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INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: AN OLD ARROW TARGETS THE NEW HEAD OF THE HATE HYDRA

CATHERINE E. SMITH[†]

INTRODUCTION

In March 1998, a white supremacist Web site began posting threats against Bonnie Jouhari—a white woman, mother of a biracial child, and employee of a fair housing organization.¹ The site included an animated photographic image of Jouhari’s workplace exploding into flames.² Jouhari’s picture appeared beneath the exploding image with a caption identifying her as a “race traitor” and warning that “[t]raitors like this should beware, for in our day, they will be hung from the neck from the nearest tree or lamp post.”³ In the summer of 1998, the Web site was modified to include comments attacking Jouhari’s daughter, describing her as a “mongrel.”⁴ The modification also included bomb-building instructions directly beneath the image of Jouhari’s exploding office.⁵

The online threats led to offline harassment of Jouhari.⁶ Despite moving several times, Jouhari and her daughter received harassing phone calls and experienced frightening events that made them fear for their

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1. Sec’y, United States Dep’t of Hous. & Urban Dev. v. Wilson, No. 03-98-0692-8, 2000 WL 988268 (H.U.D. A.L.J July 19, 2000).

2. *Wilson*, 2000 WL 988268, at *3.

3. *Id.*; Interview by HateWatch.org with Bonnie Jouhari (Jan. 17, 2000), at <http://hatewatch.org/research.php?op=readarticle&lid=8> [hereinafter *Jouhari Interview*]; Donna Ladd, *Living in Terror: Targets of Racist Web Sites Find Nowhere to Hide*, THE VILLAGE VOICE, May 23, 2000, available at <http://www.donnaladd.com/voice29.html>.

4. *Wilson*, 2000 WL 988268, at *4.

5. *Id.*

6. *Id.* at *6-7.

safety.⁷ Jouhari's efforts to obtain assistance from local, state, and federal law enforcement and other agencies were futile.⁸

Jouhari eventually found an ally in the United States Department of Housing and Urban Development ("HUD") Secretary, Andrew Cuomo.⁹ In January 2000, almost two years after the harassment began, HUD filed a civil suit against the Web site operator, Ryan Wilson, and his organization, ALPHA HQ, pursuant to the Fair Housing Act.¹⁰ In *Secretary, United States Department of Housing and Urban Development v. Wilson*¹¹ (hereinafter *Wilson*), Wilson failed to respond to the housing discrimination charge, resulting in a default decision against him and ALPHA HQ.¹² On July 19, 2000, an administrative law judge concluded that Wilson violated the Fair Housing Act by making public threats on the Internet and implementing a "relentless campaign of domestic terrorism."¹³ The judge also concluded that Wilson intentionally inflicted emotional distress on Jouhari and her daughter, awarding them approximately \$250,000 and \$750,000 respectively.¹⁴

Wilson exemplifies the marriage of one of humankind's oldest forms of animus—hatred based on an individual's race, ethnicity, gender, sexual orientation or religion—and one of its most recent innovations—

7. For an in-depth description of these events see *infra* Part III.C. and Part IV.C.1.

8. *Wilson*, 2000 WL 988268, at *3 ("[Jouhari] was very concerned about the Web site and contacted an Assistant United States Attorney, the Federal Bureau of Investigation ("FBI"), the Pennsylvania Human Relations Commission, the State of Pennsylvania's Deputy Attorney General . . ."); *Id.* at *9 ("Despite calls to law enforcement agencies and the telephone company . . . Ms. Jouhari and her daughter continued to receive numerous 'harassing' telephone calls."); see also Ladd, *supra* note 3 ("Now in hiding, [Jouhari] says she doesn't believe federal, state and local law enforcement care enough about online threats to try and stop them.").

9. See Ladd, *supra* note 3.

10. See *Wilson*, 2000 WL 988268, at *1. Jouhari had previously filed complaints in August 1998 and October of 1999 against Wilson and others, pursuant to the Fair Housing Act. See *id.*

11. 2000 WL 988268.

12. See *id.*

13. *Id.* at *17. The relevant portion of the Fair Housing Act provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment, of any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617 (2002); see also 24 C.F.R. § 100.400(c) (2002); *Wilson*, 2000 WL 988268, at *17 ("The uncontested evidence demonstrates that Wilson intended the Web site to incite interference, by violent or other means, with Ms. Jouhari's statutory right to aid and encourage others in the exercise and enjoyment of their rights granted or protected under the Fair Housing Act.").

14. See *Wilson*, 2000 WL 988268, at *21, *24. The Act provides that upon a finding of a discriminatory housing practice, the administrative law judge "shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. § 3612(g)(3) (2001). Actual damages includes damages for emotional harm. See *HUD v. Blackwell*, 908 F.2d 864, 872-74 (11th Cir. 1990); *Wilson*, 2000 WL 988268, at *21 ("Actual damages in housing discrimination cases may include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination.").

the Internet.¹⁵ While the harassment may have been conducted through a virtual medium, the harm caused Jouhari was real.¹⁶ Bonnie Jouhari and her daughter were the victims of cyberassment—the harassment of another person through or on the Internet.¹⁷

Cyberassment takes many forms.¹⁸ Tactics include hacking,¹⁹ webjacking,²⁰ spoofing,²¹ cybersquatting,²² denial of service attacks or e-

15. *Id.* at *4 (“The purpose of the Web site was to further the goals of the white supremacist movement and to make known to anyone interested in the movement their ideals, as well as the identities of those persons who were against them.”). Although Bonnie Jouhari is white, Wilson targeted her because of her civil rights activism for racial equality in housing and because she has a biracial daughter. *See id.* at *1. The fact that she is white does not diminish the bias motivated character of the harassment as a result of her activities associated with, and her relationship to, African Americans. *See, e.g.,* *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992). In a § 1981 action consistent with holdings in the Second, Third, Fourth, Fifth, Sixth and Eleventh Circuit Courts of Appeals, the court held that a white person may have standing to sue for alleged discrimination when the discrimination stems from associating with African Americans. *See id.*; *see also* *Parr v. Woodmen of the Worldwide Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). Under a Title VII claim, the court stated “[w]here a [white] plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.” *Id.* (emphasis added).

16. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 863-64 (2001) (“[T]he messages transmitted through that social space [the Internet] have physical, psychological, and cultural effects on real places and real people.”).

17. The author coined the term “cyberassment” and uses derivatives of it, such as “cyberass” “cyberasser” and “cyberassed” throughout the article.

18. For an overview of the ways in which extremists harass and intimidate others on the Internet, *see* HateWatch.org, *Hacking and Hate: Virtual Attacks with Real Consequences*, at <http://hatewatch.org/research.php?op=readarticle&lid=26> (last visited Oct. 4, 2002) [hereinafter *Hacking and Hate*].

19. The term hacker can mean “a clever programmer,” but most consider a hacker to be “someone who attempts to break into computer systems and hacking to be “the act of doing it.” WHATIS?COM’S ENCYCLOPEDIA OF TECHNOLOGY TERMS 305 (2002) [hereinafter WHATIS?COM’S ENCYCLOPEDIA], available at http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci212220,0-0.html. Hacking breaches the security of a computer system and permits the hacker to examine, duplicate, alter and destroy information. *See Hacking and Hate*, *supra* note 18. The term “hacktivism” means to break into a computer system for a “politically or socially motivated purpose” in order to “disrupt services and bring attention” to the hacktivist’s cause. *Id.*; *see also* Seth Kreimer, *Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 157-58 (2001) (discussing a number of hacktivist activities). Hate groups post hacking instructions and tools on their Web sites, encouraging hacking activities. *See Hacking and Hate*, *supra* note 18. *See generally* Michael Edmund O’Neill, *Old Crimes in New Bottles: Sanctioning Cybercrime*, 9 GEO. MASON L. REV. 232, 246 (2000) (defining and giving examples of hate); Mary M. Calkins, Note, *They Shoot Trojan Horses, Don’t They? An Economic Analysis of Anti-Hacking Regulatory Models*, 89 GEO. L. J. 171 (2000) (discussing motivations behind hacking and criminal prosecutions).

20. Webjacking is the redirection of a Web site’s numeric Internet Protocol address or name resolution to an illegitimate or fake address. *See Hacking and Hate*, *supra* note 18. In practical terms, a person seeking to go to a specific Web site by typing in the domain name, ends up at a different site. For example, the webjacking of a Ku Klux Klan Web site, <http://www.kkk.com> to <http://www.hatewatch.org>, by unknown individuals shut down the Klan site for almost a week. *See id.*

21. Spoofing means to “deceive for the purpose of gaining access” to the resources of another. WHATIS?COM ENCYCLOPEDIA, *supra* note 19, at 675, available at http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci213039,00html. However, to spoof an e-mail includes forging an

mail bombs,²³ and sending viruses.²⁴ However, the most common forms of harassing activity on the Internet occur through Web sites, e-mails, and message boards.²⁵ Hate-mongers have been especially vigilant in doling out racial epithets, libelous statements, offensive or sexually graphic pictures, threats of violence, and personal information postings about their targets.²⁶

When the Internet is used for illegal aims or to exact harms upon other individuals, the injured party will often seek a remedy. Victims may seek redress through legal action, which in turn raises many questions. Should lawyers rely on traditional legal causes of action and concepts to challenge Internet activity? What deficiencies will these tradi-

e-mail by taking on another's identity. *Hacking and Hate*, *supra* note 18. Therefore, a harasser can send e-mail and post messages in their victim's name.

22. Cybersquatting is typically the purchase of an Internet domain name for the purpose of selling it to the company that will eventually want to use the name. WHATIS?COM'S ENCYCLOPEDIA, *supra* note 19, at 163, available at http://searchwebservices.techtarget.com/sDefinition/0,,sid-26_gci213900,00.html. Domain names are sold on a first come, first serve basis. *Id.* It is usually a concern in the e-commerce area, but cybersquatting can be used for noncommercial gains as well. *See id.* In 1998, for example, white supremacists "purchased 10 Internet domains with addresses that sounded like mainstream newspapers" and directed "unsuspecting readers to the nation's oldest white hate site, Stormfront." Ros Davidson, *Web of Hate*, SALON (Oct. 16, 1998), at <http://www.salon.com/news/1998/10/16news.html>. Likewise, Hatewatch.org, a leading online hate watchdog group, has been targeted by anti-gay cybersquatters using the URLs hatewatch.com and hatewatch.net. *See* Steve Silberman, *Who Owns Hate on the Net?*, WIRED (June 5, 1998), at <http://www.wired.com/news/culture/0,1284,12761,00.html>. *See generally* John Mercer, Note, *Cybersquatting: Blackmail on the Information Superhighway*, 6 B.U. J. SCI. & TECH. L. 11 (2000) (discussing the issues surrounding cybersquatting). For a legislative response to cybersquatting see *infra* note 27.

23. A denial of service attack is an action that results in the loss of service of an online resource. *See* WHATIS?COM ENCYCLOPEDIA, *supra* note 19, at 181, available at http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci213591,00.html. There are many different forms of such attacks. *See id.* The most common form of denial of service is a Buffer Overflow Attack in which multiple e-mails, requests for information, or some form of traffic is sent to the server or network address in order to shut it down. *See id.*; *Hacking and Hate*, *supra* note 18. In November 2001, the FBI National Infrastructure Protection Center reported that extremist groups were adopting the power of modern technology and concluded that although extremist groups' cyberattacks were limited to unsophisticated e-mail bombs and threatening content, the increase in technical competency could lead to network based attacks that included the nation's infrastructures. *See* National Infrastructure Protection Center, *Highlights*, Issue 10-01 (Nov. 10, 2001), at <http://www.nipc.gov/publications/highlights/2001/highlight-01-10.pdf>; *see also* Brian McWilliams, *Internet An Ideal Tool for Extremists - FBI*, NEWSBYTES, at 2001 WL 23420348.

24. *See* WHATIS?COM ENCYCLOPEDIA, *supra* note 19, at 771, available at http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci213306,00.html ("A virus is a piece of programming code usually disguised as something else that causes some unexpected and usually undesirable event."); *see also* O'Neill, *supra* note 19, at 246.

25. *See* Andrew Backover, *Hate Sets Up Shop on Internet: Groups Push E-extremism*, DENV. POST, Nov. 9, 1999, at E1 (e-mail is the most popular vehicle for "bigots") (citing David Goldman, Executive Director of HateWatch.org).

26. *See* Anti Defamation League, *Poisoning the Web: Hatred Online*, at http://www.adl.org/poisoning_web/introduction.asp (last visited Oct. 4, 2002) [hereinafter *Poisoning the Web*]; *Hacking and Hate*, *supra* note 18.

tional actions have in addressing such activity? Will new causes of action develop as society identifies, defines, and quantifies what it considers new harms evolving from interaction on the Internet?²⁷ Arguments on the relationship between the Internet and law range from advocating absolutely no legal regulation,²⁸ to simply applying current laws,²⁹ to the development of new laws to deal with the medium's unique characteristics.³⁰ The legal rules that will impact this medium are nascent.³¹ Until

27. Such developments are rapidly emerging. For example, the Anticybersquatting Consumer Protection Act (ACPA) permits a private cause of action against a person who in bad faith with the intent to profit uses a domain name that is identical or similar to a trademark owner's famous name or distinctive mark. See 15 U.S.C. § 1125(d) (2000). Also, at least thirty-five states have a cyberstalking statute. See David Crary, *Computer Link: States Joining Forces to Throw Net Over Cyberstalkers*, THE SAN DIEGO UNION-TRIB., July 17, 2001, at 5; see also Joseph C. Merschman, Note, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L. J. 255 (2001) (discussing why current stalking statutes do not address the problem of cyberstalking). For suggestions for new laws, see Tthesis, *supra* note 16, at 868 (arguing for criminal statutes punishing the dissemination of hate speech on the Internet).

28. See, e.g., Henry H. Peritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?* 12 BERKELEY TECH. L.J. 413, 419 (1997) ("self-governance is desirable for electronic communities"); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 543 (1997); L. Trotter Hardy, *The Proper Legal Regime for Cyberspace*, 55 U. PITT. L. REV. 993, 1029 (1994); John P. Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 9, 1996), at http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration. ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone.").

29. See, e.g., Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHIC. LEGAL F. 207, 207-16 (1996); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1201 (1998) (arguing that the application of traditional rules of jurisdiction and choice of laws can be applied to cyberspace); *State Sues Landlord for Specifying White Tenants*, N.J. LAW., Aug. 7, 2000 (discussing state-filed complaint against landlord for advertising on his Web page the rental of a three-bedroom apartment "for whites only").

30. See, e.g., David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN L. REV. 1367, 1367-1402 (1996) (discussing that cyberspace requires distinct laws and rules from those that regulate other areas); Jonathan J. Rusch, *Cyberspace and the "Devil's Hatband,"* 24 SEATTLE U. L. REV. 577, 582-92 (2000) (advocating through an analogy to the Devil's Hatband, what cowboys in the Old West called barbed wire that was used to both fence in cattle and keep cattle out, that regulating the Internet may be beneficial); Tthesis, *supra* note 16, at 863-64 ("What is needed is a legal scheme to regulate the Internet because the messages transmitted through that social space have physical, psychological, and cultural effects on real places and real people."); Merschman, *supra* note 27, at 278-92 (analyzing potential legal solutions for cyberstalking). For a general discussion of the arguments on legal regulation of the Internet, see Sally Greenberg, *Threats, Harassment, and Hate Online: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 694-95 (1997); Viktor Mayer-Schonberger, *Impeach the Internet*, 46 LOY. L. REV. 569, 570-77 (2000) (discussing pros and cons of applying laws to the Internet).

31. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) ("Needless to say, the legal rules that will govern this new medium are just beginning to take shape."). For an interesting discussion on cyberspace law see Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

new legal rules develop, lawyers will rely on traditional causes of action and theories to challenge a broad range of activities on the Internet.³²

Although applying tort law to bias motivated conduct is not a new concept,³³ as the forms of harassment and intimidation morph with their application to the Internet medium, so too must the ways in which lawyers challenge such transmutations. Significant discussion and litigation is necessary to (1) determine exactly how tort law should be and will be applied to the Internet, and (2) decide if it will be necessary to identify new harms as society struggles to define what constitutes a legally cognizable injury based on Internet activity.³⁴ The debate has just begun as to how tort principles will impact human interaction on the Internet.³⁵

One of the few cases applying the tort of intentional infliction of emotional distress to online conduct is the Bonnie Jouhari case, *Wilson*.³⁶ Al-

32. See Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace Into International Shoe*, 8 SETON HALL CONST. L.J. 763, 777-79 (1998); Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375 (1999). For an international perspective, see Daniel P. Schafer, *Canada's Approach to Jurisdiction Over Cybertorts: BrainTech v. Kostiuk*, 23 FORDHAM INT'L L.J. 1186 (2000); Tara Blake Garfinkel, Comment, *Jurisdiction Over Communication Torts: Can You Be Pulled Into Another Country's Courts System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 TRANSNAT'L LAW. 489 (1996).

33. See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 29 (2001) ("In recent decades, the tort action for intentional infliction of emotional distress has evolved further to punish racism, sexism, and bullying in the workplace."); see e.g., *Cotton v. Duncan*, No. 93 C 3875, 1993 WL 473622, at *5-6 (N.D. Ill. 1993) (rejecting defendant's request to dismiss plaintiff's intentional infliction of emotional distress claim for attempting to burn a wooden cross inscribed "KKK rules" on African American family's lawn); *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1113-16, 1131 (D. Or. 2000) (upholding damages recovery for intentional infliction of emotional distress, tort of invasion, and public disclosure of private facts against defendant who mailed letters to lesbian plaintiff that used derogatory remarks, inflammatory language and death threats); see *infra* note 154 (enumerating Southern Poverty Law Center Cases).

34. "Each medium of expression may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (dealing with the regulation of broadcast media).

35. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement entirely online."); KOENIG & RUSTAD, *supra* note 33, at 219 ("It is unclear how tort law will make the transition as the American economy is transformed from a durable good-producing economy to one based upon intellectual property, information, and services.").

36. See *Wilson*, 2000 WL 988268, at *18-19. *But see, e.g., Lenhoff v. Getty*, No. 97CIV.9458, 2000 WL 977900, at *8, 9 (S.D.N.Y. 2000) (granting defendant summary judgment, because even if true, the sending of unwanted junk e-mails to plaintiff and placement of an ad with the phone number of plaintiff family's place of business is not sufficiently outrageous under New York law); *Lian v. Sedgwick James of N.Y.*, 992 F. Supp. 644, 646, 652 (S.D.N.Y. 1998) (granting summary judgment to supervisor and former employer because the sending of an e-mail to plaintiff's co-workers stating that supervisor and plaintiff had agreed that plaintiff would begin seeking other employment did not constitute extreme and outrageous conduct); *Rall v. Hellman*, 726 N.Y.S.2d 629 (N.Y. App. Div. 2001) (granting defendant's motion to dismiss because the alleged fabrication of an e-mail disseminated in plaintiff's name that made him "appear as a rude, petty, self-absorbed

though Internet conduct generally, and cyberassment in particular, may be challenged with a variety of tort causes of action,³⁷ this article suggests that, as in *Wilson*, lawyers should consider the tort of intentional infliction of emotional distress to challenge and deter bias motivated cyberassment.³⁸

Part I of this article briefly explains how hate permeates society in the United States through multiple venues, like the heads of the Hydra of ancient Greece.³⁹ Hate rhetoric that permeates society often shifts from merely espousing views, to sponsoring bias motivated acts that ultimately harm individuals and communities.⁴⁰ In an attempt to diminish the harmful effects of the Hate Hydra, society responds in a variety of ways, including legal action.⁴¹ In turn, one method right-wing extremists use to counter-respond is the organizational philosophy of "leaderless resistance."⁴² Part I concludes with a description of leaderless resistance and the ways in which right-wing extremists have adopted this philosophy to advance their many causes, including terrorism against peoples of color, religious minorities, and others.⁴³

Part II explores the Internet's role as the new head of the Hate Hydra. It is the newest venue for white supremacists to disseminate their

writer/cartoonist" which insulted the New York City cartooning industry was not outrageous and shocking to satisfy an intentional infliction of emotional distress claim).

37. See *Compuserve Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1019-26 (S.D. Oh. 1997) (finding trespass to chattel cause of action and granting a preliminary injunction on behalf of the private service provider being spammed by defendant). But see *Marczeski v. Law*, 122 F. Supp. 2d 315, 325 (D. Conn. 2000) ("A threat by telephone or on the Internet is not a civil assault."). For arguments for the use of common law tort law in dealing with Internet activity, see Susan Lyman, Comment, *Civil Remedies for the Victims of Computer Viruses*, 21 SW. U. L. REV. 1169, 1170-71 (1992) (arguing the possible application of trespass to chattel, conversion, negligence, and intentional interference with business relations for victims of computer viruses); Susan Ballantine, Note, *Computer Network Trespasses: Solving New Problems With Old Solutions*, 57 WASH. & LEE L. REV. 209, 238-42 (2000) (proposing trespass to land, instead of trespass to chattel, as possible remedy for private network providers bombarded with unsolicited bulk e-mail or spam).

38. This article focuses on online acts of harassment by individuals toward another based on animus or hate, it does not address passive Web sites that merely advocate a particular viewpoint. For discussions on the pros and cons of legal regulation of hate speech on the Web, see Tsesis, *supra* note 16; Rachel Weintraub-Reiter, Note, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145 (1998); Siegel, *supra* note 32. See, e.g., Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL'Y 287 (2001); Paul Meller, *Europe Moving Toward Ban on Internet Hate Speech*, N. Y. TIMES, Nov. 10, 2001, at 3C.

39. See *infra* notes 51-63.

40. See *infra* notes 51, 59.

41. See *infra* note 63.

42. For a definition of leaderless resistance, see *infra* note 64.

43. See *infra* notes 66-74.

viewpoints.⁴⁴ This part describes the proliferation of hate on the Internet.⁴⁵

Part III outlines some of the medium-specific characteristics of the Internet that should be considered in crafting a legal response to the cyber-head of the Hate Hydra. Specifically, the Internet's role as a force multiplier, the opportunity it offers for anonymous activity, and the slow response of law enforcement in dealing with Internet interaction should be factored into legal doctrines and future responses to online harassment.⁴⁶

Part IV suggests that future litigants should consider the tort of intentional infliction of emotional distress as a viable bow in the quiver to attack the new head of the Hate Hydra.⁴⁷ Tort law is a logical way to respond to online activities, considering its role in allocating responsibility for harms that arise from human activity, which apply to both on- and offline harms. This part includes a history of the tort of intentional infliction of emotional distress, provides an overview of its elements, and discusses why it is a viable cause of action to challenge cyberassment. Part IV concludes with an analysis of the elements of the tort as applied to the specific facts of *Wilson*, with a particular focus on proving the element of "extreme and outrageous conduct."⁴⁸ The analysis places emphasis on this element's requirement that the court consider the context or situation in which the conduct occurred, including the new challenges presented by the Internet.

44. See BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 135, 174-78 (2001).

45. See *infra* Part II and notes 76-102.

46. See *infra* Part III and notes 103-147. This article does not specifically address the continuum between ideologies of hate groups and more mainstream acts of discrimination and white supremacy.

