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Nadine E. McSpadden

Indiana University School of Law

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Slow and Steady Does Not Always Win the Race: *The Nuremberg Files* Web Site and What It Should Teach Us About Incitement and the Internet

NADINE E. MCSPADDEN*

INTRODUCTION

When the tortoise raced the hare, the tortoise won because he moved at a slow, yet constant, pace while the hare raced ahead in spurts, getting repeatedly distracted. This fable, however, invites the question: If the tortoise had seen a truck speeding his way, sure to intersect with his path and flatten him, would he have continued at the same pace toward impending doom, or would he instead have adjusted his speed to avoid the collision entirely? The simple fact of the matter is that slow and steady does not always win the race; in fact, sometimes, it may lead to destruction.

The Internet is a vast new medium of communication to which the law is still adapting. The doors that the Internet opens to the average citizen offer unique and exciting opportunities to acquire new knowledge and communicate with people across the globe with relative ease. However, there are some people, inevitably, who will choose to exploit this new medium, using cyberspace to wreak havoc and cause violence.

*The Nuremberg Files*¹ is, according to some, an example of such a dangerous use of the Internet.² A dossier of information on abortion providers according to its creators,³ or a virtual "hit list" providing a catalyst and the means to murder people in the pro-choice movement across the country, according to its detractors.⁴ Whatever one's opinion, the \$107 million jury verdict against *The Nuremberg Files*'s maintainers⁵ and permanent injunction against the electronic publication of "personally identifying information" about the site's targets in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*⁶ should

* J.D. Candidate, 2001, Indiana University School of Law—Bloomington; B.A., 1998, Tufts University. I would like to thank Professor Daniel Conkle for helping me shape the topic of this Note. Thank you to my family for their lifelong love and support. Finally, thank you to Roger Deetz, who challenges me and brightens all my days. I dedicate this Note to Leland McSpadden, who was an inspiration to all who knew and loved him.

1. *The Nuremberg Files*, at <http://www.netfreedom.net/nuremberg/index.html> (last visited Aug. 29, 2000).

2. See, e.g., *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999).

3. See Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1213 (1999).

4. See *id.* at 1213-15.

5. Courtney Macavinta, *Judge Slams Anti-Abortion Site*, at <http://news.cnet.com/news/0-1005-200-339254.html> (last visited Feb. 2, 2001) [hereinafter *Judge Slams*].

6. 41 F. Supp. 2d 1130, 1156 (D. Or. 1999). The site's authors were enjoined from "publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in [*The Nuremberg Files*] with

provide a wake-up call to the American judicial system: we are not prepared to deal with Web sites that may incite other people to commit lawless acts.

Incitement to violence is a category of speech that the First Amendment does not protect,⁷ and the current test for what speech counts as advocacy and what crosses the line to incitement simply does not have any room for a Web site. The American judicial system has always been, justifiably, reluctant to change substantive doctrine without time, often decades, to peruse the possibilities. Some argue that the Internet should be no different, that we should be slow and steady, figuring out the problems as we go along and changing the law accordingly.⁸

This Note will seek to show that it is time for us to recognize the fact that as more examples of potentially inciting Web sites infiltrate courtrooms across the country, we are forcing juries to place a round peg in a square hole, and aberrational verdicts will result. Part I examines the nature of the Internet, provides background information on the case surrounding *The Nuremberg Files*, and describes the First Amendment incitement and true-threats doctrines. Part II shows first how the incitement doctrine does not reach Web sites and then analyzes *The Nuremberg Files* case, examining the jury's options and asking what those options should have been. Finally, it acknowledges the reasons for us to be cautious in changing free speech doctrine but argues that the Internet presents new dangers that our laws should be prepared to face. The Internet is a wonderful tool but offers a dangerous opportunity for people wishing to use it as a means for committing violent acts. The American judicial system should recognize the impending doom and begin to adjust our speed to move out of its path.

I. THE INTERNET, *THE NUREMBERG FILES*, AND THE COURTS

The Internet is a massive resource, the likes of which the world has never before seen. It connects people around the world by offering new and instantaneous methods of communicating and transmitting information.⁹ This medium is entirely unique¹⁰ and, because of its uniqueness, presents new problems for our judicial bodies. Analysis that courts have traditionally used for other broadcast media simply does not apply to the Internet.

Because the American legal system has been slow to catch up with reality, we have a case such as the one involving *The Nuremberg Files*. This Web site was particularly chilling, and when combined with the volatile social climate surrounding the issue of abortion, the people placed on its list felt that their lives were in danger.¹¹ The immense verdict sparked celebration and protest across the country, but most legal scholars focused on the implications for the First Amendment.¹² Supreme Court

a specific intent to threaten." *Id.* The same prohibition applied to additional material not already on the site. *Id.*

7. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

8. See Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 250-51 (2000).

9. *Reno v. ACLU*, 521 U.S. 844, 851-52 (1997).

10. See *infra* text accompanying notes 20-28.

11. See *Planned Parenthood*, 41 F. Supp. 2d at 1133.

12. E.g., *Internet Symposium: Legal Potholes Along the Information Superhighway*, 16

precedent surrounding both the incitement¹³ and true-threats¹⁴ doctrines provides a certain degree of assistance but ultimately is unhelpful because that doctrine simply cannot apply to the Internet.

A. The Internet

Throughout the past decade, a technology revolution has quickly and quietly consumed the United States. The Internet has already changed the way people communicate, shop, recreate, and find information, and it will continue to do so for decades to come. As of 1996, “[a]bout 40 million people used the Internet . . . , a number that [was] expected to mushroom to 200 million by 1999.”¹⁵ For many people in the United States, the Internet has become a part of daily existence. We work, play, and talk to each other via chat rooms, E-mail, and Web sites.¹⁶ The Internet, for many, is a window to parts of the world we would not otherwise get to observe.

What we know today as the Internet is only a distant relation to its largely inaccessible ancestor.¹⁷ Today, individuals can access the Internet from home via an Internet Service Provider (“ISP”) such as America Online or Prodigy, from cafes and public libraries, from work, and from school.¹⁸ Once a user gets “on-line,” she has access to an extremely diverse world of information and communication.¹⁹ She may have access to E-mail, enabling her to send an almost instantaneous electronic message to another individual or group of individuals; “newsgroups,” enabling her to post her own and read others’ comments on a particular subject; “chat rooms,” enabling her to engage in real-time conversation with other users; and the World Wide Web, enabling her, via Web “pages” or “sites,” to “search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites.”²⁰ She may “navigate” the Web by typing in a known address or by using a commercial “search engine” to search for key words.²¹ “The

LOY. L.A. ENT. L.J. 541, 550 (1996) [hereinafter *Internet Symposium*]; Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1670 (1998).

13. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

14. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969).

