Targeting Speech and True Threats

Brandon Butler

Introduction: A Concept To Resolve a Controversy

This Note defines and discusses a category of crime-related speech that, although tied to grave criminal acts in controversial, high profile cases, has not been characterized clearly or accurately in those cases or in the copious First Amendment literature surrounding them. I call this phenomenon "targeting speech" because the speaker "targets" a victim by naming her or disclosing other personal information about her to an audience whose pre-existing malice the speaker directs at the victim.

By "targeting speech," I mean any communication that is:

(1) made with the purpose of providing personal information about the target (name, address, e-mail address, etc.) to an audience known to take unlawful action against persons like the target, and

(2) made with the purpose to communicate to the target that she has been singled out for the malevolent attention of these third parties.

When faced with the most prominent example of targeting speech, The Nuremberg Files case,[1] the Ninth Circuit held that a pro-life website and "wanted" posters depicting abortion providers constituted unprotected "true threats." Citing the context of political violence surrounding the posters and website at issue (similar posters

[1] Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (rehearing en banc), cert. denied, 123 S. Ct. 2637, 2638 (2003). The case is discussed in detail in Parts II and III below.

had been followed by murder of the doctors depicted), the Court held that a jury was entitled to find these communications constituted true threats despite their lack of an explicit expression of intent to carry out violence.

Dissatisfaction with the majority's argument won the defendants some unlikely allies among civil libertarians.[2] There is something wrong, critics of the majority argue, with calling speech a "threat" when it does not appear that the speaker intends to carry it out herself or have her agents do so.[3] Professor Gey suggests that a version of incitement is the better doctrine to apply to cases like this; where there is no imminent danger of violence due to speech, the First Amendment bars prosecution. Otherwise, the chilling effect on political speech in highly polarized contexts (where some level of social pressure and intimidation is common, even legitimate) could be significant.

This Note shares critics' intuition that the Nuremberg Files case tests the limits of true threat doctrine. When speech is menacing in virtue of the feared acts of third-party extremists with no formal connection to the speaker, courts must tread very lightly lest they trample important First Amendment values. But in a context of political violence and harassment, speakers cross the line by knowingly publishing the personal information of their enemies in a way that makes them targets.

This Note defends the majority's holding while suggesting a more careful analysis to use in deciding the case and others like it. Courts should recognize that phenomena like the Nuremberg Files website – targeting speech – can intimidate, even terrorize, in

[2] *See, e.g.,* Steven G. Gey, *Nuremberg Files and the First Amendment Value of Threats,* 78 TEX. L. REV. 541, 588 (2000) (suggesting that all threats in politicized contexts be protected unless there is a clear and present danger that the threat will be carried out).
[3] *Id.* at 558 ("Thus, the expression of a desire that a particular person suffer harm or even death is not enough to support legal action against a speaker if there is no evidence that the speaker is taking action to carry out that desire.").

exactly the way that a typical "true threat" does. The harms of targeting speech are essentially the same as typical threats, and its value as political speech may be no more substantial. Indeed, targeting speech is just a very clever way of issuing a particular kind of threat – it tells the victim, "I've put your name on extremists' hit list. Do what I want and I'll take it off. Otherwise, you remain exposed to whatever they see fit to do." Therefore, courts should treat targeting speech as what it is: an unprotected threat. But courts must be very careful in examining these cases, as they are very, very close to protected political speech. The chilling effect of misapplying this concept would be considerable. By seeing clearly how this species of threat operates and what elements are essential to it, courts and commentators will be better able to censure true threats and at the same time protect genuine political advocacy.

As in many areas of law, the advent of the Internet has consequences for thinking about this problem. The Internet facilitates instant, sometimes anonymous communication with anyone, anywhere in the world. Most importantly for this Note's purposes, the Internet allows movement leaders to reach motivated, malevolent extremists around the world, and allows those extremists to harass targets with very little investment of time or energy and with a low perceived risk of capture or consequence. As the examples in Part II will show, the Internet makes it possible to subject a target to threats and harassment in an overwhelming torrent the speed, dimension, and anonymity of which would have been impossible using any prior technology. Courts should have a coherent doctrine for recognizing speech that exploits these novel realities.

The Note is divided into four Parts. The first Part will sketch the key characteristics of true threats, incitement, and a third category called 'crime-facilitating

speech," showing how targeting speech fits into this scheme as a kind of threat. The second Part will describe some cases and illustrations of published condemnation followed by harm brought by third parties. The goal of this Part is to show how the idea of targeting speech can sort true threats from genuine political advocacy by testing close cases. The third Part will use the most high profile example, the Nuremberg Files case, to examine in detail the difficulty courts and commentators have had making sense of targeting speech. Part Four will examine some of the policy issues surrounding regulating this class of speech.

I. Targeting Speech and Other Crime-Related Speech

Targeting speech shares characteristics with three categories of crime-related speech: incitement, "true threats," and crime-facilitating speech. Like incitement, targeting speech gets its menacing character from its likely effect on third parties. Like a typical threat, targeting speech causes harm in the first instance by placing its victim in fear of violence yet to come. And like crime-facilitating speech, targeting speech operates in part by providing would-be criminals with information they need to commit a crime. First I'll sketch in more detail these three doctrines, then use them to flesh out the key characteristics of targeting speech.

Incitement

The modern incitement test was stated in Brandenburg v. Ohio,[4] in which the Supreme Court distinguished between mere advocacy of violence or law-breaking, which is protected by the First Amendment, and unlawful incitement. The two-part test requires that the advocacy be (1) "directed to inciting or producing imminent lawless action" and

[4] 395 U.S. 444 (1969).

(2) "likely to incite or produce such action."[5] A few years later, in Hess v. Indiana,[6] the court's per curiam opinion stressed the imminence requirement in both prongs. The speaker must advocate for and intend to bring about imminent violence, not violence "at some indefinite future time,"[7] and his speech must be likely in fact to cause imminent violence. The opinion also added to *Brandenburg* a requirement that inciting speech be "directed to" some person or group of persons in order to qualify as advocacy.[8] Because defendant Hess's statement[9] "did not appear to be addressed to any particular person or group," the Court found that he could not have been inciting violence.[10]

The Supreme Court's most recent application of the *Brandenburg* test was in NAACP v. Claiborne Hardware, 458 U.S. 886 (1982), a case involving fiery rhetoric and violence surrounding a civil rights boycott in Mississippi. White-owned businesses brought suit against civil rights leaders who were orchestrating the boycott, claiming damages resulting from the boycott and alleging that violence, threats of violence, and incitement to violence were used in the course of the boycott. Two speeches in particular were cited by the business leaders, a 1966 speech in which Charles Evers told the audience that boycott breakers would be "answerable to him," that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people,"[11] and a 1969 speech in which Evers told the crowd that the boycotters intended to "enforce" the

[5] *Id.* at 447.
[6] 414 U.S. 105, 108-09 (1973).
[7] *Id.* at 108.
[8] *Id.* at 108-09.
[9] "We'll take the fucking street later," or something to that effect. *Id.* at 107.
[10] *Id.*
[11] *Claiborne Hardware*, 458 U.S. at 900 n.28.

boycott, and that the sheriff could not provide 24 hour protection to people who broke it.[12]

In an opinion from which no one dissented,[13] Justice Stevens writes that Evers' speeches were protected under the *Brandenburg* doctrine. Although the opinion invokes the need to provide wide latitude for impassioned political advocacy,[14] the imminence requirement does the bulk of the work. The fact that the speeches were not followed immediately by violence is held to inoculate the speech from the charge of incitement.[15] Justice Stevens also alludes to the fact that Evers' speeches were "lengthy," which presumably dilutes the urgency of any exhortations to action. Imminence, then, is the *sine qua non* of incitement – speech that in some sense advocates violence, and is even followed by violence but weeks later, is not incitement because the danger was never imminent.

The centrality of the imminence requirement is best explained by reference to Justice Brandeis' concurrence in Whitney v. California,[16] in which he gives one of the

---

[12] The full speech is printed as an appendix to the opinion, on pp. 934-940, and it's an object lesson in the importance of context and the difficulty of discerning a clear intent from political speech that is often ambiguous from one sentence to the next, and laden with metaphor and exaggeration. For instance, Evers tells his audience repeatedly that they will prevail by economic and political action rather than violence, contrasting his call for lawful, peaceful tactics to police brutality that surrounded the boycott.

[13] Then-Justice Rehnquist concurred in the judgment, and Justice Marshall did not take part in the decision.

[14] "Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases." *Id.* at 928. He also cites *Watts v. United States*, 394 U.S. 705, 708, an early threats case in which a campus activist was acquitted of the charge of threatening the president because the court found his threat was really a "crude offensive method of stating a political opposition to the President."

[15] "If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." *Claiborne Hardware*, 458 U.S. at 928.

