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Abortion Foes Are Ruled a Threat

Court: 'Wanted' posters labeling doctors 'baby butchers' are not protected by the 1st Amendment, U.S. appellate judges find.

May 17, 2002 | HENRY WEINSTEIN | TIMES STAFF WRITER

An Internet Web site and "wanted" posters created by militant abortion foes were real threats to doctors and the clinics where they worked and are not protected by the 1st Amendment, a federal appeals court ruled Thursday.

"While advocating violence is protected" under the 1st Amendment, "threatening a person with violence is not," Judge Pamela A. Rymer wrote for the sharply divided court.

The 6-5 decision came in a closely watched case that has been seen as a test of how far courts will permit anti-abortion activists to go. The ruling is binding in California and eight other Western states.

In 1999, four doctors who had been pictured on Wild West-style wanted posters that labeled them "baby butchers," along with Planned Parenthood and a clinic in Portland, Ore., won a \$107-million jury verdict and an injunction against anti-abortion activists.

The injunction barred the activists from continuing to put up the posters. Also at issue in the case was a Web site called "the Nuremberg Files" that contained a list of doctors who provided abortions, including in some instances their photos, address, car license plate numbers and names of family members.

The doctors were the first to win damages and an injunction under the 1994 Freedom of Access to Clinics Act, which bars the use of force or threats of force to prevent access to abortion clinics.

The four doctors filed suit after three other abortion providers who had been named in wanted posters were shot and killed.

The Web site featured the murdered doctors on a list of people guilty of crimes against humanity. The names of doctors who had been murdered were shown crossed off the list. The names of those who had been shot and wounded were grayed.

The defendants--13 individuals and two organizations, the American Coalition of Life Activists and Advocates for Life Ministries--denounced the ruling for restricting their free speech rights and said they would appeal to the U.S. Supreme Court.

"I think this is another stop on the continuing exodus from the 1st Amendment in this nation," said Paul deParrie, one of the defendants.

DeParrie used to edit the magazine published by the Portland-based Life Ministries group, which carried articles defending the murder of abortion providers as a tool to protect the unborn.

DeParrie said the organization had been forced to shut down after the huge damage judgment in the Portland case, but he said he continues to protest at clinics where abortions are performed.

Neal Horsley, a Carrollton, Ga., computer programmer who operates the Nuremberg Files Web site, was anything but cowed.

"It strikes me that I am going to have to make some changes. I am going to have to add six more bloody baby butchering judges to the Nuremberg Files list," Horsley said.

A day after the jury verdict in 1999, an Internet service provider in Atlanta shut down the site. But Horsley has kept the site running, using a server in South Africa and four others in places he declined to name.

Horsley is not a named defendant in the case, and it is unclear how the ruling will affect him.

Supporters of abortion rights, meanwhile, hailed the decision, saying it would afford protection to abortion providers.

"The anti-choice people had reason to know the doctors would feel threatened by the posters," said James F. Newhall, one of the plaintiffs who said he has been performing abortions in Oregon since 1989.

Newhall said he became very frightened in 1994 when he learned from an FBI agent "a wanted poster had gone up with my name on it."

By then, he said, four doctors whose names had appeared on prior posters had been murdered.

"I got involved in the lawsuit because I wanted to stop the violence, and it appears that this has been successful. Not one doctor has been murdered since the trial," he said.

The last slaying of an abortion provider, that of Dr. Barnett Slepian who was killed by a sniper near Buffalo, N.Y., came a few months before the Portland trial began.

Vicki Saporta, president of the National Abortion Federation, said she thought a variety of factors—including the Portland lawsuit and a task force launched by Atty. Gen. Janet Reno and maintained by Atty. Gen. John Ashcroft—had contributed to a reduction in violence at abortion clinics.

"I think this decision is important for the continued protection of abortion providers throughout the country," she said.

The case has been in the appeals process for several years. In March 2001, a three-judge panel of the U.S. 9th Circuit Court of Appeals overturned the jury verdict, ruling that the anti-abortion materials were protected speech.

That ruling caused an outcry by supporters of abortion rights, including 40 members of Congress. In October, the full 9th Circuit, based in San Francisco, decided to reconsider the case, setting the stage for Thursday's ruling.

Thursday's decision upheld the injunction against the anti-abortion groups. But the 9th Circuit majority sent the case back to District Judge Robert E. Jones to reexamine the size of the punitive damage award.

The ruling in *Planned Parenthood of the Columbia/Willamette vs. American Coalition of Life Activists* featured an unusual ideological division.

Rymer, who was appointed by the first President Bush, was joined in the majority by one appointee of President Carter and four appointees of President Clinton.

The dissenters, who argued that the anti-abortion posters and Web site were protected by the Constitution's free speech guarantees, included two of the court's most liberal judges and three of its more conservative members.

"The defendants have not murdered anyone," wrote Judge Marsha Berzon, one of the dissenters.

"Neither their advocacy of doing so nor the posters and Web site they published crossed the line into unprotected speech," she added.

"If we are not willing to provide stringent 1st Amendment protection ... to those with whom we as a society disagree as well as those with whom we agree ... the 1st Amendment will become a dead letter."

Berzon, a Clinton appointee, was joined by Judge Stephen Reinhardt, a Carter appointee, and three judges appointed by presidents Reagan and Bush--Alex Kozinski, Diarmuid O'Scannlain and Andrew J. Kleinfeld.

Defining a 'True Threat'

The central issue dividing the judges is what constitutes an illegal "true threat," as distinct from vociferous advocacy that is protected by the 1st Amendment.

Rymer said the definition of a true threat is a statement that the maker of the threat would know would be perceived by the recipient "as a serious expression of intent to inflict bodily harm to that person."

Rymer said there was considerable evidence that the wanted posters were an attempt to intimidate doctors.

The evidence showed a pattern in which after three wanted posters appeared, the physicians on them--David Gunn, George Patterson and John Britton--were shot and killed. After these murders, Rymer said, the American Coalition of Life Activists published "guilty" posters in essentially the same format naming the four doctors who sued.

Kozinski, in dissent, said he had no quarrel with that definition of a true threat. But the majority failed to apply its own definition, he said.

"Neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names," Kozinski said.

The man who killed Dr. Britton participated in making a poster naming Britton but was not a defendant in this case, he added.

"All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence," he wrote.

"A true threat warns of violence or other harm that the speaker controls," Kozinski wrote, and that was not the case here, he said. Past U.S. Supreme Court decisions have said that a threat must be explicit and likely to cause "imminent lawless action," he added.

The ruling marked the first time that the 9th Circuit had ever found that a statement made in a public forum constituted a "true threat" that was not entitled to 1st Amendment protection, Kozinski added.

Reinhardt also stressed that point. "It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different than purely private speech directed at an individual," he wrote.

"Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome," he wrote.