15. *Reno v. ACLU*, 521 U.S. 844, 850 (1997). The Court further noted the rapid expansion of the Internet, pointing to the number of “host” computers, which had skyrocketed from “about 300 in 1981 to approximately 9,400,000 by . . . 1996.” *Id.*

16. See *id.* at 851-52.

17. The Internet grew out of a military project that began in 1969. See *id.* at 849-50. The military wanted to ensure that, in the event of a war, all defense-related information would not be lost. See *id.* at 850. Therefore, the project, called “ARPANET,” created a network of computers that enabled all defense-related entities to communicate with each other even if parts of the network were destroyed. See *id.* “While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” *Id.*

18. See *id.*

19. See *id.* at 851-52.

20. *Id.*

21. See *id.* at 852.

Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."²²

There are several characteristics which make the Internet an entirely unique medium. First, the Internet places very low barriers to entry for both speakers and listeners, both in terms of price and user-friendliness.²³ Second, the Internet provides no spatial or geographical boundaries,²⁴ so that it is just as easy for a New Yorker to access the Louvre's home page as it is to access the Metropolitan Museum of Art's home page. Third, the Internet allows for "real-time," or nearly instantaneous, communication.²⁵ Fourth, Internet users can easily mask their identities by choosing a pseudonymous E-mail address or "screen name."²⁶ Finally, the Internet provides a unique opportunity for many-to-many communication: "It's the first mass medium to combine the intimacy and connectedness of one-to-one communication on the telephone with the range and reach of one-to-many communications like broadcasting and newspapers."²⁷

The way that courts have traditionally dealt with the other media, such as radio, television, and newspapers, renders a comparison between those media and the Internet necessary.²⁸ In addition to the factors listed above, there are several other Internet characteristics that distinguish it from the more traditional media. First, unlike radio and television, the Internet is a "user-driven" technology, meaning that users have nearly total control over the information with which they come into contact, and as a result, it is not as invasive as the traditional broadcast media.²⁹ Second, while there is a history of significant government supervision and regulation of the broadcast industry, the Internet has no history of and is not currently subject to substantial government regulation.³⁰ Third, while the rationale for much of the regulation of the broadcast industry consisted of the scarcity of the airwaves, the

22. *Id.* at 853.

23. *See, e.g., Internet Symposium, supra* note 12, at 550; Sullivan, *supra* note 12, at 1670.

24. *See* Sullivan, *supra* note 12, at 1667-68.

25. *E.g., id.* at 1668.

26. *See ACLU*, 521 U.S. at 889-90 (O'Connor, J., concurring in judgment in part and dissenting in part).

27. *See Internet Symposium, supra* note 12, at 550.

28. *See ACLU*, 521 U.S. at 868-69.

29. *See id.* at 869 (noting that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden" (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996))); *Internet Symposium, supra* note 12, at 555 (acknowledging that the Internet is the most user-driven technology since the book); Sullivan, *supra* note 12, at 1668 (commenting that "[l]isteners use their own volition to 'pull' most speech currently available on the Internet rather than having it 'pushed' at them from speaker-initiated and speaker-controlled central sources"). *But cf. FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (discussing how radio and television are somewhat nonvolitional and, as such, "prior warnings cannot completely protect the listener or viewer from unexpected program content").

30. *See ACLU*, 521 U.S. at 868-69. *But cf. Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

Internet is far from a “scarce’ expressive commodity.”³¹ Finally, unlike radio, television, and newspapers, the Internet provides no editorial intermediary such as a producer, host, or editor.³²

Therefore, while the Internet provides opportunities that we could not have imagined mere decades ago, it also folds a wrinkle into legal analysis. American courts and legislatures have done as well as they can to catch up to the Internet, but we are not there yet. Web sites such as *The Nuremberg Files* point to whole new areas of crime with which our laws are not currently equipped to deal.

B. *The Nuremberg Files*

As 1999 began, the United States focused its attention on a case in an Oregon district court that began to open people’s eyes as to how volatile and dangerous an entity the Internet can be. The controversy centered around a Web site called *The Nuremberg Files* that the American Coalition of Life Activists (“ACLA”) and Advocates for Life Ministries (“ALM”) helped to maintain.³³ These anti-abortion groups used *The Nuremberg Files* as a weapon in their struggle against the legality of abortion, and much of the debate centered around the purpose of this site: it was either a mere information-collecting device or a virtual “hit list.”³⁴ The legal battle took place in the midst of a wave of violence against abortion providers and clinics, and the defendants had, at different times, stated their support for “the use of ‘force’ and justifiable homicide.”³⁵ As the plaintiffs celebrated the \$107 million jury verdict against the defendants,³⁶ the case sparked massive national debate and protest about the sanctity of the First Amendment in the age of the Internet.³⁷

However one may feel about the verdict, it is easy to see that this Web site was particularly disturbing and contained some “chilling ingredients.”³⁸ The site contains images of dripping blood on its main page.³⁹ Moreover, it depicts dismembered

31. See *ACLU*, 521 U.S. at 870. In fact, scholars refer to the Internet’s “abundance of speech,” Sullivan, *supra* note 12, at 1670, its constantly increasing “size and capacity,” *Internet Symposium*, *supra* note 12, at 555, and its “sprawling,” “arguably boundless,” and “pervasive” nature, Adam R. Kegley, Note, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 1002 (1997).

32. *Internet Symposium*, *supra* note 12, at 550-51; Sullivan, *supra* note 12, at 1671.

33. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1138, 1152 (D. Or. 1999); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 887 (1999); Courtney Macavinta, *Abortion “Hit List” Slammed in Court*, at <http://news.cnet.com/news/0-1005-200-338167.html> (last visited Feb. 2, 2001) [hereinafter *Hit List*].

34. See, e.g., Noffsinger, *supra* note 3, at 1213-15 (1999); *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html>.

35. *Planned Parenthood*, 41 F. Supp. 2d at 1136. The plaintiffs were a group of Planned Parenthood employees and abortion providers who were targeted by the site. See *id.* at 1131.

36. E.g., Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don’t*, 79 B.U.L. REV. 959, 975 (1999).

37. E.g., *id.* at 974-79; Noffsinger, *supra* note 3, at 1211-15; Wardle, *supra* note 33, at 881-912.

38. *Id.* at 975.

39. *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/>

fetuses in always grotesque and horrifying detail.⁴⁰ The most chilling portion of this Web site, however, is a list.⁴¹ Although a list may seem innocuous, this central focus of *The Nuremberg Files* provided personal information on "abortion providers, clinic employees and clinic owners, law enforcement officials involved in securing access to abortion services, judges, politicians, and abortion rights supporters."⁴² This list (at one time) contained their names, their spouse's and children's names, addresses, photos, license plate numbers, phone numbers, and various other private information.⁴³ Perhaps most frightening, there is also a list of hundreds of names, and the typeface of each name varies according to the person's current health status: the name is in black font if he or she is still healthy and working, shaded if he or she has been wounded, and struck through if he or she has been killed.⁴⁴ The authors refer to their targets as "the baby butchers and their evil lackeys,"⁴⁵ calling for them to be "brought to justice."⁴⁶

The ACLA, ALM, and other contributors to *The Nuremberg Files* claimed that their purpose in maintaining the site was only to collect and store information:

[C]ollecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. . . .