[16] 274 U.S. 357, 372 (1927).

most eloquent modern expressions of the values embodied in the First Amendment. "If there be time," Brandeis argues, "to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[17] On Brandeis' view, the First Amendment expresses the Constitution's preference that ideas do battle in the open until the last possible minute, unchecked by police power until violent consequences are beyond the reach of rational intervention. Incitement is thus a very narrowly constrained class of punishable speech, and *Claiborne*, with its published lists of boycott breakers and neck-breaking rhetoric, shows how far a court will go to avoid bringing speech, especially political speech, under that heading.

True threats

Threats – or "true threats" as they are redundantly called – have a surprisingly short pedigree and are still a source of conflict and confusion in the lower courts and in First Amendment scholarship.[18] The doctrine was first introduced in Watts v. United States, a case about a student protestor who said of President Lyndon Johnson, "[I]f they ever make me carry a rifle the first man I want in my sights is L.B.J."[19] The opinion is a short, per curiam opinion granting summary judgment for the protestor, and the doctrine of "true threats" is born from the Court's holding that the government must prove a "true 'threat'" as distinguished from "political hyperbole."[20] The court gives very little guidance, though, on how to make the distinction, saying only that "Taken in context, and

[17] *Id.* at 377.
[18] *See, e.g.*, Paul T. Crane, Note, *"True Threats" and the Issue of Intent,* 92 VA. L. REV. 1225 (2006), giving a history of the interpretations that proliferated after *Watts* and how little things changed when the Court revisited the area in *Black.*
[19] 394 U.S. 705, 707 (1969).
[20] *Id.* at 708.

regarding the expressly conditional nature of the statement and the reaction of the listeners," the Court did not see how Watts' statement could fall into the threat category.[21] At this stage, the court is content to make the common sense finding that Watts was making a crude political point by hyperbole and end the discussion there.

In *Watts'* aftermath lower courts struggled to fill in the gaps in its account of true threat. The issue that was left most disturbingly wide open after *Watts* was the *mens rea* required for threatening speech. Must the speaker actually intend his utterance to be taken as an expression of intent to commit violence? Or is it sufficient if he *should have known* his statement would be taken as a threat? Or should we look instead to the *actual effect* of the statement on its target? Or, objectifying again, should we look to the interpretation of a hypothetical *reasonable listener*? There were several options open, but courts gravitated to "objective" tests based on whether a reasonable speaker, a reasonable listener, or a reasonable "neutral" party would find a given statement to express intent to commit unlawful violence.[22]

In the meantime, Justice Scalia made some influential observations on true threats in dicta in the case of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The most important for our purposes is that the "reasons why threats of violence are outside the First Amendment" are "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will

[21] *Id.* These "factors" – context, audience reaction, conditionality – were the closest thing to a test for true threats.
[22] *See* Crane, supra note 12, at 1235ff.

occur."[23] This brings true threats into parity with fighting words, excepted from First Amendment protection because the "very utterance inflicts injury."[24]

When the Supreme Court took up the issue again in Virginia v. Black, 538 U.S. 343 (2003), it settled very little despite addressing the issue directly and even providing what looks on its face like a definition of "true threat."[25] In the end, the only clear holding on threats was that, following the rationale in *R.A.V.*, specific intent to carry out a threat is not required,[26] as the harm is done whether the speaker is bluffing or sincere. The issue of *mens rea* with respect to the statement itself remains unsettled. The relevant passage in *Black* is the following: "'True threats' encompass statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[27] Because of the ambiguity of the scope of "means to communicate," the sentence does not settle the question whether the speaker must intend only to say whatever he said (as opposed to speaking involuntarily), or if he must also intend that what he said be taken as a serious expression of intent to commit unlawful violence. Lower courts have generally stuck with their preferred pre-*Black* interpretations, mostly versions of an objective test asking whether a reasonable speaker/listener/neutral would take the statement as an expression of intent to commit violence.[28]

An important issue arguably settled by *Black* is whether a speaker accused of issuing a threat must mean to communicate that he or agents under his control will carry

[23] 505 U.S. at 388.
[24] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[25] *See* Crane, supra note 12, at 1256ff.
[26] 538 U.S. at 359-60 ("The speaker need not actually intend to carry out the threat.").
[27] *Id.* at 359 (emphasis added).
[28] *See* Crane, supra note 12, at 1261ff.

out the threat. The issue was central in the pre-*Black* "Nuremberg Files" case, described in detail below, and commentators on the case have suggested that the First Amendment should protect speech that does not involve the speaker or his agents as the perpetrators of future violence.[29] *Black* says a speaker must communicate "an intent to commit an act of unlawful violence," presumably the speaker's intent; but for reasons canvassed below, this is an overly narrow formulation if the law is to reach the harms that make threats worth regulating.

Crime-facilitating speech

The third class of crime-related speech that bears a significant relation to targeting speech is crime-facilitating speech, a class defined and discussed in an intriguing recent article by Eugene Volokh.[30] Unlike true threats and incitement, crime-facilitating speech is a purely academic construct that has not been applied in courts; indeed Professor Volokh argues that in most cases it would be ill advised to do so. Professor Volokh defines crime-facilitating speech as, "(1) any communication that, (2) intentionally or not, (3) conveys information that, (4) makes it easier or safer for some listeners or readers (a) to commit crimes, torts, acts of war…, or suicide, or (b) to get away with doing such acts." He provides examples from real cases, ranging from a contract killer how-to book to the driver who flashes her high beams to other drivers signaling the presence of a speed trap ahead.[31]

Professor Volokh points out several key aspects of this category of speech. First, as his exhaustive list illustrates, the category comprehends a great variety of conduct,

[29] *See infra* note __ and accompanying text.
[30] *Crime Facilitating Speech*, 57 Stan. L. Rev. 1095 (2005).
[31] *Id.* at 1097-1102.

from the seemingly innocuous to the conspiratorial. This variety creates a significant barrier to any attempt to pronounce the class as a whole either protected or unprotected by the First Amendment.

Second, even the most disturbing phenomena have a "dual-use" character; they are susceptible to lawful as well as harmful uses, with the consequence that many distributors of crime-facilitating information cannot know for sure to which use the material will be put. Further, even if they know for a fact that some users are likely to put the information to criminal use, that knowledge does not have the same inculpating effect as knowingly providing material that can *only* be put to criminal use (e.g. illegal automatic weapons or explosives).

Third, Volokh points out how crime-facilitating speech relates to the formation of a criminal intention:

> "To commit a typical crime, a criminal generally needs to have three things: (1) the desire to commit the crime, (2) the knowledge and ability to do so, and (3) either (a) the belief that the risk of being caught is low enough to make the benefits exceed the costs, (b) the willingness – often born of rage or felt ideological imperative, to act without regard to risk, or (c) a careless disregard for the risk."[32]

Incitement can provide the desire and sometimes the appropriate belief about risk, and to the extent it does so irrevocably (i.e. it poses an imminent threat that cannot be confronted by more argument), it has been excepted from First Amendment protection. Crime-facilitating speech provides the know-how necessary to commit the crime or to evade capture or consequence, and where that was all a criminal was lacking, it is perhaps more dangerous than incitement. As Volokh explains, advocacy of criminal conduct usually works "over time, building on past advocacy and laying the foundation

[32] *Id.* at 1107.

for future advocacy. No particular statement is likely to have much influence by itself."[33] In stark contrast, speech that provides a motivated criminal with the know-how to commit a crime successfully or without detection or capture is "instantly and irreversibly" sufficient to satisfy element 2 or 3a.[34]

Professor Volokh discusses several possible distinctions to be made within the class, most of which he says are unhelpful.[35] Distinctions based on the *mens rea* of the speaker are considered and rejected, as are distinctions based on how the speech is presented (does it pander to criminal tendencies, e.g.). There are a handful of distinctions that Volokh says are helpful and may be the key to a viable doctrine on crime-facilitating speech.

In his conclusion, Professor Volokh posits three desiderata, each of which if satisfied justifies an exception to First Amendment protection for crime facilitating speech.[36] First, if the communication is made to a small group of people who the speaker knows are likely to use the information for criminal purposes, it should not be protected. This, he says, is classic aiding and abetting and can be confidently excluded. Second, if the communication, though broadly published, has virtually no non-criminal uses (with social security numbers as paradigm case), this can be safely excluded from protection. Third, when speech could facilitate extraordinarily serious harms, such as an act of nuclear or biological terror, there is justification in this extraordinary threat for extraordinary measures to suppress it.

---

[33] *Id.*
[34] *Id.*
[35] This paper may also be seen as an attempt to draw one such helpful distinction, carving out targeting speech as an especially harmful class that is a sub-set of the universe of crime-facilitating speech.
[36] *Id.* at 1217.

Targeting speech

With those discussions in place, we turn to targeting speech to see what it has in common with the other doctrines and how it can be distinguished. The key characteristics for comparison are the audience to whom the speech is addressed, the relation between speech and the audience's formation of an intent to commit crime, the typical victims of the speech, and the nature of the harm caused. What follows demonstrates that targeting speech is best understood as a species of true threat that works by means of crime-facilitating speech.