47. See *infra* Part IV and accompanying footnotes. Although this article suggests legal action, it is not to say that litigation is the only way to address hate motivated acts that harm and intimidate others. There must be a multifaceted attack on intolerance and there is a role for everyone interested in this endeavor. See, e.g., Christopher Wolf, Anti Defamation League, *Racists, Bigots, and the Law on the Internet*, at http://www.adl.org/internet/internet_law1.asp (last visited Oct. 9, 2002). The ADL worked with Yahoo to remove hate groups from "clubs" on Yahoo's server in compliance with Yahoo's own service agreements which prohibited hate speech. *Id.* The ADL developed Hate Filter, designed for use by parents to filter out some of the most offensive hate sites. Anti-Defamation League, *ADL Releases Free Filtering Software Designed to Keep Hate Out of Homes*, at <http://www.adl.org/presrele/internet%5F75/4054%5F75.asp> (last visited Oct. 28, 2002); Steve Silberman, *Branding Bigotry*, WIRE, at <http://www.wired.com/news/culture/0,1284,13682,00.html> (last visited Oct. 6, 2002). For every \$100 donation to the organization, HateWatch.org registered a domain name that would be sought out by hate groups, such as swastika.com, thereby taking the name out of circulation on the Internet. *Id.*; http://www.tolerance.org/hate_internet/index.jsp (last visited Oct. 26, 2002) (taking visitor on a hate tour of Web sites in order to educate the viewer on what is on the Web). See additional responses to hate motivated acts and words *infra* note 63.

48. See *infra* Part IV.C. and accompanying footnotes.

Part V advocates that the First Amendment should not be invoked as a shield to protect bias motivated cyberassment in cases like *Wilson* because such harassment amounts to a “true threat.” This part discusses the parameters of the true threats exception to the First Amendment, the most recent Internet threats case, *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*,⁴⁹ and the Supreme Court’s significant oversight in failing to discuss the unique characteristics of the Internet that bolster a true threats analysis. Finally, Part V concludes by arguing that employing the tort of intentional infliction of emotional distress in cyberassment cases like *Wilson* is consistent with the interests the First Amendment true threats exception seeks to protect.⁵⁰

I. THE HATE HYDRA

Hate activity on the Internet cannot be taken out of the mainstream social and political context. The Internet did not create the hate phenomenon, but it serves as a new and unique venue through which bigots can organize and propagate hatred.⁵¹ To many Americans, the phenomenon of hate is like the Hydra of ancient Greece—it is impossible to destroy completely, for even when it is squelched or diminished in one place, it reemerges in another, often with more virulence.⁵²

Hatred permeates our society and culture through multiple venues, including: politics,⁵³ religious institutions,⁵⁴ public demonstrations,⁵⁵

49. 290 F.3d 1058 (9th Cir. 2002).

50. See *infra* Part V and accompanying footnotes.

51. For an overview of the different hate groups and ideologies see PERRY, *supra* note 44, at 135-78 (2001); Tolerance.org, *U.S. Map of Hate Groups*, at <http://www.tolerance.org/maps/hate/index.html> (last visited Oct. 6, 2002); ANTI-DEFAMATION LEAGUE, *EXTREMISM IN AMERICA: A GUIDE* (2002) [hereinafter *EXTREMISM IN AMERICA*].

52. The Hydra was a serpent that lived in the swamps of Lerna and terrorized the Greek countryside. See DONNA ROSENBERG, *WORLD MYTHOLOGY: AN ANTHOLOGY OF THE GREAT MYTHS AND EPICS* 27 (2d ed. 1994). Lerneans believed that the Hydra was impossible to kill because its central head was immortal and that, when one of its other eight heads was cut off, two heads grew in its place. See *id.*; *Hydra (mythology)*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2002, at <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761562446>; see also *The Lernean Hydra*, at <http://www.perseus.tufts.edu/hercules/hydra.html> (last visited Oct. 6, 2002). Hercules destroyed the creature. See *id.* He lured it from the safety of the swamp by shooting flaming arrows at it. *Id.* He then severed each head and had Iolas torch it with flames. See *id.* He then chopped off the central head and buried it under a heavy rock. See ROSENBERG, *supra*. Today the term hydra means a complex problem that continually causes compounding difficulties. See *Hydra (mythology)*, *supra*.

53. White supremacists hope to further their more extreme hate-based ideology by influencing and gaining access to mainstream U.S. politics. For example, in 1999, the *Intelligence Report* exposed the Council of Conservative Citizens (CCC), a mainstream organization on the political right, as the literal “reincarnation of the racist White Citizens Councils (WCC) of the 1950s and 1960s.” *Sharks in the Mainstream*, INTELLIGENCE REP., No. 93, Winter 1999, at 21, available at <http://www.splcenter.org/intelligenceproject/ip-4i5.html>. As the *Intelligence Report* showed, the CCC had access to some of politics most influential leaders, including Senate Majority Leader Trent Lott (R-Miss.), then Mississippi Gov. Fordice, and Rep. Bob Barr (R-Ga.) and counted more than

thirty state legislators in Alabama, Georgia, and Mississippi among its 5,000 members. *Id.*; Anti-Defamation League, *Council of Conservative Citizens: Promoting a Racist Agenda*, at http://www.adl.org/special_reports/ccc/ccc_intro.asp (last visited Oct. 9, 2002). However, CCC is not the only example of the extremist right shaping more widely accepted political parties and officials. Larry Pratt, who runs the Gun Owners of America—which claims more than 150,000 members—served as the co-chairman of Pat Buchanan's 1996 presidential campaign. See Frederick Clarkson, *Anti-Abortion Extremism*, INTELLIGENCE REP., No. 91, Summer 1998, at 9, available at <http://www.splcenter.org/intelligenceproject/ip-4g1.html>; *False Patriots*, INTELLIGENCE REP., No. 102, Summer 2001, at 25, available at <http://www.splcenter.org/intelligenceproject/ip-4r2.html>. Alongside neo-Nazis and Klansman, Pratt attended a meeting on October 23, 1992, in Estes Park, Colorado, which was organized by Pete Peters, a Christian Identity pastor, to develop a framework for the militia movement. See *False Patriots*, *supra*. Watchdog groups later found that Pratt had also provided editorial support to the anti-Semitic United Sovereigns of America and that the Gun Owners of America had helped to fund a white supremacist legal aid organization. See *id.*; *Bombs, Bullets, Bodies*, INTELLIGENCE REP., No. 97, Winter 2000, at 15, available at <http://www.splcenter.org/intelligenceproject/ip-4m1.html>; KENNETH STERN, *A FORCE UPON THE PLAIN* 117-18 (1996). Of course, some hate-mongers go beyond providing political support to mainstream candidates and instead position themselves as contenders for political office. In 1989, David Duke, former Imperial Wizard of the Knights of the Ku Klux Klan and founder of both the racist National Association for the Advancement of White People and the White Youth Alliance, a group associated with the National Socialist White People's Party, ran for and won a seat in the Louisiana House of Representatives. See The Center for New Community, *A Brief History of David Duke's White Supremacist Career*, at <http://www.stopduke.org/history.html> (last visited Oct. 9, 2002). In 1990, Duke bid unsuccessfully for a U.S. Senate seat, but managed to garner 60% of the white vote and the support of 43.5% of the general populous. *Id.* Today, Duke continues his work as a politically active "white racialist," serving as the chairman of the Republican Party Executive Committee (RPEC) in St. Tammany Parish, Louisiana. See *id.*; see also JAMES RIDGEWAY, *BLOOD IN THE FACE* 164-74 (2d ed. 1995); BILL STANTON, *KLANWATCH: BRINGING THE KU KLUX KLAN TO JUSTICE* 85-86 (1991). For an overview of Duke's views, see Anti-Defamation League, *David Duke in His Own Words*, at http://www.adl.org/special_reports/duke_own_words/duke_intro.html (last visited Oct. 9, 2002).

54. The following briefly summarizes two bigoted religious ideologies. *Christian Identity Theology*—Christian Identity holds that whites, not Jews, are the chosen people favored by God and casts Jews as biological descendants of Satan. Tolerance.org, *U.S. Map of Hate Groups, Christian Identity*, at http://www.tolerance.org/maps/hate/group.jsp?map_data_type_id=2 (last visited Oct. 1, 2002). People of color are identified as soulless "mud people." *Id.* In 2001, the Intelligence Project tracked thirty-one Christian Identity churches in the United States. *Odyssey of Hate*, INTELLIGENCE REP., No. 95, Summer 1999, at 42, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4k8.html>.

Virulent Homophobia as Faith—The most notorious faction of gay-hating faith may well heed from Topeka, Kansas. Tolerance.org, *Bully Pulpit: Fred Phelps' Hold on Topeka*, at http://www.tolerance.org/news/article_hate.jsp?id=129 (last visited Oct. 1, 2002). Reverend Fred Phelps of the Westboro Baptist Church runs the infamous "God Hates Fags" Web site and often pickets funerals of gay hate murder victims and others whom the church perceives as being "fags" and "fag-enablers." *Id.*; *God Hates Fags: Love Crusades*, at <http://www.godhatesfags.com/main/index.html> (last visited Oct. 5, 2002); THE TOPEKA-CAPITAL JOURNAL, *Loving God's Hate: An In-Depth Look at Reverend Fred Phelps and the Westboro Baptist Church*, at <http://cjonline.com/webindepth/phelps/> (last visited Oct. 1, 2002).

For discussions of hate and intolerance seeping into mainstream religions, see *Confederates in the Pulpit*, INTELLIGENCE REP., No. 101, Spring 2001, at 51-55, available at <http://www.splcenter.org/cgi-bin/printassistant.pl?page=/intelligenceproject/ip-4q5.html>. In Spring 2001, the *Intelligence Report* found that the neo-Confederate hate group, the League of the South, was positioning itself to take over the Presbyterian Church of America (PCA), "a conservative Southern denomination founded in 1973 that has more than 300,000 North American members." *Id.* As to a more controversial issue of hate and religion, both the Southern Poverty Law Center and the Anti-Defamation League ("ADL") categorize the Nation of Islam ("NOI") as a separatist, anti-Semitic

music,⁵⁶ talk radio,⁵⁷ television,⁵⁸ and print media.⁵⁹ The values and messages of hate rhetoric emanating from these venues can, and do, inspire

religious group. See Joseph J. Levin, Jr., Southern Poverty Law Center, *Farrakhan: A Long History of Hate*, at <http://www.splcenter.org/cgi-bin/goframe.pl?refname=/centerinfo/lci-7.html> (last visited Oct. 1, 2002); Anti-Defamation League, *Nation of Islam*, at http://www.adl.org/main_islam.asp (last visited Oct. 1, 2002). The ADL offers an extensive collection of anti-Semitic and anti-White quotes from NOI's leader, Louis Farrakhan, as evidence that the religious organization is a purveyor of hate. Anti-Defamation League, *Minister Louis Farrakhan: In His Own Words*, at http://www.adl.org/special_reports/farrakhan_own_words/on_jews.asp (last visited Oct. 1, 2002); see also Tolerance.org, *U.S. Map of Hate Group: Black Separatists*, at http://www.tolerance.org/maps/hate-group.jsp?map_data_type_id=1 (last visited Oct. 1, 2002).

55. Hate groups, like organizations involved in other social movements, use public demonstrations and marches to help raise awareness about their cause and to recruit new members. In summer 2001, Tolerance.org identified more than twenty-five white supremacist gatherings scheduled across the country. See Tolerance.org, *Hate in the News: Summer Schedule of Hate*, at http://www.tolerance.org/news/article_hate.jsp?id=232 (last visited Oct. 2, 2002). The ADL tracked thirty-seven such events from April to August 2002. See Anti-Defamation League, *Archive of Extremist Events by State: 2000*, at http://www.adl.org/learn/Events_2001/events_archive_2002-print.asp (last visited Oct. 5, 2002).

56. Music has become one of the major communicators of white power ideology. The Center for New Community, for example, tracks 123 domestic and 228 international white power bands. Tolerance.org, *Hate in the News: White Power Bands*, at http://www.tolerance.org/news/article_hate.jsp?id=403 (last visited Oct. 1, 2002). These musical groups either "express white supremacist ideas in their music or are involved with white supremacist organizations." *Id.* See also Anti-Defamation League, *Hate on Display: White Power Music*, at http://www.adl.org/hate_symbols/music.asp (last visited Oct. 1, 2002). Of course, white power musicians do not have a monopoly on hatred. Musicians in other genres also promote homophobia, racism or misogyny on occasion. In 2001, for example, Grammy-award-winning artist Eminem came under heavy fire for his homophobic and misogynist lyrics. See Scott Hirschfeld, Gay, Lesbian and Straight Education Network, *Do Words Hurt?* (Feb. 14, 2001), at <http://www.glsen.org/templates/resources/record.html?section=16&record=555>.

57. Talk radio has become a significant venue for white supremacists. In the 1990s, anti-government extremists and hate groups took hold of radio—AM, FM, shortwave and low-power stations—as primary means of ideological distribution. Carla Brooks Johnston, *Radical Radio Redux*, INTELLIGENCE REP., No. 91, Summer 1998, at 17-18, available at <http://splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4g5.html>. In 1998, far right extremists broadcast on at least 366 AM stations, forty FM stations and seven shortwave stations. *Id.* For example, William Pierce, leader of the neo-Nazi National Alliance, currently transmits his half-hour radio program, "American Dissident Voices," over nine AM or FM radio stations. See Anti-Defamation League, *The Growing Danger of the National Alliance*, at http://www.adl.org/explosion%5Fof%5Fhate/explosion_of_hate.asp (last visited Oct. 1, 2002). Shortwave offers the messengers of hate the broadest reach, with an estimated 2.5 billion people tuned in worldwide. James Latham, *From America, with Hate*, INTELLIGENCE REP., No. 103, Fall 2001, at 56, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4s8.html>. In 1990, shortwave offered just five hours of hate broadcast weekly, but, by the new millennium, 275 hours of hate-filled shows were available to listeners each week. International Center for Human Rights in Media, Radio for Peace International, *Background of Hate Speech on Short-wave Radio*, available at <http://www.rfpi.org/ichrm.html> (last visited Oct. 1, 2002).

58. Thanks in large part to the Cable Act of 1984, which forbids cable operators from exercising editorial discretion in the selection of public access shows, white power advocates have also moved toward cable programming as a means of getting their messages across. See Anti-Defamation League, *May Cable Television Stations Restrict or Regulate Extremists Who Want to Appear on Public Access Programming?*, at <http://www.adl.org/20faq/answer20.asp> (last visited Mar. 21, 2002). Perhaps the first contemporary hate-based television program came from Tom Metzger and the White Aryan Resistance (WAR). In 1984, Metzger began producing and televising

individuals to harass, intimidate, and commit acts of violence against others.⁶⁰ Such hatred ultimately creates complex problems that harm

a half-hour program titled *Race and Reason*, which broadcast in major markets such as Los Angeles, San Francisco, Atlanta, Memphis, and Phoenix. See Anti-Defamation League, *Tom Metzger/White Aryan Resistance*, at <http://www.adl.org/learn/ext%5Fus/metzger.asp> (last visited Oct. 1, 2002). WAR claims the program eventually reached forty-nine markets in thirteen states. *Id.* Several white supremacist outfits have followed Metzger's lead in recent years, including the Invisible Knights of the Ku Klux Klan in Lafayette, Louisiana, the United Klans of America in Reading, Pennsylvania, and a Canadian-based anti-Semitic Holocaust denial advocate. See Anti-Defamation League, *Hate Groups and Black Church Arsons—State by State* (June 20, 1996), at http://www.adl.org/presrele/DiRaB_41/2766_41.asp; Department of Housing and Urban Development, *Cuomo Announces Settlement with Chaplain to the Ku Klux Klan Accused of Housing Discrimination* (May 11, 2000), at <http://www.hud.gov/local/okl/prs00100.html>; Bob Aldrich, *Public Station Channels Messages of Hate*, LOS GATOS WEEKLY-TIMES (Jan. 24, 1996), available at <http://www.svcn.com/archives/lgtw/01.24.96/public.station.html>.

59. Hate groups do more than crank out flyers at the neighborhood Kinkos; many produce and distribute glossy magazines, journals and newsletters. Among them is *American Renaissance*, founded and edited by Jared Taylor. Academic in tone, its pages are dedicated to proving that peoples of color are inferior to whites. See Anti-Defamation League, *American Renaissance*, at http://www.adl.org/learn/Ext_US/amren.asp?xpicked=5&item=amren (last visited Oct. 5, 2002); *The Annals of Hate*, INTELLIGENCE REP., No. 93, Winter 1999, at 49, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4i8html>. WAR, self-billed as “the most racist newspaper on earth,” is the print arm of the White Aryan Resistance and offers vulgar cartoons and in-your-face racist and anti-Semitic text. *Id.* For more information on the White Aryan Resistance, see also MORRIS DEES & STEVE FIFFER, *HATE ON TRIAL* (1993). The racist Council of Conservative Citizens (CCC) publishes *The Citizens Informer*, which boasts circulation of 20,000. See EXTREMISM IN AMERICA, *supra* note 51, at 253, available at http://adl.org/learn/ext_us/CCCcitizens.asp?xpicked=3&itme=12 (last visited Oct. 1, 2002); *Sharks in the Mainstream*, INTELLIGENCE REP., No. 93, Winter 1999, at 21, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4i5html>. The king of white power publication, however, is the neo-Nazi National Alliance, which publishes *Resistance* magazine, *National Vanguard*, the *National Alliance Bulletin*, a comic book series (*New World Order Comix*) and a newsletter titled *Free Speech*. Anti-Defamation League, *National Alliance*, at http://www.adl.org/learn/Ext_US/N_Alliance.asp?xpicked=3&item=16 (last visited Oct. 1, 2002). William Pierce, head of the National Alliance, authored the most influential book on the white power scene, *The Turner Diaries*, as well as its lesser-known sequel, *Hunter*. *Id.* *The Turner Diaries* is a fictional account of a race war in the United States—a war fought by “white patriots” who massacre Jews, peoples of color and “race traitors.” See generally ANDREW MACDONALD, *THE TURNER DIARIES* (2d ed. 1980). The book inspired the creation of a white supremacist cell called the Order, members of which shot and killed Jewish radio host Allen Berg. See *National Alliance*, *supra*; Kenneth Stern, *Hate and the Internet*, 1 J. OF HATE STUDIES 57, 68 (2001-02). *The Turner Diaries* also served as the blueprint for the Oklahoma City bombing. *National Alliance*, *supra*. For in-depth information on ties between *The Turner Diaries* and domestic terrorism see generally MORRIS DEES & JAMES CORCORAN, *GATHERING STORM: AMERICA'S MILITIA THREAT* (1996); KEVIN FLYNN & GARY GERHARDT, *THE SILENT BROTHERHOOD* (1989); STERN, *A FORCE UPON THE PLAIN*, *supra* note 53. William Pierce died in July 2002. *Facing the Future*, INTELLIGENCE REP., No. 107, Fall 2002, at 31. For a discussion of how the *Turner Diaries* relate to the cyberassment of Bonnie Jouhari in *Wilson*, see *infra* Part IV.C.2. and accompanying footnotes.

60. See Kay Lazar, *Media-Savvy Group Spreads Hate to Massachusettes*, B. HERALD, Sept. 9, 2001, at 1 (citing Jack Levin, director of the Brudnick Center on Violence at Northwestern University as saying that less than five percent of all hate crimes “are committed by members of organized groups”).

individuals, families, and communities.⁶¹ Therefore, as messages of hate and bias motivated activities emerge from these venues—much like heads of the Hydra—individuals, communities, civil rights organizations, and law enforcement agencies respond in attempts to diminish their harmful effects on society.⁶² These responses include: creation of watchdog groups, counter-demonstrations, observation of groups by law enforcement, infiltration of groups by law enforcement, criminal prosecution for criminal acts, hate crime enhancement penalties, and civil lawsuits against extremist groups.⁶³ These methods assume an identifiable group that can be monitored or tracked.

The responses to hate by mainstream society have prompted counter-responses by extremist groups to preserve their survival. Many such groups employ the method of “leaderless resistance” as an organizing strategy against the government or an enemy.⁶⁴ This strategy rejects

61. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (finding an enhancement penalty for bias motivated crimes constitutional after accepting Wisconsin’s argument that the enhancement was not because of disagreement with the offenders views, but because it redresses a “distinct emotional harm” and “incites community unrest”). For an expansive view of the harms of hate crimes, see Lu-in Wang, *The Complexities of Hate*, 60 OHIO ST. L. J. 799 (1999).

62. See generally Bill Wassmuth & M.J. Bryant, *Not in Our World: A Perspective of Community Organizing Against Hate*, 1 J. OF HATE STUDIES 109 (2001-02) (discussing a community’s response to an out-break of anti-Semitism).

63. Responses to hatred come in many forms. The Center for New Community, the Northwest Coalition for Human Dignity and the Positive Youth Foundation, for example, launched the “Turn It Down” campaign to counter the burgeoning white power music scene. See *Turn It Down*, at <http://www.turnitdown.com/about.html> (last visited Oct. 1, 2002). Meanwhile, Tolerance.org offers a guide for parents about how they can identify and discuss hatecore music with children. See Tolerance.org, *Hate Music Tutorial*, at http://www.tolerance.org/tol_at_home/guide.jsp?ar=268 (last visited Oct. 3, 2002). Other groups have countered the use of radio and television by hate-mongers. In 1990, for example, Radio for Peace International founded the International Center for Human Rights in Media (ICHRM), which monitors, chronicles, and archives hatred in media. See International Center for Human Rights in Media, Radio for Peace International, at <http://www.rfpi.org/ichrm.html> (last visited Oct. 1, 2002). At Deep Dish TV, a national satellite network, producers chose to take hate use of cable access channels head-on with its 1991 program, “Public Access: Spigot for Bigots or Channels for Change?” See Deep Dish TV, *Public Access: Spigot for Bigots or Channels for Change?*, at <http://www.igc.org/deepdish/aboutus/cat/cat05.html> (last visited Oct. 1, 2002). When hate groups come to town, there are two options: stay away or confront them. The Southern Poverty Law Center encourages people to hold a unity rally elsewhere, allowing the hate-mongers to walk down empty streets. Southern Poverty Law Center, *Ten Ways to Fight Hate*, at <http://www.splcenter.org/cgi-bin/printassist.pl?page=intelligenceproject/twtfindex.html> (last visited Oct. 3, 2002). Anti-Racist Action, on the other hand, encourages community members to counter-demonstrate when hate groups march, letting them know that their hateful views are not welcomed. See Anti-Racist Action, *411 on ARA*, at <http://www.geocities.com/CapitolHill/Lobby/2853/411.html> (last visited Oct. 1, 2002). Civil law suits have also been successful as responses to hate. See *infra* note 154.

64. Louis Beam, *Leaderless Resistance*, THE SEDITIONIST (Feb. 1992), at <http://www.louis-beam.com/leaderless.htm>.

A system of organization that is based upon the cell organization, but does not have any central control or direction . . . All individuals and groups operate independently of each other, and never report to a central headquarters or single leader for direction or instruction, as would those who belong to a typical pyramid organization.

Id.

traditional hierarchical organizational structures, advocating instead the creation of “phantom cells,” a network of small groups and individuals that operate independently of each other and have no central command.⁶⁵ Although the more traditional hierarchical structure may be useful to indoctrinate new members and to create propaganda to reach “freedom fighters,” such formal organization creates vulnerability when used to perpetrate hate crimes or “resist state tyranny.”⁶⁶

Louis Beam, former Grand Dragon of the Texas Knights of the Ku Klux Klan, is credited with introducing the concept of leaderless resistance to the extremist right.⁶⁷ Extremist groups are easily infiltrated by government operatives and watchdog groups, often corrupted by weak leadership, and subject to multi-million dollar civil suits, which can lead to organizational bankruptcy.⁶⁸ To withstand these threats, Beam argued that such organizations should adopt a philosophy of leaderless resistance.⁶⁹ Theoretically, the only tie that binds the “phantom cells” is a shared ideological mission. Each cell is responsible for the manner in which to achieve the mission, reacting to events with its own tactics of resistance.⁷⁰

Leaderless resistance has become one of the primary organizing strategies for fringe movements, including right-wing extremist groups.⁷¹ A significant component of the strategy of right-wing extremists includes violence and criminality against the government and individuals because of race, ethnicity, gender, national origin, and religion.⁷² The individual

65. Beam, *supra* note 64; DEES & CORCORAN, *supra* note 59, at 206; PERRY, *supra* note 44, at 174; STERN, A FORCE UPON THE PLAIN, *supra* note 53, at 36; *By Any Means Necessary*, INTELLIGENCE REP., No. 102, Summer 2001, at 65, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=intelligenceproject/ip-4r8.html>.

