

The Nuremberg Files Case

One of the most important legal cases that raises the issue of free-speech on the Internet is the Nuremberg Files case, in which an antiabortion web site was ruled—after a series of back-and-forth opinions—to constitute a clear and present threat to doctors and therefore beyond the boundaries of free-speech guarantees. A little over a decade ago, one of the project groups for this class developed what I thought was an excellent report on the case as it was unfolding, which you can find at the following URL:

<http://cs.stanford.edu/~eroberts/cs181/projects/nuremberg-files/>

(It is also a nice model of what a good final project web site looks like!) Much of the legal action has happened since that time, as reported in the following series of articles from *The New York Times*.



Anti-Abortion Site On Web Has Ignited Free Speech Debate

By SAM HOWE VERHOVEK (NYT)

January 13, 1999, Wednesday

PORTLAND, Ore., Jan. 12—"The Nuremberg Files: Visualize Abortionists on Trial," proclaims the site on the World Wide Web. With simulated blood dripping from fetus parts, the site leads a cyber-visitor to the "main archive," listing the names of dozens of doctors and clinic workers around the country who provide abortions.

For some of the people the site calls "baby butchers," the information includes photographs, home addresses, license plate numbers, the names of their spouses and children. A few doctors, including Barnett A. Slepian of Amherst, N.Y., near Buffalo, who was fatally shot by a sniper last fall, have a line through their names, denoting that they have been killed; those who have been wounded have their names listed in gray.

For a Federal court jury here, hearing a civil case brought by Planned Parenthood and several doctors against some of the most militant abortion opponents in the country, the trial will boil down to this question: is the Web site constitutionally protected free speech?

The plaintiffs, who are seeking up to \$200 million in damages, have brought their case under the 1994 Federal Freedom of Access to Clinic Entrances Act, which makes it illegal to use "force or threat of force" against anyone seeking or providing an abortion, and allows clinics to seek unlimited damages if workers are harmed or intimidated. But as simple as the question before the jury sounds, the legal issues are not.

For one thing, this is the first major case brought under the law that does not involve direct personal threats or an actual physical confrontation. While the plaintiffs say the Web site amounts to a solicitation of murder, the defendants contend that it is a legal informational tool.

The Web site, which is named for the German city in which Nazis were put on trial after World War II, explains: "A coalition of concerned citizens throughout the U.S.A. is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. We anticipate the day when these people will be charged in perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children."

But abortion is legal. And in the climate surrounding the issue—the National Abortion Federation says there have been 7 killings, 15 attempted murders, 99 acid attacks, 154 arson incidents and 39 bombings involving abortion clinics or workers in the last two decades—the plaintiffs here say that radical anti-abortion groups are clearly using devices like the Web site to incite more violence and deny women access to abortion services.

“Just like bounty hunters of the Old West, the defendants want to stop the doctors by any means—dead in their tracks,” Maria Vullo, a lawyer for the plaintiffs, told jurors. “It’s terrorism.”

In testimony here on Monday, Dr. Warren Hern, of Boulder, Colo., said his life had been turned into a nightmare by the protesters, who have also put his face on their “Deadly Dozen” flier, which looks like a wanted poster and says he and other doctors are “Guilty of Crimes Against Humanity.”

“It has made me feel a great sense of personal isolation,” Dr. Hern told the jurors, explaining that he now wears a bulletproof vest, covers his windows, always sits with his back toward the wall and is leery of any contact with strangers.

But the roster of 14 defendants, which includes the American Coalition of Life Advocates, an umbrella group that has been described as too extreme by more mainstream anti-abortion groups, say most of the information they provide could be found in telephone directories.

Furthermore, they say, nothing in the “Nuremberg Files” advocates violence against the doctors or clinic workers, although the site does include links to other Web pages that defend killing abortion workers as legally justifiable homicide, and to a letter from prison from Paul J. Hill, who murdered a doctor in Pensacola, Fla., in 1994. In it, he describes “the joy I felt after shooting the abortionist, and still feel today.”

In opening arguments last week, Chris Ferrara, a lawyer for the defendants, said the case was baseless.

“This is a case about the threat to kill or injure, which is simply not there,” he said. “Opinions? Yes, sometimes harsh. But no violence.”

