380-81 (E.D. Mich. 1995) (discussing whether threats made through e-mail are punishable).

[48] The Ninth Circuit's test seems to be an objective test because it primarily focuses on a hypothetical reasonable speaker and a reasonable listener. *See* ACLU Foundation of Oregon Amicus Curiae Brief. "[T]he risk is substantial that a speaker who did not intend to threaten, but merely intended to communicate an idea in the exercise of First Amendment rights, could be criminally prosecuted or held liable for damages, including punitive damages, in a civil action." *Id.*

[49] *See, e.g.*, United States v. Patillo, 438 F.2d 13, 15 (4th Cir. 1971) (en banc) (declaring that it is necessary to show that the person uttering the threat had a subjective intent to create injury). Haiman argues that despite the Supreme Court's denial of review to several circuit courts' decisions taking this position, "the subjective intent requirement of the Fourth Circuit is close to the spirit of the *Watts* opinion . . . ," which in itself only requires a subjective test. HAIMAN, *supra* note 29, at 231; *see also* ACLU Foundation of Oregon Amicus Curiae Brief.

[50] *See, e.g.*, United States v. Malik, 16 F.3d 45, 50-51 (2d Cir. 1994); United States v. Gilbert, 884 F.2d 454, 457 & n.5 (9th Cir. 1989), *aff'g* 813 F.2d 1523, 1529 (9th Cir. 1987) ("Gilbert I") (stating that "the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech"); Planned Parenthood of

They argue that "[t]he only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat."[51]

Some argue that a threat of physical violence is one of the least difficult categories of speech to proscribe.[52] However, while it is generally simple to define a threat, accounting for contextual variables may become complicated.[53] In particular, using the Internet as a medium for threatening communications may introduce unique considerations.

IV. APPLICATION OF THE "TRUE THREAT" DOCTRINE IN *PPCW*

In *PPCW*, the jury found the defendants guilty of communicating "true threats" against the plaintiffs.[54] The jurors agreed that the Web site communications "were issued in a context where a reasonable person would foresee that they would be interpreted by the plaintiffs as a serious expression of an intent to inflict bodily harm or death."[55]

The context of the situation revolving around the threat must be integrated into the analysis of determining whether the threat showed an intent and likelihood to actually occur.[56] Taken within the context of the hostile atmosphere and the prevalence of abortion clinic violence throughout the nation,[57] the plaintiffs in *PPCW* argued that the information posted in the Nuremberg files and its related Web sites constituted threats against the plaintiff doctors.[58] Also, a second contextual factor was the use of the Internet

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the Colombia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1194 (D. Or. 1998). Once sufficient evidence is presented determining that a communication could be reasonably considered a threat, the trial court should submit the case to the jury. *Malik*, 16 F.3d at 50-51 (stating that "the existence *vel non* of a 'true threat' is a question generally best left to a jury").

[51] *Orozco-Santillan*, 903 F.2d at 1265 n.3.

[52] *See* HAIMAN, *supra* note 29, at 29.

[53] *See id.* at 230.

[54] *PPCW II*, 23 F. Supp. 2d at 1188-89.

[55] *PPCW Strikes Blow to National Anti-Choice Terrorists*, (last modified Mar. 8, 1999) <http://www.ppcw.org/trial.htm>.

[56] *See* Watts v. United States, 394 U.S. 705, 708 (1969) (explaining that factors that bear on whether specific statements can be taken as "true threats" include the context of the statement, whether the statement was conditional and the reaction of the listeners).

[57] In the 16 years between 1982 and 1998, 209 incidents of abortion clinic violence occurred. Department of the Treasury & Bureau of Alcohol, Tobacco and Firearms, *Abortion Clinic Violence 1982-1998*, Dec. 18, 1998, *available at* <http://atf.treas.gov/explarson/information/clinic2.htm>.

[58] *See PPCW* II, 23 F. Supp. 2d at 1189-90; Verhovek, *supra* note 20. The plaintiffs said that radical anti-abortion groups are "using devices like the Web site to incite more violence and to deny women access to abortion services." *Id.* Judge Jones said that the case should

as the medium of communication, but it is questionable as to whether this element was sufficiently integrated into the analysis in *PPCW*.[59]

A. *The Political Climate*

1. Free Speech in Times of Conflict

The Supreme Court has distinguished between its treatment of speech in times of peace and war.[60] In peacetime, the government has found little reason to restrict the freedom of expression.[61] In times of crisis, however, where a threat of imminent danger exists, the Court has justified limiting political speech.[62] Because of the violent nature of the abortion debate in the United States,[63] some argue that those making threats against clinic doctors, staff, and patients should be more aggressively prosecuted, even if their threats would have been considered protected speech in calmer times.[64]

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go to a jury because "there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement." *PPCW II*, 23 F. Supp. 2d. at 1188.

[59] Although the threats were communicated to the plaintiffs via the Internet, Judge Jones' opinion and order denying summary judgment for the defendants only explains that the Deadly Dozen poster was presented "at a press conference held during an ACLA meeting on January 21, 1995." *PPCW II*, 23 F. Supp. 2d at 1186. Some plaintiffs heard about the threats that day, but only because the FBI informed them. *See id.* The same opinion and order only once mentioned the Internet as the communications medium used. *See id.* at 1187. The Internet was not mentioned when discussing the context of the violent threat. *See id.* at 1186-88.

[60] *See* Brandenberg v. Ohio, 395 U.S. 444, 452 (1969) (Douglas J., concurring) ("Although I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in times of peace.").

[61] *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 225-26 (3d ed. 1998).

[62] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war, many things that might be said in times 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."); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 203-04 (1998) (stating that the role of the military is not to protect civil liberties, but to maintain national security).

[63] *See* Marcy J. Wilder, *The Rule of Law, The Rise of Violence, and the Role of Morality: Reframing America's Abortion Debate, in* ABORTION WARS, A HALF CENTURY OF STRUGGLE 1950-2000, 73, 81 (Rickie Solinger ed., 1998).

[64] Tony Mauro, *Link to Violence Could Put Curbs on Speech, First Amendment News*, FIRST AMENDMENT NEWS, May 11, 1995, *available at* <http://www.fac.org/fanews/premier/cover.htm>.

However, the hostile atmosphere surrounding abortion clinic violence does not rise to even close to the level present during wartime. Moreover, many of the Supreme Court's strongest reaffirmations of First Amendment rights were issued in times of acute crisis.[65] Thus, the abortion clinic violence should carry little weight as a contextual element in determining whether the Web site constitutes a threat.