66. Beam, *supra* note 64 (“Let the night be filled with a thousand points of resistance . . . like the fog which forms when conditions are right and disappears when they are not, so must the resistance to tyranny be.”).

67. *By Any Means Necessary*, *supra* note 65, at 65; Beam, *supra* note 64; see also DEES & CORCORAN, *supra* note 59, at 205. For a history of Louis Beam, see *The Firebrand*, INTELLIGENCE REP., No. 106, Summer 2002, at 11-21, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=intelligenceproject/ip-4v4.html>.

68. See Beam, *supra* note 64; McWilliams, *supra* note 23 (“Extremist groups have adopted the leaderless resistance model in part to ‘limit damage from penetration by authorities’ seeking information about impending attacks.”); Alex Curtis, *Why Leaderless Resistance*, at <ftp://ftp.nycr.net/pub/users/tallpaul/docs/fascist/fd192.txt> (last visited Oct. 5, 2002).

69. Beam, *supra* note 64. Beam credited Colonel Ulius Louis Amoss, an opponent of Communism, with developing the theory of leaderless resistance. *Id.* For an explanation of leaderless resistance in the militia movement, see R.J. Larizza, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct*, 47 MERCER L. REV. 581, 588 (1996).

70. Beam, *supra* note 64.

71. See *Hacking and Hate*, *supra* note 18.

72. PERRY, *supra* note 44, at 174 (“[Beam] is very much in favor of a nationwide network of invisible cells armed and ready to engage in an all-out assault against the ‘menacing horde’ of minorities and against the state.”). White supremacists are not the only advocates of leaderless resistance. Groups on the far left have adopted it as well. See *Leaderless Resistance*, at

cell that perpetrates these violent acts is often referred to as the “lone wolf.”⁷³ It has come as no surprise to organizations and individuals who monitor extremist groups that the rise in leaderless resistance has paralleled the rising popularity of the Internet.⁷⁴

How society responds to hate and extremism serves a critical role in keeping in-check the changing dynamics of hatred in America. An effective response can reduce the harmful effects of hatred on individuals and communities. But the Internet’s arrival provides yet another venue through which bigoted individuals and groups can disseminate their hateful messages, engage in bias motivated activity, and fuel leaderless resistance. The Internet has become the new head of the Hate Hydra.⁷⁵

II. THE NEW HEAD OF THE HATE HYDRA—THE INTERNET

This part will demonstrate that the Internet is yet another venue for hate-mongers. Like the Greek myth, this new venue, or head of the Hydra, may be all the more virulent because it may circumvent the effective tactics of traditional offline responses to hate-based conduct. Therefore, responses to the new head of the Hate Hydra must consider the unique challenges the medium presents as discussed in Part III.

The Internet is an offspring of the Advanced Research Project Agency (“ARPANET”), a communication system initially created for

<http://biblio.anarchy99.net/docs/anarchisme/leaderless.resistance.htm> (last visited Oct. 1, 2002) (advocating violent leaderless resistance strategy for anarchist movement). The Earth Liberation Front (ELF), a left-wing environmental organization advocates “leaderless resistance” to violently attack structures and institutions. *By Any Means Necessary*, *supra* note 65, at 65. ELF disavows harm to “any animal, human or non-human.” *Id.*

73. See *Hacking and Hate*, *supra* note 18.

74. See EXTREMISM IN AMERICA, *supra* note 51, at 75. Alex Curtis has become a leading proponent of “lone wolf” activism on the Internet. *Id.* (“Curtis encouraged fellow racists to act alone in committing violent crimes so that they would not incriminate others. He called for the elimination of nonwhites by “whatever means necessary” and promoted assassination, illegal drug sales, and biological warfare as useful tactics.”); *Despite Tough Talk, Curtis Tells All*, INTELLIGENCE REP., No. 102, Summer 2001, at 4, available at <http://www.splcenter.org/cgi-bin/printassist.pl?page=/intelligenceproject/ip-4r10.html>. Curtis used his on-line newsletter to promote “lone wolf” violence against the government. *Id.*

75. “[T]he main benefit of [the Internet] is a person can learn about our church without ever ordering one of our books or seeing one of our members. They can just learn through the screen.” Interview by Hatewatch.org with Reverend Matt Hale, leader of the World Church of the Creator, (Oct. 13, 1997), at <http://hatewatch.org/research.php?op=readarticle&lid=15>; see also Interview by HateWatch.org with Reverend Fred Phelps (Sept. 29, 1997), at <http://hatewatch.org/research.php?op=readarticle&lid=13> (explaining that the sidewalks and the Internet are left for a gospel preacher to spread his message because the media, entertainment industry, academia, and most churches are controlled by the sodomite agenda and the control of courts, and political institutions is not too far behind). For a summary of Reverend Phelps’ public anti-gay demonstrations, see *supra* note 54; Steve Dunne, *Where the Hate Is: Steve Dunne Explores White Supremacy on the Web*, THE GUARDIAN, June 25, 2001, at 2001 WL 23244844 (“Whereas we previously could only reach people with pamphlets, or by holding rallies with no more than a few hundred people . . . now we can reach potentially millions of people.” (quoting Don Black, founder of Stormfront)).

use by military personnel, defense contractors, and university researchers.⁷⁶ The system demonstrated that networks could link with each other, enabling communication and information exchange across the globe.⁷⁷ Even at its inception, the Internet created a unique opportunity to develop and build communities without geographical or physical limitations.⁷⁸ The Internet unites people across the world at the intersection of time, space, and communal interest.⁷⁹

Regardless of the source from which an individual obtains access to the Internet, once accomplished, he or she may have access to a variety of communication networks and information retrieval systems, including: electronic mail (e-mail), list serves, newsgroups, chat rooms, bulletin boards, and the World Wide Web.⁸⁰ These systems make up the medium known as "cyberspace."⁸¹ The Internet offers users an infinite number of subject matters, activities, and interactive opportunities.

In March 1995, former Klansman Don Black established the first hate Web site, Stormfront.org.⁸² Today, the site receives anywhere from

76. *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997); *see also* 47 U.S.C. § 230(f)(1) (2000) ("The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks."); *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997). The Internet is not physical or tangible, "but rather a giant network which interconnects innumerable smaller groups of linked computer networks." *Id.*

77. *See Reno*, 521 U.S. at 850. Online access makes information, posted messages, and activities on the Internet available to anyone in the world. *Id.* at 851; *see also* R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, 68 WIS. LAW. 11 (1995) (discussing legal issues arising from the use of the Internet).

78. For more information on Internet history, *see* The Internet Society, *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (last visited Oct. 1, 2002); MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 7 (2001).

79. *See* HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 5 (1993) ("Virtual communities are social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace."); *WHATIS?COM'S* ENCYCLOPEDIA, *supra* note 19, at 766 ("A virtual community is a community of people sharing common interests, ideas, and feelings over the Internet or other collaborative networks.").

80. *See Reno*, 521 U.S. at 851; Merschman, *supra* note 27, at 275. The Internet is an immense global network that connects computers via telephone or cable lines to each other and a plethora of electronically stored information. A user needs only a computer, a modem, a telephone or cable line, and an Internet Service Provider (ISP) to communicate with, or access information from, other computers all over the world. *Id.*

81. *Reno*, 521 U.S. at 851. Cyberspace is "located in no particular geographical location but available to anyone, anywhere in the world with access to the Internet." *Id.* William Gibson is often credited with creating the term "cyberspace" in his book *Neuromancer*. *WHATIS?COM'S* ENCYCLOPEDIA, *supra* note 19, at 163; *see also* Muth, *supra* note 77, at 11 ("Cyberspace refers to the interaction of people and business over computer networks, electronic bulletin boards, and commercial online services. The largest and most visible manifestation of cyberspace is the Internet.").

82. *Hate on the Net: As New Sites Arise, So Do Legal Issues*, INTELLIGENCE REP., No. 93, Winter 1999, at 46-47; *see also Poisoning the Web*, *supra* note 26. At the age of seventeen, Black joined the Neo-Nazi National Socialist White People's Party and after graduating from college he began organizing for David Duke. *Id.* In 1982, Black went to prison for plotting to violently

2,000 hits a day to 20,000 a week⁸³ and is described as a “supermarket of online hate,” offering a display of many forms of anti-Semitism and racism.⁸⁴ The site also includes a section for children,⁸⁵ which is maintained by Black’s adolescent son.⁸⁶ Black also sells Web hosting services through Stormfront.org, which houses other hate sites.⁸⁷

Black’s site is not alone.⁸⁸ Indeed, most major hate groups in the United States have Web sites.⁸⁹ The Southern Poverty Law Center’s Intelligence Project identified 405 domestic hate sites on the Internet in 2001, an estimate that does not include individual Web publishers front-

overthrow the government of Dominica, a Caribbean island he and other white supremacists intended to make a “white state.” *Id.*; see also Tara McKelvey, *Father and Son Team on Hate Site*, USA TODAY.COM (Oct. 31, 2001), available at <http://www.usatoday.com/life/2001-07-16-kid-hate-sites.htm>.

83. *Poisoning the Web*, *supra* note 26 (quoting Black as receiving 2000 hits a day); Dunne, *supra* note 75 (quoting Black’s estimate of 20,000 hits a week); McKelvey, *supra* note 82 (citing more than 5,000 unduplicated visits daily to Stormfront.org).

84. *Poisoning the Web*, *supra* note 26.

85. Forty-five percent of American children, or more than thirty million persons under the age of eighteen have access to the Internet. See Lee Raine & Dan Packel, The Pew Internet Project, *More Online, Doing More* (Feb. 18, 2001), at <http://www.pewinternet.org>. Seventy-three percent of persons between the ages of twelve and seventeen and twenty-nine percent of persons under the age of twelve have been online. *Id.*; see also McKelvey, *supra* note 82 (according to the Simon Weisenthal Center, in 2000, there were approximately forty-four white extremist sites that targeted children); see, e.g., Robert Ratish, *Objectionable E-mail Sent to Girl Leads to Bias Report*, THE RECORD, July 10, 2001, at L3. A fourteen-year-old girl contacted police after receiving harassing e-mail containing racial epithets against African-Americans, Jews, Hispanics, and homosexuals. *Id.* The National Alliance offers kids the game “Ethnic Cleansing.” Jeffrey L. Brown, *Enabling Kids to Play Dangerous Games*, THE BOSTON GLOBE, Apr. 20, 2002, at A13. Set in an urban area, the objective of the game is to kill Jews and people of color. *Id.* It emits monkey sounds or “Oy Vey” when a black person or Jew is killed. Josh Plotnik, *The Game that Goes Too Far*, CORNELL DAILY SUN, Mar. 26, 2002, available at <http://www.cornellsun.com/articles/5072/>. Ethnic Cleansing can be downloaded off the National Alliance Web site for \$14.88. *Id.*

86. See <http://www.kids.stormfront.org/default.shtml> (last visited Oct. 2, 2002); McKelvey, *supra* note 82 (citing approximately 344,00 visitors to the children’s site in two years); see also Richard Firstman, *Hate Online America*, Family PC from ZDWIRE (Apr. 16, 2001), at 2001 WL 7573054 (“Matt Hale’s World Church of the Creator features a children’s page with crossword puzzles and games highlighting words that teach ‘racial loyalty.’ Words such as ‘nigger’ and ‘kike.’”).

87. See *Poisoning the Web*, *supra* note 26; Keith Perine, *The Trouble with Regulating Hate*, THE INDUSTRY STANDARD, July 24, 2000, at <http://www.thestandard.com/article/0,1902,16967-2,00.html>.

88. For a discussion of Black’s site and other hate sites on the Internet, see PERRY, *supra* note 44, at 174-78; Stern, *Hate and the Internet*, *supra* note 59; MICHAEL WHINE, CYBERCRIME: LAW ENFORCEMENT, SECURITY AND SURVEILLANCE IN THE INFORMATION AGE 234-50 (Douglas Thomas & Brian D. Loader eds., 2000); Anti-Defamation League, *Stop Hate*, at http://www.adl.org/-hate-patrol/hate_patrol_print.html (last visited Oct. 9, 2002); *Active Hate Sites on the Internet in the Year 2001*, INTELLIGENCE REP., No. 105, Spring 2002, at 38-43.

89. See, e.g., <http://www.Aryan-Nations.org>; <http://www.davidduke.com>; <http://www.bog-ritz.com>; <http://www.creator.org>; www.resist.com; <http://www.scripturesforamerica.org>; <http://www.natall.com>; <http://www.cofcc.org>; <http://www.kkkk.net>; <http://www.american-knights.com>.

ing as legitimate groups.⁹⁰ The Simon Weisenthal Center monitors approximately 2,300 Web sites it considers “problematic.”⁹¹ Weisenthal’s figure includes 500 sites maintained by Europeans, but hosted by American servers to avoid European laws.⁹² Some Web sites advocate hatred of gays and lesbians, such as Reverend Fred Phelps’s site www.godhatesfags.com,⁹³ and bigotry against Hispanics and other groups perceived to be “non-white immigrants.”⁹⁴

The Internet offers communities of hate, as it does all communities, unlimited opportunities.⁹⁵ These opportunities include the ability to do the following: create a sense of community for participants, regardless of location in the world;⁹⁶ limit participation and interaction for members only, in order to strategize about the mission without outside interfer-

90. *Active Hate Sites on the Internet in the Year 2001*, *supra* note 88, at 38-43. The number of hate sites in 2000 was 366. *Active Hate Sites on the Internet in the Year 2000*, INTELLIGENCE REP., No. 101, Spring 2001, at 40-41. This listing includes Ku Klux Klan, Neo Nazi, Racist Skinhead, Identity, Black Separatists, Neo-Confederate and others. *Id.* Hatewatch estimated that there were 500 hate sites. *See* Perine, *supra* note 87.

91. *See* Perine, *supra* note 87.

92. *Id.*; *see also* Kevin Boyle, *Hate Speech – The United States Versus the Rest of the World*, 53 ME. L. REV. 487 (2001).

93. *See Hate, American Style*, WIRED (July 2, 1997), at <http://www.wired.com/news/culture/0,1284,4872,00.html> (last visited Oct. 9, 2002).

94. *See* <http://www.americanimmigrationcontrol.com/index.htm> (last visited Oct. 11, 2002); *see also Blood on the Border*, INTELLIGENCE REP., No. 101, Spring 2001, at 8-15, available at <http://www.splcenter.org/intelligenceproject/ip-4q1.html>. In a posting to a neo-Nazi National Alliance E-group in an attempt to spark a race war, a member wrote, “All it takes is for bodies to show up, and for the Mexicans in L.A. to start reprisals against Whites in California. Many wars have started over a single shot. I seriously urge any lone-wolf to leave a few bodies in the desert to get things warmed up.” *Id.* at 8. Other anti-immigration groups include the National Organization for American European Rights, at <http://www.duke.org> (last visited Oct. 11, 2002), and The Social Contract Press, at <http://www.thesocialcontract.com> (last visited Oct. 11, 2002).

95. *See* Tsesis, *supra* note 16, at 832 (“One of the downsides of the Internet is that it provides a global forum for the advocates of intolerance and inequality.”); Leets, *supra* note 38, at 287 (“The World Wide Web has allowed marginalized extremist groups with messages of hate to have a more visible and accessible public platform.”); Siegel, *supra* note 32, at 377 (“The Internet presents a forum in which racists can take their messages and transmit them to individuals around the world with little effort.”); Greenberg, *supra* note 30, at 673 (“The Net’s characteristics make it the ideal tool for harassment, threats, and the dissemination of hateful messages.”). *But see Cyberhate Revisited*, INTELLIGENCE REP., No. 101, Spring 2001, at 44, available at <http://www.splcenter.org/intelligenceproject/ip-4q7.html> (reporting an interview with former director of HateWatch, David Goldman, who says that Extremists are not as successful on the Web as those who track hate groups expected).

96. *See 163 and Counting . . . Hate Groups Find Home on the Net*, INTELLIGENCE REP., No. 89, Winter 1998 at 24, available at <http://www.splcenter.org/intelligenceproject/ip-4e2.html>; *Reevaluating the Net*, INTELLIGENCE REP., No. 102, Summer 2001, at 54, available at <http://www.splcenter.org/intelligenceproject/ip-4r5.html> (discussing a growing consensus among experts who study hate on the Web that extremism and hate flourish in the e-mail, discussion groups and chat rooms more so than on Web sites). *See Reno*, 521 U.S. at 870. The Internet “provides a relatively unlimited, low-cost capacity for communication of all kinds.” *Id.*

ence;⁹⁷ recruit new members to the collective;⁹⁸ and market products.⁹⁹ However, some enter cyberspace not simply to spread their message, interact with other like-minded individuals, or sell goods, but to cyberass those whom they perceive as the enemy.¹⁰⁰ As the law stands today, white supremacist Web sites and their producers have a First Amend-

97. See Anti-Defamation League, *The Consequences of Right-Wing Extremism on the Internet: Coordinating Extremist Events*, at http://www.adl.org/internet/extremism_rw/cord.asp (last visited Oct. 30, 2002); *163 and Counting . . . Hate Groups Find Home on the Net*, *supra* note 96, at 25. For a history of white supremacist activity on Bulletin Board Systems ("BBS") beginning as early as 1983, see Hate and Ethnic Violence, *Early Racist and Antisemitic Bulletin Board Systems (BBS)*, at <http://www.publiceye.org/hate/hate.html> (last visited Oct. 12, 2002); see also DEES & CORCORAN, *supra* note 59, at 40 (crediting neo-Nazi Louis Beam with creating the bulletin board system, Aryan Liberty Net, in 1984).

98. See Tsesis, *supra* note 16, at 832 ("Hate groups take advantage of this relatively inexpensive medium for ideological distribution. They can spread pamphlets, letters, and images to groups of users who can anonymously participate in racist meetings, think tanks, and planning committees. One of the downsides of the Internet is that it provides a global forum for the advocates of intolerance and inequality.").

99. See Anti-Defamation League, *The Consequences of Right-Wing Extremism on the Internet: Making Money Online*, at http://www.adl.org/internet/extremism_rw/e-commerce.asp (last visited Oct. 9, 2002). The Internet is playing a major role in the distribution of white power music. See Kenneth Lovett, *Kids Finding a Download of Trouble: Hate-Groups Music Abundant of the Net*, N.Y. POST, Apr. 25, 2001, at 6. In April 2001, for example, an investigation by the *New York Post* found scores of hatecore titles available for free download on the Web. *Id.* Titles include "Kill all them Jews" by Neo Hate and "Gook Ears" by Ian Stuart and the Klansmen. *Id.* In *Midtown Boot Boys* "Gays Gotta Go," lyrics encourage listeners to "Stop the threat of AIDS today; Cripple, maim or kill a gay; We've got to take a stand today; We've got to wage a war on gays." *Id.* The leading United States distributor of hatecore music is Resistance Records, currently owned and operated by the National Alliance, the nation's most infamous neo-Nazi organization. See Anti-Defamation League, *Deafening Hate: The Revival of Resistance Records*, at http://www.adl.org/resistance_records/print.html (last visited Oct. 9, 2002); Tolerance.org, *The Major Players*, at http://tolerance.org/news/article_hate.jsp?id=408 (last visited Oct. 9, 2002); Erik K. Ward et al., *Sounds of Violence*, INTELLIGENCE REP., No. 96, Fall 1999, at 29-32, available at <http://www.splcenter.org/intelligenceproject/ip-416.html>. With more than 250 titles in its catalogue, watchdog groups believe Resistance Records has the potential to generate millions of dollars of profits for the National Alliance.

100. Sara Salzman, a Jewish woman, has been the subject of constant harassment through message boards on the Internet. Julie Jargon, *P.S. I Hate You*, WESTWORD.COM (Aug. 10, 2000), at <http://www.westword.com/issues/2000-08-10/features3.html/print.html>. The alt.revisionism Usenet site is a forum in which individuals who believe that the Holocaust never happened post messages and dialogue with one another. *Id.* Salzman and other anti-revisionists post messages challenging or disputing the beliefs of the revisionists with evidence that the Holocaust happened. *Id.* Shortly after Salzman began participating in the alt.revisionism site, someone began to post offensive messages about her to alt.revisionism and white power news groups. See *id.* Salzman received hundreds of e-mail messages that had been posted about her, including those referring to her as a "dyke," and "a dog fucking Jewish thing," accusing Salzman of child abuse and stating that she forced her daughter to give men oral sex to support the Nizkor Project. *Id.* Other messages posted private facts about Salzman, such as her address, including a map with directions to her house, personal details about her family, and threats of violence. See *id.* For a discussion of the harms of hate speech and a creative argument in defamation law to challenge such speech on the Internet, see Victor Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 COLUMBIA HUM. RTS. L. REV. 1 (2001).

ment right to advocate their viewpoints and to disseminate their hatred, no matter how distasteful, crass, offensive, or hurtful to others.¹⁰¹

In some situations, however, site operators go beyond mere ideological rhetoric, advocating strategies and tactics of cyberassment, blurring the line between protected activities and legally actionable conduct.¹⁰² Such conduct should be actionable, not because of the viewpoints espoused, but because bigots cross the line from espousing views, to exacting harm on others. When bias motivated cyberassers identify specific individuals, make serious threats of violence against them, create an environment that perpetuates fear and terror in their victims, and cause emotional harms, they cross the line. Responses to such cyberassment are necessary, but traditional offline responses to bias motivated activity may not be sufficient. With this new medium come new and unique challenges and dangers that warrant scrutiny through a different lens.

III. NEW CHALLENGES OF THE INTERNET

In developing responses to cyberassment and other activity on the Internet, it is necessary to recognize that the Internet presents challenges unique to the medium itself.¹⁰³ This part will explain the challenges

101. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 269-70 (1964). "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Collins v. Smith*, 447 F. Supp. 676, 690 (N.D. Ill. 1978) (quoting *Street v. N. Y.*, 394 U.S. 576, 592 (1969)), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). In that case, the court struck down an ordinance used to prohibit neo-Nazis from marching in Skokie, Illinois, a town with a large Jewish population. See *id.* at 680, 685-86. "It is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear." *Id.* at 702. For proposals on regulating hate speech, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97 (1998). But see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990) (arguing that regulating racist speech on campus violates First Amendment principles).

102. Gary Stephen Dellapenta posted messages under a woman's name in America Online ("AOL") chat rooms and on the Internet saying that she had an unfulfilled fantasy of being raped. *Cyberstalking Law Invoked*, WIRED (Jan. 25, 1999), at <http://www.wired.com/news/print/0,1294,17504,00.html>. The posts included her name, address, phone number and instructions for disarming her security system. Six men who read the postings showed up at her house, some in the middle of the night. *Id.* She received dozens of calls from men leaving filthy messages. *Id.* The woman placed notes on her front door explaining that the Internet ads were a hoax, but new messages were posted on the Internet explaining that the notes were part of the fantasy and to disregard them. *Id.* The woman was so disturbed that she lost her job and dropped from 130 pounds to just ninety-five pounds. *Id.* Dellapenta was sentenced to six years imprisonment, the maximum allowable under California's cyberstalking statute. See Press Release, L.A. County District Attorney's Office Media Relations, *Cyber-Stalker Sentenced to Six Years in State Prison* (July 22, 1999), at http://da.co.la.ca.us/_text/mr/1999/072299a.htm.