One of the great tragedies of the Nuremberg trials of Nazis 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. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion

index.html.

40. *Id.*, at <http://www.netfreedom.net/nuremberg/smdead.html>.

41. *Id.*, at <http://www.netfreedom.net/nuremberg/aborts.html>.

42. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1133 (D. Or. 1999); *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/aborts.html>.

43. *See* Calvert & Richards, *supra* note 36, at 975; Noffsinger, *supra* note 3, at 1210; Wardle, *supra* note 33, at 887; *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html>. In fact, the site "urges people to send 'photos or videotapes of the abortionist, their car, their house, friends, and anything else of interest, as many and as recent as possible.'" *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html> (quoting from the original *The Nuremberg Files*, at <http://www.christiangallery.com/atrocities> (n.d.)). Now, the site should no longer contain that personal information, because the judge in *Planned Parenthood* issued a permanent injunction against the publication of such data. *See Planned Parenthood*, 41 F. Supp. 2d at 1155-56. The authors have, however, begun "testing a new format" for the list, which provides the personal information of targeted people in the pro-choice movement in the State of Maryland. *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/MD.html>.

44. *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/aborts.html>.

45. *Id.*

46. *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html> (quoting from the original *The Nuremberg Files*, at <http://www.christiangallery.com/atrocities> (n.d.)).

turns against *the wanton slaughter of God's children* (as it surely will).⁴⁷

Thus, although these groups are in favor of the use of deadly force against people involved in giving abortions,⁴⁸ they claimed that the reason for *The Nuremberg Files* was a peaceful one: to collect information in the event that abortion becomes illegal in the United States.⁴⁹

However, the social climate of the United States at the time of the trial was such that anyone involved with an abortion clinic had to take every hint of a threat of violence very seriously.⁵⁰ In addition to the Web site, *Planned Parenthood* also concerned "wanted" posters that ACLA and ALM were distributing to fellow abortion foes.⁵¹ Violent members of the pro-life movement killed or wounded a vast number of people involved in the pro-choice cause who had appeared on such posters between 1993 and 1998.⁵² Dr. David Gunn, an abortion provider, was shot and killed.⁵³ Dr. George Patterson, an abortion provider, was shot and killed.⁵⁴ Dr. John Bayard Britton, an abortion provider, was shot and killed; James Barrett, Dr. Britton's volunteer escort, was shot and killed; and Mrs. Barrett, James Barrett's wife, was wounded in the same shooting that killed her husband.⁵⁵ Dr. Garson Romalis, a Canadian abortion provider, was shot.⁵⁶ Two clinic workers were murdered and five others wounded.⁵⁷ An off-duty police officer and nurse working in an abortion clinic were killed when a bomb went off. Dr. Barnett Slepian, an abortion provider, was shot and killed.⁵⁸ Far from being isolated events, the violent culture of this facet of the anti-abortion movement continued to thrive.⁵⁹

The unrest that *The Nuremberg Files* created in its targets was caused not only by the overall social climate, but also by the fact that the Web site's maintainers, the defendants in *Planned Parenthood*, were on record as supporting violence against

47. Noffsinger, *supra* note 3, at 1213 (quoting *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/index.html> (alteration, omission, and emphasis in original)).

48. See *Planned Parenthood*, 41 F. Supp. 2d at 1136.

49. *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html>.

50. See *Planned Parenthood*, 41 F. Supp. 2d at 1134-35.

51. See *id.* at 1134.

The Deadly Dozen poster contained the boldface heading "GUILTY of Crimes Against Humanity" followed by another boldface heading, "THE DEADLY DOZEN," and the names, addresses, and telephone numbers of twelve people, including three of the plaintiffs. . . . [T]he size and boldness of the print visually emphasized the words, "GUILTY OF CRIMES AGAINST HUMANITY . . . THE DEADLY DOZEN . . . \$5,000 REWARD . . . ABORTIONIST."

Noffsinger, *supra* note 3, at 1214 (emphasis in original).

52. See *Planned Parenthood*, 41 F. Supp. 2d at 1134-35.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1135.

abortion providers and their cohorts.⁶⁰ In fact, several of the defendants signed a petition in support of the man who killed Dr. Gunn, calling the murder justifiable and asking for an acquittal.⁶¹ One of the defendants subsequently stood outside an abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign saying, “Dr. Shah, do you feel under the Gunn?”⁶² ALM put forth public praise of Dr. Britton’s assassin, stating: “The man’s a hero. May his tribe increase.”⁶³ The director of ACLA and ALM commented, “[I]f someone was to condemn any violence against abortion, they probably wouldn’t have felt comfortable working with us.”⁶⁴ One result of *The Nuremberg Files* being introduced into such a volatile climate was that the FBI notified the plaintiffs in *Planned Parenthood* that they appeared on the Web site and advised them to take precautions.⁶⁵

The fallout from the *Planned Parenthood* case has been significant for ACLA, ALM, and *The Nuremberg Files*. First, the eight-person jury found that *The Nuremberg Files* and the “Deadly Dozen” posters were in violation of the Freedom of Access to Clinic Entrances Act of 1994 (“FACE”),⁶⁶ that those entities were “true threats” against their targets and as such were unprotected by the First Amendment, and ultimately awarded the plaintiffs \$107 million in damages.⁶⁷ Second, MindSpring, the ISP that had provided a virtual home for *The Nuremberg Files*, shut down the

60. *See id.* at 1134, 1137.

61. *See id.* at 1134.

The petition states in part: We, the undersigned, declare the justice of taking all godly action necessary to defend innocent human life including the use of force. We proclaim that whatever force is legitimate to defend the life of a born child is legitimate to defend the life of an unborn child. We assert that if Michael Griffin did in fact kill David Gunn, his use of lethal force was justifiable provided it was carried out for defending the lives of unborn children.

United States v. Dinwiddie, 76 F.3d 913, 918 n.2 (8th Cir. 1996).

62. *Planned Parenthood*, 41 F. Supp. 2d at 1134.

63. *Id.*

64. *Id.* at 1137.

65. *Id.* at 1134. One article asks the reader to put herself in the position of the abortion providers:

An FBI agent contacts you to offer twenty-four-hour protection and advises you to purchase and wear a bulletproof vest. Terrified, you alternate which car you drive to work, never allow your family to ride with you, and post an armed guard outside your office. . . . Then you learn that three others pictured on posters and named on the Web site have since been murdered. Your fear haunts you every day

Noffsinger, *supra* note 3, at 1209-10.

66. 18 U.S.C. § 248 (1994). FACE “attaches both criminal penalties and civil liability to activities by persons who use force, threat of force or physically obstruct persons obtaining or providing reproductive health services.” Melanie C. Hagan, *The Freedom of Access to Clinic Entrances Act and the Nuremberg Files Web Site: Is the Site Properly Prohibited or Protected Speech?*, 51 HASTINGS L.J. 411, 415 (2000) (citations omitted).