2. Abortion Clinic Violence

In *PPCW*, Judge Jones followed the Ninth Circuit's objective test, stating "'[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.'"[66] Furthermore, he held that the case should go to a jury because "there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement."[67]

The abortion debate within the United States has turned from peaceful, albeit emotional, disputes to violent advocacy.[68] Since *Roe v. Wade*,[69] death threats against abortion providers, as well as arsons and bombings of abortion clinics, have become more frequent.[70] Throughout the 1980s, a perceptible shift was evident from peaceful activism to violent altercations.[71] Murders of abortion doctors have also become more common.[72] After the murder of Dr. David Gunn in 1993, several anti-abortion activists and groups "asserted that the murder was justified and signed a declaration endorsing the use of violence

[65] *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding that State officials could not prevent students from wearing armbands to protest the Vietnam war without evidence that the students' expression had caused or would likely cause "substantial disruption of or material interference with school activities . . .").

[66] Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1189 (D. Or. 1998) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (citing United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989))).

[67] *PPCW II*, 23 F. Supp. 2d at 1188.

[68] *See* Wilder, *supra* note 63, at 81-84.

[69] 410 U.S. 113 (1973).

[70] *See* Wilder, *supra* note 63, at 81-84.

[71] *See id.*

[72] *See id.* at 81-83. "On March 10, 1993, forty-seven-year-old physician David Gunn was shot in the back with a .38-caliber revolver during an anti-abortion demonstration outside the clinic where he practiced in Pensacola, Florida." *Id.* at 81. In 1994, a volunteer clinic escort and a physician were shot and killed while inside the escort's truck. *See id.* at81-82. "In 1995 . . . two clinic employees were murdered in Brookline, Massachusetts . . . ." *Id.* at 82.

against doctors."[73] Violent threats, acts and murders, coupled with these pronouncements of justification, have led many to imagine a connection between the anti-abortion movement and the violence.[74] Some even argue that pro-life politicians have given a "wink and a nod" to abortion clinic blockades and attacks.[75]

In the past two decades, approximately 300 acts of violence have been committed against United States abortion clinics, including seven killings since the mid-1990s.[76] The most recent act of severe anti-abortion violence that occurred previous to the filing of *PPCW* included the murder of a New York abortion provider, Dr. Barnett Slepian, in October 1998.[77] "Slepian's murder was the fifth sniper attack since 1994 against doctors in Canada and the northern United States."[78] The years of violence preceding Slepian's murder and the posting of the Nuremberg Files on the Web had created a climate of violent tension.[79] When Slepian's name was crossed off of the Nuremberg Files list of abortion providers, the plaintiff doctors saw the Nuremberg Files as a "hit list," and thus a threat to anyone remaining on the list.[80]

Congress and the courts have responded to the violence by enacting and

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[73] *Id.* at 83 (citing Fawn Vrazo, *A Small Chorus for Vigilantes*, DETROIT FREE PRESS, Jan. 19, 1995, at A1).

[74] *See id.* at 82-83 ("In the public mind . . . the 'pro-life' position became increasingly associated with brutality.").

[75] *Id.* at 82. Anti-abortion groups and bombers have felt that they received a green light from President Reagan when, during his first term, he remained silent despite repeated requests to condemn the violence. *See id.* Furthermore, President Bush implied strong support for anti-abortion violence when he repeatedly intervened in the judicial proceedings of Operation Rescue. *See id.*

[76] *Court Rules Site Is a Menace*, WIRED NEWS, Feb. 2, 1999, *available at* <http://www.wired.com/news/news/politics/0,1283,17700.html>. As a result of the violence, the availability of abortion providers decreased 18 percent between 1982 and 1992. *See* Wilder, supra note 63, at 84. Some areas of the United States have little to no abortion doctors at all. *See id.* By 1992, only "84 percent of United States counties had physicians who were willing to perform abortions." *Id.* Furthermore, there is only one abortion provider in North Dakota and one in South Dakota. *See id.* Clinics are now frequently relying on physicians to fly or drive hundred of miles to perform abortions. *See id.*

[77] *See Free Speech*, *supra* note 12.

[78] Malcolm Maclachlan, *Pro-Violence Sites Push Boundaries of Law*, TECH-WEB NEWS, Oct. 27, 1998, *available at* <http://www.techWeb.com/wire/story/TWB19981027S0016>.

[79] *See* Hans Greimel, *Doctors Tell of Fear: A Bulletproof Vest is Daily Wardrobe*, ABC NEWS.COM, Jan. 8, 1999, *available at* <http://abcnews.go.com/sections/us/DailyNews/abortion990107.html>. Several doctors have reacted to the Web site in fear and now wear bulletproof vests and wigs for protection. *See id.*

[80] *See id.* Dr. Elizabeth Newhall, one of the plaintiffs, said that she took the site as a clear message stating that her "life was at risk . . . ." *Id.*

upholding legislation limiting speech rights and punishing interference of clinic operations "by force or threat of force."[81]

3. The Anti-Abortion Web Site

Defendants claimed the anti-abortion Web site was a form of "political protest" and that the lawsuit was "simply an attempt to stifle debate."[82] The defendants claimed that the purpose of the Nuremberg Files was to build a repository of information on abortionists, so they could be tried for "crimes against humanity."[83] Furthermore, the defendants contended the Web site itself did not include any express threats.[84] There were no explicit commands to Web site readers encouraging violence against abortion providers.[85] In fact, the site states that its supporters "anticipate the day when [abortion providers] will be charged in PERFECTLY LEGAL COURTS . . . ."[86]

However, according to Jonathan Entin, a law professor at Case Western Reserve University, it is well known that some people in society are willing to kill abortion providers.[87] "[T]o what extent will people take seriously the implicit message on this Web site, which is clearly that all right-thinking people should use whatever means necessary to stop people from performing abortions?"[88]

Reproductive-rights advocates following the *PPCW* case maintained that the Nuremberg Files, and similar sites, truly threatened providers because the anti-

[81] Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694-95 (codified at 18 U.S.C. § 298(a) (1994)). It should be noted, however, that not all courts have upheld FACE. In March 1995, a federal judge struck down FACE, not on First Amendment grounds, but because the law goes beyond the power of Congress to regulate interstate commerce, and upsets the balance of power with states. United States v. Wilson, 880 F. Supp. 621, 633-35 (E.D. Wis. 1995). However, this decision was reversed by the Seventh Circuit. *See* United States v. Wilson, 73 F.3d 675, 688-89 (7th Cir. 1995).