103. See A Report of the President's Working Group on Unlawful Conduct on the Internet, *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet* (Mar.

unique to the medium that may be significant in crafting a legal response to cyberassment. First, the Internet serves as a “force multiplier.”¹⁰⁴ Second, the Internet provides a veil of anonymity for harassers.¹⁰⁵ Third, because the Internet is a new medium, law enforcement has been slow to respond to requests for assistance.¹⁰⁶ Advocates must take each of these factors into consideration when addressing a tortious claim arising from Web-generated conduct.

A. *The Internet as a “Force Multiplier”*

The Internet serves as a “force multiplier.”¹⁰⁷ Unlike any other medium, the Internet permits anyone with ideas, information, or a message to reach vast numbers of people.¹⁰⁸ Additionally, it is relatively inexpensive.¹⁰⁹ Before the Internet, the reach of a white supremacist’s inflammatory views was limited to pamphlets or flyers distributed to groups of people within physical proximity.¹¹⁰ Furthermore, the costs to dissemi-

2000), at <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm> [hereinafter *The Electronic Frontier*] (“New technologies can, of course, create new forms of socially undesirable behavior. More often they provide new ways of committing traditionally undesirable behavior.”); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). The Supreme Court in addressing regulation of broadcast media stated: “Each medium of expression may present its own problems.” *Id.*

104. See *The Electronic Frontier*, *supra* note 103.

105. See *infra* Part III.B and accompanying footnotes.

106. See *infra* Part III.C and accompanying footnotes.

107. *The Electronic Frontier*, *supra* note 103 (“The potential to reach vast audiences easily means that the scale of unlawful conduct involving the use of the Internet is often much wider than the same conduct in the offline world. To borrow a military analogy, use of the Internet can be a ‘force multiplier.’”). The term “force multiplier” is a military term that means “any factor that increases the combat power of a force.” See *ACADEMIC PRESS DICTIONARY OF SCIENCE AND TECHNOLOGY*, 865 (Christopher Morris ed., 1992).

108. The Supreme Court recognizes the Internet’s capabilities. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”); *CASS SUNSTEIN, REPUBLIC.COM* 62 (2001) (finding in an informal survey that several hate groups had well over a hundred thousand hits and at least one with over one million hits); see, e.g., *Blakely v. Continental Airlines*, 730 A.2d 854, 863 (N.J. Super. Ct. App. Div. 1999) (“While Internet communications share some of the same features as print and television communications, some features such as the virtually limitless accessibility of many Internet connections renders this communication medium unique.”).

109. Kreimer, *supra* note 19, at 124 (“Access to the Internet lowers the costs of producing and disseminating information and argument, and hence the capital to enter public dialogue.”).

110. See Dunne, *supra* note 75 (quoting Don Black, founder of Stormfront) (“Whereas we previously could only reach people with pamphlets, or by holding rallies with no more than a few hundred people . . . now we can reach potentially millions of people.”); Backover, *supra* note 25 (quoting Don Black).

As far as recruiting, its been the biggest breakthrough I’ve seen in the 30 years I have been involved in this. Prior to the ‘Net,’ when we had to rely on printed literature and leaflets and occasional public meeting, we were limited in the number of people we could reach. Now we can reach potentially millions of people.

Id.

nate the message grew proportionally with the size of the audience. With the advent of the Internet, the same message can be generated cheaply and has an extensive reach, no longer hampered by physical or geographical limitations.¹¹¹

Although the ability to reach large audiences with a message is generally a positive and welcomed feature of the Internet, it also has its downside. The downside exists when organizations or social movements, like right-wing extremists, advocate not simply their viewpoint or message, but harassment, intimidation, and violence against others.¹¹² Access to vast numbers of people makes it easier to disseminate a message, and it also makes it easier to encourage third parties, in any location, to engage in behavior that harms others. The ability to encourage third parties is particularly dangerous when used by organizations that follow leaderless resistance.

A variety of mediums are utilized to facilitate communications among leaderless resistance cells, but the Internet makes it significantly easier than other mediums for individuals or groups to encourage third parties anywhere in the world, with whom they have no prior relationship, to engage in illegal or violent acts. The Internet provides a powerful and essential tool to implement an effective leaderless resistance campaign. Recent incidents indicate not only that Web-based messages of hate-centric leaderless resistance are revolutionizing the workings of the white power movement, but also that they are taking root and resulting in violence.¹¹³

On the weekend of July 4, 1999, for example, Benjamin Smith went on a shooting spree in Illinois and Indiana, killing an African-American man and an Asian postal worker and injuring at least eight others.¹¹⁴

111. At the end of 2000, more than 104 million American adults and thirty million children under the age of eighteen had access to the Internet. See Raine & Packel, *supra* note 85. The number of worldwide users is expected to reach more than 502 million by 2003. *The Electronic Frontier*, *supra* note 103. The Internet makes it possible for interaction among individuals in the same building, one block away, or 3000 miles away. See A Report from the Attorney General to the Vice President, *Cyberstalking: A New Challenge for Law Enforcement and Industry* (Aug. 1999), at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm> [hereinafter *Cyberstalking Report*].

112. Brian Levin, California State University law professor and director of the Center for the Study of Hate and Extremism: "There is a difference between flying an airplane drunk and cycling drunk. The omnipresence of the Web makes such things as threats a more potent social ill." Lakshmi Chaudhry, *Slo-Mo Justice Against Hate*, WIREd (Jan. 18, 2001), at <http://www.wired.com/news/print/0,1294,33710,00.html>.

113. The HBO film, *Hate.com: Extremists on the Internet*, exposed some of the most menacing of hate sites and their creators—and revealed how site operators—via leaderless resistance—deliberately inspired site visitors to commit hate crimes. *Hate.com: Extremists on the Internet* (HBO television broadcast 2000), available at http://www.hbo.com/hate/about_film/index.shtml.

114. Abraham H. Foxman, Anti-Defamation League, *Stopping Extremism Before the Crime*, at <http://www.adl.org/terrorism%5Famerica/op%5Fed%5F053002.asp> (last visited Oct. 31, 2002); Anti-Defamation League, *The Consequences of Right-Wing Extremism on the Internet*, at

Smith, a member of the neo-Nazi World Church of the Creator, frequently visited the hate group's Web site—an Internet portal advocating leaderless violence.¹¹⁵ Shortly before the shooting spree, Smith told a documentary filmmaker that, “It wasn't really ‘til I got on the Internet, read some literature of these groups, that . . . it really all came together.”¹¹⁶

In June 1999, two brothers, Matthew and Tyler Williams, were charged with the murder of a gay couple in California and the arsons of three synagogues.¹¹⁷ Matthew Williams reportedly accepted the radical right philosophies he read online and downloaded scores of printouts from white power sites.¹¹⁸ Several weeks before their crime spree, phone records indicated that a call was placed from the Williams' phone to a telephone number assigned to Alex Curtis.¹¹⁹ Curtis, a former Ku Klux Klansmen and ardent racist, provides an online incentive to adherents of leaderless resistance, the “Lone Wolf point system,” through which murderers can “score” points toward the designation of “Aryan warrior.”¹²⁰

In April 2000, Richard Baumhammers killed five people—his Jewish neighbor, two Asian Americans, a man of Indian descent, and an African-American man.¹²¹ Baumhammers was a frequent visitor to white supremacist Web sites and strongly anti-immigrant.¹²² In fact, Baumhammers visited Tom Metzger's White Aryan Resistance (WAR) Web site before going on the shooting spree.¹²³ Furthermore, not only was Baumhammers a frequent guest to hate sites, but he had also launched a

http://adl.org/internet/extremism_rw/inspiring.asp (last visited Oct. 9, 2002) [hereinafter *The Consequences of Right-Wing Extremism on the Internet*]; see also *Shooting Their Way into the New Millennium*, INTELLIGENCE REP., No. 97, Winter 2000, at 29, available at <http://www.splcenter.org/intelligenceproject/ip-4ml.html>.

115. See *The Consequences of Right-Wing Extremism on the Internet*, supra note 114.

116. *Id.*

117. *Id.*

118. See *id.*

119. *Id.*

120. Anti-Defamation League, *Alex Curtis: 'By Whatever Means Necessary,'* at http://www.adl.org/curtis/by_whatever_means.asp (last visited Oct. 9, 2002) (explaining, for example, “Policy Formulation and Decision Making Leaders of International Satanic anti-Christ Conspiracy for Control of the World” are worth one point, members of Congress are worth one-fifth of a point and a national leader of the NAACP is worth 1/12 of a point. One point earns the designation of “Aryan Warrior.”); Anti-Defamation League, *Alex Curtis: Growing Influence*, at http://www.adl.org/curtis/growing_influence.asp (last visited Oct. 9, 2002).

121. *Pennsylvania Rampage*, INTELLIGENCE REP., No. 98, Spring 2000, at 41, available at <http://www.splcenter.org/intelligenceproject/ip-4n7.html>.

122. *The Consequences of Right-Wing Extremism on the Internet*, supra note 114; see also *Pennsylvania Rampage*, supra note 121, at 41.

123. *The Consequences of Right-Wing Extremism on the Internet*, supra, note 114.

Web site of his own for his "Free Market Party," which was filled with links to other "white rights" organizations.¹²⁴

In a November 2000 article about leaderless resistance and lone wolves—individuals who independently carry out the ideology's call to violence—Alex Curtis cited Oklahoma City bomber Timothy McVeigh, Richard Baumhammers, Ben Smith, the Williams Brothers, and others as "leaderless resisters" who "brought racial activism out of the right-wing morass and into the embryonic stages of a resistance."¹²⁵ Benjamin Smith, the Williams brothers, and Richard Baumhammers were "lone wolves" who often visited white supremacist Web sites—Internet portals espousing racist and bigoted ideologies, violence against minorities, and leaderless resistance. Indeed, their crimes make it clear that the Internet is fueling hate-based violence. The cost and the likelihood of continued Web-spawned leaderless resistance cannot be ignored.

The potential dangers of leaderless resistance on the Internet have not gone unnoticed. In November 2001, the FBI National Infrastructure Protection Center reported that extremists groups were adopting the power of modern technology, particularly the Internet, to facilitate aspects of leaderless resistance.¹²⁶ The report recognized extremist groups' violent capabilities, concluding that the use of leaderless resistance makes it more difficult for law enforcement to foresee their actions.¹²⁷

If a single hate site advocating leaderless resistance welcomed one million visitors—a very plausible reality considering that by 2003, more than 500 million people will be on the Internet¹²⁸—and if just one-tenth of one percent of those visitors responded to calls for hate-based violence, 10,000 bias crimes would occur. The Internet's force multiplier status, when coupled with bigotry and leaderless resistance, is a recipe for disaster that must be recognized when assessing civil claims as a response to bias motivated cyberassment.

124. *Id.*; see *Pittsburgh Gunman 'Had Racial Motives,'* BBC NEWS, at <http://news.bbc.co.uk/2/hi/world/americas/732290.stm> (last visited Oct. 9, 2002).

125. Alex Curtis, *Why Leaderless Resistance?*, at <ftp://ftp.nyct.net/pub/users/tallpaul/docs/fascist/fd192.txt> (last visited Oct. 9, 2002). For more information on Alex Curtis see ANTI-DEFAMATION LEAGUE, *Alex Curtis*, in *EXTREMISM IN AMERICA*, *supra* note 51, at 75-82.

126. See National Infrastructure Protection Center, *supra* note 23; see also McWilliams, *supra* note 23.

127. See McWilliams, *supra* note 23.

128. *The Electronic Frontier*, *supra* note 103.

B. Anonymity

Another challenge presented by the Internet is that the new medium allows its users to operate under a veil of anonymity.¹²⁹ This anonymity exists in at least two forms: identity anonymity and access anonymity.

Many who surf the Internet, visiting Web sites, sending e-mails, and participating in message boards or online chats, do so under pseudonyms ("identity anonymity"). Although Internet Service Providers ("ISPs") require that users provide identifying information before accessing the Internet, individuals can overcome such requirements and remain anonymous by providing false personal information to the ISP.¹³⁰

Identity anonymity on the Internet is, in many ways, advantageous. The ability to conceal one's identity online can be liberating, permitting individuals to speak more freely, thereby fostering communication and open debate.¹³¹ Some argue that, because a participant's age, education level, race, gender, sexual orientation, or other distinguishing features can be concealed online, one is freed from the effects of stereotypes or prejudice that often pollute face-to-face communication.¹³²

However, identity anonymity creates a significant hurdle for plaintiffs seeking redress from offensive or undesirable activity via e-mail, message boards, and other Internet features.¹³³ Potential plaintiffs often

129. An interesting side note: the ability to remain anonymous on the Internet may create, expand or alter the ways in which we think of bias motivated harassment or discrimination based on perception. For example, a white person applies for a job online, and, for whatever reason, due to the online interview or interaction with the employer, the candidate is perceived to be African American and is refused the position because of this perception or belief.

130. Merschman, *supra* note 27, at 276 (explaining that anonymity can be achieved through Internet services such as Hotmail, that offer free e-mail accounts). ISPs can provide identifying information if requested, or if the ISP is required to do so by a civil subpoena. Of course, there is no guarantee that the information will be reliable. See *Cyberstalking Report*, *supra* note 111, at 4; Roger Rosen & Charles B. Rosenberg, *Suing Anonymous Defendants for Internet Defamation: Plaintiffs' Council Can Utilize Specific Procedures to Unmask an Online Wrongdoer*, L.A. LAW., Oct. 24, 2001, at 19; Greenberg, *supra* note 30, at 678; see also America Online, *Civil Subpoena Policy*, at <http://legal.web.aol.com/aol/aolpol/civilsubpoena.html> (last visited Oct. 12, 2002).

131. See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L. J. 1639, 1642 (1995).

132. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1330 (2000) (suggesting that cyberspace may change the manner in which race functions in America today because it enables racial anonymity and racial pseudonymity).

133. "The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor." *Columbia Ins. Co.*, 185 F.R.D. at 577-80 (balancing "the need to provide injured parties with a forum in which they may seek redress for grievances . . . against the legitimate and valuable right to participate in online forums anonymously and pseudonymously"). For an analysis of the use of defamation law suits as a way to identify and silence detractors of major corporations who make their opinions known online, see Joshua R.

have difficulty identifying whom to serve with papers or in what jurisdiction to institute criminal or civil proceedings.¹³⁴ More troubling, perhaps, is the impact identity anonymity of cyberassessors can have on victims. When cyberassessors operate with shielded identities, their victims cannot determine the identities of the persons involved, locate them, or assess the seriousness of the threats.¹³⁵ Indeed, cyberassessors may engage in persistent and outrageous conduct *because* they believe they cannot be identified.¹³⁶ Victims then face harassment and threats from unknown sources, which can have an even more terrifying effect on the victims' minds.

The Internet also creates "access anonymity" for its users, allowing people to view information on public access sites, including hate-based leaderless resistance portals, without being identified by the site's producer, the ISP, or others.¹³⁷ Unlike the publisher of an underground

Furman, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 233-49 (2001).

134. See Branscomb, *supra* note 131, at 1642-43; Kevin Whitelaw, *Fear and Dread in Cyberspace-Stalkers Go Online, Too. But They're Hard to Find*, U.S. NEWS AND WORLD REP., Nov. 4, 1996, at 50.

135. Justin Myer Lichterman, Note, *True Threats: Evolving Mens Rea Requirements for Violations of 18 U.S.C. § 875(C)*, 22 CARDOZO L. REV. 1961, 1963 n.6 (2001) ("People's belief that they can interact with one another anonymously affects their on-line conduct, demeanor, and activity because they avoid fear of embarrassment, humiliation, or punishment."); see, e.g., Greenberg, *supra* note 30, at 674-75; Branscomb, *supra* note 131, at 1642-43; Jonathan I. Edelman, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 231, 234-38 (1996); Andrew Jablon, Note, "God Mail:" *Authentication and Admissibility of Electronic Mail in Federal Courts*, 23 AM. CRIM. L. REV. 1387, 1394-95 (1997).

136. Identity anonymity permits someone to say things she may not say otherwise, or engage in a free exchange of ideas, and it also permits an individual to engage in offensive conduct he or she otherwise would not do, if they were in a face-to-face confrontation. See, e.g., Merschman, *supra* note 27, at 276 ("The Internet also facilitates stalking because its perceived 'impersonal' nature may make a person less apt to view his online behavior as stalking. Instead, he may view cyberstalking as non-confrontational and less aggressive than telephoning a victim, sending her a letter or gift, or spying on her in person, and therefore may be more inclined to commit the offense. The stalker may express things to an individual over the Internet that he would lack the courage to say if confronting that individual in person."); see also Branscomb, *supra* note 131, at 1642-43 ("Disguising the sources of messages or postings relieves their authors from responsibility for any harm that may ensue. This often encourages outrageous behavior without any opportunity for recourse to the law for redress of grievances.").

137. When individuals log onto the Web, the connections between their individual computers and the World Wide Web is identifiable through an Internet protocol address, or "IP address," which is assigned by ISPs. IP addresses can be used to track Web activity to an individual computer through a comparison of ISP and Web site logs for a particular IP address. Individuals can create full access anonymity online, however, simply by using computers in public libraries, schools or other public venues. Further, several companies offer access anonymity software for purchase. The Anonymizer, for example, offers encryption protection to shield Web activity from ISP tracking systems and others who might want to cybersnoop. See Anonymizer.com, *Threats of the Web, How Anonymizer Protects Your Surfing*, at <http://www.anonymizer.com/threats.shtml> (last visited Oct. 12, 2002); see also Somebody, *Frequently Asked Questions*, at <http://somebody.net/faqs.html> (last visited Oct. 7, 2002).

newspaper who holds a subscription list, a Web site operator has no easy way of determining if a particular user is a 60-year-old man or a 12-year-old child, much less where that user resides geographically.¹³⁸ In this way, a Web surfer can attain a broad array of information without being publicly identified with the materials in question; no one knows where she has been or what she has seen. Indeed, the only freely accessible trail of the surfer's online activity resides on her computer's hard drive, and the specific computer may be located in a public library or school and used by many people.

On the positive side, access anonymity allows an individual to inform herself about sensitive or personal information without fear or embarrassment.¹³⁹ For example, the Internet allows a teenager who is questioning her sexuality to access materials about homosexuality from leading medical practitioners like the American Psychological Association or from gay and lesbian cultural and advocacy organizations. The Internet enables the teen to access this information without fear of peers or family members identifying her as homosexual or, in a homophobic setting, labeling her as a "queer," "faggot," or "dyke."

However, access anonymity also provides substantial advantages for online cyberassers. Just as the hypothetical gay teen above cannot be identified as a "user" of online homosexual content, cyberassers also reap the benefits of access anonymity. Bigoted adherents of leaderless resistance, who find their "orders" online and then take action against individuals or communities, can be tied to the organizational Web site only if law enforcement first identifies them as suspects, and then conducts a fruitful search of their computers' hard drives.¹⁴⁰ For the victim, even if she knows where the online threat resides, the secret of her harassers' identities lie not at the Web site, but on unidentifiable hard drives. As a result, every person she sees, and the millions she does not, are her potential harassers and attackers.

The Internet provides both identity anonymity and access anonymity, which, although generally beneficial to the millions of people on the Web, exacerbate the victimization of persons targeted by cyberassers. When combined with the dangers presented by bigotry, leaderless resistance, and the force multiplier effect of the Internet, it is clear that the impact of anonymity must also be recognized when assessing civil claims related to cyberassment.

138. Of course, some Web sites require registration for use, but Web surfers can overcome these requirements. See *supra* notes 131-134 and accompanying text.

139. *Columbia Ins. Co.*, 185 F.R.D. at 578.

140. See *Cyberstalking Report*, *supra* note 111, at 3 ("[T]he veil of anonymity might encourage the perpetrator to continue . . . acts" and "some perpetrators, armed with the knowledge that their identity is unknown, might be more willing to pursue the victim at work or home, and the Internet can provide substantial information to this end.").

C. *Slow Response by Law Enforcement*

Not surprisingly, the response by law enforcement to cyberassment and criminal activities on the Internet in general has been slow to evolve because it is a new technology.¹⁴¹ Even if an online activity is defined as a crime under federal or state law, most law enforcement agencies lack the resources to investigate online crime and the training to track and expose it before offline harms occur.¹⁴² These problems are compounded by jurisdictional limitations of local law enforcement and by jurisdictional conflicts among different agencies.¹⁴³ For example, an individual living in Denver, Colorado might cyberass a victim who resides in Lubbock, Texas. The authorities in Texas may encounter challenges investigating the individual in Colorado. Even if the Texas agency decides to investigate the matter, it must have cooperation from Denver law enforcement agencies to do so.¹⁴⁴ Individuals who seek to commit crimes, cyberass, or intimidate others online appear to have free reign without fear of criminal prosecution.¹⁴⁵ Although changes are taking place within law enforcement agencies, their ability to respond to illicit Internet activity remains limited and will take some time to get up to speed.¹⁴⁶

When hate proponents shift from merely espousing their views to engaging in cyberassment, those cyberasssed must correspondingly seek

141. See *Cyberstalking Report*, *supra* note 111, at 5 (“Cyberstalking is a relatively new challenge for most law enforcement agencies . . . only a handful of agencies throughout the country have focused attention or resources specifically on the cyberstalking problem.”); *The Electronic Frontier*, *supra* note 103, at 4 (“Despite the general adequacy of laws that define the substance of criminal and other offenses, the Working Group finds that the Internet presents new and significant investigatory challenges for law enforcement at all levels.”). For a discussion of extremists employed in fields of law enforcement, see Robin Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1081-87 (1996).

142. See *Cyberstalking Report*, *supra* note 111, at 3; O’Neill, *supra* note 19, at 275.

143. See *Cyberstalking Report*, *supra* note 111, at 3 (explaining the frustration of jurisdictional limitations for local authority to investigate an Internet harassment case); Catherine Therese Clarke, *From Criminet to Cyber-Perp: Toward an Inclusive Approach to Policing the Evolving Criminal Mens Rea on the Internet*, 75 OR. L. REV. 191, 200-01 (1996).

144. See *Cyberstalking Report*, *supra* note 111, at 6.

145. Branscomb, *supra* note 131, at 1642.

146. There have been some criminal prosecutions for threats and harassment over the Internet. For example, in March 1998, more than sixty Latino students and employees of California State University, Los Angeles, and other academic institutions received a threatening e-mail, which read in part, “I’m going to come down and kill your wetback, affirmative action ass I hate wetbacks!!! Kill all wetbacks!” See California State University, Center for the Study of Hate and Extremism, *Have There Been Hate-Related Prosecutions or Civil Cases Pursued for Online Legal Violations?*, at <http://www.hatemonitor.org/faq.html> (last visited Oct. 7, 2002.). Just over a year later, Kingman Quon, a man of Asian descent, was sentenced to two years imprisonment for sending the e-mails. See *id.*; see also *United States v. Machado*, 195 F.3d 454 (9th Cir. 1999) (upholding defendant’s conviction for interference with federally protected activity by sending racist e-mails from a computer lab at the University of California, Irvine to sixty Asian-American students); *Cyberstalking Law Invoked*, *supra* note 102.

means in which to redress their harms. Just as offline responses to the many offline heads of the Hate Hydra have developed, so too must the responses to online tactics evolve. To challenge these tactics, legal advocates should appreciate not just the similarities of on- and offline harassment, but also their differences, so that their response will meet the objective of eliminating the harms of bias motivated conduct online. Some conduct will invariably be actionable under traditional tort causes of actions, while other conduct will test the parameters and limits of tort law. In testing those parameters, this article suggests that an appropriate response is the use of the intentional infliction of emotional distress as an old arrow in the quiver to target the cyber-head of the Hate Hydra.¹⁴⁷

IV. A LEGAL RESPONSE: THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

This article has demonstrated how the Internet is the new head of the Hate Hydra. The unique challenges this medium presents must be considered in order to respond to bias motivated cyberassment and to ensure that the harms that occur may be remedied. This part suggests that litigants should consider the tort of intentional infliction of emotional distress to challenge bias motivated cyberassment.¹⁴⁸ First, as a civil remedy, this cause of action offers distinct advantages over criminal prosecution. Second, as a tort, intentional infliction of emotional distress serves to allocate responsibility for harms that arise from human activity. More specifically, it permits a contextual analysis that is sufficiently flexible to incorporate the new challenges presented by the Internet. Finally, this part concludes with a demonstration of the viability of the tort of intentional infliction of emotional distress in the Internet arena by analyzing the specific facts presented in *Wilson*.