Judge Robert E. Jones of Federal District Court, has turned down requests from the defendants to dismiss the case outright, in effect ruling that the Web site was not automatically protected free speech.

In some ways, Judge Jones seems to have signaled that the plaintiffs may have a valid case. Quoting an appeals court ruling in another case, Judge Jones wrote that “alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.”

Jonathan Entin, a law professor at Case Western Reserve University in Cleveland, said the case posed a difficult question of where to draw the line between protected free speech and illegal threats. The basic standard set by the Supreme Court is that speech is protected unless it is directed toward and likely to produce “imminent lawless action,” he said.

“The problem for the plaintiffs is, the Web site does not explicitly say, it is your moral duty to go out and kill these people or maim them or harm their family,” Professor Entin said. “On the other hand, in the context in which this case is being litigated, we know there are people who are out there who are willing to go out and kill people who perform abortions. So the question is, to what extent will people take seriously the implicit message on this Web site, which is clearly that all right-thinking people should use whatever means necessary to stop people from performing abortions?”

Other experts said that if the Web site specifically advocated murder, it would almost certainly be found to be illegal, and, conversely, if it did not list doctors’ names and addresses, it would almost certainly be considered protected speech. But the question before the jury, where in the middle does it belong?

“The issues in this case are very tricky,” said David J. Fidanque, executive director of the American Civil Liberties Union of Oregon, which has filed a friend-of-the-court brief, arguing that the jury must focus not only on the fear the list may have spurred in the doctors, but also on the intent of the abortion opponents who contributed to it.

Though the case happens to represent one of the first major jury trials regarding free speech and threats on the Internet, several legal experts agreed that the core issue would be the same if the abortion opponents had published the list of doctors in a newspaper or flier.

The plaintiffs want an injunction from Judge Jones that could essentially force the abortion opponents to cease circulating the files. Among the named defendants are Michael Bray, a minister and author of a book called “A Time to Kill,” which argues that killings of abortion doctors can be justifiable, and C. Roy McMillan, director of an anti-abortion group in Mississippi who has said that “it wouldn’t bother me if every abortionist in the country today fell dead from a bullet.”

In testimony this afternoon, another defendant, Andrew Burnett, publisher of Life Advocate Magazine of Portland, defended publishing the names and addresses of doctors on the Web site with the address www.christiangallery.com/atrocidity. He said his own address had been published numerous times in The Oregonian, the daily newspaper in Portland, after he was arrested in abortion protests.

It was a jarring experience, Mr. Burnett said, but one that made him realize how committed he was to his cause. Of the lists, he said: “It’s a legitimate way to have people reconsider what they do for a living.”

Creators of Anti-Abortion Web Site Told to Pay Millions

By SAM HOWE VERHOVEK (NYT)

February 3, 1999, Wednesday

PORTLAND, Ore., Feb. 2—In by far the largest judgment ever imposed on militant abortion opponents, a Federal jury today ordered creators of Old West-style “wanted” posters and a World Wide Web site that lists the names of abortion providers to pay more than \$107 million to Planned Parenthood and a group of doctors who contended that the material amounted to deadly threats.

The plaintiffs hailed their victory as a major step in their fight to stop the “domestic terrorism” of some abortion foes, whose lists of “baby butchers” on the Web site, called “The Nuremberg Files,” include the names, home addresses and license-plate numbers of many abortion doctors and the names of their spouses and children. When a doctor on the list is slain, as three have been, the Web site shows a line drawn through his name.

At least seven people working at abortion clinics around the country have been killed in recent years, and there have been more than 250 clinic bombings and incidents of arson. In that climate, abortion rights groups maintain, “The Nuremberg Files”—so called because the defendants say they hope someday to have abortion providers tried for crimes against humanity—is intended to stir up more violence.

But the defendants, who noted that nothing in their materials specifically advocated violence against abortion providers, said the decision trampled on the Constitution’s free-speech protections. They vowed to appeal, and legal experts believe the case may well wind up in the Supreme Court as a major test of the line between protected speech and unlawful intimidation.

In pressing its case, each side invoked civil rights history. The plaintiffs said they were using the legal tactics of civil rights groups that had won judgments allowing them to seize the assets and so shut down the operations of Klan organizations.