[82] *Free Speech*, *supra* note 12.

[83] Planned Parenthood of the Colombia/Wilamette, Inc. v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998).

[84] *See* i*d.* at 1189. "The fact that a threat is subtle does not make it less of a threat." United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989). A threat does not have to be apparent on its face before context may be considered. "Instead, the Ninth Circuit consistently has emphasized that whether 'true threats' must be determined 'in light of their entire factual context.'" *PPCW II*, 23 F. Supp. 2d. at 1194 (quoting Lovell v. Poway Unified Sch. Dist., 90 F.3d. 367, 372 (9th Cir. 1996) (determining that an objective, speaker-based test is sufficient for the purposes of a First Amendment analysis in determining whether an alleged threat is a "true threat")).

[85] *See PPCW II*, 23 F. Supp. 2d. at 1186. The Web site contained "no 'quotable quotes' calling for violence against the targeted providers." *Id.*

[86] *Id.* at 1188.

[87] *See* Verhovek, *supra* note 20.

[88] *Id.*

abortion movement had followed up its threats with violence and murder.[89] Maria Vullo, the plaintiffs' lawyer, argued that the site constituted a "true threat" in light of the seven lives taken by anti-abortion bombings and shooters in the five years preceding the trial.[90]

However, since the advent of the Vietnam War, the Supreme Court has generally protected free speech rights in times of violent crisis.[91] Thus, it is unlikely that offensive speech made during a political debate, no matter how violent, can be punished by force of law.[92] In deciding whether speech constitutes a "true threat," the trier of fact should not look to the larger political atmosphere.[93] Instead, the context of the speech should be limited to the particular characteristics of the communications made.[94] Face-to-face communication characteristics include the communicator's intonation, gaze, facial expression, contact, body orientation, gesture and movement.[95] Much of the Web acts like textual media such as books and newspapers.[96] Such textual media lacks particular characteristics of efficient face-to-face communications.[97] Indirect media, such as the Web, may disrupt the contention that the speech is actually a "true threat."[98]

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[89] *See Free Speech*, *supra* note 12.

[90] *See* Greimel, *supra* note 79.

[91] *See, e.g.,* Cohen v. California, 403 U.S. 15, 16-17 (1971) (reversing conviction of defendant who walked through courthouse corridor wearing a jacket bearing the words 'Fuck the Draft' in a place where women and children were present, thus breaching the peace under a California statute prohibiting disturbance of the peace by offensive conduct); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969) (holding that school authorities violated students First Amendment rights when they punished them for wearing black armbands in protest of the Vietnam War).

[92] *See Cohen*, 403 U.S. at 16-17; *Tinker*, 393 U.S. at 510-11.

[93] The government's power to punish face-to-face confrontational expressions, such as harassment, fighting words, and assaults is well established. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression,* 91 COLUM. L. REV. 334, 343 (1991). The broader political context of a community should not cause speech to be legally proscribed. *See Cohen*, 403 U.S. at 16-17 (reversing conviction of a protester despite the heated tension of the nation created by a state of war); *Tinker*, 393 U.S. at 510-1 (protecting students' free speech rights, despite the fact that the country was at war).

[94] *See* Kevin Francis O'Neill & Raymond Vasvari, 23 HASTINGS CONST. L.Q. 77, 87 (1995). "Meeting the enemy face to face is qualitatively different from countering his or her message through any other medium of expression." *Id.*

[95] *See Face to Face Interaction* (last modified Oct. 25, 1998) <http://www.ling.lancs.ac.uk/staff/greg/interact.html>.

[96] Information posted on the Web is considered "published." *See* ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996).

[97] "Interactive media" communications, such as the Web sites discussed in PPCW, often only consist of passive electronic text. *See Face to Face Interaction*, *supra* note 95.

[98] *See infra* notes 122-39 and accompanying text.

B. *The Medium*

As the communications occurred in a unique medium,[99] the elements of that medium must also be integrated into the analysis of determining whether the communications are "true threats."[100] Whenever a new medium develops, there is always a struggle to determine how the Constitution and, in particular, the First Amendment will apply to that medium.[101] The characteristics of new media consistently continue to force lawyers, judges and governments to reevaluate their current intellectual constructions of the law.[102] With the Internet, the concept of a physical reality no longer exists as the sole criterion to base legal assumptions upon and thus, the legal system has been slow to respond in determining how laws will apply in this new medium.[103]

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[99] "The Web's open, distributed, decentralized nature stands in sharp contrast to most information systems that have come before it." *Reno*, 929 F. Supp. at 838; *see* Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1621 (1995) ("The architectural characteristics of new interactive media offer unique opportunities for advancing First Amendment values . . . .").

[100] *See supra* notes 33-53 and accompanying text.

[101] *See Electronic Freedom*, *supra* note 21, at 92 (explaining that with the genesis of the Internet, the struggle has turned to whether free speech can be expressed in bits and bytes); *see also* FCC v. Pacifica Found., 438 U.S. 726, 737-38 (1978) (agreeing with the FCC's contention that broadcast speech may be treated differently from other forms of expression).

[102] *See* EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 68 (1994). The Supreme Court has consistently expressed that the nature of different media must be accounted for in applying restrictions to expression within that media. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."); *Pacifica Found.*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems."); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have different natures, values, abuses and dangers [and thus,] [e]ach . . . is a law unto itself . . . .").

[103] Applying current law to the Internet without completely understanding the characteristics of new media reflects our legal system's sometimes slow response to recognize how the First Amendment applies to communications on these new media. *See* CAVAZOS & MORIN, *supra* note 102 at 68. For example, lawmakers and judges deliberated over First Amendment questions when broadcast technologies emerged "as if the expressions at issue were somehow different because of the manner in which they were delivered to the audience . . . . The result was a regulatory system for television and radio that would be viewed as intolerable if imposed on print media." *Id.; see generally* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987). According to Laurence Tribe, "[t]hese [court] decisions reveal a curious judicial blindness, as if the Constitution had to be reinvented with the birth of each technology." Laurence H. Tribe, The Constitution In Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote

The first case regarding the proscription of speech on the Internet to reach the Supreme Court was *Reno v. ACLU*.[104] In *Reno*, the Supreme Court held that Congress could not ban indecent materials on the Internet because, *inter alia*, the characteristics of the Internet disallow certain legal controls.[105] The Supreme Court upheld the lower court's decision, which argued that communications via the Internet, a dynamic and robust medium,[106] deserve a high level of protection.[107] Despite these rulings, prosecutors attempt to control online communications.[108] For example, several cases exist regarding the prosecution of online threats.[109]

Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991), *quoted in* CAVAZOS & MORIN, *supra* note 102, at 68.