67. *See generally Planned Parenthood*, 41 F. Supp. 2d 1130; *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, No. CIV. 95-1671-JO, 1999 WL 65450 (D. Or. Feb. 25, 1999). For more information about FACE, see *United States v. Dinwiddie*, 76 F.3d 913, 917, 921-25 (8th Cir. 1996).

Web site because it violated company policy.⁶⁸ Finally, and arguably most significantly, the judge who presided over *Planned Parenthood*, U.S. District Court Judge Robert Jones, issued a permanent injunction prohibiting ACLA and ALM from distributing abortion providers' personal information on "wanted" posters or "on the *Nuremberg Files* or any similar site."⁶⁹ Thus, while the groups were able to maintain parts of their Web site upon finding a new ISP, they are now entirely prohibited from publishing personal data on their original site or any sort of "mirror" site with duplicate information.⁷⁰

This case sparked national attention, both celebratory and outraged, because of the potential danger and because of the great value the United States places on political speech.⁷¹ Historically, the Supreme Court has defined both incitement⁷² and true threats,⁷³ two unprotected categories of speech, extremely narrow in order to protect the most speech. More recently, one federal court was willing to extend the traditional incitement doctrine to the printed word.⁷⁴ Arguably, it is only another small step to do the same for the Internet.

C. The Courts: Incitement and True Threats

The traditional First Amendment concern for and protection of political speech has not lessened throughout the years. Among citizens and government, there has been, since the United States's conception, a marked urgency to protect the vast majority of political speech, whether it champions this country or argues for its downfall.⁷⁵ However, there are two categories of speech that are unprotected by the First Amendment, whether political speech or not. The government may prohibit and punish speech that incites others to commit acts of violence⁷⁶ and speech that contains a true threat against another person.⁷⁷

68. Patrick McMahon, *Anti-Abortion Site Kicked Off Web*, USA TODAY, Feb. 8, 1999, at 2A; Rose Aguilar, *ISP Shuts Down Antiabortion Site*, at <http://news.cnet.com/news/0-1005-200-338353.html> (last visited Feb. 2, 2001). The authors were able to find another ISP to host their truncated Web page. See *The Nuremberg Files*, *supra* note 1, at <http://www.netfreedom.net/nuremberg/index.html>. In fact, the authors have plans to expand the site to include a live "Web cam" placed outside selected abortion clinics worldwide that would provide live video streaming of women entering clinics. *Id.* The site predicts that "[t]he Live Web Cam Project will make things get very interesting very fast." *Id.*

69. *Judge Slams*, *supra* note 5, at <http://news.cnet.com/news/0-1005-200-339254.html>.

70. *Planned Parenthood*, 41 F. Supp. 2d at 1156.

71. *E.g.*, Calvert & Richards, *supra* note 36; Noffsinger, *supra* note 3; Wardle, *supra* note 33; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

72. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

73. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969).

74. See *Rice*, 128 F.3d at 243-44.

75. *E.g.*, *id.* at 243.

76. See *Brandenburg*, 395 U.S. at 447.

77. See *Watts*, 394 U.S. at 707.

1. Modern Incitement Doctrine

The modern test for whether speech falls into the incitement category comes from a 1969 Supreme Court case, *Brandenburg v. Ohio*.⁷⁸ In *Brandenburg*, the Supreme Court overturned the punishment of a Ku Klux Klan leader, holding that the statute under which he was convicted did not draw a sufficient line between incitement, which is unprotected by the First Amendment, and advocacy, which is protected.⁷⁹

The test the Court announced in *Brandenburg* is the test that courts apply today when determining whether particular speech is incitement or advocacy:

[T]he 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*.⁸⁰

This test is extremely protective of political speech. The speaker must incite lawless action, the danger of such action must be imminent, the action must be likely to occur, and the speaker must intend for it to occur.⁸¹ Thus, there is both a subjective requirement—the speaker must intend to incite violence—and an objective requirement—the violence must be likely to occur, from the point of view of someone other than the speaker. Further illuminating its test, the Court quoted from an old decision: “[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as *preparing* a group for violent action and *steeling* it to such action.”⁸² In analyzing speech and determining whether it falls into the *Brandenburg* definition of incitement, therefore, two signposts the courts look to are whether the speech “prepares” and “steels” its audience to commit imminent lawless action.

One of the more recent and provocative incitement cases was *Rice v. Paladin Enterprises, Inc.*,⁸³ which concerned a book entitled *Hit Man: A Technical Manual for Independent Contractors*.⁸⁴ This book explained, in gruesomely explicit detail, how to become a contract killer and commit murder.⁸⁵ The defendants argued that the First Amendment offered them protection, but the Fourth Circuit Court of Appeals

78. 395 U.S. 444 (1969).

79. *See id.* at 449; *id.* at 456-57 (Douglas, J., concurring). The defendant was prosecuted for comments he made at a Ku Klux Klan rally. Among other things, he said: “We’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.” *Id.* at 446.

80. *Id.* at 447 (emphasis added).

81. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 369 (1996).

82. *Brandenburg*, 395 U.S. at 448 (omission in original) (emphasis added) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

83. 128 F.3d 233 (4th Cir. 1997).

84. *Id.* at 239.

85. *Id.* In this case, someone followed the instructions and committed a contractual murder. The relatives and representatives of the victims sued the publisher, Paladin Enterprises, for wrongful death, claiming that the publisher aided and abetted the killer by publishing the book. *See id.* at 239-41.

ultimately held that this book fell into the *Brandenburg* definition of incitement and, as such, was unprotected.⁸⁶

In analyzing *Brandenburg* and its applicability to the case at bar, the court acknowledged that “abstract advocacy of lawlessness is protected speech.”⁸⁷ However, *Hit Man*, the court held, was not abstract advocacy. First, speech was an integral and inextricable part of the crime.⁸⁸ Second, *Brandenburg*’s imminency requirement, the only one not fulfilled in this case, did not apply because it is only pertinent “where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such.”⁸⁹ Third, although the First Amendment may prevent the proscription of speech based on mere foreseeability that its contents may be used for an impermissible purpose, “it would not relieve from liability those who would . . . intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment.”⁹⁰ Fourth, the court held that just because a message may be disseminated to a wide audience does not automatically provide First Amendment protection.⁹¹ Finally, the court held not only that this speech did not fall into *Brandenburg*’s “mere advocacy,”⁹² but that it “[was] the antithesis of speech protected under *Brandenburg*.”⁹³ The book, in other words, had no value other than to teach its readers how to commit murder.⁹⁴

Thus, a federal court of appeals was willing to mold the *Brandenburg* doctrine to the modern era, when books such as *Hit Man* are written and published. The incitement doctrine is still evolving along with society, as is the true-threats doctrine. The plaintiffs in *Planned Parenthood* proceeded under a true-threats theory, so it is crucial to understand that doctrine as well as incitement for the purposes of this Note.

86. *See id.* at 247-51.

87. *Id.* at 243.