But several of the 14 defendants—12 individuals and organizations called the American Coalition of Life Activists and Advocates for Life Ministries—said they would never pay the judgment awarded today, and they likened themselves to fighters for racial justice.

“I could not in good conscience give money to an industry that thrives on killing children,” one defendant, Catherine Ramey, said outside the courthouse. “That would be like asking Martin Luther King to pay money to the Ku Klux Klan.”

The case was brought here in Portland, where some of the defendants’ operations are based, under Federal racketeering statutes and the Freedom of Access to Clinic Entrances Act of 1994, which makes it illegal to use “force or threat of force” against anyone seeking or providing an abortion.

The plaintiffs said the judgment, rendered by a jury of four men and four women, was an obvious message that their opponents’ tactics were illegal, and they urged prosecutors around the country to consider bringing criminal charges against the defendants.

Whether any of the money awarded today will ever find its way to Planned Parenthood or its co-plaintiffs is uncertain at best. In three other major cases against militant abortion opponents, here and in Houston and Chicago, juries have ordered smaller damage amounts, but many of the defendants have either refused to pay or asserted that they have transferred all their assets to others and thus have no way to pay. Further, the verdict returned today most likely has years of appeals ahead.

There have, however, been some seizure of assets from abortion foes. Planned Parenthood, for instance, has been able to seize computers from the national headquarters of Operation Rescue as well as frequent-flier miles accumulated by the group’s leader.

Few of the defendants here were even in the courtroom when, after three weeks of testimony and five days of deliberations, the verdict was reached today, and several have said they have taken steps, like transferring assets, to make themselves “judgment-proof.”

Charles Wysong, a defendant who is the head of the American Rights Coalition, a group based in Tennessee that says it helps women dealing with physical or emotional pain after they have had abortions, said the judgment would have no effect on his anti-abortion activities.

“We will continue to do whatever we’ve been doing,” said Mr. Wysong, who added that he had little money to pay anyone given the demands of providing for his 15 children, ages 10 months to 24 years. “I’ve fought this battle for a long time without much money. God will raise up someone to carry it on.”

Whatever the prospects for payment of any part of the award, abortion rights advocates said they had achieved a landmark victory in their quest to stifle the activities of militant anti-abortion groups.

“The jury saw anti-choice ‘wanted’ posters for what they are—a hit list for terrorists,” Gloria Feldt, president of the Planned Parenthood Federation of America, said in a statement issued in New York. “Whether these threats are posted on trees or on the Internet, their intent and impact is the same: to threaten the lives of doctors who courageously serve women seeking to exercise their right to choose abortion.”

Ms. Feldt said the jury's decision had helped to protect "our constitutional right to provide important health services and information, free from fear."

But defense lawyers said it had abridged a more fundamental right. Unlike previous cases brought under the clinic-access law, this one did not involve physical confrontation. "Any document that criticizes an abortionist could now be construed as threatening," said Christopher Ferrara of the American Catholic Lawyers Association, who represented one of the defendants. "And that has to alarm anyone who's concerned about the First Amendment."

Indeed, some free-speech advocates agreed that the case could open the door to disturbing limitations on public debate.

"A lot of this is aggressive speech, to some offensive speech," said David Hudson, a research attorney with the Freedom Forum First Amendment Center at Vanderbilt University. "But it is speech."

To some of the plaintiff doctors, though, who testified to wearing disguises or bulletproof vests in public, and instructing their children to head for the bathtub if they ever heard gunfire in the house, the case was about clear threats to their lives.

"Free speech is not in jeopardy here," said one plaintiff, Dr. Elizabeth Newhall of Portland. "Women and their doctors are."

In closing arguments last week, the plaintiffs' lawyers said the intimidation was obvious. They pointed, among other things, to the Web site's drawing a line across the names of doctors who have been killed, including the most recent, Barnett A. Slepian of Amherst, N.Y., near Buffalo, who was shot by a sniper in the fall. The names of those wounded are listed in gray.

"It's about using tactics to intimidate so these doctors will stop performing abortion because they are afraid that just like other doctors who have been murdered, it will happen to them," Maria T. Vullo, a lawyer for the plaintiffs, told the jurors.