The Audience. In the case of threats and crime-facilitating speech, whether the speaker intended to reach a particular audience can be the difference between lawful and unlawful speech. Targeting speech as I conceive it also requires intent to reach a particular audience. In any case, the fact that an utterance may unintentionally terrorize its victim or incite an audience of sympathizers is not enough to cross the line to truly harmful speech.

For a true threat, the key audience is the victim, the person whom the speaker intends to frighten by threatening harm to them or their loved ones. Although courts and scholars are divided as to the appropriate *mens rea* for true threats, there is broad agreement that speech must be intentionally communicated to a victim somehow in order to be a threat.[37] In United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997), for example, the court held that the defendant's violent sexual fantasies about his classmate were not threats because there was no evidence that he intended to intimidate her by

[37] One exception is threats to the President of the United States, which are criminal regardless of whether they reach the President himself. The special disruption caused by such threats.

communicating them.[38] Rather, the defendant posted the stories on an electronic message board devoted to rape fantasies and later e-mailed them to a third party wholly unknown to the putative victim classmate. In United States v. Kelner, 534 F.2d 1020 (2nd Cir. 1976) on the other hand, although the speaker (a member of the Jewish Defense League) did not deliver his message[39] directly to Yasser Arafat, the threat was broadcast on television news and Kelner could be sure his message would get to the PLO leader.

The paradigm audience for incitement is the sympathetic mob – a group of people the speaker believes he can move to action by his words. As hypothesized by the imminent danger test in Brandenburg and its progeny, the audience is a mob *in person*. That imminence test as well as the directed-ness requirement from *Hess* seem to rule out speech broadcast to individuals in their homes, as there would always be time for counter-speech to answer the inciter before his audience could take harmful action, and speech broadcast by TV or radio is rarely directed to a distinct group.

A single audience for crime-facilitating speech is much harder to define. As Professor Volokh argues, the staggering variety and "dual-use" nature of most crime-facilitating speech is one of the category's most vexing aspects. Crime-facilitating speech can have valuable as well as harmful uses, and so it seems to deserve protection with respect to its law-abiding audience but sanction with respect to its criminal one. But it is

[38] 104 F.3d at 1495 ("Even if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation.")

[39] "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive." *Kelner*, 534 F.2d at 1021.

very difficult, when all parties are adults, to give identical speech disparate treatment depending on its audience and their intended uses.

At any rate, we can confine ourselves to the audience with respect to which the law might concern itself, namely those who would use the information to perpetrate or to elude capture in perpetrating a crime. For instance in Rice v. Paladin Enters., Inc.,[40] the dangerous audience is the serious would-be assassin, not the Walter Mitty type who buys the book to facilitate impotent fantasies. As in the inciter case, audience and author are co-conspirators (though unlike the inciter, the author may be an unwilling or unwitting one) against a third party who may not know anything about the expression - indeed, who both parties might like to keep forever ignorant of the expression.

The audience for targeting speech consists of *both* the target victim *and* third-party sympathizers. Like a threat, targeting speech is intended to harm the victim by putting her in fear and subjecting her to all of the "disruption that fear entails," so the victim has to know about the communication for its primary object to be achieved. As *Alkhabaz* shows, even a graphic and gravely disturbing communication of intent to harm is not a threat unless it aims at and reaches a victim. Likewise, targeting speech such as the Nuremberg Files website can only have the desired effect (intimidating abortion providers into ending their medical practice, e.g.) if the victims are in the audience. If the site were a secret, password-protected, members-only bulletin board, for example, so that the existence and the contents of the list were known only to members of the extremist wing of the "pro-life" movement, it would no longer be targeting speech. Such a private site may still be crime-facilitating, or just simple criminal conspiracy, but so long as it is

[40] 128 F.3d 233 (4th Cir. 1997), the contract killing "how-to" book case.

unknown to its target, it cannot be targeting speech, for it would not function in the same way or cause the same kind of disruption.

Targeting speech does not look like typical true threats because it engenders fear in the target by putting her in fear of violence to be perpetrated by third parties. Like throwing fresh bait next to a swimmer in shark-infested waters, the speaker intimidates his victim by drawing the malevolent attention of others. Still, the victim's fear in targeting speech cases can be *heightened* by the unknown extent of danger involved in her exposure. As columnist Dahlia Lithwick wrote in a recent column on Internet threats, online harassment sometimes amounts to "calls to action for truly crazy third parties," and "in a community that reaches the entire world, it's useful to recall that—male or female—you are only as safe as your most deranged critic."[41] How deranged are your critics, and how many of them are there? Targeting speech takes advantage of those unknowns to push the victim's fears to the limit of her imagination.

Like crime-facilitating speech, targeting speech can in some sense "hide" behind the appearance of being addressed to a general audience. Indeed, the most difficult thing about regulating targeting speech would be sorting out genuine targeting speech from political (or, as in the Ellen Degeneres case, even non-political) speech that had the unintended consequence of inspiring death threats from zealous members of the general public. There's also a kind of reverse heckler's veto problem, whereby a speaker could be silenced as a result of the violent acts of the extreme wing of his own audience regardless of his own innocent motives.

[41] Dahlia Lithwick, *Why Women Shouldn't Apologize for Being Afraid of Threats on the Web,* SLATE, May 4, 2007, http://www.slate.com/id/2165654/pagenum/2/.

Intent Formation. As discussed in Professor Volokh's paper and summarized above,[42] one way to conceptualize crime-related speech where third party action is required to complete the harm is to look at how the speech interacts with the third party criminal's intent formation. As we saw above, crime-facilitating speech provides the know-how to an already-motivated bad actor, and in that way is "instant and irreversible" in a way that advocacy is not. Exhortation to unlawful violence will almost never rise to the level of incitement because it will almost always be subject to the *Whitney* principle that so long as there is time for more speech to combat and counteract the effects of potentially harmful advocacy, coercive government intrusion violates the First Amendment. Insofar as the danger posed by crime-related speech is evaluated in terms of the expression's effect on the motivational structure of third party criminals, crime-facilitating speech is more harmful than actual advocacy of criminal action. The minute the former reaches a motivated actor he will form an intention to carry out the crime.

Typical true threats are not susceptible to this analysis because they do not involve the psychology of third parties. The speaker herself completes the criminal act by issuing the threat. As *R.A.V.* pointed out, and *Black* formally held, the harm is done when the threat is issued, regardless of whether the speaker intends to carry it out.

Targeting speech shares characteristics of all three types of crime-related speech. It is like incitement in that it often includes fiery rhetoric designed to motivate zealous third parties to take action against the target, but unlike incitement the ringleader in targeting speech cases relies on an existing reserve of highly motivated individuals who need very little encouragement to form an intention to harass or harm the target.

[42] *See* supra note 27 and accompanying text.

Like crime-facilitating speech, targeting speech has an instant, irreversible quality to it. Once a zealot has the name, address, or e-mail address of someone an opinion leader in his movement tells him is, e.g. a "race-traitor,"[43] or even just "too optimistic,"[44] the damage is done. In the Internet age, a few effortless clicks are all that's needed to issue an anonymous death threat or post a shocking violent fantasy to the target's personal website.[45]

What makes targeting speech a threat is that it is addressed to a victim as well as to third party bad actors. Indeed, it need not actually interact with third party psychology at all – the threat is that it *just might*, and the victim has no way of knowing when or how third party zealots will act on the call to action against her. Whether or not the sharks respond, the swimmer surrounded by bait in shark-infested waters will be effectively intimidated.

Typical Targets. The "target" of crime-related speech is the speaker's intended victim. Whether the target is in the speaker's intended audience is one thing that separates the various kinds of crime-related speech. Targets of crime related speech sometimes share other characteristics.

---

[43] *See, e.g.*, Jodi Wilgoren et al., *Shadowed by Threats, Judge Finds New Horror*, N.Y. Times, Mar. 2, 2005, at A1.
[44] *See Call for Blogging Code of Conduct*, BBC News, March 28, 2007, http://news.bbc.co.uk/2/hi/technology/6502643.stm (last visited May 12, 2007).
[45] *See, e.g.*, Kathy Sierra, *Death threats against bloggers are NOT "protected speech" (why I cancelled my ETech presentations)*, http://headrush.typepad.com/whathappened.html (last visited May 12, 2007). Sierra's experiences were one of the catalysts for this paper. *See also*, Lynn Harris, *Death threats dog female blogger*, SALON, Mar. 28 2007, http://www.salon.com/mwt/broadsheet/2007/03/28/kathy_sierra/index.html (last visited May 12, 2007).

One striking thing about the leading opinions on incitement is that they almost all involve an anti-government defendant. That is, the "target" of incitement in the paradigm cases is the United States government itself or the capitalist and democratic order.[46] Perhaps this is an accident of history – the key early cases were prosecutions under the Espionage Act of 1917, which criminalized just this kind of agitation. More likely, though, the doctrine of incitement is shaped, and rightly so, by well-known concerns about protection for political dissent in a democracy. For a generation of progressive judges skeptical of judicial intervention in majority rule, it was important that the law sought to suppress core political activity, rather than the kind of economic liberty rights upheld in the hated *Lochner* decision.