88. *Id.* at 245 (quoting *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (citations omitted in original)).

89. *Id.* at 246 (quoting U.S. DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 37 (1997) (footnote omitted in original)).

90. *Id.* at 248.

91. *Id.* The factors the court examined in determining that the publishers did “assist and encourage” this crime were “the speaker’s dissemination or marketing strategy, . . . the nature of the speech itself,” and whether “the audience both targeted and actually reached [was] . . . very narrowly confined . . .” *Id.* Using a slippery slope analysis, the court commented:

Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means *or even on the internet*, the necessary plans and instructions for assassinating the President, for poisoning a city’s water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific . . . purpose of assisting such crimes—all with immunity.

Id. (emphasis added).

92. *See Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

93. *Rice*, 128 F.3d at 249. The court further commented that this book “prepares and steels its readers” to commit violent acts. *Id.* at 256.

94. *See id.* at 262 (“Ideas simply are neither the focus nor the burden of the book.”).

2. Another Puzzle Piece—the True-Threats Doctrine

Along with and closely related to incitement, true threats is a category of speech that is unprotected by the First Amendment.⁹⁵ The seminal true-threats case is *Watts v. United States*,⁹⁶ in which a draft protester proclaimed that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”⁹⁷ The Court distinguished between threats and protected speech, holding that the defendant’s statement was mere “political hyperbole,” not a viable threat against the President.⁹⁸ This short opinion has been interpreted many times throughout the decades, and there seems to be a consensus among the circuits that threats are punishable as true threats only when they are “so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.”⁹⁹ Thus, the courts are, in general, very protective even of threatening speech and will allow it to be punished only when it reaches an extreme state of potential dangerousness.

Among the factors that courts consider in determining whether particular speech constitutes a true threat are the speaker’s intent,¹⁰⁰ the immediacy and clarity of the speaker’s purpose,¹⁰¹ whether the speech is largely political opinion in nature,¹⁰² whether the communication is inextricably intertwined with violent conduct,¹⁰³ the speech’s content and specificity of target,¹⁰⁴ the overall context,¹⁰⁵ and the audience to which the speech is directed.¹⁰⁶

The Supreme Court has laid out two very important and time-honored categories

95. See *Watts v. United States*, 394 U.S. 705 (1969).

96. *Id.*

97. *Id.* at 706.

98. See *id.* at 708.

99. *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976); see also *United States v. Baker*, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995) (quoting the *Kelner* definition), *aff’d sub nom. United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). However, the district judge in *Planned Parenthood* gave the following instructions to the jury regarding a true threat:

A statement is a ‘true threat’ 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. This is an objective standard—that of a reasonable person. Defendants’ subjective intent or motive is not the standard that you must apply in this case.

Noffsinger, *supra* note 3, at 1237 (quoting Jury Instruction No. 10, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, No. CIV. 95-1671-JO, 1999 WL 65450 (D. Or. Feb. 25, 1999)).

100. See *Baker*, 890 F. Supp. at 1385-86; Noffsinger, *supra* note 3, at 1226-28 (explaining that speaker intent is both subjective and objective).

101. *Shackelford v. Shirley*, 948 F.2d 935, 939 (5th Cir. 1991).

102. See *Watts*, 394 U.S. at 708; *Kelner*, 534 F.2d at 1025.

103. *Kelner*, 534 F.2d at 1027.

104. Noffsinger, *supra* note 3, at 1218-20.

105. See *id.* at 1220-24 (examining surrounding facts, speaker demeanor, social atmosphere, and violent history of a type of speech).

106. See *id.* at 1224-26 (remarking that speech directed to a specific target rather than to a general audience is more likely to constitute a true threat).

of unprotected speech: incitement and true threats. *Rice* took a step in updating *Brandenburg*, but it still does not explicitly cover the Internet. The Court, justifiably so, is reluctant to expand our notion of what speech is unprotected, but as *Brandenburg* currently stands, Web sites can never incite someone to commit a lawless act.¹⁰⁷

II. IT IS TIME TO RECOGNIZE OUR SHORTCOMINGS: WEB SITES WILL NEVER MEET A *BRANDENBURG* STANDARD

The American judicial system must recognize the fact that there is a gaping hole in the incitement doctrine as it currently exists. Because Web sites cannot meet the "imminency" prong of *Brandenburg*,¹⁰⁸ a court cannot find that Web sites fall into the incitement category. Perhaps because of this reason, the plaintiffs in *Planned Parenthood* chose to proceed with a true-threats argument,¹⁰⁹ and while the jury agreed with them,¹¹⁰ it seems fairly clear that the jury was following its instincts rather than the law. Had the jury been able to consider an incitement argument, which seems to better fit the case, the outcome may have been less aberrational and certainly more legal. Ultimately, while there are many valid reasons to be cautious in reexamining the incitement doctrine in the age of the Internet, there are also very serious reasons that we should hurry to begin the process.

A. Web Sites Do Not Fit into Current Analysis

Brandenburg gave us the modern incitement test, which had four components: intent, imminency, likelihood, and gravity.¹¹¹ While the creators of a Web site may have intent, and the gravity of the lawless conduct could be severe, it is uncertain how courts will treat the "likelihood" prong. Possibly, the fact that a Web site is always reaching a broad, general, unspecified audience will prevent it from being "likely" to incite violence. Moreover, a Web site will never be able to fulfill the imminency requirement.

Internet Web sites provide a fascinating paradox with which our judicial and legislative bodies must eventually deal. When a Web page author creates a site, it is instantaneously possible for people around the globe to examine and interact with it.¹¹² However, because of the user-driven nature of the Internet and its massive depths, it could be a day, a week, or a year before a user accesses the Web page.¹¹³ For that matter, it is conceivable that no user would ever stumble across that particular site. Thus, on the one hand, "[o]ver the Internet, information may reach a mass audience in nearly real time, as quickly as it is available."¹¹⁴ On the other hand,

107. See *infra* text accompanying notes 108-18.

108. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *infra* text accompanying notes 111-18.

109. Noffsinger, *supra* note 3, at 1236.

110. See McMahon, *supra* note 68, at 2A.

111. See *Brandenburg*, 395 U.S. at 447.

112. Sullivan, *supra* note 12, at 1667-68.

113. See *Internet Symposium*, *supra* note 12, at 555.

114. Sullivan, *supra* note 12, at 1668; see also Sunstein, *supra* note 81, at 364 ("With the

there is no way to predict how long it will be before a user actually finds a specific Web site.