A. *The Advantages of Civil Litigation Over Criminal Prosecution*

Hate motivated activity that causes injury to individuals and communities may be challenged through both civil litigation and criminal prosecution. However, civil remedies are often more advantageous in litigating claims because litigants may avoid the cumbersome administrative processes necessary to pursue criminal action, deter organized group activity, and address political concerns.¹⁴⁹ Civil actions, unlike criminal

147. See KOENIG & RUSTAD, *supra* note 33, at 219 ("The amazing malleability of old torts permits causes of action and remedies to evolve to counter new threats. In every historical epoch, tort law has quickly adapted to new social and technological conditions.")

148. For a variety of ways to challenge hate on the Internet see Stern, *Hate and the Internet*, *supra* note 59, at 59.

149. See David G. Braithwaite, *Combating Hate Crimes: The Use of Civil Alternatives to Criminal Prosecutions*, 6 B.U. PUB. INT. L.J. 243, 245 (1996) ("the most effective and comprehensive means of eliminating hate groups requires a combination of more effective data compilation, legislation based on civil RICO, and the expansion of traditional tort doctrine"); see

prosecutions, offer distinct advantages in litigating claims because they have a lower burden of proof, permit recovery of compensatory damages, including emotional distress damages, and allow recovery of punitive damages if warranted.¹⁵⁰ Many legal experts also suggest that civil remedies are more successful in addressing hate motivated conduct because the administrative processes of the criminal justice system are either inadequate or slow in investigating such crimes or activities.¹⁵¹ Furthermore, when dealing with Internet activities, the inadequacies of criminal prosecutions are compounded.¹⁵²

Civil actions seem to be more successful than criminal prosecutions in curbing and deterring hate activity.¹⁵³ Many extremist organizations have been forced into bankruptcy or obscurity after having large monetary judgments entered against them.¹⁵⁴ From a political standpoint, the

also *Parents vs. Hate*, INTELLIGENCE REP., No. 96, Fall 1999, at 40, available at <http://www.splcenter.org/intelligenceproject/ip-index.html> (questioning whether it is possible to use criminal and civil law to prevent hate groups from recruiting minor children); Damon Henderson Taylor, *Civil Litigation Against Hate Groups Hitting the Wallets of the Nations Hate-Mongers*, 18 BUFF. PUB. INT. L.J. 95, 103-04 (2000) (discussing use of civil conspiracy and aiding and abetting).

150. See Braithwaite, *supra* note 149, at 253-54; Kim Murphy, *A Civil Action Becoming Doctor's Defense Weapon*, L.A. TIMES, Jan. 13, 1999, at A1 ("After more than two decades of clinic violence, the abortion-rights movement now is fighting its radical opponents in a way that law enforcement hasn't been able to—by filing lawsuits that seek millions of dollars in damages, as well as an end to veiled threats against abortion providers.").

151. See Taylor, *supra* note 149, at 104; Braithwaite, *supra* note 149, at 250-52; see also JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 195 (1993).

152. See *supra* section III.C.; KOENIG & RUSTAD, *supra* note 33, at 220 ("Tort law plays a key role in punishing emergent forms of wrongdoing because criminal sanctions inevitably lag behind in times of rapid technological change.").

153. See Braithwaite, *supra* note 149, at 251 ("One common problem is that some hate crime statutes only make hate crimes misdemeanors, carrying little or no punishment, and thus containing little or no deterrence value."). See generally Morris Dees & Ellen Bowden, *Taking Hate Groups to Court*, 31 TRIAL 2, Feb. 1, 1995, at 20 ("In addition to helping to combat the 15 percent of hate crimes for which these groups are directly responsible, these [civil] suits have an effect on the remaining 85 percent by eliminating the poisonous impact hate groups have on the rest of society.").

154. Morris Dees and Southern Poverty Law Center ("Center") attorneys have litigated tort claims in order to bankrupt hate groups and deter their bias motivated activities. Southern Poverty Law Center, *Center Battles White Supremacist Groups*, LEGAL ACTION, at <http://www.spl-center.org/cgi-bin/printassist.pl?page=/legislation/la-2.html> (last visited Feb. 26, 2002). In 1987, the Center won a jury verdict for \$7 million against United Klans of America for the lynching death of Michael Donald. *Id.* In 1993, the Oregon Court of Appeals affirmed a \$12.5 million jury verdict in a civil action brought against neo-Nazi Skinheads and White Aryan Resistance for the violent beating death of an Ethiopian youth, Mulugeta Seraw. *Id.* Plaintiffs represented by the Center were awarded a \$1 million default judgment against the Church of the Creator for the death of Harold Mansfield, a black sailor who served in the Gulf War. *Id.* The Center got a jury verdict of \$37.5 million, reduced by a judge to \$21.8 million, against the Ku Klux Klan for burning a black Baptist church in South Carolina. *Id.* In September 2000, a jury awarded a mother and son \$6.3 million against the Aryan Nation and its leader, Richard Butler. *Id.* Butler was forced to relinquish his twenty-acre Aryan Nation compound to the plaintiffs, who had been shot at and chased by the compound's security guards. *Id.* For other tort cases against hate groups involving substantial jury awards, see also *Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987) (civil action against Klan arson of plaintiff's

savvy litigant may prefer a civil cause of action as well. In the plaintiff's role as a private attorney general, she may bring into a public forum the hateful acts that target private citizens, subjecting the defendant to public scrutiny and criticism.¹⁵⁵ Also, the plaintiff may want to seek civil remedies over criminal penalties because sending the defendant to jail often results in the creation of a martyr for hate-mongers.¹⁵⁶

The optimal strategy is to use both the civil suit and criminal prosecution to ensure a comprehensive and multi-faceted response to hate motivated acts, sending a clear message that such conduct will not be tolerated. The two need not be dependent upon, nor mutually exclusive of, each other.¹⁵⁷

B. Tort Law and Intentional Infliction of Emotional Distress

Most legal commentators agree that tort law is an effective tool to create and define the types of harms that should be recognized as legal interests.¹⁵⁸ Tort law allocates responsibility for harms that arise out of human activities. It is a legal building block for community interaction and civility. An individual may seek compensation for harm to her person, property, or economic interest caused by conduct that defies a standard established for the benefit of individuals and the community.¹⁵⁹ The

home); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (enjoining defendants from harassing Vietnamese fishermen in exercise of their legal rights to fish in Galveston Bay); Brian Levin, *The Vindication of Hate Violence Victims Via Criminal and Civil Adjudications*, 1 J. HATE STUDIES 133, 154-61 (2001-02).

155. KOENIG & RUSTAD, *supra* note 33, at 219.

156. See Claudia Kolker, *2nd Guilty Verdict Reached in Dragging Murder Trial: Jury Begins to Consider Death Penalty for Lawrence Brewer. One of Three Whites Accused of Slaying of Black Man*, L.A. TIMES, Sept. 21, 1999, at A16 (quoting Bill Hale, Executive Director of the Texas Commission on Human Rights, stating that Brewer, one of three men found guilty for the dragging death of James Byrd, Jr., will be celebrated as a martyr to white supremacists); Todd Venezia, *Killer a Martyr to Some On Far Right*, N.Y. POST, June 11, 2001, at 5 (explaining how Timothy McVeigh, executed for killing 168 people in the bombing of federal building in Oklahoma City, is considered a martyr by some white supremacists).

157. See Levin, *supra* note 154, at 158 ("Not only are existing civil and criminal laws being enforced with renewed vigor, hate crime statutes and other new laws are providing additional avenues for hate violence victims to seek justice against those who act against them and our democratic ideals.").

158. The word "interest" means the "object of any human desire." RESTATEMENT (SECOND) OF TORTS § 1 (1964) [hereinafter RESTATEMENT]. A legally protected interest is a desire that society recognizes as so legitimate that one who interferes with its realization may be civilly liable. See *id.* § 1, cmt. d. In determining which interests are actionable, courts must balance a number of factors, including the plaintiff's claim of protection against an injury to a legal interest, the defendant's freedom of action to achieve her objectives, and the interests of the community and society. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6, (5th ed. 1984); *id.* at 16 ("When the interest of the public is thrown into the scales and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering.'"); see also KOENIG & RUSTAD, *supra* note 33, at 1 ("Tort law inevitably involves balancing individual and social interests.").

159. "The purpose of the law of torts is to adjust [for] . . . losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another." KEETON ET AL., *supra*

need to allocate responsibility for harms to individual and community interests does not end where cyberspace begins. The values and objectives of tort law, specifically the tort of intentional infliction of emotional distress, may serve an important role for seeking recourse for injuries caused by bias motivated cyberassment.¹⁶⁰

Intentional infliction of emotional distress is a tort that protects mental tranquility and peace of mind.¹⁶¹ Prior to the 1930s, recovery for emotional distress was “parasitic” to other independent torts such as assault, battery, false imprisonment, trespass, or seduction.¹⁶² The reasons for limiting its recovery were based on the perceived difficulty in proving mental injury, the possibility of fictitious claims, and the fear of a flood of litigation over trivial matters and bad manners.¹⁶³ In the 1930s, as the resistance to addressing mental injuries lessened, the viability of intentional infliction of emotional distress came to fruition, and it was recognized as an independent tort.¹⁶⁴ In 1965, the Second Restatement of Torts recognized the tort as imposing liability if the plaintiff could prove

note 158, § 1 at 6 (quoting Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238 (1944)); see also KOENIG & RUSTAD, *supra* note 33, at 29 (“The history of tort law demonstrates a progressive recognition of societal as well as individual interests.”). Legal scholars and commentators cannot agree on a definition of tort law. See KEETON ET AL., *supra* note 158, § 1 at 1. (“Even though tort law is now recognized as a proper subject, a really satisfactory definition of a tort is yet to be found.”).

160. See generally KOENIG & RUSTAD, *supra* note 33, at 221 (discussing the role of tort law in cyberspace).

161. See *State Farm Mutual Auto. Ins. Co v. Ramsey*, 368 S.E.2d 477, 478 (S.C. Ct. App. 1988); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987); *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988).

162. KEETON ET AL., *supra* note 158, at 57 (“[I]f some independent tort . . . could be made out, the cause of action served as a peg upon which to hang the mental damages, and recovery was freely permitted.”); see Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 126 (1990) (“Prior to the 1930s and 1940s, a person could sue only for an insult to personal dignity by bringing an action for assault, battery, trespass, or defamation.”).

163. KEETON ET AL., *supra* note 158, at 54-55; see also *Sammes v. Eccles*, 358 P.2d 344, 345-48 (Utah 1961) (“Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefore.”).

164. William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 41 (1956). The earlier cases that recognized the tort as a separate cause of action were situations in which passengers were insulted by common carriers. See KEETON ET AL., *supra* note 158, at 57. In 1948, the Restatement of Torts adopted intentional infliction of emotional distress as an independent cause of action in Section 46: “One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it.” RESTATEMENT OF TORTS § 46 (Supp. 1948). Even today, this tort is at a crossroad. Just as the Restatement (Second) established its prominence, the Restatement (Third) may be minimizing it. See Martha Chamallas, *Removing Emotional Harm From the Core of Tort Law*, 54 VAND. L. REV. 751 (2001) (discussing changes in the Restatement (Third) that remove recovery for emotional harm in important areas).

that the defendant: 1) by extreme and outrageous conduct; 2) intentionally or recklessly; 3) caused; 4) the plaintiff severe emotional distress.¹⁶⁵

Intentional infliction of emotional distress is a viable tool to challenge cyberassment, particularly when it is bias motivated.¹⁶⁶ First, the tort is still developing and is sufficiently flexible to address new situations that evolve from Internet activity.¹⁶⁷ Second, the central component of the tort, determining whether the defendant's conduct is extreme and outrageous, requires a contextual analysis. This contextual component empowers courts with the flexibility to consider the nature of the Internet and its unique characteristics today and as it evolves over time.¹⁶⁸

Finally, the tort of intentional infliction of emotional distress fills the gap by addressing harms from Internet activity that would not be actionable under other torts.¹⁶⁹ Emotional harms like those suffered in *Wilson* would

165. RESTATEMENT, *supra* note 158, § 46(1) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . ."); see Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982) (explaining that the tort of intentional infliction of emotional distress contains four elements: "(1) The defendant must act intentionally or recklessly, (2) the conduct must be extreme and outrageous, (3) it must be the cause, (4) of severe emotional distress"). Negligent infliction of emotional distress claims are independently actionable as well in most jurisdictions, but are usually limited to persons in the physical zone of danger or to family members who experience the serious injury or death of a loved one through some sensory observation. See KEETON ET AL., *supra* note 158, § 54 at 362-67.

166. See KOENIG & RUSTAD, *supra* note 33, at 29 ("In recent decades, the tort action for intentional infliction of emotional distress has evolved further to punish racism, sexism, and bullying in the workplace.")

167. See, e.g., *Bartanus v. Lis*, 480 A.2d 1178 (Pa. Super. Ct. 1984) ("[T]he intentional infliction of emotional distress is an evolving tort and its scope has not yet been clearly defined." (citing *Papieves v. Lawrence*, 263 A.2d 118, 121 (Pa. 1970))); RESTATEMENT, *supra* note 158, § 46 cmt. c ("The law is still in a stage of development. . . This section states the extent of the liability thus far accepted generally by the courts. The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed."); KEETON ET AL., *supra* note 158, at 55 ("[T]he law is clearly in a process of growth, the ultimate limit of which cannot yet be determined.")

168. For a historical development of emotional distress claims, see Martha Chamallas & Diane Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Zalvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). See also *Payton v. Abbott Labs*, 437 N.E.2d 171, 176-78 (Mass. 1982) (providing history of infliction of emotional distress); *Sammes v. Eccles*, 358 P.2d 344, 345-46 (Utah 1961) (providing history of intentional infliction of emotional distress); *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173, 1175-76 (Wash. 1977) (providing history of tort of intentional infliction of emotional distress).

169. The tort is slowly being recognized as a viable cause of action for different emotional harms. See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 51 (1988) (recognizing intentional infliction of emotional distress to challenge employee abuse by employer); Eric S. Fisher, *Potter v. Firestone and the Infliction of Emotional Distress*, 30 TORT & INS. L. J. 1071 (1995) (explaining the California Supreme Court's decision to permit intentional infliction of emotional distress damages in fear of cancer cases); Aaron Goldstein, *Intentional Infliction of Emotional Distress: Another Attempt at*

not be actionable under assault, defamation, or the privacy torts. Assault requires the apparent ability and opportunity of the defendant to carry out a threat immediately, a requirement that would materialize only under the rarest of circumstances from Internet threats.¹⁷⁰ Web site postings that include racial slurs, epithets, or rhetorical hyperbole would be difficult to prove true or false for a defamation claim.¹⁷¹ There would also be no claim under the privacy torts because the information disclosed is obtained legitimately, is available to the public, and does not appropriate a person's name or likeness.¹⁷² Thus, the tort of intentional infliction of emotional distress serves to protect exactly what Ryan Wilson and the white supremacists harassing Bonnie Jouhari sought to destroy through terror and the power of fear—her mental tranquility and peace of mind.¹⁷³

Eliminating Native American Mascots, 3 J. GENDER, RACE & JUSTICE 689 (2000) (advocating the use of intentional infliction of emotional distress to eliminate Native American mascots of sports teams); Mary Kate Kearney, *Child Witnesses of Domestic Violence: Third Party Recovery for Intentional Infliction of Emotional Distress*, 47 LOYOLA L. REV. 283 (2001) (arguing that intentional infliction of emotional distress claim is the best way for the courts to recognize a child's injury and send a message to abusers); Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1253 (1994) (discussing the Texas Supreme Court's decision to permit intentional infliction of emotional distress claims in divorce cases); Dean Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982) (suggesting intentional infliction of emotional distress to challenge racist conduct); Benson A. Wolman, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAPITAL U. L. REV. 245 (1988) (suggesting that sexual insults will be challenged with the intentional infliction of emotional distress claims). *But see* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM & MARY L. REV. 579 (1993) (advocating a restriction on the tort in order to afford greater protections to religious freedoms).

170. See *Marczeski v. Law*, 122 F. Supp. 2d 315, 325 (D. Conn. 2000) ("A threat by telephone or on the Internet is not a civil assault." (citing DOUGLASS B. WRIGHT ET AL., CONNECTICUT LAW OF TORTS § 8 (3d ed. 1991))); see also KEETON ET AL., *supra* note 158, at 44-45.

171. See Randy Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 179 (1990) ("[A] factual statement is actionable and an expression of opinion is not . . . The consequence of thinking of speech in the bipolar terms of fact and opinion for the purposes of the problem of racist and sexist attacks is that the attacks will be classified as opinion, and thus deemed absolutely protected under the first amendment."); see generally *Raible v. Newsweek*, 341 F. Supp. 804, 808-09 (W.D. Pa. 1972) (dismissing a libel action in which plaintiff was called a "bigot," stating, "Americans have been hurling epithets at each other for generations. From charging 'Copperhead' during the Civil War, we have come down to 'Racist,' 'Pig,' 'Fascist,' 'Red,' 'Pinko,' 'Nigger Lover,' 'Uncle Tom' and such. Certainly such name calling, either express or implied, does not always give rise to an action for libel.").

172. Intrusion is the intentional intrusion on the solitude of another that would affect a reasonable person. See KEETON ET AL., *supra* note 158, at 854-56. False light privacy and public disclosure of private facts require disclosure of private information. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (publicizing details of private life of another is actionable if it would be highly offensive to a reasonable person and had not legitimate public concern). Appropriation is the use of another's likeness for one's own benefit. See *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 565 (1977).

173. See *Tompkins v. Cyr*, 995 F. Supp. 664, 677 (N.D. Tex. 1998) ("[C]itizens have a right to be protected from the kind of 'abuse' that the tort of intentional infliction of emotional distress

C. *Intentional Infliction of Emotional Distress as the Arrow in the Quiver*

1. The Cyberassment of Bonnie Jouhari

Ryan Wilson, a well-known neo-Nazi, founded ALPHA HQ to further the goals of the white supremacist movement.¹⁷⁴ At the time of the events at issue, the organization had approximately 80 members.¹⁷⁵ Wilson designed the ALPHA HQ Web site to further the goals of the movement and to publicly identify persons who were against hate groups.¹⁷⁶ The site contained bomb-making recipes from popular white supremacist literature and highlighted the bomb recipe used by Timothy McVeigh in Oklahoma City.¹⁷⁷ The site also listed various types of guns, including their advantages, disadvantages, and information on how to obtain them, as well as a support list for incarcerated individuals who had committed racist crimes in a section titled “prisoners of war.”¹⁷⁸ In a three-year time period, 97,157 individuals visited the site.¹⁷⁹

Bonnie Jouhari “worked as a fair housing specialist at the Reading-Berks Human Relations Council (“HRC”) in Reading, Pennsylvania from August 23, 1995, until November 20, 1998.”¹⁸⁰ Jouhari’s responsibilities included investigating discrimination complaints, outreach, and educating on fair housing issues.¹⁸¹ Jouhari, a white woman, whose daughter is white and African-American, was recognized in the community as an advocate for civil rights.¹⁸² In 1997, Jouhari suspected that a heavy Ku Klux Klan presence in the county surrounding Reading was deterring blacks from buying affordable, better-quality housing outside the city limits.¹⁸³ In her official capacities as a fair housing specialist and

proscribes.”); *Taylor v. State*, 617 So. 2d 1198, 1204 (La. App. 1993) (“We recognize a legally protected right to be free from serious, intentional invasions of mental and emotional tranquility.”); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 368 S.E.2d 477, 478 (S.C. App. 1988) (“The modern trend recognizes that emotional tranquility is an interest worthy of protection.”); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987) (“[F]reedom from severe emotional distress is an interest which the law should serve to protect.”); *Johnson v. Rogers*, 763 P.2d 771, 779 (Utah 1988) (“Virtually all jurisdictions in the United States now recognize a broad protected interest in mental tranquility . . .”).

174. Sec’y, United States Dep’t of Hous. & Urban Dev. v. Wilson, No. 03-98-0692-8, 2000 WL 988268, at *4 (H.U.D.A.L.J. July 19, 2000).

175. *Id.*

176. *Id.* at *4. See generally Nancy Ritter, *Gauging Cyber Venom: Free Speech or Provocation?*, N.J. LAW., Nov. 16, 1998, at col.1 (illustrating pro and con arguments for Pennsylvania’s decision to seek a civil injunction).

177. *Wilson*, 2000 WL 988268, at *5.

178. *Id.*

179. *Id.* at *4.

180. *Id.* at *1.

181. *Id.*

182. *Id.* at *2-3.

183. Ladd, *supra* note 3.

the chairwoman of the local hate crimes task force, Jouhari requested that local police take action against white supremacist activities in the area.¹⁸⁴ As a result of her actions, Jouhari received racist flyers in the mail, was followed by strange men, and was threatened repeatedly.¹⁸⁵ However, Jouhari persisted in her efforts to challenge the white supremacist presence in the area.¹⁸⁶

Perhaps frustrated by her unwillingness to cave in to the more traditional methods of harassment, the white supremacists turned to the Internet to get their message across to Jouhari and the hundreds of millions of people with access to the Internet worldwide.¹⁸⁷ In March 1998, Jouhari's picture appeared on the ALPHA HQ Web site.¹⁸⁸ The first posting on the site was a photograph of Jouhari holding a flyer that depicted a hooded Klansman with a noose and read "Race Traitor Beware."¹⁸⁹ Taken from a television interview in which Jouhari described receiving such flyers and other threats, the photograph was captioned: "This 'woman' works at the Reading-Berks Human Relations Council and has received warnings in the mail that she is a race traitor and should beware. Traitors like this should beware, for in our day, they will be hung from the neck from the nearest lamp post."¹⁹⁰ Immediately above Jouhari's picture was an animated photographic image of her workplace exploding into flames, with a caption reading: "The Reading-Berks Human Relations Council. This is the office where plans for additional race-mixing and 'integration' are planned."¹⁹¹

In the summer of 1998, Wilson made changes to the ALPHA HQ Web site.¹⁹² He described Jouhari's daughter as a "mongrel" and posted instructions on how to make a bomb directly under the picture of Jouhari's office.¹⁹³ Wilson also "placed Ms. Jouhari's photograph and the

184. *Id.*

185. *Id.*; *Wilson*, 2000 WL 988268, at *3-4, *8.

186. *See generally Wilson*, 2000 WL 988268, at *6-8 (demonstrating Jouhari's efforts in continuing her work at the Council while being exposed to continued harassment).

187. *See Reno v. ACLU*, 521 U.S. 844, 850 (1997) (explaining how the Internet has enabled tens of millions of people to communicate with each other, as well as provide access to vast amounts of information around the world); *see also Muth, supra* note 77, at 11 ("The largest and most visible manifestation of cyberspace is the Internet—a worldwide network of networks electronically connecting millions of computers and computer users."); *The Electronic Frontier, supra* note 103 ("the number of Internet users worldwide is estimated to reach 502 million by 2003").