The protectiveness of incitement doctrine is highly sensitive to the perceived danger of dissenting speech. The early dissents of Justices Holmes and Brandeis, and the overturned opinion by Judge Learned Hand in *Masses Pub. Co.*, only blossomed into modern incitement doctrine decades later when anti-communist hysteria had passed and

[46] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (defendant charged with conspiracy to violate the Espionage Act of 1917 by distributing leaflets encouraging resistance to the military draft); Masses Publ'g Co. v. Patten, 244 Fed. 535 (S.D.N.Y. 1917)("monthly revolutionary journal" critical of the military draft and of capitalism was excluded from the mail by the Postmaster General); Abrams v. United States, 250 U.S. 616 (1919) (self-described anarchists indicted for distributing leaflets critical of capitalism, democracy, the draft, and U.S. hostility to communist Russia); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting)(publication of a violent socialist Manifesto); *Whitney*, 274 U.S. at 372 (1927) (Brandeis, J., concurring) (defendant organized the Communist Labor Party of California, accused of being a criminal syndicalist); Dennis v. United States, 341 U.S. 494 (1951) (defendants charged with organizing the Communist Party of the U.S.A. and teaching under its auspices the necessity and duty to overthrow and destroy the U.S. government by force and violence); *Brandenburg*, 395 U.S. at 444 (1969) (Klan rally at which the leader threatened "revengeance [sic]" against the President, Congress, and the Supreme Court). *Cf. Claiborne Hardware*, 458 U.S. 886 (1982) (civil rights leader accused of incitement to violence against black citizens who broke a boycott in Mississippi).

dissident writers were seen more as cranks than as internal enemies. Holmes himself joined opinions in *Schenck* and *Debs* that imposed hefty prison sentences on speakers hardly more dangerous than the pamphleteers in his celebrated dissent in *Abrams*.

Threats and crime-facilitating speech have a much more diverse range of targets, to the point that it is probably not accurate to say there is a "typical" target. Although the major threat cases have had a political aspect, threats are just as likely to be put to personal use. Crime-facilitating speech may be target-less in the sense that it helps other parties to evade legal obligations to the government (e.g. to cheat on their taxes) with no intention to harm the government or anyone in particular, or in the sense that the aim is not to victimize anyone but rather harm to a third party is a necessary incident to the crime (e.g. the use of a published credit card number, which perpetrates a fraud against its owner, but is not targeted to harm any cardholder in particular). Or the publisher of targeting speech may be agnostic about the victim, as in *Paladin*; a how-to book on contract killing is certainly an aid to a crime with a target (perhaps the paradigm case of such a crime), but the author of the book had no particular target or class of targets in mind.

Targeting speech differs from crime facilitation in that in each case the speaker aims to victimize a particular person or group of people. Like threats, targeting speech always has an intended victim, and intimidating that victim is the speaker's primary goal. And targeting speech's typical targets are quite different from the abstract, resilient, institutional targets contemplated in the incitement doctrine. Victims of targeting speech are concrete individuals, usually private citizens, low-level people who are dragged into public (or more public) life and subjected to the frightening attentions of unknown

numbers of unknown people. In the cases I discuss below, the victims are chosen precisely because of their perceived vulnerability. Unlike celebrities or politicians, they do not have bodyguards to accompany them to the grocery store or personal assistants to pre-screen their hate mail. One commentator has argued that the right wing of American politics (especially the "pro-life" movement) systematically abuses mid-level staffers and volunteers as a way of demoralizing left-wing organizations and discouraging private citizens from getting involved at the grass roots level.[47] Before and after the Kathy Sierra incident[48] many commentators noted that females who write online are the targets of especially nasty harassment, hate mail, and death threats.[49]

So, unlike incitement, the targets of targeting speech are private citizens often chosen for their weakness. And unlike typical threats and crime-facilitating speech,

---

[47] Bowers, *supra* note 14 ("Keep in mind that the targets of right-wing smears are often junior staffers, college professors or other mid-range employees that ultimately mean little to the organization where they are employed. By targeting such people, the Noise Machine hopes to enact more pain to the organizations who employ [targets] than [targets] can ever bring to the organization in question.… In order for the Noise Machine to get its scalps and thus continue its normal operation, simultaneous to all of the media smears there is a constant campaign of violent threats."). *See also* Posting of Joseph Hughes to MyDD, http://www.MyDD.com/, (Feb. 14, 2007, 16:57 EST) ("This is how the right works. Wage mock outrage campaigns that rarely work outside the media while, at the same time, (at least tacitly) encouraging their loyal audience to wage a quiet campaign that, needless to say, brims with a level of rage and profanity not only never to be found among their targets, but also never to be discussed by those 'journalists' covering the initial campaign.").

[48] *See* Part II.

[49] *See* Lithwick, supra note 67; Harris, supra note 38; Joan Walsh, *Men Who Hate Women on the Web*, SALON, Mar. 31, 2007, http://www.salon.com/opinion/feature/2007/03/31/sierra/ (last visited May 12, 2007); Gary Kamiya, *The Readers Strike Back*, Salon, Jan. 30, 2007, http://www.salon.com/opinion/kamiya/2007/01/30/writing/index1.html/ (last visited May 12, 2007) ("It should be noted that some of these attacks have an ugly misogynistic aspect. At Salon, but I believe not just at Salon, a disproportionate number of nasty posts are directed at women writers. Often, the letter writers delight in using cutesy nicknames to belittle women authors, a tactic seldom used against male writers.").

which are as variable as the groups or individuals who might use them, there is a certain profile that emerges from the cases of targeting speech: a mid- or low-level person, a private citizen, often a woman, who is engaged knowingly or not in a politically volatile activity and can be driven out of civic engagement or politically charged activity by threats and intimidation from third party zealots.

Harm. What most distinguishes true threats from other recognized classes of crime-related speech, and places them solidly in the category of criminal speech *simpliciter*, is that as soon as the threat is communicated to its victim, the harm is done. *R.A.V.* provides the first clear articulation of this idea, which *Black* makes official: the harm caused by threat speech is the fear of violence and the disruption that fear causes, *regardless of whether the threat is carried out or whether the speaker ever intended to carry it out.* Like fighting words, threats cross the threshold from mere expression into a kind of speech-act whose consequences are more than merely informative or persuasive. A threat is not an inchoate crime, foiled by interception before it can be carried out. It is a completed criminal act, because the harm is done.

As Professor Volokh points out, crime-facilitating speech is a very different phenomenon in this respect – even when it is put to a harmful use, it retains the potential for many at least innocent and sometimes even beneficial uses.[50] The speech itself is at worst an ambivalent first step toward a completed crime. Thus Volokh argues that legal restrictions on crime-facilitating speech must be limited so as to protect to the extent possible the lawful, beneficial uses.

[50] *See* Volokh, supra note 25, at 1126-27.

Targeting speech, as a form of true threats, crosses the threshold into a completed harmful act as soon as it is communicated to its target. Even before the death threats, hate mail, graffiti, or other acts of terror begin, the target gets the sense that she has been exposed to danger. For example, when the conservative writer Michelle Malkin published the names, cell phone numbers, and e-mail addresses of college student anti-war activists on her weblog in April of 2006, the bare fact of their being posted in that context[51] was likely enough to intimidate the students long before they started getting death threat voicemails from her readers.[52] The fear is even more tangible when the target does not have to use her imagination to get an idea of what zealots may do to her, as was the case in the Nuremberg Files case, where several doctors had already been murdered following their depiction on "wanted" posters.

Targeting speech has the ability to compound harm in a way not necessarily possible with an ordinary threat. After exposing its victim to a certain level of nastiness (anonymous death threats, graffiti, harassing phone calls), the targeting speaker can threaten to keep the target in the public eye, to print more posters, make more websites, give more speeches, and thereby catalyze more bad behavior from his followers, until the target complies with the speaker's demands.[53]

---

[51] The information was already public, in a sense – the students themselves had listed the information in a press release about a protest they were staging, but the re-posting by Malkin made them targets.

[52] *See* Roger Sideman, *Cyber war over UCSC heats up*, Santa Cruz Sentinel, April 22, 2006, *available at* http://www.santacruzsentinel.com/archive/2006/April/22/local/stories/02local.htm/ (last visited May 12, 2007). As the story mentions, Malkin's critics responded by posting her personal contact information, to similar unsavory effect.

[53] Catholic League leader Tom Donahue did this to John Edwards and two young female bloggers on his campaign, promising to keep them in the limelight until they resigned

Now that we have seen how targeting speech relates to already recognized classes of crime-related speech, we turn to some examples of targeting speech and nearby phenomena to see how a clear test for targeting speech can distinguish true threats from legitimate social or political pressure.