One of the primary justifications for the imminency requirement is that if there is time between the speech and the potential lawless conduct, there is time to rebut the false, misleading, or dangerous speech.¹¹⁵ Because of the potentially significant lag time between a Web page's creation, a user accessing it, and ultimately acting on the material found within it, there could be, arguably, sufficient time to rebut any "inflammatory" speech to further undercut the imminency prong.¹¹⁶ However, some argue that, in fact, the Internet provides fewer opportunities for "good counsel" to overtake the bad: "If inciters can customize access to a sympathetic audience and reach them one by one, the public occasions for eavesdropping by those of good counsel will be diminished. Likewise, the elimination of institutional filters on the Internet removes an extralegal source of restraint on subversive speech."¹¹⁷

Ultimately, though, *Brandenburg's* imminence prong can never be fulfilled by a Web page. Because there is no way to know how much time will exist between a Web page's conception and its first visitor, the risk of *imminent* unlawful conduct is impossible to predict with any certainty. The problem with applying this analysis to the Internet is that, if they do not already exist, there certainly someday could be a Web page that, even if not discovered for ten years, would incite its visitors to commit lawless acts.¹¹⁸ However, the American courts should at least acknowledge the fact that, under present First Amendment incitement doctrine, a Web page can never run afoul of *Brandenburg*.

B. What We Should Learn from The Nuremberg Files

While the attorneys for the plaintiffs in *Planned Parenthood* chose to argue that *The Nuremberg Files* was a true threat rather than speech that was incitement to violence,¹¹⁹ the two doctrines are so closely related that they could have attempted either one. Technically, a Web page could constitute a true threat and be punishable, because the *Brandenburg* problems do not exist.¹²⁰ However, while *The Nuremberg Files* arguably did not constitute a true threat, the plaintiffs may have argued their case that way because incitement is not an option for a Web site.

touch of a button, it is now possible to reach millions of people, whether or not they want to be reached.").

115. Sullivan, *supra* note 12, at 1671.

116. Andrew P. Napolitano, *Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" as a Unifying Standard for Erratic First Amendment Jurisprudence*, 29 SETON HALL L. REV. 1197, 1257 (1999).

117. Sullivan, *supra* note 12, at 1671.

118. See *infra* text accompanying notes 153-57.

119. Noffsinger, *supra* note 3, at 1236.

120. The widely accepted definition of a true threat is speech that is "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976).

1. What Did the Jury Do?

The first question we must ask ourselves is whether the *Planned Parenthood* jury, in bringing down a \$107 million verdict on the defendants, followed the law or, instead, applied a new and unfamiliar analysis. In finding that *The Nuremberg Files* constituted a true threat against the people listed within it, the jury, in all likelihood, went beyond the confines of current true-threats doctrine.

The current doctrine is extremely limited, as the above definition clearly suggests. True-threats cases point to a doctrine that courts, in general, interpret very narrowly. A draft protester threatening the life of the President was engaging in “political hyperbole,” not true threats.¹²¹ A person sending E-mails to a third party describing the brutal abduction of a nonspecific woman who lived on his college campus was not truly threatening because there was no specific discussion of an intent to act imminently, and because the discussions were part of private E-mails not intended for public distribution.¹²² However, a series of threatening, harassing, indecent, and profane phone calls and letters to a Jewish Organization did constitute a true threat,¹²³ and comments made on television that a group of people had planned Yasser Arafat’s assassination in detail did constitute a true threat.¹²⁴

Although *The Nuremberg Files* is certainly threatening, as the FBI’s precautions suggest,¹²⁵ it is debatable whether it meets the definition of a true threat. In fact, the only criteria that the Web site clearly fulfills is specificity of target: the list of names. The site did not list any dates, nor did it suggest any sort of time limit, thus immediacy is not fulfilled. The *Planned Parenthood* defendants had a (somewhat) plausible explanation for the purpose of the site, and if courts are unwilling to make inferences about unequivocal intent beyond what is in writing, then the site is likely not unequivocal. Finally, if an abortion doctor stopped providing abortions, his or her name would likely have been taken off of the list; thus it is not an “unconditional” threat. Clearly, therefore, it is a stretch to say that the jury followed the true-threats doctrine as we know it.

2. What Might the Jury Have Done?

Instead of proceeding with a true-threats argument, the plaintiffs might have chosen to argue that this Web site incited others to commit acts of violence against the people listed within it. *Brandenburg* protects “abstract advocacy of lawlessness,”¹²⁶ but advocacy is not protected by the First Amendment “where [it] is directed to inciting or producing imminent lawless action and is likely to incite or produce such

121. *Watts v. United States*, 394 U.S. 705, 708 (1969).

122. *United States v. Baker*, 890 F. Supp. 1375, 1386, 1388-89 (E.D. Mich. 1995), *aff’d sub nom. United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). The court commented that “drawing . . . an inference [about intent to commit specific illegal acts] not grounded in any specific language . . . would exceed the bounds of the First Amendment.” *Id.* at 1389.

123. *See United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir. 1990).

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

125. *See supra* note 65 and accompanying text.

126. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

action.¹²⁷

The defendants in *Planned Parenthood* claimed that their intent in maintaining *The Nuremberg Files* was merely to collect information, so that in the event abortion becomes illegal in the United States, abortion providers would not be able to hide and escape prosecution.¹²⁸ However, the *Brandenburg* intent test is both subjective and objective, and the brutal and chilling nature of the Web site coupled with the violent social atmosphere surrounding the abortion debate¹²⁹ leaves sufficient evidence for a jury to find that a reasonable person would believe this site to be directed to inciting violence against the people listed within it. Further, there is also evidence suggesting that the defendants supported violence against people furthering the abortion cause and that may have been sufficient evidence to find subjective intent as well.¹³⁰

The gravity of the potential lawless action, wounding or murdering abortion providers, clinic workers, and legal and judicial employees, is certainly sufficiently extreme to qualify under *Brandenburg*. As for the likelihood that such violence would have resulted, and putting the problems inherent to the Internet aside, one need only examine the volatile social climate and inflammatory nature of the Web site to determine that there is sufficient evidence to believe that once people found it, *The Nuremberg Files* would have been very likely to incite people to commit acts of violence. Moreover, it gave them all the necessary data to find the targets: addresses, phone numbers, pictures, license plates, family members, and other personal information.¹³¹

Above and beyond the explicit *Brandenburg* test are factors that courts often take into account when deciding an incitement case. First, the audience to which this Web site was directed, as with any Web site, was a general, worldwide audience.¹³² Anyone who happened upon this site, pro-choice or pro-life, would have seen the bloody imagery and list of information. This is another problem inherent to Web sites: the audience will always be general and broad, rather than a specific audience who would be easy to rile up. Second, the nature of this speech is, at its heart, political, which would afford it greater protection than nonpolitical speech.¹³³ Finally, it is debatable whether this site prepared and steered its audience to commit acts of lawlessness; likely, there would be sufficient evidence on both sides for a jury to come out either way.

The *Hit Man* book in *Rice* crossed the line from mere advocacy to incitement, according to the Fourth Circuit Court of Appeals.¹³⁴ While *Hit Man* is an extreme case, arguably more extreme than *The Nuremberg Files*, the court's analysis is helpful in determining whether the Web site would pass muster under *Brandenburg*. The

127. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

128. Noffsinger, *supra* note 3, at 1213.

129. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1134-36 (D. Or. 1999).