Another lawyer for the plaintiffs, Martin London, said: "Our clients want freedom. They want the freedom to hug their child in front of a window."

Award Is Overturned in Abortion Doctors Case

By SAM HOWE VERHOVEK (NYT)

March 29, 2001, Thursday

SAN FRANCISCO, March 28—A federal appeals court threw out a record \$109 million verdict against abortion opponents today, ruling that a Web site and wanted posters that branded abortion doctors "baby butchers" and criminals were protected by the First Amendment.

A three-judge panel of the United States Court of Appeals for the Ninth Circuit here unanimously said the abortion opponents could be held liable only if the material authorized or directly threatened violence.

The panel ruled two years after a Portland, Ore., jury ordered 12 abortion opponents to pay damages to Planned Parenthood and four doctors, who had sued under federal racketeering law and another law against inciting violence against doctors who perform abortions. The case was seen as a test of a recent Supreme Court ruling that a threat must be explicit and likely to cause "imminent lawless action."

"If defendants threatened to commit violent acts, by working alone or with others," then their works could properly support the verdict, Judge Alex Kozinski wrote for the appeals court. But if their works "merely encouraged unrelated terrorists," he said, "then their words are protected by the First Amendment."

Planned Parenthood and the doctors were portrayed in the Old West-style wanted posters as "baby butchers," and a Web site called the "Nuremberg Files" listed the names and addresses of abortion providers and declared them guilty of crimes against humanity.

The abortion opponents said their posters and Web site were protected under the First Amendment because they were merely a list of doctors and clinics, not a threat.

Judge Robert Jones of Federal District Court instructed the jury to consider the history of violence in the anti-abortion movement, including the killings of three doctors after their names appeared on the lists.

One was Dr. Barnett Slepian, who was killed by a sniper in 1998.

Doctors who were on the list testified that they lived in constant fear.

The defendants maintained they were political protesters collecting data on doctors in hopes of one day putting them on trial like Nazi war criminals were at Nuremberg.

Among the defendants was Michael Bray of Bowie, Md., who went to prison from 1985 to 1989 for his role in arson attacks and bombings of seven clinics.

Free Speech That Threatens My Life

By WARREN M. HERN

March 31, 2001, Saturday

BOULDER, Colo.—The news of James Kopp’s arrest in France for the 1998 murder of Dr. Barnett Slepian reached me just as I finished performing an abortion for the last patient of the morning. My relief was tempered by the news of the previous day: A judgment against anti-abortion fanatics who want me and other doctors killed had been overturned by the United States Court of Appeals for the Ninth Circuit, in California.

The previous afternoon, as I sat by a window in my office talking with a reporter about the appellate court decision, I noticed that the Venetian blinds were slightly open. Without interrupting the conversation or thinking about it, I reached over to close the blinds. That has become my response when I find myself by an open window. I move away, draw the curtains or close the blinds.

It’s too dangerous for me to be in front of a window. Five shots were fired through the waiting room windows of my office in 1988. But I learned the need to be cautious most intensely in October 1998 as I watched in horror the reports of Dr. Slepian’s assassination in the kitchen of his home in western New York.

Whoever shot Dr. Slepian accomplished his purpose—to strike terror into my heart. It was an act of political terrorism, as have been the assassinations and attempted assassinations of 10 other abortion doctors and several similar attacks, also sometimes fatal, on others who helped abortion doctors or were with them.

It is unusual now for me to lift the coverings of windows in my home so I can see out. I have a nice view from my home of the famous Flatirons mountains that rise above Boulder, but it is a luxury now to enjoy that view.

As my life is now, the windows cannot be uncovered at night. Sometimes I look into the homes of my neighbors and see them moving about and relaxing with their families. My office is a fortress of steel fences and bulletproof windows, and my home has become a hiding place from which I emerge and hope that I will not be the next assassin’s target.

James Kopp, a suspect in Dr. Slepian’s assassination, has been arrested, but where is the next one like him? Who are all the people who helped him escape and hide? When and where will the next assassin strike? Will I get to live out my life?