II. Some Cases and Illustrations

The Edwards Bloggers

On January 30, 2007, Amanda Marcotte announced on her weblog "Pandagon" that she had joined the presidential campaign of former Senator John Edwards.[54] The next day Melissa McEwan announced that she, too, would be working for Edwards.[55] Both women had published online for several years in the informal, often abrasive tone common to partisan weblogs on both sides of the political spectrum. Marcotte and McEwan had been particularly strident on the issue of abortion, condemning the Catholic Church's positions on that issue in language that was often far short of polite, diplomatic, or politically sensitive.[56]

On February 6, 2007, the conservative organization the Catholic League issued a press release condemning the Edwards campaign for hiring the two women, calling them

---

from the campaign or Edwards fired them. Donahue called the women "anti-Catholic bigots" in a press release and subsequent interviews.

[54] Posting of Amanda Marcotte to Pandagon, http://pandagon.blogsome.com (Jan. 30, 2007).

[55] Posting of Melissa McEwan to Shakesville, http://shakespearessister.blogspot.com (January 31, 2007).

[56] Perhaps the most inflammatory was a post that begins by describing the Immaculate Conception in pornographic language. *See* posting of Amanda Marcotte to Pandagon, http://pandagon.blogsome.com (Jan. 14, 2006). But notice that the bulk of the post is a substantive critique of a Catholic Church-sponsored marriage-counseling pamphlet condemning birth control.

"anti-Christian bigots."[57] The League's president, Bill Donohue, made appearances on cable news shows and gave press conferences over the next two weeks, promising to keep the pressure and attention on the young women and the campaign until they resigned or Edwards fired them. Conservative writer Michelle Malkin had already attacked Marcotte and McEwan on her own weblog, and echoed Donahue's call for their resignation, directing her readership to contact the Edwards campaign to voice their disapproval.[58] Conservative talk show personality Bill O'Reilly joined the argument shortly thereafter, echoing Donahue's claim that the women were "anti-Christian" and that Edwards should fire them.[59]

At the same time, a steady stream of vulgar and often sexualized harassment and threats poured into Marcotte and McEwan's e-mail inboxes and onto their weblogs' online comment boards. Marcotte posted a sample of this correspondence to Pandagon under the headline "People who claim to love Jesus write me."[60] McEwan posted articles on her own site[61] and at *The Guardian* newspaper's *Comment Is Free* website[62]

---

[57] Press Release, Catholic League, John Edwards Hires Two Anti-Catholics (Feb. 6, 2007) *available at* http://www.catholicleague.org/release.php?id=1229. A search for "Marcotte" on the Catholic League homepage (http://www.catholicleague.org) returns a series of press releases documenting the League's side of the conflict, including vows to continue public denunciation of Edwards and the two young women until the campaign fires them or they step down.

[58] Michelle Malkin, http://michellemalkin.com/ (Feb. 3, 2007, 22:13 EST).

[59] *The O'Reilly Factor: John Edwards and His Extreme Team* (Fox News Network television broadcast Feb. 13, 2007), *available at* http://www.foxnews.com/story/0,2933,251693,00.html.

[60] Posting of Amanda Marcotte to Pandagon, http://pandagon.blogsome.com (Feb. 13, 2007).

[61] Posting of Melissa McEwan to Shakesville, http://shakesville.blogspot.com (Feb. 16, 2007).

[62] Melissa McEwan, *My Life As a Rightwing Target*, COMMENT IS FREE, Feb. 16, 2007, http://commentisfree.guardian.co.uk/melissa_mcewan/2007/02/my_life_as_a_rightwing_target.html.

discussing the threats she received. By February 13, 2007, Marcotte and McEwan had left the campaign, saying they did not want the controversy stirring around them to distract from Edwards' message.

In a column for *Salon*,[63] Marcotte explained why she resigned, and gave her own reaction to the League's campaign against her. She said that she resigned because she "couldn't handle the stress of having people flinging an endless stream of baseless accusations at me without being able to come out and defend myself."[64] Marcotte expressed regret that the whole incident would scare away other young feminist activists who feared "watching [their] in box fill to the brim with sexually violent, threatening e-mails."[65] Her article suggests that she did not step down because of fear engendered by the intimidation and threats, but rather so that she could answer them directly without the limitations that ties to a mainstream political campaign would place on her.

By contrast, McEwan wrote that her departure was due directly to the influx of threats and intimidation.[66] McEwan said that she could not ignore or dismiss the contents of her inbox, and that she was fearful that the threats would be carried out, referring to her experience as a victim of rape years before at the hands of someone whose threats against her had not been taken seriously.[67] She cautioned critics who might celebrate her

---

[63] Amanda Marcotte, *Why I had to quit the John Edwards campaign*, SALON, Feb. 16, 2007, http://www.salon.com/news/feature/2007/02/16/marcotte/.
[64] *Id.*
[65] *Id.*
[66] McEwan, *supra* notes 8,9; Posting of Melissa McEwan to Shakesville, http://shakespearessister.blogspot.com (Feb. 13, 2007) ("There will be some who clamor to claim victory for my resignation, but I caution them that in doing so, they are tacitly accepting responsibility for those who have deluged my blog and my inbox with vitriol and veiled threats.").
[67] Id.

resignation, saying that in doing so they would be applauding the ugly campaign that had scared her away from mainstream politics.

The key question, and one for which there is not a clear answer, is whether Donohue and the Catholic League deserve blame for the threats and harassment that Marcotte and McEwan received. The League's campaign was obviously intended to be the impetus and inspiration for outrage among like-minded people, and some of those like-minded people were the ones who issued threats and engaged in harassment. Given the relatively obscure nature of their websites before Donohue's campaign, there was no reason for anti-abortion activists to even know Marcotte and McEwan existed without some guidance from Donohue or the media outlets that covered his campaign. Did the Catholic League use targeting speech to pressure Marcotte and McEwan out of the political mainstream?

Commentators on the left suggested as much. Chris Bowers, a young Democratic Party strategist and publisher of the website MyDD.com, argued that all anti-abortion activism is accompanied by a welcome shadow campaign of violence and intimidation, saying, "As all democratic means have failed them, the only tool conservatives have successfully used to slow down abortion has been a campaign of terrorist violence against abortion providers."[68] Jeffrey Feldman, a cultural anthropologist who writes about political rhetoric, agreed.[69] Feldman concluded, "Donohue's cynical attack on Edwards was…strategically deployed. His goal was…to charge the debate with rhetoric of

[68] Posting of Chris Bowers to MyDD, http://www.mydd.com/ (Feb. 14, 2007, 01:20 EST).
[69] Jeffrey Feldman, *Return of 1990s-Style Right-Wing Violence?*, THE HUFFINGTON POST, Feb. 15, 2007, http://www.huffingtonpost.com/jeffrey-feldman/return-of-1990sstyle-rig_b_41324.html.

confrontation and threats--the better to turn his lone voice into a political force capable of defeating a political campaign."[70] Donohue demanded (and received) two corrections to Feldman's columns, making clear that there was no direct connection or affiliation between any private threats and the Catholic League or Donohue himself.[71] A search of the League's website returns neither a condemnation of the threats nor a call for them to cease.

To get a clearer answer about culpability, targeting speech analysis asks two questions: were the press releases and public statements (1) made with the purpose of providing personal information about Marcotte and McEwan to an audience the League knew would be likely take unlawful action against Marcotte and McEwan, and (2) made with the purpose to communicate to Marcotte and McEwan that they had been singled out for the malevolent attention of that dangerous audience?

The answer to (1) is unclear. Surely Donohue knows that his audience includes extremists, or at least partisans willing to engage in online harassment. Any movement audience contains extremists; that is why it is essential that targeting speech be made with the *purpose* to communicate to those extremists, rather than doing so by accident or happenstance or even unavoidable necessity. Otherwise, every politically charged speech would qualify is a threat – a consequence any reading of the First Amendment must avoid. To find that Donohue had issued a threat in the form of targeting speech, we would

[70] Frameshop, http://jeffrey-feldman.typepad.com (Feb. 14, 2007, 00:33 EST).
[71] *Fallout From the Edwards Confrontation*, CATALYST ONLINE (Catholic League, New York, N.Y.), April 2007, *available at* http://www.catholicleague.org/catalyst.php?year=2007&month=April&read=2221. The League calls Feldman's claims "smears." The same article features a series of quotes from "hate mail" the League received as a result of its campaign.

need evidence that Donohue's purpose was to catalyze the kind of harassment that it did in fact catalyze. Otherwise, his followers have a kind of heckler's veto.

The analysis is similar with respect to the second element: there is no evidence that Donohue meant to communicate to Marcotte and McEwan not only that he condemned their views and invited others to join him, but also that he had exposed them to the malevolent attentions of people willing to commit unlawful acts against them. Certainly part of Donohue's strategy was to exert political pressure on the Edwards campaign over its employment of the two women; the League expressed its intent to keep the issue in the public eye until Edwards fired them.[72] This is a standard political tactic, though; the line between legitimate pressure and unprotected threats has not been crossed until there is proof of something more menacing being brought to bear than ordinary social or political pressure. Despite the claims of partisan bloggers, there does not appear to be a strong argument that Donohue or the Catholic League have stepped across the line to true threat speech.