130. See *supra* text accompanying notes 60-65.

131. Calvert & Richards, *supra* note 36, at 975; Noffsinger, *supra* note 3, at 1210; Wardle, *supra* note 33, at 887; *Hit List*, *supra* note 33, at <http://news.cnet.com/news/0-1005-200-338167.html>.

132. Sullivan, *supra* note 12, at 1667-68.

133. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

134. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 249 (4th Cir. 1997).

court insisted that mere presentation to a wide audience is not dispositive where there is evidence that, in reality, the audience that was targeted and reached was actually quite narrow.¹³⁵ Like *Hit Man*, *The Nuremberg Files* targeted a specific (and hopefully small) group: those pro-life people who are willing to support violence against those who are a part of the pro-choice cause. Thus, that would be yet another factor weighing against the *Planned Parenthood* defendants in a *Brandenburg*-type argument. However, because *The Nuremberg Files* is a Web site, *Brandenburg* does not reach it. In fact, if someone decided to create a Web site for *Hit Man*, the law in its current form would protect such information as a Web site, even though it is not protected as a book.

Therefore, it is very possible that this Web site would meet *Brandenburg*'s incitement test if a Web site could ever meet that test. In fact, the plaintiffs may have decided to forego an incitement argument because a Web site's audience will always be too general, *Brandenburg*'s likelihood requirement is difficult for a Web site to fulfill, and the imminency requirement seems impossible for a Web site ever to fulfill. Thus, though *The Nuremberg Files* Web site is frightening and threatening to its targets,¹³⁶ the law in its current state arguably offers total protection to the site's creators.

3. What Should the Jury Have Been Able to Do?

Whether or not one agrees with the outcome of *Planned Parenthood*, it seems fairly clear that the jury followed its instincts rather than the law. *The Nuremberg Files* is a disturbing, chilling Web site that very likely could have provoked someone to commit an act of violence against an abortion provider or, at the very least, offered sufficient information for those people who already planned on doing so to find their targets with ease. However, it was not a true threat as courts currently apply the doctrine. Further, while the attorneys did not proceed under an incitement theory, the site may have fit into *Brandenburg* if not for the problems inherent to Web sites that make *Brandenburg* an awkward fit in general.

Given what it had to work with, the jury did the best job it could have done. It is time, however, to acknowledge the fact that current incitement doctrine simply does not allow room for a Web site to fall within its boundaries. The law, as it stands, requires juries contending with Web sites, such as *The Nuremberg Files*, to force a round peg into a square hole. Certainly, creating new doctrine or changing a well-established legal calculus to account for societal changes is no small task and should not be undertaken lightly. At the least, however, the American judicial system must acknowledge the fact that there is no room for the Internet in current incitement doctrine.

135. *Id.* at 248.

136. *See Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1133-34 (D. Or. 1999).

C. Slow and Steady Has Its Benefits

There are many serious and valid reasons why the legislative and judicial bodies across the country should hesitate before carving some sort of new niche for unprotected Internet speech. Some are time-honored arguments for freedom of speech in general, and others are specific to the unique nature of the Internet as a new medium of communication.

1. Time-Honored Reasons to Protect Speech

First, one of the great rationales for protecting freedom of speech is to keep the channels of political debate open and allow people to speak freely without fear of punishment for their words or ideas.¹³⁷ The Supreme Court has recognized 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."¹³⁸ In order to maintain an atmosphere of robust public debate, the government must be especially hesitant to proscribe new categories of speech. If people are afraid of government action, there will be a chilling effect on the speech itself. In fact, one scholar argues that if courts begin to censure Internet speech, especially with verdicts of the magnitude in *Planned Parenthood*, there will be a "direct and chilling effect . . . to suppress speech."¹³⁹

Second, courts have often likened certain forms of public protest to the "poor man's printing press."¹⁴⁰ Activities such as leafleting and picketing have historically been more accessible to low-income people than publishing books, so courts have been especially wary of regulating that speech which is accessible to all.¹⁴¹ While using the Internet is certainly more expensive than marching down a public street, access is relatively cheap,¹⁴² and "as the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."¹⁴³

Finally, and especially relevant to Web sites such as *The Nuremberg Files*, we must be careful about forcing dissenting opinions underground.¹⁴⁴ While it may be tempting, for some, to silence and immobilize people who are prepared to paint their

137. *E.g.*, *N.Y. Times Co.*, 376 U.S. at 270.

138. *Id.*; *see also Rice*, 128 F.3d at 243.

Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

Id.

139. Wardle, *supra* note 33, at 887-88.

140. *E.g.*, *United States v. Miller*, 367 F.2d 72, 79 (2d Cir. 1966).

141. *See id.*

142. Sullivan, *supra* note 12, at 1670.

143. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

144. *See Calvert & Richards*, *supra* note 36, at 969.

disagreement with government policy in ugly, vivid, explicit, and dangerous colors, it would be extremely unhealthy for our society to instill that practice. Many scholars believe that allowing dissenters to express their vehement and caustic opinions operates as a sort of "safety valve," enabling people to blow off steam with words rather than blowing off someone's head with a gun.¹⁴⁵

The time-honored reasons for protecting the freedom of speech are certainly still relevant to modern problems. Above and beyond our historical rationales, however, are reasons specific to the Internet that should lead us to pause before hampering its current total freedom.

2. New and Internet-Specific Concerns

The Internet is different from other media for a variety of reasons,¹⁴⁶ so many of the rationales the government has traditionally used for regulating the media will not apply to the Internet. First, the Internet is a largely user-driven medium.¹⁴⁷ Unlike radio or television, there is only a small chance that a user might accidentally happen upon inappropriate material.¹⁴⁸ However, that argument cuts both ways: users who are looking for an inflammatory site such as *The Nuremberg Files* will be able to access it with the push of a button, rather than being at the mercy of radio and television programming. Second, some argue that the Internet provides ample time to rebut volatile or dangerous information, and, as such, the government should hesitate to create new categories of proscribed Internet speech.¹⁴⁹ However, because the Internet is so user-driven, the opportunity for people not looking for a particular Web site to rebut the information contained within it is seriously diminished.¹⁵⁰

Third, the link between words and actions that must exist for the incitement doctrine, which some people believe is tenuous to begin with, becomes even more attenuated with a Web site. When a user comes across an inflammatory Web page, he or she must then make the mental leap to want to act, prepare to act, and then, finally, act. There are some who believe "[t]hat the printed word can ever be an incitement to immediate action is troubling. . . . Human agents, not printed words, commit acts of violence."¹⁵¹ However, the advent of *Rice* shows that courts are willing to move beyond such simplistic analysis and confront the reality that books can incite someone to commit a lawless act.¹⁵² While, admittedly, *Hit Man* was a truly extreme example of incitement, there is no reason to believe that such information will never be available on the Internet. Thus, when the judicial system showed its willingness to extend the incitement doctrine to the printed page, it took one step toward legitimating the link between word and deed. Arguably, however, that link is more attenuated when the information is coming from a Web site instead of a book.