188. *Wilson*, 2000 WL 988268, at *3.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at *4.

193. *Id.* at *4-5. Wilson added the following disclaimer on the site:

This organization does not wish to imply that the individuals mentioned in the above article or in any location throughout this Web site be harassed or injured in any way. For legal reasons we must make this statement. If those people are still alive when the political tide swings back to the right . . . they will find our wrath something to be dealt with.

image of her office blowing up in the main frame on the second page of the website.¹⁹⁴ Visitors to the site had to pass through that frame in order to explore the rest of it.¹⁹⁵

Immediately after the Web posting, the offline harassment of Jouhari escalated and intensified.¹⁹⁶ Jouhari and her daughter began to receive harassing phone calls, which continued despite their efforts to change their number to an unlisted one.¹⁹⁷ From March 1998 until October 1998, when the Jouharis moved in with a friend, they received as many as 30 harassing phone calls a day.¹⁹⁸ Jouhari also received harassing phone calls at work.¹⁹⁹ Even Jouhari's co-workers felt threatened by the harassment; they closed window blinds while at work, and some staff members refused to come to the office on weekends or after regular work hours.²⁰⁰

Jouhari ultimately left Reading, her hometown, for fear of threats to both her daughter's and her own safety.²⁰¹ In October 1998, Jouhari and her daughter moved to Washington State, taking only what they could carry in their car.²⁰² Following advice from the FBI, when they arrived in Seattle, they did not open a bank account, get drivers licenses, register to vote, or put their names on any documents.²⁰³ They curtailed their travel, and Jouhari paid the family's bills by traveler checks or money order.²⁰⁴ Although Jouhari rented an apartment in her name, she obtained an unlisted phone number, a caller identification system, and call block features.²⁰⁵

Within a month after arriving in Washington, Jouhari and her daughter began receiving harassing phone calls again.²⁰⁶ They also observed a van circling their apartment for hours at a time.²⁰⁷ In May 1999, a pounding on the door in the middle of the night woke them up.²⁰⁸ They

Id. at *4.

194. *Id.* at *5.

195. *Id.*

196. *See id.* at *6-7.

197. *Id.* at *7.

198. *Id.* at *8.

199. *Id.* at *7.

200. *Id.*

201. *Id.* at *8 ("I didn't want to leave the only place I ever knew. I didn't want to leave my job and the benefits. I was holding out hope that something would happen to make this better.")

202. *Id.* at *11.

203. *Id.* at *12.

204. *Id.*

205. *Id.*

206. *Id.* at *13.

207. *Id.*

208. *Id.*

could not see anyone through the peephole and no one would respond to their call of "who's there?"²⁰⁹

Although nothing happened to them that evening, Jouhari and her daughter stayed awake the entire night in fear.²¹⁰ The family subsequently moved in with their pastor, but the phone calls began again, up to 20 a day, when they left his home and moved to an apartment in Kent, Washington.²¹¹ An unknown perpetrator also broke into their apartment.²¹² Jouhari and her daughter remained in the apartment from September 1999 until February 2000, when Jouhari received a phone call from David Goldman of HateWatch, who described another serious threat of unknown origin on the Internet directed at Jouhari and her daughter.²¹³ Jouhari contacted the FBI and informed them of the harassing phone calls, the break-in, and the new Web site references.²¹⁴ At the advice of the FBI, Jouhari and her daughter stayed in a hotel room that night and left Kent the next day, leaving behind all furniture and personal items.²¹⁵ Jouhari and her daughter moved three times while in Washington in an attempt to escape the madness.²¹⁶ The United States Department of Housing and Urban Development eventually filed suit on Jouhari's behalf.²¹⁷

In *Secretary, United States Department of Housing and Urban Development v. Wilson*,²¹⁸ the administrative law judge decided that Wilson's conduct of posting Jouhari's photographs on the Web site, posting images of Jouhari's office bursting into flames, making threats against Jouhari's life, and referring to Jouhari's daughter as a "mongrel" fell within the parameters of intentional infliction of emotional distress.²¹⁹ The judge conducted a detailed factual finding and briefly summarized the elements of intentional infliction of emotional distress and the dispo-

209. *Id.*

210. *See id.*

211. *Id.* at *13-15.

212. *See id.* at *15.

213. *Id.* at *16. HateWatch.org. was founded by David Goldman and is a Web site dedicated to combating online bigotry. *See* <http://www.HateWatch.org> (last visited Oct. 4, 2002).

214. *Wilson*, 2000 WL 988268, at *16.

215. *Id.*

216. *See id.* at *11-16.

217. *See id.* at *1.

218. 2000 WL 988268.

219. *Id.* at *18. This article focuses on the intentional infliction of emotional distress upon Bonnie Jouhari. However, Ryan Wilson intentionally inflicted emotional distress on Bonnie Jouhari's daughter as a result of Jouhari's relationship with her daughter. *See id.* ("Where [extreme and outrageous] conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress, (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." (quoting RESTATEMENT, *supra* note 158, § 46)). *See generally* Kearney, *supra* note 169 (discussing the right of a third party to recover from emotional distress relating to conduct directed at a family member).

sitive issues that led to his conclusion.²²⁰ However, for illustrative purposes, this article will engage in an independent analysis to demonstrate the strength and flexibility of the tort of intentional infliction of emotional distress as a tool to combat bias motivated cyberassment.

To prove intentional infliction of emotional distress, a plaintiff must establish that the defendant: 1) by extreme and outrageous conduct; 2) intentionally or recklessly; 3) caused; 4) the plaintiff severe emotional distress.²²¹ The following part will begin with the most difficult hurdle in proving this tort, demonstrating that Wilson's conduct was extreme and outrageous.²²²

2. The Extreme and Outrageous Conduct of Ryan Wilson

The extreme and outrageous nature of a defendant's conduct is shown only when the conduct at issue is so outrageous in character and extreme in degree that it goes beyond all possible bounds of decency and is regarded as utterly intolerable in a civilized community.²²³ In addressing this element, the court first determines if the defendant's conduct may reasonably be considered extreme and outrageous.²²⁴ If reasonable persons may differ, the jury determines whether the conduct was sufficiently outrageous.²²⁵

Insults, threats, and annoyances are not extreme and outrageous conduct when they are not coupled with other aggravating circum-

220. See *Wilson*, 2000 WL 988268, at *17-19.

221. RESTATEMENT, *supra* note 158, § 46 ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.").

222. Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 GONZ. L. REV. 291, 306 (1999-2000) ("In practice, however, lawsuits tend to focus on just one of the elements – outrageousness of the defendant's conduct – since proof of that element often indicates evidence of the other three."); Givelber, *supra* note 165, at 46 ("The extraordinary feature of the tort, however, is its insistence upon 'extreme and outrageous conduct.' In fact, this element is, in large respect, the entire tort."); Goldstein, *supra* note 169, at 703 (identifying other factors used to determine extreme and outrageous conduct); Love, *supra* note 162, at 147 ("The critical issue in a cause of action brought under Section 46 is whether the defendant has engaged in 'extreme and outrageous conduct.'").

223. RESTATEMENT, *supra* note 158, § 46 cmt. d. In *Wilson*, the judge found Wilson's conduct sufficiently extreme and outrageous based on the following: 1) Wilson was a well-known leader of the white supremacist movement who ran a white supremacist Web site; 2) Wilson made specific violent threats against Jouhari; 3) Wilson used leaderless resistance as an integral feature of his threats, coupled with the tendency of white supremacists to take violent or harassing acts against targeted persons; and 4) Wilson's timing of his acts of intimidation and harassment directed at Jouhari. See *Wilson*, 2000 WL 988268, at *19.

224. RESTATEMENT, *supra* note 158, § 46 cmt. h ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so.").

225. *Id.* ("Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.").

stances.²²⁶ Therefore, merely identifying Bonnie Jouhari as a “race traitor” and labeling her daughter a “mongrel” would probably not rise to the level of extreme and outrageous conduct.²²⁷ However, aggravating circumstances existed in this case that satisfy a finding of extreme and outrageous conduct.²²⁸

First, the use of racial slurs, coupled with threats of offline violence, may be sufficient aggravating circumstances to support an intentional infliction of emotional distress claim in some jurisdictions.²²⁹ Jouhari

226. See Magruder, *supra* note 168, at 1035 (“Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.”); RESTATEMENT, *supra* note 158, § 46 cmt. d (“The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.”). *But see* Gorwara v. AEL Indus., Inc., No. CIV.A.89-6401, 1990 WL 44702, at *7 (E.D. Pa. 1990) (discussing cases that recognize changing notions in society where racial slurs are no longer mere insults).

227. The Superior Court of Pennsylvania dismissed an intentional infliction of emotional distress claim based on an isolated slur that did not involve continuous malicious action, a special relationship between the parties, or knowledge by the actor of victim’s susceptibility to emotional distress. *Dawson v. Zayre Dep’t Stores*, 499 A.2d 648, 650 (Pa. Super. Ct. 1985) (“The law does not invoke liability in a situation where, without aggravating circumstances, one hurls an epithet at another during the course of a disagreement.”). See *Lay v. Roux Lab., Inc.*, 379 So. 2d 451, 452 (Fla. Dist. Ct. App. 1980) (holding that although racial epithets and references to plaintiff as “nigger” is reprehensible conduct, it is insufficient to reach the threshold of outrageous and atrocious conduct); *Bradshaw v. Swagerty*, 563 P.2d 511, 514 (Kan. Ct. App. 1977) (holding that a debt collector calling plaintiff a “nigger,” “bastard,” and “knot-headed boy” are insults and insufficient to reach the threshold of outrageousness and atrociousness); *Irving v. J.L. Marsh, Inc.* 360 N.E.2d 983, 986 (Ill. App. Ct. 1977) (holding that an employee of a retail store referring to plaintiff as “arrogant nigger” was insufficient as a basis for a cause of action for intentional infliction of severe emotional distress). *But see generally* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.—C.L. L. REV. 133 (1982) (advocating a tort cause of action for racial insults); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994) (analyzing racially motivated threats of violence and proposing tort of racial intimidation); Smolla, *supra* note 171 (analyzing the debates over controlling racist and sexist speech).

228. See *Wilson*, 2000 WL 988268, at *19.

229. See *Bernard v. Doskocil Cos.*, 861 F. Supp. 1006, 1014-15 (D. Kan. 1994) (holding that when reviewing the facts as a whole there is enough evidence to support a determination of extreme and outrageous conduct where there are racial slurs of “black boy,” or “nigger rig;” racist jokes not directed at plaintiff or told in his presence; isolated pranks of plaintiff’s co-workers; and threats of fire); *Gomez v. Hug*, 645 P.2d 916, 919-20 (Kan. Ct. App. 1982) (holding that plaintiff’s claim for intentional infliction of emotional distress survives summary judgment where plaintiff was subjected to racial slurs and offensive insults, such as “fucking spic,” “fucking Mexican Greaser,” and “pile of shit,” as well as threats of violence, all of which resulted in serious medical problems); *Ruiz v. Bertolotti*, 236 N.Y.S.2d 854, 855-56 (N.Y. Sup. Ct. 1962) (holding that a statement to a third party expressing anger and threatening bodily harm to “colored persons” moving into a neighborhood was sufficient to survive motion to dismiss in an action for malicious tort with purpose to frighten). *But see* *Bowers v. Estep*, 420 S.E.2d 336, 338 (Ga. Ct. App. 1992) (finding that supervisor who threatened, intimidated and humiliated employee did not engage in outrageous behavior). See generally Nockleby, *supra* note 227, at 696-99 (discussing reasons why threats of racial violence

was identified on the ALPHA HQ Web site as a “race traitor” because of her efforts to assist African-Americans in obtaining housing and because she has a biracial daughter.²³⁰ The term race traitor is a bias motivated slur because it connotes association with African-Americans to be wrong or a negative association.²³¹

Furthermore, the language posted on the Web site included “code words” from *The Turner Diaries*,²³² a white supremacist book that depicts a fictional race war where white supremacists take over a region of California.²³³ One passage describes the “Day of the Rope,” which is the day that white supremacist troops hang white people who have betrayed their race, including white women who were married to, or lived with, men of color or Jewish men.²³⁴ White women and men were taken from their homes and hung, with signs placed around their necks that stated “I defiled my race” or “I betrayed my race.”²³⁵ The author described that “from tens of thousands of lampposts, power poles, and trees throughout this vast metropolitan area the grisly forms hang.”²³⁶

The slurs contained in the Web posting, coupled with the threats of violence depicted in the hanging of Jouhari and images of her exploding office, could qualify as outrageous conduct.²³⁷ As demonstrated by the administrative law judge’s findings, the facts of *Wilson* were sufficiently extreme and outrageous, even absent a consideration of the unique characteristics of the Internet. But the analysis for such activity should not end there. Courts should fully integrate the unique features of the Internet

should satisfy the “outrageousness” element but concluding the tort would not be effective in situations in which a single, racially motivated threat is made).

230. *Wilson*, 2000 WL 988268, at *5.

231. In a 42 U.S.C. § 1981 action, the Tenth Circuit held that white persons may have standing to sue for alleged discrimination against them for associations with black persons. *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992); see *supra* note 15 and accompanying text.

232. ANDREW MACDONALD, *THE TURNER DIARIES* (2d ed. 1980).

233. *Id.* at 160-69. Andrew MacDonald is the pen name for William Pierce, the leader of a neo-Nazi organization, the National Alliance. *The Alliance and its Allies*, INTELLIGENCE REP., No. 93, Winter 1999, at 10, available at <http://www.splcenter.org/intelligenceproject/ip-4i3.html>. THE TURNER DIARIES is considered the blueprint for Timothy McVeigh’s bombing of the Alfred P. Murrah Federal building that killed 168 people in Oklahoma City. *Id.* at 12. See generally *Barnes*, *supra* note 140, at 1105-08 (describing information contained in THE TURNER DIARIES).

234. MACDONALD, *supra* note 232, at 160-69.

235. *Id.* at 160-61.

236. *Id.* at 160.

237. An argument can be made that the constant posting of her name, picture and place of work on an Internet site satisfied the aggravating circumstance of repeated harassment. *Boyle v. Wenk*, 392 N.E.2d 1053, 1056 (Mass. 1979) (“Repeated harassment . . . may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability for infliction of emotional distress.”); *Sammes v. Eccles*, 358 P.2d 344, 345, 347 (Utah 1961) (holding that aggravated circumstances existed for a claim of intentional infliction of emotional distress where the defendant repeatedly called a married woman on the phone and solicited sex, came to her residence and made indecent exposure of his person). See generally *KEETON ET AL.*, *supra* note 158, at 54-66 (discussing general requirements for infliction of emotional distress).

into their analyses so that the totality of the circumstances may be fully appreciated.

A significant factor in *Wilson* and most cyberassment cases is the conduct at issue, which must be considered in the context or the situation of the parties.²³⁸ The creation of new laws or tests for Internet activity may not be warranted, at least for intentional infliction of emotional distress, if courts consider the context in which the conduct occurred and the unique characteristics of the Internet. To date, courts confronted with challenges in tort to Internet activities have engaged in analyses devoid of discussion, or even mention, that the medium may create new or different dangers that warrant scrutiny.²³⁹ This article advocates that courts should consider the unique characteristics of the Internet in determining if the conduct is sufficiently extreme and outrageous. In *Wilson*, the Internet, acting as a force multiplier and tool of anonymity, coupled with the inadequacies of law enforcement to confront the online conduct, contributed to Ryan Wilson's ability to intentionally inflict emotional harm on Jouhari, and served to heighten Jouhari's level of terror. These considerations should not be overlooked; they must be analyzed to determine if an average citizen, after viewing it in this context, would look at such conduct and say, "Outrageous!"

a. ALPHA HQ Web Site as a Force Multiplier

As discussed in Part III.C. of this article, Ryan Wilson created the ALPHA HQ Web site to further the goals of the white supremacist movement and to publicly identify persons who were against its goals.²⁴⁰ The site contained bomb-building instructions, listed various types of guns, and posted a support list for "prisoners of war," *i.e.*, those incarcer-

238. See *King v. Kidd*, 640 A.2d 656, 668 (D.C. 1994); *Johnson v. Lakewood Hosp.*, Nos. 70943, 71257, 1997 WL 547968, at *11 (Ohio Ct. App. 1997) ("The conduct must also be viewed in context to determine what is 'beyond all possible bounds of decency . . . and utterly intolerable in a civilized community.'" (quoting *Stepien v. Franklin*, 528 N.E.2d 1324, 1330 (Ohio Ct. App. 1988))); *Givelber*, *supra* note 164, at 75 ("Although there is little evidence that this tort will ever provide the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving situational justice.").

239. See *Lenhoff v. Getty*, No. 97CIV. 9458, 2000 WL 977900, at *8-9 (S.D.N.Y. 2000) (granting defendant's summary judgment; sending unwanted junk e-mails to plaintiff and placement of an ad with the phone number of plaintiff family's place of business is not sufficiently outrageous under New York law); *Lian v. Sedgwick James of N.Y., Inc.*, 992 F. Supp. 644, 647, 651 (S.D.N.Y. 1998) (granting summary judgment; the sending of e-mail to plaintiff's co-workers stating that supervisor and plaintiff had agreed that plaintiff would begin seeking other employment did not constitute extreme and outrageous conduct); *Rall v. Hellman*, 726 N.Y.S.2d 629, 631-33 (N.Y. App. Div. 2001) (granting defendant's motion to dismiss; the alleged fabrication of an e-mail disseminated in plaintiff's name that made the plaintiff "appear as a rude, petty, self-absorbed writer/cartoonist," who sought to insult the New York City cartooning industry, was not outrageous and shocking to satisfy an intentional infliction of emotional distress claim).

240. *Wilson*, 2000 WL 988268, at *4.

ated for committing racist crimes.²⁴¹ To ensure that anyone visiting the Web site got the clear message that Jouhari was a target, Wilson placed Jouhari's photograph and images of her office exploding in the main frame of the second page of the site; therefore, visitors could not explore the ALPHA HQ Web site without seeing the postings.²⁴²

Ryan Wilson's site received over 97,000 visitors in a three year time period, quite an accomplishment for someone who, in 1993, managed to get only 80 racists to attend a rally near New Hope, Pennsylvania.²⁴³ The force that such a rally could generate pales in comparison to the force Wilson could call to arms on the Internet. Through the Internet, Wilson was capable of reaching not only his white supremacist brothers and sisters within a particular geographical location, but those anywhere in the world.²⁴⁴ Thus, it is no surprise that the harassment of Jouhari continued even after she moved from Pennsylvania to Washington State, over 3000 miles away from the initial source of her troubles.²⁴⁵ Jouhari had become readily identifiable by racists over a wide geographic area.

Although some of the individuals who visited the ALPHA HQ Web site may have been repeat visitors or may not have been white supremacists committed to the mission of ALPHA HQ, it is hard to dispute that the threats against Jouhari, her identity, and the location of her place of work were seen by tens of thousands of people who had some interest in white supremacy. Jouhari did not know whether each viewer's interest was a passing interest in white supremacy or a dogmatic adherence to it. But Jouhari's fears and terror were caught up in exactly that—what she did not know.

Exacerbating Jouhari's fear of the force multiplier effect was the white supremacist organizational strategy, leaderless resistance. Floyd Cochran, a former recruiter for the Aryan Nations who now combats hate and intolerance, and David Goldman, then Executive Director of Hatewatch.org, a Web based organization that monitors hate activity on the Internet, testified as experts in the *Wilson* case.²⁴⁶ Cochran testified that Jouhari was targeted

241. *Id.* at *5.

242. *Id.*

243. *Id.* at *4-5. Wilson organized the rally to speak out against New Hope's liberal attitude for gay rights. See Mark A. Waligore, *A Day of Hate: Thank God It's All Over*, THE TRENTONIAN, Nov. 7, 1993, at 2. The rally attracted over 200 counter-protesters and had more than 300 police officers on hand. Mark Davis & Christine Schiavo, *Neo-Nazis Hold Rally at State Park*, PHILA. INQUIRER, Nov. 7, 1993, at B1.

244. Bonnie Jouhari was certainly aware of this, stating, "the thought of [the statements on the Web site] circulating all over the world with people wanting to do me harm made me feel terrible." Andrea Fine, *When Web Words Threaten*, CHRISTIAN SCIENCE MONITOR, Nov. 24, 1998, at 3.

245. See *Wilson*, 2000 WL 988268, at *13. Even if Wilson knew individuals in Washington State, without the Internet, he would have had to have their address, phone number, or contact information to reach them.

246. *Id.* at *4.

as an enemy of the white race because she had engaged in sexual relations with an African-American man and because, as a fair housing advocate, she promoted integration.²⁴⁷ The messages about Jouhari on the ALPHA HQ Web site were disseminated with the hope and expectation that anonymous white supremacists, in the spirit of leaderless resistance, would take harmful and intimidating action against the identified target, Bonnie Jouhari.²⁴⁸

Finally, although the postings in *Wilson* occurred before the events of September 11, 2001, the tragic events of that day have changed American's threshold for what is possible in the name of extreme political resistance. Prior to September 11th, such violence may not have been a reality to the average American. Today, however, an exploding image of Bonnie Jouhari's office, as a call to violence to hundreds or even thousands of unknown individuals who visit the Web site, will not rest in the minds of American citizens as mere folly.

b. The "Access Anonymity" of Jouhari's Harassers

As explained in Part III.B. of this article, Internet anonymity exists in at least two forms: identity anonymity and access anonymity. Although Jouhari knew the identity of the Web site provider, Ryan Wilson, she was terrorized by unknown persons, who, whether intentionally or by happenstance, visited Ryan Wilson's ALPHA HQ Web site and took offline action in the spirit of leaderless resistance.²⁴⁹ Furthermore, Jouhari's fears were not based on mere speculation that someone would act pursuant to Wilson's violent messages. As soon as the messages were posted, Jouhari was terrorized,²⁵⁰ even when she moved from one coast of the United States to another.²⁵¹ Jouhari knew the source of the online threats, but, because of access anonymity, there was no trail available to track down the identity of her harassers. As a result, every person she saw, and the millions she did not, were her potential harassers and attackers.²⁵² A Web site, after all, can be viewed by anyone, anywhere in the world. Not only was Jouhari unaware of the identity of her harassers, it is highly possible that

247. *Id.* at *5.

248. *Id.*

249. Wilson's Web site was known in the region for its embrace of leaderless resistance. See Tom Burghardt, *Solidarity with Pennsylvania Anti-Racists!*, ANTIFA INFO-BULLETIN, at <http://www.web.apc.org/~ara/documents/news/support.html> (last visited Oct. 1, 2002) ("Wilson . . . runs the 'ALPHA, HQ' [Web site], a sophisticated multimedia operation which encourages like-minded fascists to conduct 'leaderless resistance operations' against opponents. . . . Among the material on Wilson's page is a disgusting article that celebrates a series of racist attacks on a black Philadelphia family last Fall by lynch-rope specialists. The family was eventually driven from their home due to escalating attacks and death threats against their children.").

250. *Wilson*, 2000 WL 988268, at *6-7.

251. *Id.* at 13.

252. See Post-Hearing Brief at 49, Sec'y, United States Dep't of Hous. & Urban Dev. v. Wilson, No. 03-98-0692-8, 2000 WL 988268 (H.U.D.A.L.J. July 19, 2000) ("[Jouhari and her daughter] fear that every hang-up phone call or knock at the door is from a white supremacist.").