Kathy Sierra

Kathy Sierra is a successful writer and consultant in the tech industry, whose weblog "Creating Passionate Users" was widely read and respected until early 2007, when she discontinued the site. In a posting entitled, "Death threats against bloggers are NOT 'protected speech' (why I cancelled my ETech presentations)," [73] Sierra explained

---

[72] *The Ad That Never Ran*, CATALYST ONLINE (Catholic League, New York, N.Y.), March 2007, *available at* http://www.catholicleague.org/catalyst.php?year=2007&month=March&read=2201 ("This is the first of many public education statements we will make on this issue.… In every instance we will give due attribution to John Edwards' seminal contribution.")

[73] Sierra later removed the post, replacing it with a statement about her desire to move on after the threat incident. *See* Creating Passionate Users, http://headrush.typepad.com

that she would not be attending or presenting at a major industry conference because a torrent of violent sexual fantasies and death threats had been posted to her website and to another tech writer's site recently and she was afraid the threats could be serious. At first she blamed tech blogger and author Chris Locke, on whose sites the initial threats had been posted; though Locke himself did not post any of the offending material, registered users of his site did.[74] Locke and Sierra later issued "coordinated statements," each explaining that they had reconciled their differences.[75] The animus behind the threats remains a mystery, but in addition to her gender, Sierra herself suggests that her attackers considered her "too optimistic" for the cynical, macho world of information technology writing online.[76]

The incident provoked a public discussion of the gender politics of the technology industry, the blogging subculture, and online generally,[77] as well as leading one

---

(April 6, 2007). An entry about Sierra at Wikipedia.com describes some of the threats, http://en.wikipedia.org/wiki/Kathy_Sierra.

[74] Locke denies any responsibility. The EGR Weblog, http://www.rageboy.com (Mar. 27, 2007, 3:16 AM). In a piece published weeks after the incident, *Wired* magazine tried to piece together the facts so far as everyone could agree to them, which still leaves many key questions (who leveled the most heinous threats? How or why did the torrent start?) unanswered. Dylan Tweney, *Kathy Sierra Case: Few Clues, Little Evidence, Much Controversy*, WIRED, April 16, 2007, http://www.wired.com/techbiz/people/news/2007/04/kathysierra.

[75] Coordinated Statements on the Recent Events, http://www.rageboy.com/statements-sierra-locke.html (April 1, 2007).

[76] *Call For Blogging Code of Conduct*, BBC NEWS, Mar. 28, 2007, http://news.bbc.co.uk/2/hi/technology/6502643.stm.

[77] *See, e.g.*, Ellen Nakashima, *Sexual Threats Stifle Some Female Bloggers*, WASH. POST, Apr. 30, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/29/AR2007042901555.html; Joan Walsh, *Men Who Hate Women On the Web*, SALON, Mar. 31, 2007, http://www.salon.com/opinion/feature/2007/03/31/sierra/; Jessica Valenti, *How the Web Became a Sexists' Paradise*, THE GUARDIAN, Apr. 6, 2007, http://www.guardian.co.uk/g2/story/0,,2051394,00.html.

prominent commentator to call for a "blogger code of ethics."[78] Most commentators condemned Sierra's attackers, but some members of the online community thought Sierra over-reacted to the postings[79] and that her own post blaming Chris Locke and others amounted to "character assassination."[80]

One striking aspect of the Sierra story for the purposes of this Note is how easy it was for unfocused hostility to be transformed into sinister threats and harassment on the Internet. The websites where the harassment began were not gathering places for typical violent extremists; Sierra was not accused of being a 'baby-killer' or of committing any grave political, moral, or religious misdeed that could stir an ordinary partisan to acts of extraordinary harassment. To this day, nearly a year after the key events took place, there is still no clear causal account of the attack; there is no consensus answer to the question of who "started" the swarm of harassment against Sierra.[81] It seems to have sprung

[78] Posting of Tim O'Reilly to O'Reilly Radar, http://radar.oreilly.com (Mar. 31, 2007).
[79] *See, e.g.*, posting of Cyndy Aleo-Carreira to Profy, http://www.profy.com (Mar. 28, 2007) ("Any woman blogger has had their share of that type of vitriol. And while it may not be acceptable behavior, it exists."); posting of Markos Moulitsas to Daily Kos, http://www.dailykos.com (Apr. 11, 2007 at 11:45:43 PM PST) ("Email makes it easy for stupid people to send stupid emails to public figures. If they can't handle a little heat in their email inbox, then really, they should try another line of work.")
[80] Chris Locke called Sierra's initial post "unjustified -- but highly effective -- character assassination." The EGR Weblog, http://www.rageboy.com (Mar. 27, 2007, 3:16 AM). Nick Denton, founder of Gawker Media, wrote at the ValleyWag blog, "The bloggers are behaving like a lynch mob, or a US president, looking for someone to string up, or a country to invade. Sierra is upset, traumatized, even; but it's Locke's reputation which will be, possibly quite unfairly, soiled by her accusation." A writer at the Guardian Unlimited website said the swift reaction to the incident by tech blogging "A-listers" constituted a smear job by "high audience" bloggers with huge platforms against "low audience" ones who could not defend themselves. Seth Finkelstein, *Accusations of Sex and Violence Were Bound To Grab the Headlines*, THE GUARDIAN, April 19, 2007, http://www.guardian.co.uk/technology/2007/apr/19/blogging.comment.
[81] *See* Tweney, *supra* note 24.

organically from a collection of attitudes and dispositions in the unique subculture of online writing and blogging about technology.

Nevertheless, I think there are some clear cases of targeting speech to be found in the Kathy Sierra story. Sierra wrote that she disabled comments on her weblog because she could not "keep up with the hateful ones (including those that post my home address and social security number, etc.)."[82] In a context where antagonists are harassing Sierra in the comments space on her own website, posting her personal information to that space constitutes targeting speech. It tells Sierra, "You're in danger, now – people who are making threats against you now know where you live."

SHAC

A third example shows that targeting speech is not a political tactic used only by the right wing. Huntingdon Life Sciences ("HLS") is an international firm based in England whose business includes conducting various forms of animal testing for consumer goods manufacturers.[83] Since 1999, Stop Huntingdon Animal Cruelty ("SHAC"), an organization based in Britain but with affiliates in several countries, has waged a campaign against Huntingdon that it claims has led to divestment and discontinued employment of the firm by major multi-national banks and corporations.[84]

It is undisputed that the original SHAC group, based in the UK, augments its conventional publicity and lobbying efforts with a coordinated campaign of harassment aimed at individual executives and employees at HLS and its client and investor

---

[82] Creating Passionate Users, *supra* note 17 (April 2, 2007).
[83] *See* Huntingdon Life Sciences, http://www.huntingdon.com (last visited Jan. 15, 2007).
[84] *See* SHAC – History, http://www.shac.net/SHAC/history.html (last visited Jan. 15, 2007); Dumped Huntingdon, http://www.shac.net/FINANCIAL/dumpedhls.html (last visited Jan. 15, 2007).

companies. Indeed, their tactics in the U.K. are singled out for condemnation in a Research Paper published by the House of Commons in 2001, which cites several instances of terrorism and harassment by members of SHAC.[85]

In the United States, their tactics have been less brazen, but at least one court has held the "targeting" aspect of their strategy to constitute "credible threats of violence."[86] SHAC posted to its website not only personal information (names, home addresses, phone numbers) of HLS employees (whom it called "targets"), but also instructions for vandalism and pranks that could be carried out against them.[87] In another case, the court said that protests SHAC called "home visits" were in reality "a terrifying and often destructive night time invasion."[88]

If the facts are as they have been recounted in these cases, SHAC animal rights activism is a paradigm case of targeting speech. Evidence from the cases suggests SHAC's websites are frequented by violent extremists willing to carry out all forms of harassment against HLS and its clients. At the same time SHAC publicizes to its targets that they have been singled out for attention from violent activists. Finding oneself listed

---

[85] *See* HOUSE OF COMMONS RESEARCH PAPER 01/56, ANIMAL EXPERIMENTS, 2001-2, at 15, *available at* www.huntingdon.com/ResearchPaper0156.pdf ("The tactics of staff intimidation have been escalated to a new level by publishing, on the Stop Huntingdon Animal Cruelty (SHAC) website, plans of the institution and internal telephone numbers of staff. They also have lists of shareholders in the company published on the site and visitors to the site are encouraged to target both customers and shareholders of the company."). The Research Paper also cites numerous UK newspaper articles detailing attacks and intimidation traced to the SHAC campaign.

[86] *See* Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 540-41 (Cal. Ct. App. 2005) (accusing SHAC USA of harassment and illegal targeted picketing). Notably, the court relied on the Nuremberg Files case in ruling against SHAC, holding that lists of names and personal information, taken in context as the Nuremberg decision requires, amounted to "credible threats of violence."