Thus, there are many valid and justifiable reasons that we should be mindful of

145. See *id.*

146. See *supra* text accompanying notes 23-32.

147. See *Reno v. ACLU*, 521 U.S. 844, 869 (1997); Sullivan, *supra* note 12, at 1668-69.

148. See *Internet Symposium*, *supra* note 12, at 555.

149. See, e.g., Napolitano, *supra* note 116, at 1257.

150. Sullivan, *supra* note 12, at 1671.

151. Calvert & Richards, *supra* note 36, at 981 (emphasis in original).

152. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997).

when considering changing a First Amendment doctrine. One of the fundamental principles upon which our society rests is that of the freedom of speech, a precious freedom which no one wants to see diminished. However, there are also serious considerations that should prod us to act soon, before the American judicial system is confronted with yet another case it is not prepared to handle.

D. Slow and Steady Can Lead to Destruction

The Internet is a precious medium of communication that our society should attempt to protect from extensive government regulation. However, it can and will likely someday be a tool of dangerous groups, used to instruct, inflame, and commit acts of violence. Because of several of its unique features, the Internet is particularly vulnerable to groups wanting to use it for the global dissemination of dangerous information.

There are already many hate groups communicating on the Internet, using its various resources to transmit frightening and repugnant information. Over fifty hate groups currently communicate on the Internet, discussing conspiracies and providing bomb-making formulas to their cyberspace visitors.¹⁵³ *The Anarchist's Cookbook*, *The Terrorist's Handbook*, and the National Rifle Association's bulletin board are all available to instruct viewers in bomb-making techniques, sometimes with simple household objects such as baby food jars.¹⁵⁴ Perhaps more disturbing than bomb-making instructions are the sites that tell their users "how to form guerrilla cells and how to harm federal agents."¹⁵⁵

All of the above examples exist, according to their creators, "solely for informative purposes"¹⁵⁶ and, as such, are protected by the First Amendment. However, one does not have to make a great leap in logic to see the potential for a Web site, someday, to cross the line between informative purposes and incitement to horrific violence. *The Nuremberg Files*, according to some, is such a site, but even if that particular example does not cross the line, it is not difficult to imagine one that will. "It is likely, perhaps inevitable, that hateful and violent messages carried over the . . . Internet will someday be responsible for acts of violence."¹⁵⁷ When such a site comes into existence that expressly directs its viewers to commit lawless acts, the legal community should have a test in place that will allow for its proscription.

There are several reasons why the Internet is particularly vulnerable to hate groups and future messages of violence. First, its low cost leaves it accessible to many people, and many public places such as libraries allow patrons to access it for free.¹⁵⁸ While in many ways this is a positive feature of the Internet, it is also frightening because of the potential for mass distribution and violence. "We're seeing old hate

153. Sunstein, *supra* note 81, at 367.

154. *Id.* at 366.

155. Kelly Owen, *Oklahoma City: After the Bombing; Hate Speech on Internet Called Protected by Constitution*, L.A. TIMES, May 12, 1995, at A-17.

156. *Id.*

157. Sunstein, *supra* note 81, at 367-68. *But see* Sullivan, *supra* note 12, at 1672 ("[I]t is hardly clear that the Internet poses a unique or novel problem of violent stimulus to hair-trigger loners . . .").

158. *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

materials taken off car windshields and locker rooms and put on the Internet. . . . Here is a great marketing tool to get into the mainstream of America."¹⁵⁹ Thus, while we should allow everyone to create Web sites and bulletin boards for "informative purposes," the Internet's accessibility for all creates potential for dangerous exploitation of its resources.

Second, at the present time, there is virtually no regulation of the Internet. Unlike radio and television, there is no host or producer acting as an intermediary who must approve the information that goes out on the airwaves.¹⁶⁰ Not only is there no primary filter through which Web sites must go, but also there is no secondary one either: "[N]either the public library nor the local private bookstore can use its standards of taste, decorum, market judgment, or consideration of the sensibilities of other customers to filter out access to publications on such violence-abetting topics as how to build explosives or to commit a murder for hire."¹⁶¹ Thus, at the present time, if someone chose to put *Hit Man*, in all its gruesomely explicit detail, online, it would immediately be accessible to every Internet user.

Third, this information will be available to people in *real-time*.¹⁶² While a book such as *Hit Man* will be put on shelves in bookstores, people must wait for the store to be open before browsing, finding it, buying it, and taking it home to read; if it were a Web site uploaded at two o'clock in the morning, millions of people across the globe could access it instantaneously, following its instructions and killing someone by dawn. The personal information on abortion providers that *The Nuremberg Files* contained was immediately accessible to all violently passionate people across the country, and they could have used that information to wound or kill the people on the list within hours of its creation.

Finally, and perhaps most frighteningly, the Internet offers an opportunity never seen before: extremely cheap, instantaneous, world wide distribution.¹⁶³ Rather than someone shouting at the top of his lungs from a picket line to the tens or hundreds of people in the immediate area, and possibly making the local news, Web sites are accessible to *anyone in the whole world* who has Internet access. Rather than an audience of hundreds, or even thousands, Web sites have a potential audience of millions, perhaps tens of millions.¹⁶⁴

When messages advocating murderous violence are sent to large numbers of people, it is possible to think that the *Brandenburg* calculus changes: Government may well have the authority to stop speakers from expressly advocating the illegal use of force, at least if it is designed to kill people. The calculus changes when the risk of harm increases because of the sheer number of people exposed.¹⁶⁵

Granted, the audience is only potential: people must first find a Web site before

159. See Owen, *supra* note 155, at A-17.

160. See Sullivan, *supra* note 12, at 1671.

161. *Id.*

162. See *id.* at 1668.

163. See *id.* at 1667-68, 1670.

164. *Internet Symposium, supra* note 12, at 550.

165. Sunstein, *supra* note 81, at 370-71.

taking in the information that it provides. Ultimately, though, the utter massiveness of the Internet should urge legislative and judicial bodies across the country to face this problem before a situation develops with which the law cannot currently deal. *The Nuremberg Files* presented such a problem, and when the jury was forced to choose between following a law that does not accommodate Web sites or following its instincts about the ideal outcome, it chose the latter. Whether or not we condone the jury's decision, it is clear that the American legal system must take account of this new medium presenting new problems with which the law is not equipped to deal.

CONCLUSION

The Internet is changing American society, especially the way we communicate with each other, to such an extent that it is difficult to keep up with the changes. There have been hateful groups of people trying to get a message out for as long as there have been people; that will likely never change. What has changed, however, is that now the Internet provides a means for dangerous sects of society to inflame and endanger others. Our judicial system shows a natural and justifiable reluctance to alter its legal doctrine, but if it continues at this slow and steady pace, society will quickly pass it by. Somehow, the courts and legislatures must recognize the fact that at the present time, the law does not accommodate the scenario of a Web site that incites others to commit lawless acts. That recognition must come soon, or else we will be like the tortoise, crushed by the vehicle that he saw coming from miles away.