This week’s decision by the Court of Appeals was crushing. I am one of four physicians who are plaintiffs in this lawsuit against anti-abortion activists who have targeted us. We sued them under federal racketeering law and another law against inciting violence against doctors who perform abortions. We sat in that courtroom in Portland in 1999 for one month next to the people who wanted us dead. We listened to our lawyers present fact after fact to the jury, showing the terror that had been inflicted on our lives. We listened to the self-righteous anti-abortion fanatics justify their use of speech in posters and on the Internet to terrify abortion doctors. My medical colleagues and I went into medicine to help people, and we do. But we became the targets of these despicable and dangerous people.

Each of us doctors described to the jury how we had been stalked and portrayed as criminals by the defendants’ “wanted poster” hit lists, which were distributed as fliers and displayed in a 1995 news conference in Virginia. Later, this list was posted on the Internet.

We described how our lives had been permanently warped—in some ways ruined—by this harassment. Maria Vullo, our attorney, eloquently showed the pattern to the jury: poster, murder; poster, murder; poster, murder—all since 1993. Her colleagues pounded home the inescapable conclusion that the defendants purposely created a climate that said to fanatics, “Kill these doctors. Here’s your list.”

The federal jury of Portland citizens agreed with us that the anti-abortion posters and rhetoric were dangerous to us. Their verdict against the defendants was an important signal that our adversaries may not exploit our democracy’s sacred freedom of speech in order to endanger others.

My name, along with those of other doctors, is on an Internet abortion hate list—called the “Nuremberg Files”—now found to be acceptable free speech by the appellate court’s decision. Dr. Slepian’s name has had a line drawn through it. Who’s next? Warren M. Hern, a physician, is the director of the Boulder Abortion Clinic

Posters by Abortion Foes Posed Threat, Court Rules

By ADAM LIPTAK (NYT)

May 17, 2002, Friday

A federal appeals court in California ruled yesterday that organizations that distributed Old West-style wanted posters identifying doctors who provided abortions had illegally threatened them, and it upheld a jury verdict against the organizations.

The defendants, two anti-abortion organizations and a number of individuals, also listed doctors' names and addresses on a Web site they called the Nuremberg Files. The names of doctors who had been killed were lined through in black; the names of wounded doctors were highlighted in gray.

The defendants said they were engaged in political advocacy, while the plaintiffs, four doctors and two health clinics, maintained that the speech in question encouraged violence against abortion providers.

The decision, by the United States Court of Appeals for the Ninth Circuit in San Francisco, reversed a decision by a three-judge panel of that court.

The vote was 6 to 5. The majority rejected a First Amendment doctrine that protects speech advocating violence so long as it is not directed to incite immediate lawless action.

"While advocating violence is protected," Judge Pamela Ann Rymer wrote for the majority, "threatening a person with violence is not." Judge Rymer said another doctrine, concerning threats, applied when specific people were named and made to fear for their safety.

Maria Vullo, who argued the appeal for the plaintiffs, said the essence of the court's decision was its rejection of threatening speech. "It's really terrorism," she said about the speech.

Christopher Ferrara, who represented the defendants, said his clients would ask the United States Supreme Court to review the decision. "This is a threat case without any identifiable threat," he said. "We're found liable for the format we chose."

An Oregon jury awarded the plaintiffs \$109 million in 1999. The earlier decision by the appeals court panel threw out that verdict. Yesterday's decision reinstated it, though the court instructed the trial judge to reconsider the punitive damages portion of the award in light of recent decisions.

The majority discounted the argument that the language used by the defendants was not overtly threatening. The use of wanted-style posters followed by killings was, the majority said, sufficient to strip the defendants of First Amendment protection.

"This is not political hyperbole," Judge Rymer wrote. "They were a true threat."

The dissenting judges said the majority erred in applying the "true threats" doctrine, which is often employed in considering face-to-face encounters, to the mass communications here.

"Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process," wrote Judge Stephen Reinhardt. "Private threats delivered one-on-one do not."

Floyd Abrams, the constitutional lawyer, said he was troubled by the decision.

"To analyze the case only as a 'threat' as opposed to one that essentially involves the toughest sort of political speech is to move far away from the core of the First Amendment," Mr. Abrams said.

"With a 6-to-5 vote and the fact that there are two bodies of law that are in great tension with each other, there is a good chance that the Supreme Court will agree to hear the case."