[87] *Id.*

[88] Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 50 Cal. Rptr. 3d 27, 30 (Cal. Ct. App. 2006).

on a SHAC website is surely a terrifying experience, one that SHAC, like ACLA, hopes will intimidate its targets into complying with its political demands.

Ellen Degeneres

On the October 16, 2007, episode of her popular eponymous daytime chat show, host Ellen Degeneres burst into tears. She said she was upset because a family to whom she had given an adopted dog had subsequently been forced to return the dog to the adoption agency. According to the agency, Ms. Degeneres violated agency rules by giving the dog to friends when she determined she could not keep the dog herself.[89] Degeneres pleaded on air for the agency to return the dog to her hairdresser's family. Following the airing of the episode, the owner of the agency claimed she was forced to close the agency for days and go into hiding due to the wave of harassment and death threats that poured into her e-mail and voicemail inboxes.[90] One male caller said, "You Nazi, scum-sucking pigs. You're gonna pay dearly for stealing this dog from those little girls."[91]

On hearing about the death threats, Degeneres issued another on-air plea, this time asking her viewers not to harass the adoption agency.[92] Although she certainly intended to use her television show to bring some kind of critical pressure on the adoption agency, there is no reason to believe Degeneres intended to direct her viewers to harass the agency with violent threats. This case shows that legitimate social pressure can engender

---

[89] *The Early Show* (CBS television broadcast Oct. 18, 2007).
[90] *Id.*
[91] *Id.*
[92] Andrew Gumbel, *Ellen DeGeneres in the Dog House Over Pet Adoption*, THE INDEPENDENT, Oct. 19, 2007, *available at* http://news.independent.co.uk/world/americas/article3075660.ece ("'You don't resort to violence,' she said. 'So anybody out there, please stop that. Please don't threaten or do whatever.'")

threats even in relatively mundane contexts, and it is clearly not a case where it would be appropriate to consider Degeneres' on air plea a threat. There is no evidence she meant to reach people who would interpret the plea as license to unlawful behavior, and there is likewise no evidence she meant the adoption agency to take her appearance as a threat of intimidation by exposure to dangerous third parties.

The Nuremberg Files

Finally, the Nuremberg Files case is surely the most hotly debated, and (perhaps after SHAC) the clearest instance of targeting speech. The defendants in the case were a group of anti-abortion activists (the American Coalition of Life Activists, or "ACLA," some of its members individually, and an affiliated "ministry" group) with a long history of publications and public statements in support of violence against abortion clinics, abortion providers, judges, politicians, and abortion rights supporters.[93] The group formed when they were forced out of the larger anti-abortion group Operation Rescue because of their refusal to disavow violence. One of the individual defendants (Michael Bray) had worked on "WANTED" posters depicting a doctor that was later murdered by a fellow activist (Paul Hill) who collaborated on the creation of the posters. Many of the defendants drafted and signed public statements calling for the acquittal of activists who killed doctors, advancing a justifiable homicide theory. Defendant Michael Bray wrote a book called *A Time to Kill*, which according to defendant-publisher Advocates for Life Ministries (ALM) "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists."[94] ALM also published *Life*

[93] The facts that follow are taken from 290 F.3d at 1063-66.
[94] *Id.* at 1064.

Advocate, a nationally distributed magazine that advocated the use of force to oppose the delivery of abortion services.

A group of doctors and clinics sued the ACLA and some of its individual members for intimidation in violation of the federal Free Access to Clinics Entrances Act (FACE).[95] The alleged intimidation was carried out via a series of posters and publications culminating in an ACLA-sponsored website called The Nuremberg Files.[96] Visitors to the site could find, among gruesome bloody graphics and strident anti-abortion rhetoric, a list of names of doctors, clinics, judges, law enforcement personnel, and other persons perceived by ACLA to be abortion rights supporters. Along with the listings for "abortionists" was the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of three murdered doctors who had been the subjects of prior "wanted" posters were stricken through.

Following the publication of the initial "Deadly Dozen" poster that eventually became the Nuremberg Files site, the FBI contacted the doctors listed, offering to protect them and advising them to wear bulletproof vests and take other safety precautions,

---

[95] 18 U.S.C. § 248.

[96] Surprisingly, the website is still live, with a few modifications - the strikethrough/greyed-out device to mark murdered and wounded doctors has been replaced with a list "obtained from a pro-abortion web site" providing the same information. The site's owner, Neal Horsley, added this subtitle to the listing:

> "Due To The Recent Ninth Circuit Court of Appeals Decision We Have Reverted To A Version Of The Nuremberg Files Published Without The Strike Through Lines Defined By A Hysterical Ninth Circuit Court of Appeals As A "True Threat". (Most weirdly, the Ninth Circuit found that it was only the use of the strike through graphical device on the names of dead abortionists that somehow made the Nuremberg Files a "true threat." I temporarily removed that graphic device to conform to the cloud coocoo land decrees of the Ninth Circuit.)

See The Nuremberg Files, http://www.christiangallery.com/atrocity (last visited April 21, 2007). A visit to the site is a lesson in the importance of context, as it frankly does not wear all of its menacing nature on its face.

which they did. One of the individual defendants reprinted the poster in a newsletter he published and the ACLA republished it and distributed it at events it held later that year and early in 1996. The information on the posters was later incorporated into the Nuremberg Files website, which was unveiled in January 1996 at a "White Rose Banquet" held to honor prisoners convicted of anti-abortion violence.

The effect of the posters on the doctors they depicted was dramatic. Dr. Warren M. Hern testified that when he saw his name on the "Deadly Dozen" poster, he perceived "the danger posed by this document, the Deadly Dozen List, which meant to me that—that as night follows day, that my name was on this wanted poster…and that I would be assassinated, as had the other doctors been assassinated."[97] Hern interpreted the poster to mean, "Do what we tell you to do, or we will kill you. And they do."[98] The other doctors expressed similar sentiments – they were aware of the history of posters followed by killings and feared that they were next.

According to the district court, by January 1995 the ACLA knew the effect that the "WANTED"-type posters had on doctors depicted in them. Judge Rymer points out that ALM claimed in a September 1993 issue of *Life Advocate* that the murder of Dr. David Gunn following the circulation of an "unWANTED" poster with his name on it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff."[99] Defendant Michael Bray wrote about a doctor who decided to stop performing abortions after his name was listed on a poster, "it is clear to all who possess

[97] 290 F.3d at 1066.
[98] *Id.*
[99] *Planned Parenthood IV*, 290 F.3d at 1065.

faculties capable of inductive analysis: he was bothered and afraid." Defendant Charles Wysong said that from what former "abortionists" had told him, it was clear that "the two things they feared most were being sued for malpractice and having their picture put on a poster." Defendant Andrew Burnett testified with respect to the danger implicit in being listed on an ACLA poster, "I mean, if I was an abortionist, I would be afraid."

The targeting speech framework was inspired by this case, so it should not be surprising that it fits. The facts in the case amply support both prongs: the defendants spoke to an extremist audience, and it meant for the doctors to take these posters as implied threats that sooner or later someone in that audience would take violent action.

III. The Nuremberg Files: How the Court and It's Critics Are Both Wrong

In a way, the central controversy in the Nuremberg Files case is whether the speech at issue consisted in what I call targeting speech, with both the majority[100] and one of the dissenters[101] agreeing that if it did, the First Amendment likely barred the plaintiffs from suing to stop it. The defendants argued that it was "merely" targeting speech, at worst, and critics have agreed, decrying the First Amendment consequences if courts were to punish "threats" that did not involve some commitment by the speaker to carry out the threat personally (or to cause his agents or co-conspirators to do so).[102]

---

[100] *See,* 290 F.3d at 1072 ("If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.").

[101] *See id.* at 1089 fn. 2 (Kozinski, J., dissenting) (saying that "the speaker must indicate he will take an active role in the inflicting" of threatened harm). *But see id.* at 1103 fn. 1 (Berzon, J., dissenting) ("I do not address the constitutional viability of a cause of action for putting another in harm's way by publicizing information that makes it easier for known or suspected potential assailants to find an intended victim. There was no such cause of action in this case….").

[102] *See infra* note 99.

When Planned Parenthood of Willamette/Columbia and several of the doctors named on the posters brought suit against ACLA in Oregon, the jury found for the plaintiffs on all claims except for two of the individual defendants on RICO claims. Injunctions against use of the posters and portions of the website were awarded, along with hefty damages awards.[103] A panel of the Ninth Circuit reversed, saying that posters singling out doctors for the attention of unrelated third parties were protected speech under the first amendment, and that the district court had erred in allowing the jury to convict without finding that the defendants themselves or their agents intended to carry out the threat.[104]

In a rehearing en banc the Ninth Circuit reversed the panel's decision. Judge Rymer wrote for the majority, and applying to ACLA's posters that Circuit's "reasonable speaker" test for true threats, he found them to be unprotected true threats reachable by the FACE proscription on intimidation. The reasonable speaker test asks "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[105] The court pointed out that FACE itself requires only the "intent to intimidate," i.e. an intent to place someone in fear, not an intent to *carry out* the intimidating threats. Taking into account the history of murders connected to "WANTED" posters, the majority held that a reasonable person would have known that

[103] *Planned Parenthood II,* 41 F.Supp.2d 1130 (D. Or., 1999).
[104] *Planned Parenthood III*, 244 F.3d 1007, 1015 (2001) ("Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party.")
[105] *Id.* at 1074, quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).

issuing such posters naming individual doctors would put those doctors in fear for their lives.