[104] 521 U.S. 844, 885 (1997) (holding that the government cannot prohibit the posting of indecent materials on the Internet).

[105] *See Id.* at 870 (determining how far First Amendment protection should extend on the Internet).

[106] *See* Berman & Weitzner, *supra* note 99, at 1621 ("The architectural characteristics of new interactive media offer unique opportunities for advancing First Amendment values, as well as unique challenges to existing First Amendment doctrines."). In order for the Internet to develop and be afforded First Amendment protections, its architecture must be open and decentralized. *See id.* Furthermore, it must give users sufficient control to choose only the information they want to receive, eliminating any need for government intrusion. *See id.*

[107] *See Reno*, 521 U.S. at 864-85. Internet communications deserve the "broadest possible protection from government-imposed, content-based regulation." ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (determining that Congress cannot ban indecent materials from the Internet). "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects." *Id.* at 883. In 1998, the United States District Court for the Eastern District of Pennsylvania elaborated by explaining that "unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media." ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (issuing a preliminary injunction against the enforcement of the Child Online Protection Act). The Internet strengthens the First Amendment concept of an unrestricted market place of ideas to discover truth, thus becoming a medium more worthy of First Amendment protection. *See id.*

[108] *See, e.g., Reno*, 31 F. Supp. 2d at 498-99 (E.D. Pa. 1999) (issuing a preliminary injunction against the enforcement of the Child Online Protection Act); United States v. Thomas, 74 F.3d 70, 705-06 (6th Cir. 1996) (determining jurisdiction on the Internet). "[B]ecause the Internet . . . exists within societies that have long-standing traditions and laws, its rapid assimilation into the 'real world' is provoking tensions and confrontations that are now being played out in the legal domain." Edwin Diamond & Stephen Bates, *Law and Order Comes to Cyberspace*, TECH. REV., Oct. 1995, at 22, 24.

[109] *See, e.g.*, United States v. Machado, 195 F.3d 454, 455-57 (9th Cir. 1999) (upholding defendant's conviction for communicating threats via e-mail); United States v. Baker, 890 F. Supp. 1375, 1380 (E.D. Mich. 1995), *aff'd sub nom.* United States v. Alkhabaz, 104 F.3d 1492, 1504 (6th Cir. 1997) (finding that a private e-mail to an unidentified recipient,

1. The Internet as a Means of Communicating Threats

PPCW is the first major case brought under the FACE statute not involving personal threats or physical confrontations.[110] The medium of a particular communication is an integral part of determining the context of that communication.[111] It follows that the communications medium must be integrated into a factual determination as to whether communications could be considered a "true threat." Therefore, the nature of the Web is an important characteristic of the communications that must be accounted for in this determination.

2. The World Wide Web

The Web is a medium that uses a remote information retrieval protocol to communicate.[112] Information made available on the Web is considered "published."[113] Internet users use their own computers to retrieve these online publications through the Web.[114] Unlike over-the-air broadcasts, Web communications do not "invade" an individual's computer screen uninvited.[115] While viewers of broadcasts act as passive audiences to its information, obtaining information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial."[116] The "odds are slim" that a user would accidentally find questionable content.[117] Unlike e-mail,[118] Web communications are not made directly toward individuals.[119] Web sites act more like books in an electronic library that must be affirmatively searched for.[120]

Direct threats are certainly punishable.[121] However, courts have articulated doubts regarding the punishment of threats through indirect media, such as

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sufficiently identifying a specific class of potential targets, can fulfill the First Amendment "true threat" requirement for prosecution).

[110] *See* Verhovek, *supra* note 20.

[111] *See Face to Face Interaction*, *supra* note 95.

[112] *See Reno*, 929 F. Supp. at 836. The Web is a series of documents stored in different computers all over the Internet. *See id.* Web pages may include text, hyperlinks, still images, sounds, and video. *See id*. at 836-37.

[113] *See id.* at 837.

[114] *See id.*

[115] *See id.* at 844.

[116] *Id.* at 845.

[117] *See id.* at 844-45.

[118] *See infra* Section IV-B-3.

[119] Information on the Web is not distributed, but accessed. *See Reno*, 929 F. Supp. at 836-37.

[120] *See id*.

[121] *See supra* Section III.

broadcast television.[122] The Web differs from broadcast communications because it is less invasive,[123] thus implying that even more doubts would be raised regarding the punishment of threats through it. For example, the Second Circuit Court of Appeals, in deciding *United States v. Kelner*, sustained a conviction regarding a threat made in a television broadcast.[124] In *Kelner*, the appellant made a threat in a videotaped and broadcasted interview to assassinate Yassir Arafat, who was in the United States in the same city.[125]

In his defense, Kelner argued that there was no "communication" of a threat because the broadcast was made to an "indefinite and unknown audience."[126] Nevertheless, the court disagreed.[127] Judge Oakes, writing for the majority, believed that Congress did not intend for a communication to circumvent the statute simply because of the improbability of its reaching the victim.[128]

Although Judge Meskill concurred in the affirmation of Kelner's conviction because the provisions of the law appeared to have been met, he expressed doubt that Congress intended the ban to apply to the broadcast media.[129] These

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[122] *See, e.g.*, United States v. Kelner, 534 F.2d 1020, 1030 (2d Cir. 1976) (Meskill, J., concurring) (expressing doubts regarding the conviction of the defendant who threatened the life of Yassir Arafat through a recorded and televised broadcast).

[123] *See* Reno, 929 F. Supp. at 837 (explaining that unlike broadcasting technologies, when information is made available on the Web, it is considered "published" and can be accessed only if the user affirmatively seeks the information).

[124] *See Kelner*, 534 F.2d at 1020, 1028.

[125] *See id.* at 1020-21.

[126] *Id.* at 1023.