Ryan Wilson did not know their identities either. David Goldman testified that Wilson used the Web site to incite other white supremacists to action in the name of leaderless resistance.²⁵³

c. Inadequate Response from Law Enforcement

There are few outlets that provide individuals who have undergone online harassment with assistance diminishing their fears and reducing their anxieties—including law enforcement. This problem should also be considered in determining extreme and outrageous conduct. Generally, the response by law enforcement has been, “turn off your computer;” Jouhari’s experience was no exception.²⁵⁴ Throughout her ordeal, Jouhari contacted an Assistant United States Attorney, the Federal Bureau of Investigation (“FBI”), the Pennsylvania Human Relations Commission, and the Deputy Attorney General for the State of Pennsylvania without much success in obtaining assistance.²⁵⁵ As a result, Jouhari found no support and received no assurances from the criminal justice system.²⁵⁶

Taking the facts presented in *Wilson* as a whole—racial slurs coupled with threats of violence, Wilson’s adherence to leaderless resistance, and the unique features of the Internet that facilitated Wilson’s objectives—a jury could certainly find that Wilson’s conduct was sufficiently extreme and outrageous to constitute intentional infliction of emotional distress.²⁵⁷

3. Severe Emotional Distress

Although some emotional distress is expected as the price for living in the world, the law intervenes when the distress is so severe, no reasonable person could be expected to endure it.²⁵⁸ “The intensity and the du-

253. *Wilson*, 2000 WL 988268, at *6. Goldman explained that leaderless resistance was a “philosophy of armed struggle” and “it says that rather than taking action as a group, as an organization such as the Ku Klux Klan, individuals, without having direction from a leader, should take hostile or harassing action against victims or potential victims in order to give deniability to the organization, but also at the behest of the greater white revolution.” *Id.*; see also *id.* (explaining that any white supremacist who wants to be considered a “warrior” in the movement will take violent or harassing action against a targeted person).

254. *Jouhari Interview*, *supra* note 3; *Cyberstalking Report*, *supra* note 111 (“In several instances, victims have been told by law enforcement simply to turn off their computers.”).

255. *Wilson*, 2000 WL 988268, at *4, *9 (“Despite calls to law enforcement agencies and the telephone company . . . Ms. Jouhari and her daughter continued to receive numerous ‘harassing’ telephone calls.”); see Ladd, *supra* note 3 (“Now in hiding, [Jouhari] says she doesn’t believe federal, state and local law enforcement care enough about online threats to try and stop them.”).

256. *Wilson*, 2000 WL 988268, at *7. Jouhari stated that law enforcement she contacted “think it is a joke.” Ladd, *supra* note 3.

257. *Sammes*, 358 P.2d at 347 (“That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.”).

258. RESTATEMENT, *supra* note 158, § 46 cmt. j (“The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and

ration of the distress [should] be considered in determining its severity.²⁵⁹ In this case, the constant harassment changed Jouhari's life. Before Jouhari became a target of the ALPHA HQ Web site, she was happy, a hard worker, committed to her job, and a "pretty laid back" person.²⁶⁰ However, after the cyberassment began, Jouhari became stressed out, high-strung, cautious, anxious, worried, upset, and preoccupied.²⁶¹ She began to have headaches, neck and knee pain, and stomach problems.²⁶² Jouhari was prescribed muscle relaxants and anxiety medication.²⁶³

The threats and intimidation did not merely cause concern, but led Jouhari to take action.²⁶⁴ She became extremely aware of her daily activities, obtained a license to carry a weapon, and purchased a nine-millimeter handgun.²⁶⁵ Jouhari eventually left her job and her home.²⁶⁶ She moved more than four times in order to seek some peace of mind and safety—to no avail.²⁶⁷ She and her daughter were forced to live as fugitives, all the while struggling financially because the constant moves and harassment precluded steady employment.²⁶⁸ Even today, Jouhari and her daughter live in an undisclosed location.²⁶⁹

4. Intent and Causation

The issues of intent and causation are significant factors, but should not be difficult to demonstrate in this case. To prove that the defendant intentionally caused severe emotional distress, the plaintiff must show that the defendant acted with the desire to cause such distress or knew that such distress was substantially certain to result.²⁷⁰ Wilson's desire

unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.").

259. *See id.*

260. *Wilson*, 2000 WL 988268, at *9.

261. *Id.*

262. *Id.*

263. *Id.*

264. *See id.*

265. *Id.* at *8.

266. *Id.* Moving from Reading "was leaving everything [s]he worked for." *Id.* at *8-9.

267. *Id.* at *8-16.

268. *Id.* at *16. Jouhari stated that "The career I'm really good at doing is over, I think, if I want to end this madness, I don't have a home If I want any peace, I'm going to have to change my name and let everything I ever worked for, my education, my work, my awards, throw it all down the drain." *Id.*; *see also id.* at *8 ("I didn't want to leave the only place I ever knew. I didn't want to leave my job and benefits. I was holding out hope that something would happen to make this better.").

269. *Jouhari Interview*, *supra* note 3.

270. RESTATEMENT, *supra* note 158, § 8A, § 46 cmt. i; *see also Delgado*, *supra* note 227, at 145; *Love*, *supra* note 162, at 151; RESTATEMENT, *supra* note 158, § 46 cmt. i (applying the tort also when the defendant has acted recklessly, in deliberate disregard of a high degree of probability that emotional distress will occur).

was to cause emotional injury to Jouhari and that was, in fact, the result.²⁷¹ Wilson's purpose for the Web site was to further the goals of the white supremacist movement, which included hanging "race traitors."²⁷² Wilson also wanted Jouhari to stop her activities as a fair housing advocate and utilized fear and intimidation to bring about that end.²⁷³ It is also substantially certain that such actions would result in fear and distress for a civil rights activist with a biracial daughter.

Causation has been met if the defendant acts with intent to cause the harm, and the intended harm results from his acts.²⁷⁴ Wilson intended to inflict emotional harm on Jouhari by intimidating her into ceasing her civil rights activism and threatening her for having a biracial daughter, both of which further the goals of white supremacy. As a result, Jouhari suffered severe emotional distress.

Although it was not proven in *Wilson* that Ryan Wilson himself engaged in the offline harassment of Bonnie Jouhari, it is important to make the distinction between the offline harassment and the online harassment. The central issue is not whether Ryan Wilson caused the offline harassment, but rather whether Ryan Wilson intended for his Web postings to cause Jouhari severe emotional harm.²⁷⁵ Even if the offline harassment by unknown individuals had not occurred, Jouhari should have been able to recover for her emotional harms because the racial slurs and online threats alone would cause the result that Wilson intended—to frighten and terrorize Jouhari.²⁷⁶ The moment Jouhari became aware that

271. *Wilson*, 2000 WL 988268, at *5-6.

272. *Id.*

273. *Id.*

274. RESTATEMENT, *supra* note 158, § 435A ("A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where the harm results from an outside force the risk of which is not increased by the defendant's act."). See *Meyers v. Hot Bagels Factory, Inc.*, 721 N.E.2d 1068, 1075 (Ohio App. 1999) (explaining in some jurisdictions, the outrageousness of the defendant's conduct itself can demonstrate his intent to cause emotional distress).

275. "Whether a white supremacist is responsible for every hang up or annoying phone call . . . is not the issue. What does matter is that Ryan Wilson and ALPHA HQ has put Ms. Jouhari and [Ms. Jouhari's daughter] in a heightened state of fear and vigilance." Sudarsan Raghavan, *Woman Threatened by White Supremacist Group Takes Her Plight to Court*, PHILA. INQUIRER, Apr. 19, 2000, available at http://www.phillynews.com/inquirer/2000/Apr/19/pa_west/SHATE19.html (quoting HUD lawyer Patricia McGarvey Knebel); Post-Hearing Brief at 49, *Wilson*, No. 03-98-0692-8, 2000 WL 988268 (H.U.D. A.L.J. July 19, 2000) ("[The] ALPHA HQ Web site put [Jouhari and her daughter] in a heightened state of fear and hyper-vigilance, causing them to continually uproot their lives in search of seemingly illusive [sic] safety and peace.").

276. Such recovery is similar to the arguments justifying liability for intentional infliction of emotional distress in fear of cancer cases. See *Potter v. Firestone*, 863 P.2d 795, 808, 810 (Cal. 1993) (finding that defendant company polluted a community's water supply with toxic waste known to cause cancer, the court permitted recovery for intentional infliction of emotional distress. The emotional distress recovery was permitted, even though the plaintiff had not presented any physical manifestations of cancer.). The recovery is for the plaintiff's anxiety about getting the disease, which is a separate legally

her name, picture, and work place, coupled with racial epithets and violent threats, were being displayed on a white supremacist Web site, she reasonably feared for both her and her daughter's safety and did what was necessary to protect their lives.

The fact that Wilson adhered to leaderless resistance and that offline harassment actually occurred made the causal connection between Wilson's Web postings and the severe emotional harm even stronger. A person who commits an intentional tort is liable whether the harm is expected or not, unless the harm is from "an outside force the risk of which is not increased by the defendant's acts."²⁷⁷ Wilson was not only aware of a risk to Jouhari of offline harassment, but also increased the risk by identifying Jouhari as the enemy in a call to anonymous lone wolves to act, and act they did.²⁷⁸

V. THE INTERNET AND THE TRUE THREATS DOCTRINE OF THE FIRST AMENDMENT

To serve as an arrow in the quiver to challenge bias motivated cyberassment, the tort of intentional infliction of emotional distress must be able to withstand First Amendment scrutiny.²⁷⁹ However, hate-mongers who cloak their activity in First Amendment armor will find no solace when the cyberassment, like in *Wilson*, rises to the level of a "true threat."²⁸⁰

cognizable injury than that of the individual who actually gets the disease. *Id.*; see also *id.* at 821 (requiring a showing of severe emotional harm to avoid spurious claims).

277. RESTATEMENT, *supra* note 158, § 435A; see *id.* at cmt. a (stating "thus where a person pursues another, threatening and attempting to kill him, and the other is struck by lightning during the pursuit, the first is not responsible for the harm thus caused unless the risk of being struck by lightning was increased by the pursuit"); see *Kimberlin v. Delong*, 637 N.E.2d 121, 129 (Ind. 1994) (permitting wrongful death action against defendant who injured decedent in a bombing, leading to decedent's suicide years later, because the intentional tort was a substantial factor in bringing about suicide).

278. Beam, *supra* note 64 ("Organs of information distribution such as newspapers, leaflets, computers, etc., which are widely available to all, keep each person informed of events, allowing for a planned response that will take many variations. No one need issue an order to anyone. Those idealist truly committed to the cause of freedom will act when they feel the time is ripe, or will take their cue from those who precede them.").

279. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"). A civil action, enforceable through the power of the court, may constitute "state action" for purposes of the Fourteenth Amendment and therefore triggers First Amendment protections. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (holding that a private cause of action for promissory estoppel triggers First Amendment protections because the application of state law is sufficient "state action"); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state court in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964))).

280. At first glance, some commentators may argue that the viability of intentional infliction of emotional distress is limited by the holding in *Hustler v. Falwell*, 485 U.S. 46 (1988). In *Hustler*,

A. *The True Threats Doctrine*

The central tenant of the First Amendment is that the government cannot limit expression because of the message, ideas, or subject matter espoused.²⁸¹ Most Americans respect the notion that even the person whose views are extremely offensive has the right to espouse those views without censorship.²⁸² However, the right to free speech is not absolute.²⁸³ Similar to obscenity, “fighting words,” and defamation, true

Jerry Falwell sued *Hustler Magazine* for libel, invasion of privacy, and intentional infliction of emotional distress for a parody it ran in its magazine that implied, in a bogus interview with Falwell, that his “first time” was during a drunken fling with his mother in an outhouse. *Id.* at 47-48. Although Falwell’s privacy and libel claims were unsuccessful, the jury awarded him compensatory and punitive damages for intentional infliction of emotional distress. *Id.* at 49. The Supreme Court reversed, finding that the State’s interest in protecting its citizens from emotional harm did not outweigh the press’ First Amendment rights. *Id.* at 50-51. The Court held that a public figure may not recover intentional infliction of emotional distress damages based on a publication, without showing that it contained a false statement of fact that was made with actual malice. *Id.* at 56; see *Cohen*, 501 U.S. at 671 (distinguishing promissory estoppel claim from *Hustler* which “held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress”). A plaintiff cannot circumvent the First Amendment requirements of a defamation claim by filing an intentional infliction of emotional distress cause of action. See, e.g., *id.* (“Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim.”); *Tech Plus, Inc. v. Ansel*, No. Civ.A.96-01668-B, 1999 WL 482329, at *12 (Mass. Super. Mar. 22, 1999) (A plaintiff cannot “end run the First Amendment protection of [opinion speech] by bringing an intentional infliction of emotional distress claim” based on the same speech.) The *Jouhari* case is not a defamation case in disguise. *Jouhari* did not seek reputational damages disguised in an intentional infliction of emotional distress framework. She sought emotional harm damages based on her fear of serious bodily harm. To require all intentional infliction of emotional distress cases, regardless of their factual underpinnings, to meet the requirements of a defamation case is paramount to making the tort, once again, parasitic to another tort cause of action.

281. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); see *Turner Broad. Sys., Inc. v. Fed. Communications Comm’n.*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) (striking down prosecution of white teen for burning a cross in a black family’s yard because the ordinance, even though it criminalized unprotected speech, did so based on its content or viewpoint stating that “[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed.”); *id.* at 386 (“The government may not regulate [speech] based on hostility--or favoritism--towards the underlying message expressed.”); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

282. See *Mosley*, 408 U.S. at 95-96 (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.”). Even Bonnie *Jouhari*, despite all that she had been through stated “free speech is a wonderful thing. [White supremacists] have the right to espouse their view.” *Jouhari Interview*, *supra* note 3.

283. See, e.g., *R.A.V.*, 505 U.S. at 382-85 (permitting restrictions on speech in certain limited areas such as obscenity, fighting words, and defamation); *Harte-Hanks Communications, Inc. v.*

threats are not protected speech.²⁸⁴ Under the true threats doctrine, the First Amendment right of an individual to articulate a message free of government regulation must yield to competing interests of “protecting individuals [and society] from [threats] of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”²⁸⁵

The designation of true threats as a form of unprotected speech originated in *Watts v. United States*.²⁸⁶ At a public rally on the grounds of the Washington Monument, Robert Watts told the crowd that he was not going to participate in the draft, stating, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”²⁸⁷ Watts was convicted of violating a statute that criminalized a threat to kill or seriously injure the President of the United States.²⁸⁸ The court of appeals affirmed

Connaughton, 491 U.S. 657, 664-65 (1989) (defamation); *Jenkins v. Ga.*, 418 U.S. 153, 155-58 (1974) (obscenity); *Street v. New York*, 394 U.S. 576, 592 (1969) (fighting words).

284. See *Watts v. United States*, 394 U.S. 705, 705 (1969) (holding the statute at issue, which made a threat against the President of the United States a criminal offense held that what constituted a “threat” had to be “distinguished from . . . constitutionally protected speech”); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002) (“distinguish[ing] between political hyperbole, which is protected, and true threats, which are not”); *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 702 (7th Cir. 2001), *cert. granted in part by Scheidler v. Nat’l Org. for Women, Inc.*, 122 S.Ct. 1604 (2002), *and cert. granted in part by Operation Rescue v. Nat’l Org. for Women*, 122 S.Ct. 1605 (2002) (holding that the lower court correctly concluded that the statements “were not protected political speech but constituted true threats outside the protection of the First Amendment”); *United States v. Fulmer*, 108 F.3d 1486, 1492-93 (1st Cir. 1997) (“[A] true threat is unprotected by the First Amendment.”); *United States v. Alkhabaz*, 104 F.3d 1492, 1505 (6th Cir. 1997) (“[O]nly communications which convey ‘true threats’ . . . are ‘threats’ outside the embrace of the First Amendment’s guarantees.”); *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (“The First Amendment . . . requires a court . . . to differentiate between ‘true threats’ and protected speech.”); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir. 1995) (“True threats of force . . . lie outside the First Amendment.”).

285. *R.A.V.*, 505 U.S. at 388; see, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (enhancing penalty for bias-inspired crime upheld on the basis that it was not over and above disagreement with offenders’ beliefs or biases, but because it redressed perceived harms – inflicting individual and societal harms). The Supreme Court has yet to provide a clear definition for the term “true threat.” See *Planned Parenthood*, 290 F.3d at 1071 (providing benchmarks, but no definition, for a true threat); *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (“*Watts* did not fashion a bright-line test for distinguishing a true threat from protected speech.”); see also *United States v. Baker*, 890 F. Supp. 1375, 1385 (E.D. Mich. 1995) (ruling a communication containing an alleged non-coercive threat may be regulated), *aff’d sub nom United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

286. 394 U.S. 705 (1969).

287. *Watts*, 394 U.S. at 705-06.

288. *Id.* at 706. The statute at issue provided:

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 or to inflict bodily harm upon the President of the United States, the President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Watts' conviction.²⁸⁹ The Supreme Court reversed the lower courts and held that, although the statute was constitutional, the government failed to prove that Watts' statement was a threat, as opposed to constitutionally protected speech.²⁹⁰ After a review of the context of the statement, its conditional nature, and the reaction of the listeners, the Court found that the statement was not a threat, but merely political hyperbole.²⁹¹

Shortly after *Watts*, the Supreme Court decided *Brandenburg v. Ohio*.²⁹² The defendant in *Brandenburg*, a leader of a Ku Klux Klan organization, was convicted under an Ohio statute that prohibited advocating violence.²⁹³ The defendant stated at a Klan rally, "We're not a revenge 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."²⁹⁴ The Supreme Court reversed the defendant's conviction and struck down the statute because the First Amendment protects speech that advocates the use of force or violations of laws, as long as it is not "directed to inciting or producing imminent lawless action and is [not] likely to incite or produce such action."²⁹⁵ This language is known as the *Brandenburg* exception.²⁹⁶

The Supreme Court has yet to establish a standard for determining when speech or expressive activity rises to the level of a "true threat."²⁹⁷

Id. (quoting 18 U.S.C. § 871(a) (1966)).

289. *Id.*

290. *Id.* at 707-08 (finding the statute constitutional because of the Nation's "valid, even . . . overwhelming, interest in protecting the Chief Executive and in allowing him to perform his duties without interference from threats of physical violence" (citing H.R. REP. NO. 652, 64th Cong., (1st Sess. (1916)))).

291. *Id.* at 708; see *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1014 (9th Cir. 2000) ("We call statements 'true threats' to distinguish them from statements that are threatening on their face but could only be understood, under the circumstances, as hyperbole or jokes."); *opinion vacated for en banc consideration*, 268 F.3d 908 (9th Cir. 2001); *United States v. Kelner*, 534 F.2d 1020, 1026 (2nd Cir. 1976) ("[T]he [*Watts*] Court construed the word 'threat' to exclude statements which are, when taken in context, not 'true threats' because they are conditional and made in jest.").

292. 395 U.S. 444 (1969).

293. *Brandenburg*, 395 U.S. at 444-45.

294. *Id.* at 446-47.

295. *Id.* at 447-48 ("[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." (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961))).

296. See generally Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and The First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1215 (1999) (explaining that the Court in *Brandenburg* held that abstract advocacy of violence deserves First Amendment protection).

297. *Planned Parenthood*, 290 F.3d at 1074 ("Apart from holding that Watts's crack about LBJ was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment."); see also *United States v. Francis*, 164 F.3d 120, 122 (2d Cir. 1999); Noffsinger, *supra* note 296, at 1216 ("Because the [*Watts*] opinion included no explicit test or criteria broadly applicable to other cases, the lower courts have adopted a patchwork of tests for assessing whether speech constitutes a threat.").

Although *Watts* and *Brandenburg* are often cited as two different exceptions to the First Amendment prohibition on regulating speech, the two cases have provided “benchmarks” for the parameters of violent speech.²⁹⁸ Advocating violence is protected speech, while a true threat of violence is not.²⁹⁹ Federal and state courts have developed differing tests of analysis to distinguish between a true threat and protected speech.³⁰⁰ The true threats doctrine has been analyzed in the context of threats made via public speeches, mail correspondence, the telephone, and radio and television broadcasts. Today, the same analyses are shifting to threats made over the Internet.

298. See *Planned Parenthood*, 290 F.3d at 1071 (“The Supreme Court has provided benchmarks, but no definition,” in defining a true threat.); Noffsinger, *supra* note 296, at 1215 (“Most subsequent lower court decisions have evaluated potentially threatening speech either under *Watts*—when the challenged speech resembles a ‘true threat’—or under *Brandenburg*—when the speech appears to incite others to take some unlawful action—but rarely under both cases.”).

299. See *Planned Parenthood*, 290 F.3d at 1072 (“[W]hile advocating violence is protected, threatening a person with violence is not.”); *Roberts v. United States*, 468 U.S. 609, 628 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protections.”).

300. For a discussion of the different tests, see *State v. Perkins*, 626 N.W.2d 762, 767-71 (Wis. 2001). The tests can be placed in the following categories:

Unequivocal and Unconditional: *Kelner v. United States*, 534 F.2d 1020, 1027 (2d Cir. 1976) (a true threat is “on its face and in the circumstances in which it is made so unequivocal, unconditional, immediate, and specific, as to convey a gravity of purpose and imminent prospect of execution”); see also *United States v. Crews*, 781 F.2d 826, 831-32 (10th Cir. 1986) (holding a true threat “according to language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected ‘vehement, caustic . . . unpleasantly sharp attacks on government and public officials’” (quoting *Kelner*, 534 F.2d at 1026)).

Objective Reasonableness Standard from the Speaker’s Perspective: “Whether a particular statement may properly be considered to be a threat is governed by an objective standard – 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.” *Planned Parenthood*, 290 F.3d at 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (finding standard from perspective of the speaker to avoid conviction based on ambiguous statements that a listener may find threatening due to events of which the speaker is unaware); *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) (asking 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 an intention to inflict bodily harm upon or take the life of [another]”).

Objective Reasonableness Standard from the Listener’s Perspective: Some jurisdictions view the statement from the listener’s perspective. See *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000), *cert. denied by Hart v. United States*, 531 U.S. 1114 (2001) (“[A] court must . . . determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future.”); *United States v. Viehhaus*, 168 F.3d 392, 396 (10th Cir. 1999) (“The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.”).

Objective Reasonableness-Hybrid: At least one federal jurisdiction adheres to a hybrid test, considering the threat from the perspective of both the speaker and listener. *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997) (stating a true threat exists when “a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression of intent to harm”); see *Perkins*, 626 N.W.2d at 770 (adopting the hybrid test).

B. True Threats Over the Internet

The most significant case to date that discusses true threats on the Internet is *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.³⁰¹ In *Planned Parenthood*, the United States Court of Appeals for the Ninth Circuit, consistent with other courts that have discussed threats over the Internet, applied the traditional true threats test established through its jurisprudence.³⁰² However, the Ninth Circuit did not discuss any of the unique characteristics or features of the Internet that might impact the gravity of the threat, a significant oversight considering the new medium's role as a force multiplier and tool of anonymity.³⁰³

In 1994, based on differing opinions about the escalating violence in the pro-life community, a number of activists formed a splinter group from the pro-life organization Operation Rescue, named the American Coalition of Life Activists ("ACLA").³⁰⁴ ACLA supported the use of force to oppose abortion services, even though doctors David Gunn, George Patterson, and John Bayard Britton were shot and killed the previous year following the release and publication of wanted-style posters by pro-life activists that identified the doctors as abortionists and included their names, photographs, and addresses.³⁰⁵

Undeterred by the deaths of these three people in 1995, ACLA released the "Deadly Dozen" poster. Designed in a wanted-style format with "GUILTY" captioned at the top, the poster included the names and addresses of thirteen doctors, including doctors Warren Hern, Elizabeth Newhall, James Newhall, and George Kabacy, a doctor who worked for the Planned Parenthood of Columbia/Willamette ("PPCW") clinic.³⁰⁶ ACLA issued different variations of the wanted-style posters, including

301. 290 F.3d 1058 (9th Cir. 2002) (petition for certiorari filed, 71 USLW 3292 Oct. 8, 2002)(No. 02-563).