Nevertheless, ACLA and amicus parties (including the ACLU foundation of Oregon) asked the court to declare that the First Amendment requires an actual intent to carry out the threats in order for threatening speech to be an unprotected "true" threat. The court refused to require actual intent, quoting *R.A.V.* to argue that threats are beyond First Amendment protection because government must have the power to "protect[] individuals from the fear of violence, and the disruption that fear engenders, and from the possibility that the threatened violence will occur." That rationale (dicta in *R.A.V.*) was of course adopted formally in Virginia v. Black, 538 U.S. 343 at 359, the most recent high court decision on the meaning of "true threat."

As *Black* makes clear, a threat is not an inchoate crime – an act of violence caught in the planning stages – but rather is itself a completed crime. That is why the intent to carry out the threat is not a required element of the crime. In an inchoate crime the state needs to prove the intent to complete a course of conduct, which combined with a "substantial step" justifies state intervention before the intent is fully carried out. Threats are not like this, Judge Rymer argued; intent to carry out the threat is very good evidence that the speaker should have known his audience would interpret the speech as a "true threat," but a bluffer can just as easily and knowingly create the fear and disruption that are the harm that make a threat a complete crime in its own right.

The dissents of both Judge Kozinski and Judge Berzon from the en banc opinion focus on a point that the majority sidesteps in its opinion, but that forms the heart of this paper: whether speech that "threatens" targets with the acts of third parties can be

considered a "true threat." Judge Rymer passes over these objections by insisting on the importance of context in evaluating putative threats.[106] Rymer argues that the context of violence surrounding the issuance of "wanted"-type posters would put a reasonable speaker on notice that disclaimers of any intent on their part to personally carry out violence would not be taken seriously by the targeted doctors. Third parties do not come into the picture because the majority takes the jury to have held that the context of violence rendered the ACLA's disclaimers disingenuous – the posters expressed an intention *by ACLA* to carry out violence against the doctors unless they stopped performing abortions.[107] Passive language at places in the *en banc* opinion minimizes the importance of who does the dirty work, focusing instead on the constant correlation between the posters and murder,[108] but the majority returns repeatedly to the idea of a threat as communicating "an intent to inflict bodily harm."[109] If the majority is right, this

[106] *See id.* at 1078 ("The alleged threat must be analyzed in light of its entire factual context to 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.… The court [in United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)] noted that the fact that Mrs. Dinwiddie did not *specifically* say to Crist that *she* would injure him does not mean that her comments were not 'threats of force.'")

[107] *See, e.g.*, 290 F.3d at 1072 ("If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.")

[108] *See, e.g.*, 290 F.3d at 1075 ("A true threat, that is one 'where a reasonable person would foresee that the listener will believe he *will be subjected* to physical violence upon his person, is unprotected by the first amendment'") (emphasis added) (citing *Orozco-Santillan*, 903 F.2d at 1265). *See also*, 290 F.3d at 1079 ("Gunn *was killed* after his poster was released; Britton *was killed* after his poster was released; and Patterson *was killed* after his poster was released. Knowing this, and knowing the fear generated among those…who were singled out for identification on a 'wanted'-type poster, ACLA deliberately identified Crist [and the other plaintiffs] on a 'GUILTY' poster…to intimidate them," (emphasis added)). Of the three murders, only one can be tied directly to the "WANTED" posters and the defendants in this case. *See supra* note 3 and accompanying text. Dr. Patterson's murderer is still at large and the Court mentions no connection between Dr. Gunn's murder and the WANTED posters that preceded it.

[109] 290 F.3d at 1076.

was not a targeting speech case – the jury did not find that ACLA intimidated its targets by encouraging and endorsing third-party violence against these particular doctors. But if the dissent is right, this is a paradigm targeting speech case.

What makes this case a good case for discussing targeting speech is that beginning with the dissents, and continuing with an ever-growing body of commentary,[110] critics argue that this *was* a what I call a targeting speech case (without using that term, of course), that hence there was no true threat, and therefore the First Amendment should have shielded the ACLA defendants' speech. It is not clear that the facts support that characterization, but more than any other case, this one stimulates criticism in the form of an intuition that targeting speech cannot be comprehended under the doctrine of true threats.

Targeting speech does not fit neatly into the true threats doctrine, and commentators are right to criticize that doctrine's use in the Nuremberg Files case.

---

[110] *See, e.g.*, Steven Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541, 590 (2000) ("The thing that separates constitutionally unprotected true threats from constitutionally protected…political intimidation is…that the speaker specifically identifies the target of the threat, and…communicates the intent to carry out the threat personally or to cause it to be carried out."); Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. Pub. Pol'y 283, 289 (2001) (requiring "proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat" and arguing that the Nuremberg Files would not satisfy this requirement because "there was no evidence that the defendants or their associates threatened that they would take any action beyond cataloging names of abortion providers and identifying when they were injured or killed."); Daniel T. Kobil, *Advocacy Online:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. Tol. L. Rev. 227, 250 (2000) ("The Nuremberg Files defendants thus were sanctioned for uttering exactly the sort of speech that the Supreme Court had found was protected when it had been made face-to-face to a volatile audience. Unless the Supreme Court overrules or modifies Claiborne Hardware, it is difficult to defend application of the "true threat" doctrine in such a fashion."); Matthew G.T. Martin, Comment, *True Threats, Militant Activists, and the First Amendment,* 82 N.C. L. Rev. 280, 305 (criticizing the majority because it "did not cite any evidence – other than the poster pattern – tending to show that ACLA exercised sufficient control to cause any harm").

Stipulating that the ACLA defendants neither actually intended nor communicated the intent (sincere or not) to carry out violence themselves, the Nuremburg Files case still presents a highly disturbing set of facts. So, too, do the cases of the Edwards bloggers and the SHAC animal rights campaigns. I turn now to some analysis of the issues raised by these cases.

IV. Some Tentative Policy Conclusions

First, we are right to be disturbed by targeting speech even if it eludes categorization in the existing rubric of exceptions to First Amendment protection. What is disturbing, primarily, is the real harm it does. Like any true threat, someone is placed in fear and suffers the associated disruptions regardless of whether anyone follows through on the exposure. Knowing that your name, your social security number, your picture have been posted to a hate group website can be enough to turn your life upside down. Add death threat e-mails or phone calls, and the effect could be much worse than a simple threat; targeting speech can be a kind of proto-threat from which hundreds of anonymous threats emerge.

Second, the social cost of regulating targeting speech could be, in many cases, quite low. Genuine targeting speech shares with true threats a very low social value. Much of targeting speech, such as the listings of home addresses or phone numbers seemingly inviting the audience to terrorize targets at home – approaches that near-zero threshold Professor Volokh says may justifiably rob crime-facilitating speech of its First Amendment protection. A portion of the intended audience – e.g. the extreme, violent wing of the anti-abortion movement – may also satisfy Volokh's other class of regulable

crime-facilitating speech: expression directed to an audience the speaker knows will put the information solely to criminal use.

Third, the audience is very important in deciding whether a speech amounts to targeting speech. Professor Gey argues that some public shaming, such as the campaign of leaflets targeting a local real estate developer in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), can have a "coercive" effect that is "not fundamentally different from the function of a newspaper."[111] But the audience in *Keefe* was the developer's neighbors in his own upscale neighborhood, and the harm was not that his neighbors would hunt him down and kill him, but rather that they would socially ostracize him. The victims in the Nuremberg Files case were not afraid of social disapproval; they were wearing bulletproof vests to work.

Fourth, and related to the point about audience: the role that targeting information plays in the motivation of would-be criminals – its instant and irreversible effect – makes treatment of targeting speech under an incitement standard untenable. Professor Gey argues that the holding in *Claiborne Hardware* should have required acquittal for the ACLA defendants, saying it is "doubtful that the speech in the Nuremberg Files case could be considered more likely to encourage a violent response than the speech in Claiborne Hardware."[112] But however angry and heated the civil rights protesters in *Claiborne* may have been, the point of comparison is the unknown, already committed extremists who may have been (indeed, who past experience suggested surely were) in the audience for the Nuremberg Files. The activists in *Claiborne* were ordinary citizens in the midst of a local political fight, not violent extremists in search of a victim. For true

[111] Gey, *supra* note __, at 562
[112] *Id*. at 561.

targeting speech there is not time, especially in the Internet age, to intervene with more speech before a highly motivated audience (shielded online by relative anonymity) acts on a movement leader's marching orders.