[127] *See id.*

[128] *See id.* Judge Oakes argued:

> If [the] appellant's contention were accepted, any would-be threatener could avoid the statute by seeking the widest possible means of disseminating his threat. Publication of the threat in 100 major newspapers, even though it would reach only an "indefinite and unknown audience," would be as sure a means of communicating the threat to the victim as would calling him on the telephone. Our concern under the statute is . . . whether the appellant intended to communicate his threat . . . through the chosen means, the television interview.

Id.; see also United States v. Holder, 302 F. Supp. 296, 300 (D. Mont. 1969), *aff'd*, 427 F.2d 715, 715 (9th Cir. 1970) (finding it was unnecessary under the statute for the Government to prove that defendant had the "specific intent to injure or the present ability to carry out the threat"); *see also* Bass v. United States, 239 F.2d 711, 716 (6th Cir. 1957) (finding that proof of intent to injure is unnecessary when "the statute does not require evidence of intent to injure").

[129] *See Kelner*, 534 F.2d at 1030 (Meskill J., concurring) ("I am apprehensive about the implications of considering the broadcast media to be modes of communication in threat cases."); *see also* HAIMAN *supra* note 29, at 232. "[Kelner raised] the question as to whether a threat of physical harm announced to the world at large, rather than directed to the person being threatened, constitutes the sort of coercive communication from which people need to be protected." *Id.*

doubts were expressed regarding the transmission of threats that would occur via a broadcast medium,[130] which happens to be more invasive than the Internet.[131] Following Judge Meskill's concern, Haiman suggests that unless the message's target was aware of the threat and believed him- or herself to be in serious danger, people need not be protected and, thus, the threat should not be proscribed.[132] As the Web is not considered a direct form of communications, there may be little reason to expect targets to actually receive the threat.[133]

Some courts have not taken this awareness factor into account. For example, although the Supreme Court overturned the Court of Appeals' decision in *Watts*, it did so without analyzing the element of distance or awareness of the target, the President of the United States.[134] Similarly, *United States v. Baker* involved an alleged threat not conveyed directly to its target, but rather in a private e-mail not available in any publicly accessible portion of the Internet.[135] The complaint was based on e-mail messages sent from Baker to a third party graphically detailing "the torture, rape, and murder of a woman who was given the name of a university classmate of Baker's . . . ."[136] The named target never saw the alleged threats.[137] Relying on an earlier Tenth Circuit decision, the Baker court argued that the threat need not be communicated to the person or group identified as its target.[138] Although Baker's conviction was overturned because the factual proof was insufficient as a matter of law,[139] this assertion may stand as argumentative authority.

3. Distinguishing E-mail As A Direct Communication of Threats

While Web threats are not direct, threats to targets through more direct forms of media may be scrutinized more effectively.[140] E-mail threats would

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[130] *See Kelner*, 534 F.2d at 1023.

[131] *See* ACLU v. Reno, 521 U.S. 844, 869 (1997).

[132] *See* HAIMAN *supra* note 29, at 232.

[133] *Cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) (rejecting an argument that an ordinance prohibiting the display of films containing nudity at drive-in movie theatres served a compelling interest in protecting minor passersby from the influence of such films). In *Erznoznik*, the Court implied that speech cannot be punished simply because it is heard or viewed by those passing by. *See id.*

[134] *See* Watts v. United States, 394 U.S. 705, 705-08 (1969).

[135] 890 F. Supp. 1375, 1379 (E.D. Mich. 1995).

[136] *Id.*

[137] *See id.* at 1386 (finding that there was no allegation that the threatening e-mail was ever distributed in any format to anyone other than the third party recipient).

[138] *See id.* at 1380 (citing United States v. Schroeder, 902 F.2d 1469, 1470-71 (10th Cir. 1990)).

[139] *See Baker*, 890 F. Supp. at 1390.

[140] *See, e.g.*, United States v. Cox, 957 F.2d 264, 267 (6th Cir. 1992) (affirming

probably be treated differently from threats made via the Web due to the direct and invasive nature of e-mail.

For example, the case of *United States v. Machado* involved direct threats over e-mail.[141] In a computer lab at the University of California at Irvine ("UCI"), Richard Machado sent an e-mail to approximately sixty Asian students at the University, threatening that if they did not leave UCI, he would "hunt all of [them] down and Kill [their] stupid asses."[142] After less than a day of deliberation, the jury found "Machado guilty of interfering with students' right to attend a public university."[143] The jury found that the e-mails were not "flames,"[144] but "true threats."[145]

E-mail communications are distinguished from Web communications in that they are substantially more direct. The indirect communicative nature of the Web acts as a buffer between the communicator and the target, who may never even read the threat.

V. INCITEMENT AS A FORM OF PROHIBITED VIOLENT SPEECH

The *PPCW* defendants were charged with making threats against abortion doctors, as prohibited by FACE.[146] The use of FACE to combat anti-abortion

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defendant's conviction for making a threat over the telephone to a bank employee); United States v. Cooper, 523 F.2d 8, 10 (6th Cir. 1975) (affirming defendant's liability for a telephone threat); United States v. Sirhan, 504 F.2d 818, 820 (9th Cir. 1974) (affirming defendant's conviction for threatening the United States Secretary of State in a letter to kill the Israeli Prime Minister when she was in the United States on official business); United States v. Prochaska, 222 F.2d 1, 3 (7th Cir. 1955) (holding that a letter demanding money and advising addressee that he had "only one chance" and should "make it easy on [himself]" by cooperating fully contained a sufficient threat to injure).

[141] 195 F.3d 454, 455 (9th Cir. 1999).

[142] United States v. Machado, No. SA CR 96-142 AHS, Trial Mem. at 3 (C.D. Cal. Aug. 19, 1999).

[143] Davan Maharaj, *Man Guilty in E-mail Hate Crime*, L.A. TIMES, Feb. 11, 1998, at A3.

[144] *See id.* (noting that a "flame" is slang for an angry online message that is not meant to be harmful). *See also* Kenneth Lake, *Hate Speech Conviction Outlaw Email*, INTERNET FREEDOM, Feb. 13, 1998, *available at* <http://www.netfreedom.org/uk/news/hatespeech.html>.

> It is difficult to see how Machado could have actually intended to carry out his threat to assassinate 59 students. It is far more likely that Machado's racist comments, like much speech among news groups and mailing lists, were simply an idle threat. Any experienced user will know that abusive messages and flames are commonplace on the Net.

Id.