302. See *id.* at 1085.

303. See *id.* at 1075; *United States v. Kammersell*, 7 F. Supp. 2d 1196, 1201-02 (D. Utah 1998) (holding that an e-mail message threatening to injure someone with a bomb was a true threat); *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997) (concluding that e-mails exchanged with an unknown e-mail pal that included discussions of abduction and rape of teenage girls and killing of a Korean woman, defendant's classmate, did not constitute a true threat); *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd sub nom.* For a critical race feminist analysis of the three Internet threat cases, including the *Baker (Alkhabaz)* case, see Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity Shifting*, 3 J. GENDER RACE & JUST. 439, 463-72 (2000).

304. *Planned Parenthood*, 290 F.3d at 1064.

305. *Id.* at 1063-64. Dr. Gunn was killed in March 1993; Dr. Patterson was killed in August 1993; Dr. Britton was killed in July 1994. *Id.* at 1064. One of ACLA's founding members stated, "If someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." *Id.*

306. *Id.* at 1064-65 ("The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bulletproof vests and take other security precautions, which they did.").

one dedicated to Dr. Robert Crist, as well as others that displayed the names of various reproductive health care clinics.³⁰⁷ In 1997, a pro-life activist affiliated with ACLA posted a list called the "Nuremberg Files" on a Web site, identifying over 200 individuals, including, once again, Crist, Hern, and the Newhalls.³⁰⁸ The Nuremberg Files provided the names of doctors, abortion clinic employees, politicians, and judges identified as "abortionists."³⁰⁹ The Web site also indicated doctors who continued to perform abortions, as well as recognizing individuals who had been "victimized by anti-abortion terrorists" by striking through the names of persons killed and "graying out the names of the wounded."³¹⁰

Fearing that their lives were in danger, doctors Crist, Hern, the Newhalls, and a number of the abortion providers, including PPCW, sued the ACLA and twelve anti-abortion activists for violations of state and federal law. Finding violations of the Freedom of Access to Clinic Entrances Act of 1994 (FACE)³¹¹ and the Racketeer Influenced and Corrupt Organizations Act (RICO),³¹² a jury awarded the plaintiffs "\$107 million in actual and punitive damages."³¹³ The district court issued a permanent injunction prohibiting the distribution of similar content on posters or Web sites.³¹⁴

A three-judge panel of the United States Court of Appeals for the Ninth Circuit vacated and remanded the jury verdict, struck the injunction, and awarded judgment to the defendants.³¹⁵ The panel found that

307. *Id.* at 1064-66.

308. The Nuremberg Files can be found at <http://www.ChristianGallery.com/atrocities> (last visited Oct. 30, 2002).

309. *Planned Parenthood*, 290 F.3d at 1065; see *Planned Parenthood*, 244 F.3d at 1012-13.

310. *Planned Parenthood*, 244 F.3d at 1012-13; *Planned Parenthood*, 290 F.3d at 1065 (stating that the "abortionist" section "bears the legend: 'Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)'" and had "the names of Gunn, Patterson and Britton" struck through).

311. The Freedom of Access to Clinic Entrances Act of 1994 provides in pertinent part:

(a) Prohibited activities. Whoever – (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a) (2000); see *United States v. Dinwiddie*, 76 F.3d 913, 919-25 (8th Cir. 1996) (upholding the constitutionality of FACE as within the commerce power of Congress and consistent with First Amendment).

312. The Racketeer Influenced and Corrupt Organizations Act provides in pertinent part:

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

18 U.S.C. § 1962(c) (2000).

313. *Planned Parenthood*, 244 F.3d at 1013. A state tort claim for intentional infliction of emotional distress was abandoned before trial. *Id.* at 1013 n.3.

314. See *id.* at 1013.

315. See *id.* at 1020.

the content of the posters and Web site did not amount to true threats, but instead was protected speech under the First Amendment.³¹⁶ Furthermore, the panel found that the defendants had not authorized, ratified, or directly threatened acts of violence and therefore could not be held liable.³¹⁷ Essentially, two things were required before the defendants could have been found liable. First, the plaintiff abortion providers must have “understood the content on the posters and Web site to be veiled threats that defendant ACLA members (or others working with ACLA) would inflict bodily harm on [them] unless they stopped performing abortions.”³¹⁸ Second, the defendant anti-abortion activists “should have foreseen that the” abortion providers “would take the threats seriously.”³¹⁹ However, liability could not rest on the jury’s belief, as it did, that “it understood the statements as merely encouraging or making it more likely that others would” assault the abortion providers.³²⁰ Finding liability based on the publication of the doctors’ names, making it more likely that unrelated third parties might harm them, was an impermissible consideration under the First Amendment.³²¹

In a rehearing *en banc*, the Ninth Circuit, in a 6-5 decision, disagreed with the three-judge panel decision and upheld ACLA’s liability, finding that the content on the posters and Web site constituted “true threats” and was not protected speech.³²² The Ninth Circuit concluded

316. *See id.* at 1014-15.

317. *See id.* at 1014-17 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) (holding that although Evers’s statements could be construed as “intending to create a fear of violence whether or not improper discipline was specifically intended,” the statements were nevertheless protected because “there [wa]s no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence”).

318. *Id.* at 1015. The court continued, “[S]o interpreted, the statements are unprotected by the First Amendment, regardless of whether the activists had the means or intent to carry out the threats.” (citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 n.3 (9th Cir. 1990)).

319. *See id.* “The [jury] instruction provided that [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.” *Id.* at 1016.

320. *Id.* (“And by publishing the doctors’ addresses, ACLA made it easier for any would-be terrorists to carry out their gruesome mission. From the doctors’ point of view, such speech may be just as frightening as a direct threat, but it remains protected under *Claiborne Hardware*.” (citing *NAACP*, 458 U.S. at 929)).

321. *See id.* at 1014-15. The Ninth Circuit panel decision was vacated for *en banc* consideration of the case. *See Planned Parenthood*, 268 F.3d 908 (9th Cir. 2001). Some lawyers take note that it is possible that the September 11 terrorist attacks may have influenced the decision to hear the case *en banc*. *See Hit List or Free Speech*, INTELLIGENCE REP., No. 105, Spring 2002, at 61, 62, available at <http://www.splcenter.org/cgi-bin/goframe.pl?refname=/intelligenceproject/ip-4.html> (“The rehearing order came more than six months after the original decision, but a mere three weeks after the Sept. 11 attacks—and that timing may not have been coincidental . . . In the wake of Sept. 11, courts may be less inclined to afford First Amendment protection to speech that intentionally ‘encourage[s] unrelated terrorists,’ or makes ‘it easier for any would-be terrorist to carry out their gruesome mission.’” (quoting *Planned Parenthood*, 244 F.3d at 1016)).

322. *Planned Parenthood*, 290 F.3d at 1063. The court remanded “for consideration of the whether the punitive damages award comports with due process.” *Id.* at 1063.

that ACLA's liability was consistent with the First Amendment jurisprudence of the circuit,³²³ which is that a true threat is a statement made when 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."³²⁴

After an analysis of the facts and circumstances of the case, the Ninth Circuit concluded that it was reasonable for ACLA members to foresee that the plaintiffs would interpret the posters as a serious expression of ACLA members' intent to harm them.³²⁵ Although the posters did not contain explicit language threatening to kill the doctors, the context in which the posters and Web site were displayed was sufficient to lead the plaintiffs to believe that their lives were in danger.³²⁶

The Ninth Circuit explained that a historical context of violence existed regarding the posters. The dissemination of posters in a wanted-style format, with identifying information on specific abortion doctors, was previously followed by murders of three of those identified and the shooting injury of a fourth.³²⁷ The court compared the posters to Ryder trucks and burning crosses, images that do not literally mean death or serious injury, but when placed in a particular historical, social, or politi-

323. *See id.* The court first defined the term "threat" under the purposes of the FACE statute to ensure that it comported with the First Amendment's true threats doctrine essentially collapsing both into a single analysis. *See id.* "The task in this case [of determining if a true threat exists] does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE." *Id.* at 1085. Regardless of which test is used, courts consider a wide range of factors, including: (1) the political dimensions which the statement is made, (2) the context in which the statement is made, (3) the specificity of the statement, (4) whether the threat was communicated directly to its victim, (5) whether the statement was unconditional and immediate, (6) whether the message conveyed a gravity of purpose, (7) how the recipient and other listeners reacted to the threat, and (8) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. *See generally* Noffsinger, *supra* note 296, at 1218-28 ("Courts' evaluation of threatening speech often includes evaluation of the speech's content and context, the audience, and the speaker's intent, yet the analysis varies widely."); Nadine E. McSpadden, *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*, 76 *IND. L. J.* 485, 496 (2001) ("[I]n determining whether particular speech constitutes a true threat" a court considers the speaker's intent, the immediacy of the speaker's purpose, whether the speech is political, whether the speech is intertwined with violence, the content, context, specificity of target, and "the audience to which the speech is directed.").

324. *Planned Parenthood*, 290 F.3d at 1074, 1088.

325. *See id.* at 1078-82. The defendant also advanced a subjective intent argument that the court rejected. *Id.* at 1080. In *Watts v. United States*, the determination of whether a statement constitutes a "true threat" is distinct from the question of the defendant's intent. *Watts*, 394 U.S. at 707 ("[W]hatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a 'true threat.'"). Part of the state of mind of defendant does interject itself by virtue of determining, for example, whether a statement is in jest.

326. *See Planned Parenthood*, 290 F.3d at 1086.

327. *See id.* at 1085-86.

cal context, send a message.³²⁸ Just as two Ryder trucks parked in the driveway of an abortion clinic by a known anti-abortion activist would constitute a threat, so did the “wanted” posters.³²⁹ The court explained that the Ryder trucks in the abstract were not themselves threats, but placed in context, that a Ryder truck was used in the Oklahoma City Bombing of the Alfred P. Murrah Federal Building, the threatening message was clear.³³⁰ Both the person making the threats and the employees who worked at the clinic would understand the significance of the Ryder trucks.³³¹ Similarly, the “wanted” posters constituted true threats because they sent a message to specific doctors that they were “wanted” and should be killed.³³² The “scorecard” in the Nuremberg Files, indicating those who had been killed and injured, reinforced the message.³³³ As a result of the posters, the physicians took extreme security measures to protect themselves and their families, including wearing bullet-proof vests.³³⁴ The Ninth Circuit concluded that the statements on the posters and Web site constituted unprotected speech under the First Amendment because they were true threats.

C. Application of the True Threats Doctrine to Wilson

The cyberassault of Jouhari warranted recovery for intentional infliction of emotional distress.³³⁵ In Jouhari’s case, the First Amendment did not protect Wilson’s conduct because his conduct constituted a true threat.³³⁶ First, Wilson posted an image of Jouhari’s office exploding into flames and included bomb-building instructions under her picture on the ALPHA HQ Web site.³³⁷ The site also stated that Jouhari “should be-

328. See *id.* at 1078-79, 1085-86 (citing *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir. 2000)); see also *United States v. Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993) (expressing that in a conviction for cross burning under civil rights statutes, “[s]ome would certainly view a burning cross as ‘a precursor to physical violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy’” (quoting Charles H. Jones, *Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression*, 18 WM. MITCHELL L. REV. 935, 948 (1992))).

329. *Planned Parenthood*, 290 F.3d at 1078-79, 1085-86 (citing *Hart*, 212 F.3d at 1072).

330. See *id.* at 1079 (citing *Hart*, 212 F.3d at 1072).

331. See *id.*

332. See *id.* at 1085-86.

333. See *id.*

334. See *id.*

335. See Sec’y, *United States Dep’t of Hous. & Urban Dev. v. Wilson*, No. 03-98-0692-8, 2000 WL 988268, at *18 (H.U.D.A.L.J. July 19, 2000).

336. See *id.* at *18. The facts of Jouhari’s case probably make it easier to show a true threat than the facts in *Planned Parenthood*. See *United States v. Gilbert*, 884 F.2d 454, 456-57 (9th Cir. 1989) (holding that a letter and posters, mailed to employee of adoption agency “that placed minority children with white families,” condemning employee’s actions and warning that “[w]hite persons consorting with blacks will be . . . punished by Death, Automatic by Public Hanging,” and other slurs constituted a true threat and was actionable under the Fair Housing Act).

337. *Wilson*, 2000 WL 988268, at *3-4. For a discussion on creating a new category of “harm advocacy speech” that may be regulated by the government without violating on the First Amendment, see S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost*

ware, for in our day, they will be hung from the neck from the nearest tree or lamppost.”³³⁸ Taken in context, these statements would certainly lead a reasonable person to foresee that the statements would be interpreted by Jouhari as a serious expression of intent to harm her and her daughter, considering the history of violence by white supremacists and their use of leaderless resistance.³³⁹ Even more convincing is the fact that these were code words from the *Turner Diaries*. Second, the offline harassment of Jouhari began almost immediately after the first posting on the ALPHA HQ Web site, and persisted relentlessly for close to two years.³⁴⁰ Third, Jouhari’s reaction, as well as those around her, to the Web postings indicated that she was terrified.³⁴¹

In an attempt to distinguish the Jouhari case from *Planned Parenthood*, it may be argued that the tort of intentional infliction of emotional distress presents too great a chance of censoring unpopular ideas.³⁴² Because extreme and outrageous language will often be associated with unpopular ideas, it would be too difficult to discern if the trier of fact disapproves of the language rather than the message.³⁴³ However, such claims fall flat when addressing threats of violence. The tort of intentional infliction of emotional distress serves to protect a person’s mental

of Harm Advocacy: Getting Beyond Brandenburg, 41 WM. & MARY L. REV. 1159, 1189-92, 1196-97, 1214-30, 1238-43 (2000).

338. *Wilson*, 2000 WL 988268, at *3. “A threat may be inferred from [its] context . . . [and when] the speaker expressly mentions future violence, context can make it clear that it is the speaker himself who means to carry out the threat.” *Planned Parenthood*, 244 F.3d at 1017-18; *see also* *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1129-31 (finding comments to be “true threats,” the court upheld punitive damages recovery against defendant for mailing letters to lesbian plaintiff that included derogatory remarks, inflammatory language and death threats, such as “JUNE LEFT[,] NOW IT’S YOUR TURN TO GO[,] HEAD FIRST OR FEET FIRST”).

339. *Wilson*, 2000 WL 988268, at *17-19. The Third Circuit, which includes Jouhari’s home state of Pennsylvania, uses the “objective, reasonable person test” that is followed by the Ninth Circuit. *See United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (stating that the test “requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein 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 an intention to inflict bodily harm upon or to take the life of the President” (quoting *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969))).

340. *Wilson*, 2000 WL 988268, at *19-20.

341. *Id.* at *20; *see Planned Parenthood*, 290 F.3d at 1086; *see also United States v. Hoffman*, 806 F.2d 703, 712 (7th Cir. 1986) (holding that a letter mailed to the White House threatening the President constituted a true threat; “The immediate response of the mail-room employee and the Secret Service to the content of the letter is clear evidence of the seriousness the recipients of Hoffman’s letter attached to the expression of the intent to harm the President.”).

342. Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1758-59 (1985) (“The tort of intentional . . . infliction of severe emotional distress . . . presents too great an opportunity for censorship of unpopular ideas for the utterances made the object of liability under the tort to be completely outside the first amendment’s coverage.”).

343. *Id.*

tranquility and interest in peace of mind.³⁴⁴ The use of this tort to challenge violent threats on the Internet is wholly consistent with the rationales underlying the First Amendment exception for true threats, which serves to protect individuals and society from threats of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.³⁴⁵

D. Unique Features of the Internet May Bolster a True Threats Analysis

While the *Planned Parenthood* Court's analysis is persuasive in terms of establishing a standard for determining what constitutes a true threat, this article advocates that courts should recognize and take into account the significance of the Internet medium when it is used as a vehicle for issuing violent threats.³⁴⁶ In *Planned Parenthood*, the Ninth Circuit, sitting *en banc*, made it clear that the factual context and "all of the circumstances" of the case should be considered in determining if a

344. See *Planned Parenthood*, 290 F.3d at 1079 ("[I]t is making a threat to intimidate that makes ACCLA's conduct unlawful, not its viewpoint."); *Tompkins v. Cyr*, 995 F. Supp. 664, 677 (N.D. Tex. 1998) ("[C]itizens have the right to be protected from the kind of 'abuse' that the tort of intentional infliction of emotional distress proscribes."); *Taylor v. State*, 617 So. 2d 1198, 1204 (La. App. 1993) ("We recognize a legally protected right to be free from serious, intentional invasions of mental and emotional tranquility."); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 368 S.E.2d 477, 477 (S.C. App. 1988) ("The modern trend recognizes that emotional tranquility is an interest worthy of protection."); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 652 (Tex. 1987) ("[F]reedom from severe emotional distress is an interest which the law should serve to protect."); *Johnson v. Rogers*, 763 P.2d 771, 779 (Utah 1988) ("Virtually all jurisdictions in the United States now recognize a broad protected interest in mental tranquility . . ."); RESTATEMENT, *supra* note 158, § 46 cmt. j ("Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like . . . [and] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.").

345. *Planned Parenthood*, 290 F.3d at 1075-76. "Violence is not a protected value." *Id.* at 1086; see also *United States v. Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993) ("Cloaking an act that portends violence with the guise of protected expression is nothing more than claiming that the First Amendment protects fighting words." (citing *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992))). In an amicus brief submitted to the Ninth Circuit panel in the *Planned Parenthood* case on behalf of the ADL, The American Jewish Committee and Hadassah, amici stated:

Threats directed against places of worship, religious groups, and individuals significantly interfere with constitutionally protected freedoms of religion, speech and assembly. People understandably will refrain from activities that they reasonably will fear will put their lives and the lives of their children in jeopardy. People acting under the cloud of threats experience enormous distress. The law should not tolerate such interference with people's lives. True threats, as determined under this Court's well established definition, serve no desirable purpose and inflict great harms.

Brief of Amici Curiae Anti-Defamation League et al. in Support of Plaintiffs at 14, *Planned Parenthood*, 244 F.3d 1007 (9th Cir. 2001) (No. 95-1671-JO).

346. See Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1750-52 (1995). Lawrence Lessig proposes that the Supreme Court should not develop First Amendment law as it applies to the Internet, not "just now." *Id.* at 1052. The Court should refrain from deciding conflicts until the "nature of these conflicts is well mapped, well constructed, well understood." *Id.* He believes that the Supreme Court should let the lower courts wrestle with the issues before it determines how to regulate the Internet. *Id.*

statement is a true threat.³⁴⁷ However, the Ninth Circuit failed to focus on a contextual component of great significance—the pro-life activists' use of the Internet as the medium to disseminate their violent message.³⁴⁸ As discussed above in Part III, the Internet serves as a significant force multiplier, permits anonymity, and Web-based activities receive slow responses from law enforcement agencies.³⁴⁹ These features, or new challenges, may warrant separate or collective consideration in determining if statements constitute true threats.³⁵⁰

At least two features of the Internet, its role as a force multiplier and tool of anonymity, may have played a significant role in fueling the fear of the plaintiffs in *Planned Parenthood*.³⁵¹ Similar to the ALPHA HQ Web site in *Wilson*, the Nuremberg Files Web site was accessed by an incredible number of visitors, approximately 200,000 hits a month between 1995 and 1998,³⁵² despite the organization's small numbers offline. Furthermore, reproductive rights advocates were cognizant of its

347. *Planned Parenthood*, 290 F.3d at 1078 (citing *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984)). "Indeed, context is critical in a true threats case and history can give meaning to the medium." *Id.*

348. See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1792 (1995). The use of this contextual analysis lends itself to consideration of the Internet as a new medium within the confines of the current true threats jurisprudence. See *id.* ("Certainly it is likely that new and unanticipated problems will arise and a degree of judicial caution is therefore desirable in invoking the First Amendment. But it is by no means clear that the basic principles will themselves have to be much changed.")

349. See *supra* footnotes accompanying Part III.

350. See Elizabeth Phillips Marsh, *Purveyors of Hate on the Internet: Are We Ready for Hate Spam*, 17 GA. ST. U. L. REV. 379, 407 (2000) ("When purveyors of hate use the Internet to send e-mail threats, distribute hate spam, or establish hate motivated Web sites, these insidious communications are magnified in a way that deserves heightened governmental response."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 901-10, 942-46, 965-69 (1998) ("new deployment of information technology seems to generate some kind of regulation designed to guide and constrain it. This in turn prompts a First Amendment challenge designed to guide and constrain the regulation."); Jason Schlosberg, *Judgment on "Nuremberg": An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet*, 7 B.U. J. SCI. & TECH. L. 52, 56-60, 65-70, 75-78 (2001) ("As the communications occurred in a unique medium, the elements of that medium must also be integrated into the analysis of determining whether the communications are 'true threats.'"); Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 14-19, 33-34 (1998) (concluding that the increasing practice associated with tabloids merging into mainstream press will produce diminished First Amendment rights which "will come less in the alteration of formal doctrines than in the actual outcome of verdicts and damages awards"); Sunstein, *supra* note 348, at 1792-1804 (discussing whether different features or characteristics of different media should affect First Amendment analysis).

351. See Kim Murphy, *A Civil Action Becoming Doctor's Defense Weapon*, L.A. TIMES, Jan. 13, 1999, at A1. Unlike Jouhari and her daughter, the plaintiffs in *Planned Parenthood* were offered protection. See *id.*

352. From the shooting death of Dr. Barnett Slepian in New York in October, 1998, to January, 1999, Neil Horsely, the operator of anti-abortion Web site ChristianGallery.com, claimed that he had over "2 million people and 12 million hits" by January, 1999. Diane Lore, *Abortion Foe Vows Web site Will Grow*, ATLANTA J. & CONSTITUTION, Feb. 4, 1999, at A01.

broad reach to unknown individuals.³⁵³ The plaintiffs discovered the identity of the Web operator, but access anonymity of the Web site itself may have created more apprehension than the offline posters. Priscilla Smith of the Center for Reproductive Law and Policy stated that the Internet posting, "in and of itself," made "doctors feel more vulnerable" because the information could "get to somebody in the woods of North Carolina or on the Canadian border in two seconds."³⁵⁴ A reasonable person making the threats would certainly be aware that advocating serious injury or death of abortion providers to millions of anonymous individuals via the Internet, after three killings had already taken place, would cause the victims of their threats to interpret the threats as a serious expression of intent to harm.

CONCLUSION

Bias motivated activities on the Internet need a legal response that considers the medium's unique features: its effect as a force multiplier, its viability as a tool of anonymity, and the inadequate response of law enforcement. These factors contribute to the legal harms of individuals and communities. This article advocates that lawyers should use the tort of intentional infliction of emotional distress as an arrow in the quiver to target the cyber-head of the Hate Hydra. The tort permits a contextual analysis that encompasses the online medium's unique challenges, particularly in those instances in which specific individuals are identified and threatened with violence, directly or through code words. In situations where fear and intimidation are at the heart of the case, the tort of intentional infliction of emotional distress does not infringe on a hate-monger's First Amendment right to espouse his or her views. Protecting a person's right to mental tranquility, which includes freedom from fear of serious injury or death, is consistent with the First Amendment's true threats exception, an exception created to protect individuals, like Bonnie Jouhari, and society in general, from threats of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur. Victims like Jouhari should turn to civil remedies as a means to counter bias motivated attacks against them. In so doing, the tort of intentional infliction of emotional distress will rise to the challenge, presenting a formidable foe to those who would advocate hate and violence in cyberspace.

353. See *Wilson*, 2000 WL 988268, at *27.

354. *Murphy*, *supra* note 351.