[145] *See* Sarah Lubman, *E-Mail Hate Crime Yields 1st Prison Term*, MERCURY CENTER, May 4, 1998, *available at* <http://www7.mercurycenter.com/local/center/amail050598.htm>.

[146] *See* Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of

threats has been a strategy used by lawyers representing abortion providers because threats to abortion providers have been taking a heavy toll on the availability of safe abortion services.[147]

However, until *PPCW*, FACE had only been used to combat threats made during face-to-face communications.[148] Because the threatening communications in *PPCW* were made via a web site,[149] the dynamics of the situation have changed. Therefore, the applicable law should also change. The more relevant law is the prohibition of speech that incites imminent lawless action.[150]

As the determination of whether communications on the Web may be punished as "true threats" is contentious, one may suggest that the language does not threaten, but instead incites others to act violently.[151] As such, proscription of speech due to the language's intent to incite violence, rather than the proscription of speech because of its threatening nature, may be more applicable to Web communications such as those in *PPCW*.[152] Although the defendants in *PPCW* were not charged with inciting violence, it may have been the more appropriate standard to combat violently charged anti-abortion speech made via the Web.[153]

A. *Incitement to Violence and the Supreme Court*

While earlier cases allowed limits on speech advocating criminal conduct,[154]

Life Activists, 23 F. Supp. 2d 1182, 1184 (D. Or. 1998).

[147] *See* Rivkin, *supra* note 1 (stating that an abortion rights activist and his attorney devised the strategy of using the FACE act to counter threats to abortion providers soon after its passage; citing the senior litigation partner of the firm representing the PPCW plaintiffs as stating that the availability of safe abortion providers have declined due to the threats made against them); *see also supra* notes 68-81 and accompanying text.

[148] *See supra* notes 20-21 and accompanying text.

[149] *See PPCW II*, 23 F. Supp. 2d at 1186-88.

[150] Even many journalists and academics have confused the charge of making "true threats" with one of inciting others to violence. *See, e.g.*, McMahon, *supra* note 12 (citing law professor Robert O'Neil of the Thomas Jefferson Center for the Protection of Free Expression discussing the Nuremberg Files web sit as a possible incitement to imminent lawless action).

[151] *See id* (implying that the proper question to apply is whether the Web site incited imminent lawless action); Strauss *supra* note 93, at 343 ("When speech is addressed to a larger audience, however, there is a greater danger that the government is actually concerned not with the wounds that the speech inflicts, but with the possibility that the speech will have a persuasive effect on the audience.").

[152] *See* McMahon, *supra* note 12; Strauss, *supra* note 93, at 343.

[153] *See* McMahon, *supra* note 12; Strauss, *supra* note 93, at 343.

[154] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding conviction of leaders of the Communist Party in the United States under the Smith Act); Schenck v. United States, 249 U.S. 47, 50-53 (1919) (affirming conviction of man obstructing the

the 1969 Supreme Court case of *Brandenberg v. Ohio* substantially limited the type of advocacy that could be punished.[155] This case concerned the controversial racist remarks made by a Ku Klux Klansman at two televised rallies.[156] While other Klansmen uttered many racist statements in the background,[157] the appellant's statements advocated violence.[158] After the broadcasts, the appellant was charged under an Ohio law punishing people who, among other things, "'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial and political reform . . . .'"[159]

The Supreme Court overturned the conviction and established a two-prong test to determine whether speech may be criminally prosecuted.[160] The *Brandenberg* test held that advocacy cannot be forbidden unless that advocacy (1) "is directed to inciting or producing imminent lawless action," and (2) that

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recruiting and enlistment service of the United States government by mailing out circulars persuading others to "not submit to intimidation"); Debs v. United States, 249 U.S. 211, 216-17 (1919) (upholding convictions for anti-war speech); *see generally* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT §§ 4.01, 4.02 (1994) (discussing the history of the Court in limiting violent speech prior to *Brandenberg*).

[155] 395 U.S. 444, 444-49 (1969). According to the Court, "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." *Id.* at 447.

[156] *Id.* at 445-47 & n.1.

[157] The significant portions that could be understood were:

"How far I the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

Id. at 446 n.1.

[158] *See id.* at 446-47. The appellant stated that "[w]e're not a revengent 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 taken . . . . Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." *Id.*

[159] *Id.* at 448.

[160] *See id*. at 446.

such advocacy is "likely to incite or produce such action."[161] In order for prosecution to pass constitutional muster, both the call to immediate criminal action and the likelihood that such a call will be heeded are necessary to justify prosecution.[162]

Brandenberg held that mere advocacy is an insufficient basis for a claim of a threat to violence.[163] Thus, some action or evidence of action beyond mere words must exist to justify a prosecution of advocacy activity.[164] The Supreme Court has determined that in order to proscribe speech, a "speech plus" requirement is necessary whereas there must be a reasonable indication that the speech will lead to imminent violence.[165]

In subsequent years, *Brandenberg* was expanded as the courts held that speech intended to stir anger and even speech that creates a climate of violence is protected under the First Amendment.[166] Furthermore, *Brandenberg* implemented what Justices Oliver Wendell Holmes and Louis Brandeis argued in earlier dissenting opinions: that if the government were to punish speech that promotes subversion, "the danger had to be great and its occurrence proximately close."[167] The Supreme Court indicated that any danger must be

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[161] *Id*. at 447.

[162] *See id.*

[163] *See id.* at 449.

> Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Id.; *see also* Yates v. United States, 354 U.S. 298, 318 (1957) (holding that the acts of advocating and teaching the forcible overthrow of government are immune from prosecution under the First Amendment); Debs v. United States, 249 U.S. 211, 216 (1919) (holding that the jury cannot "find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probably effect to obstruct the recruiting service . . . and unless the defendant had the specific intent to do so in his mind").

[164] *See* Cox v. Louisiana, 379 U.S. 559, 562-64 (1965) (justifying prosecution of the advocacy in the course of a street demonstration where the imminent threat was that the demonstrators would violently attack the county courthouse around which they were circling). Prosecutorial or investigative activity must be predicated on a reasonable indication that the speech will lead to imminent violence.

[165] *See Brandenberg*, 395 U.S. at 455 (Douglas, J., concurring) (arguing that speech can only be regulated "when it comes to the 'plus' or 'action' side of the protest").

[166] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926-32 (1982) (holding that unless violent activity followed speeches that contained references to violence against those who did not participate, the activity organizer could not be held liable).

[167] KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 18 (1995).

"imminent."[168] Imminent is defined as "[n]ear at hand; mediate rather than immediate; close rather than touching . . . ."[169] A considerable problem, however, exists in determining what is actually "near at hand," or imminent. The Supreme Court attempted to define the term by indicating that something that is imminent is "likely to occur within a very short span of time."[170]

The courts have left juries to make future factual determinations of whether the violence in certain cases is actually imminent.[171] Historically, judicial or jury decisions regarding threats have been grounded on the characteristics of nature. These statutes and precedents are of limited use when applied to factual situations that occur in cyberspace.[172] This discrepancy continues to cause legal problems for judges, juries and plaintiffs struggling to apply laws to online communications.[173] Here, determining whether online communications incite imminent violence must be decided by looking to the qualities of cyberspace rather than the laws of physical nature. Thus, the imminence of an alleged incitement to violence must be determined in a whole new light.

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[168] *See Brandenberg*, 395 U.S. at 447 (holding that only speech that produces or incites, or is likely to produce or incite, imminent lawless action, may be punished).

[169] BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

[170] GREENAWALT, *supra* note 167, at 18; *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that statements advocating illegal action at some indefinite future time is insufficient to permit State punishment of speech). The defendant in this particular case remarked to his fellow demonstrators, "[w]e'll take the fucking street later." *Id* at 107. The Supreme Court decided that even if his words implied illegal action at a later time, his conviction had to be overturned in the absence of evidence that he intended to produce "imminent disorder." *Id*. at 109. Thus, while the word "imminent" contains some degree of flexibility, the Court has adopted a very stringent standard for punishment of speech likely to encourage criminal action. GREENAWALT, *supra* note 167, at 18-19.

[171] See, e.g., Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, *reprinted in* Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 CHI. L. REV. 239, 235, 239-41 (1973).

> [A] jury's findings, within the limits of a conceivable psychological nexus between words and deeds, are beyond scrutiny and control; and while the jury may have been a protection against governmental power when the government was a thing apart from the people, its checking function fails where the government policies are supported by majority opinion.

Id. at 241.

[172] *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (explaining that the Supreme Court has "long recognized that each medium of expression presents special First Amendment problems").

[173] According to Laurence Tribe, "[t]hese [court] decisions reveal a curious judicial blindness, as if the Constitution had to be reinvented with the birth of each technology." Laurence H. Tribe, The Constitution In Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991), *quoted in* CAVAZOS & MORIN, *supra* note 102, at 68.

B. *Incitement to Violence from Internet Communications*

The recent development of abortion clinic violence has triggered new debate over one of the oldest questions under First Amendment law: What is the relationship between speech and violence?[174] This question takes on new meaning within the characteristics of the Internet.

Such an implicit threat in *PPCW* may also be regarded as an incitement to violence.[175] However, it is difficult to imagine that communications on the Web could meet the *Brandenberg* test of illegality.[176] The test, originally created to allow legislators to criminalize speech that would incite a riot, does not seem applicable to cyberspace where riots are nearly impossible.[177]

According to Justice Holmes in *Schenck v. United States*, the First Amendment does not protect a person from punishment for "falsely shouting fire in a theater and causing a panic."[178] However, the question remains as to what it means to falsely shout fire in cyberspace.[179] Falsely shouting fire in cyberspace deserves less condemnation than doing so in a theater because it is far less threatening.[180] While falsely shouting fire on the Web, an Internet news group, or in an e-mail may startle a few people, such communications are less likely to incite readers to imminent, criminal action because the readers are disparate in physical time and space around the country, and even around the world.[181]

"Only if online speech . . . designates a particular target for illegal activity and is shown to have enough force to be likely to cause imminent [lawless] action might it lose constitutional protection . . . ."[182] Furthermore, although it

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[174] *See supra* Section IV-A-2 (discussing recent trends in abortion clinic violence); Mauro, *supra* note 64 (discussing the relationship between speech and violence).

[175] *See* McMahon, *supra* note 2; *see also* Dan Goodin, *Online Hate Speech On Trial*, CNET NEWS, Nov. 5, 1997, *available at* <http://www.news.cnet.com/news/0-1005-200-323756.html>.

[176] 395 U.S. 444, 447 (1969).

[177] *See* CAVAZOS & MORIN, *supra* note 102, at 74 (1994).

[178] 249 U.S. 47, 52 (1919) ("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.").

[179] *The Availability of Bomb-Making Information on the Internet: Hearings Before the Senate Judiciary Subcomm. On Terrorism, Tech. & Gov't Info.*, 104th Cong. 34 (1995) [hereinafter *Hearings*] (statement of Jerry Berman, Director, Center for Democracy and Technology).

[180] *See id.* ("We believe that shouting fire in cyberspace is actually *far less threatening*, and thus less deserving of censure, than the equivalent act in the physical world.").

[181] *See id. But see* Rice v. Paladin Enters., 128 F.3d 233, 255-56 (4th Cir. 1997) (holding that book demonstrating killing techniques goes beyond mere advocacy), *cert. denied*, 523 U.S. 1074 (1998).

[182] CAVAZOS & MORIN, *supra* note 102, at 74 (1994).

has been argued that other types of expression, including pornography,[183] hate speech,[184] and even violence on television,[185] have been the cause of harmful acts, "the relationship between speech and action has been drawn most closely in the abortion-clinic setting."[186] Some have argued that the increase of violence stems from the aggressive speech used in protesting abortions.[187] "[T]he nature of the medium, however, makes it highly unlikely that such a prosecution would ever be successful."[188]

Furthermore, the problem remains in determining the imminent distance between online speech and violence. According to Justice Holmes in *Schenck v. United States*, "[i]t is a question of proximity and degree."[189] Some argue that the incitement exception to the First Amendment should only apply to face-to-face communications.[190] However, regardless of the distance between

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[183] *See generally* DIANA E.H. RUSSELL, DANGEROUS RELATIONSHIPS: PORNOGRAPHY, MISOGYNY, AND RAPE 34-41, 113-20 (1998) (arguing that there is a significant relationship among pornography, misogyny, and rape that is dangerous to women).

[184] *See generally* SHARON ELAINE THOMPSON, HATE GROUPS 67-79 (1994) (tackling the difficult issue of hate groups' free speech rights).

[185] *See Violence on Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Committee on Energy and Commerce*, 103d Cong., 24-25, 44-49 (1993).

[186] Mauro, *supra* note 64.

[187] Wilder, *supra* note 63, at 82-83 (stating that anti-abortion leaders express the belief that "murder was ethically, theologically, and legally justified").

[188] CAVAZOS & MORIN, *supra* note 102, at 74.

[189] *249 U.S. 47, 52 (1919); see also* Yogal Rogat, *Mr. Justice Holmes: Some Modern Views: The Judge as Spectator*, 31 U. CHI. L. REV. 213, 215 (1964):

> In *Schenck*, "clear and present danger," and "a question of proximity and degree" bridged the gap between the defendant's acts of publication and the [prohibited interference with the war]. This connection was strikingly similar to the Holmesian analysis of the requirement of "dangerous proximity to success" [quoting from an earlier Holmes opinion] that, in the law of attempts, bridges the gap between the defendant's acts and the completed crime. In either context, innocuous efforts are to be ignored.

Id.

[190] *See* Rivkin, *supra* note 1 (quoting Columbia University Law School professor Michael Dorf). There is also Supreme Court precedent supporting this position. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516-17 (1951) (affirming conviction of those who conspired to organize the Communist Party of the United States as a group to teach and advocate the violent overthrow of the government); Gitlow v. New York, 268 U.S. 652, 655, 671-72 (1925) (affirming conviction of defendant who advocated and advised the overthrow of the federal government by force within "The Left Wing Manifesto"); Abrams v. United States, 250 U.S. 616, 622-24 (1919) (holding that the acts of printing and disseminating pamphlets containing disloyal, scurrilous, and abusive language about the form of government of the United States, and language intended to incite, provoke, and encourage resistance to the United States in the war against Germany, were not within the protection of

the inciting speech and ensuing illegal violence, "still *some* time and space [exists] between the speech and action . . . ."[191] This distance is only magnified by the time it takes the audience to absorb the speaker's message, to decide what to do with it, and to take action based on that message.[192] Any ensuing action is mediated by the audience's mental process.[193]

The length of this process is only intensified by communications on the Internet. Those communicating on the Internet are generally disparate in time and place.[194] The person who receives the message through the Web will generally not be in the proximity of the victim at the time of the communication.[195] In fact, the actors involved may be on the completely opposite side of the planet.[196] Thus, it would take a fair amount of time from the receipt of the communications and the carrying out of the violence.[197] The lack of any proximity questions whether the danger being created is actually imminent.[198]

VI. CONCLUSION

We must recognize that individuals have the right to be protected from threats of physical violence, especially those prohibiting them from practicing their constitutional right to abortion. However, we must also realize that political activists have a First Amendment right to freedom of speech, no matter how extreme their views may be. In a concurrence, Justice Souter stated that the Supreme Court has not barred First Amendment challenges to laws punishing threats.[199] Justice Souter warned that "[such] actions could deter protected advocacy and [cautioned] courts applying [these laws] to bear

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the freedom of speech and of the press guaranteed by the Constitution).

[191] *See* FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 23 (1993).

[192] *See id.* People do not immediately respond to incitement like robots. *See id.* at 24. Furthermore, all people are not rational in their decision-making. *See id.* Nevertheless, all people "are *conscious* of what they are doing and, presumably, have the capacity to stop themselves from doing it . . . [unless they] are insane, drugged, hypnotized, seriously retarded, too young to understand the consequences of their actions, or somehow under the physical control of the speaker." *Id.* The disparity in time and space between the incitement and the ensuing violence is only increased by the consciousness of the violent actor. *See id.* at 23-24.

[193] *See id.* at 23.

[194] *See Hearings*, *supra* note 179, at 36-37 (testimony of Jerry Berman, Director, Center for Democracy and Technology).

[195] *See id.*

[196] *See id.*

[197] *See id.*

[198] *See id.*

[199] *See* National Org. of Women v. Scheidler, 510 U.S. 249, 263-65 (1994) (Souter, J., concurring) (discussing the First Amendment concerns regarding the application of RICO).

in mind the First Amendment interests that could be at stake."[200]

Although civil actions utilizing FACE generally achieve a desired result against threats made at the abortion clinic gates,[201] anti-abortion threats should not be punished if made as a posting on the Web. In *PPCW*, the plaintiffs should have put forth different types of civil claims in order not to create such a strong barrier against First Amendment freedoms.[202]

Such a claim would be increasingly difficult if made against communications via the Web. The Supreme Court held in *Reno v. ACLU* that speech on the Internet deserves stronger protection than speech made through other forms of media.[203] Also, the indirect communicative nature of the Internet provides a strong buffer between a speaker and a threatened target.[204] Taking this contextual element into account may hinder efforts to proscribe violent speech, either threatening or inciting, on the Web where danger is no longer as imminent as it would seem through more direct means of communications. This may present problems for those seeking protection from anti-abortion threats.

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[200] *Id.* at 265.

[201] *Cf.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773-74 (1994) ("[T]hreats to patients or their families, however communicated, are proscribable under the First Amendment . . . [, as is speech that] is so infused with violence as to be indistinguishable from a threat of physical harm . . . ."); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 685-87 (9th Cir. 1988) (upholding, for the first time, a 12.5 foot buffer zone around clinic doors).

[202] For example, one may sue for intentional infliction of emotional distress. *See* WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION: CASES, COMMENTS, QUESTIONS 699 & n.3 (8th ed. 1996). Generally, to sustain a conviction under the tort of intentional infliction of emotional distress, "a plaintiff must usually show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe." *Id*. at 699 n.3. Also, civil actions against the aiding and abetting of a crime by providing threatening information may be of some use to plaintiffs attempting to obtain remedies. *See* Rice v. Paladin Enters., 128 F.3d 233, 250-55 (4th Cir. 1997) (holding that the publisher of a book entitled *Hit Man: A Technical Manual for Independent Contractors* may be liable for "aiding and abetting" murder); *see generally* Judith L. Rosenthal, Comment, *Aiding and Abetting Liability for Civil Violations of RICO*, 61 TEMP. L. REV. 1481 (1988). This may be of particular use to plaintiffs in cases such as *PPCW* who are challenging web sites with dossiers of personal information that may help one to commit a crime.

[203] 521 U.S. 844, 868-70 (1997).

[204] *See, e.g.*, *Hearings*, *supra* note 179, at 36-37 (testimony of Jerry Berman, Director, Center for Democracy and Technology).