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O Say, Can You See: Free Expression by the Light of Fiery Crosses

Jeannine Bell*

Scholarship on cross burning has paid scant attention to the full context of the act of burning a cross. Many First Amendment scholars generally ignore cross burning's historical underpinnings. Those scholars who do recognize the historical importance of cross burning as a threat to African Americans do not fully address its place in First Amendment doctrine. Scholars in neither group acknowledge the contemporary use of cross burning by those with anti-integrationist ends.

This Article presents a comprehensive, context-based theory that both places cross burning in its proper doctrinal framework and recognizes the history of cross burning as one of Ku Klux Klan-inspired terrorism directed at African Americans. The author prefaces critical commentary on the Supreme Court's decision in Virginia v. Black with analysis of the full landscape of cross burning cases including another issue to which others have paid little attention—the ways in which state courts have negotiated First Amendment challenges to cross burning statutes. Thoroughly examining cross burning from each of these perspectives, the Article argues that cross burning should be treated as hate crime, which may be prosecuted, rather than as constitutionally protected hate speech.

Few things can chill free expression and association to the bone like night-riders outside the door and a fiery cross in the yard.¹

INTRODUCTION

Russ and Laura Jones began experiencing trouble with skinheads soon after moving to a working-class white neighborhood in St. Paul, Minnesota. The Joneses were the only Blacks living in the neighborhood, which was well-known among local Blacks for its racism. Within weeks of moving in, the Joneses found the tires on their new station wagon slashed. The next month, the tailgate of their car was broken. A few weeks later, their son was called a “nigger” on their front sidewalk. About three months after they moved in, at 2:30 in the morning, the first cross was burned.

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¹ State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995).

Within a two-hour time span, a group of skinheads burned three crosses in the yard of or in close proximity to the Joneses' house.²

Firm supporters of the First Amendment, the Joneses were not as worried about the message the skinheads were trying to communicate as they were concerned about what the skinheads might do next.³ Russ Jones recalled: "When I saw that cross burning on our lawn, I thought of the stories my grandparents told about living in the South and being intimidated by white people. When a cross was burned down there they either meant to harm you or put you in your place."⁴ To the Joneses, the cross burning was clearly a threat. They were worried about placing their children in danger. Like numerous African Americans who have faced this type of neighborhood violence, when they called the police, the Joneses learned that they could not rely on law enforcement to protect them.⁵ The police were able to offer little if any help to the family. Mr. Jones recalled:

When they arrived, the police themselves didn't seem to know what to do. They seemed shocked by the cross, but after asking the usual questions, they packed up to leave saying they didn't have any suspects because there were no witnesses.⁶

That would have been the end of the story, had not one of the skinheads bragged to his friends about his role in the cross burning.⁷ He and others, court documents later revealed, had been trying to drive the Joneses out of the neighborhood. They were "really disgusted" at having an African American family living across the street and were trying to "do something about it."⁸ During their discussion of what they were going to do to get rid of the Joneses, one of the skinheads suggested slashing the

² See *United States v. J.H.H.*, 22 F.3d 821, 826–27 (8th Cir. 1994).

³ Though the perpetrators' freedom of speech was not their predominant concern, Russ and Laura Jones emphasized in interviews that because they are minorities and Jehovah's Witnesses, they especially value their First Amendment rights. See Laura J. Lederer, *The Case of the Cross Burning: An Interview with Russ and Laura Jones*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 30 (Laura Lederer & Richard Delgado eds., 1995) [hereinafter Lederer, *Interview*].

⁴ *Id.*

⁵ See JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS AND HATE CRIME* 115–16 (2002) (detailing failure of district police officers to investigate hate crime); Elizabeth Boyd et al., *Motivated by Hatred or Prejudice: Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 L. & SOC'Y REV. 819 (1996) (describing failure of police officers to investigate incidents of hate crime); Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 384–88 (2002) (describing failure of the police to take serious action in response to racially motivated attempts to drive minorities out of white neighborhoods).

⁶ Lederer, *Interview*, *supra* note 3, at 29.

⁷ According to the Joneses, the perpetrator, Robert A. Viktora, was caught because he was overheard bragging to friends about having burned the crosses. The person who overheard Viktora bragging provided an anonymous tip to the police. *Id.*

⁸ *J.H.H.*, 22 F.3d at 826–27 (8th Cir. 1994).

tires of the Joneses' car. That had already been done, replied another, and it hadn't worked.⁹

One of the skinheads who burned the cross on the Joneses' lawn, "R.A.V.," was charged with violating St. Paul's bias crime ordinance. His First Amendment challenge to the law became *R.A.V. v. City of St. Paul*.¹⁰ When the Supreme Court overturned the St. Paul ordinance in *R.A.V.*, the skinheads took the decision as a victory and celebrated. The Joneses remembered the skinheads gathering directly across the street from their house after the Court decision. Laura Jones recalled:

They had a rally on one sunny Sunday afternoon, wearing their masks, wielding their baseball bats and clubs, waving their Confederate flags It was awful. I felt trapped in my own home. We didn't go anywhere because I would have had to face them and could never tell what they would do.¹¹

The Court's decision in *R.A.V.* paved the way for many such First Amendment "victories" for skinheads and other would-be cross burners. Relying on *R.A.V.*, state courts in Washington, South Carolina, Maryland, and New Jersey held their cross-burning statutes unconstitutional. In *Black v. Commonwealth*,¹² the Virginia Supreme Court struck down on First Amendment grounds Virginia's law barring cross burning. According to the Virginia court, *R.A.V.* left it no choice but to invalidate the statute.¹³

When the Virginia case came before the United States Supreme Court in *Virginia v. Black*,¹⁴ the Court evaluated the Commonwealth's arguments that Virginia's cross-burning statute did not violate the First Amendment. The Court ultimately found, for reasons discussed *infra* Part III, that the Virginia cross-burning statute impermissibly regulated protected speech. In a move that surprised many, however, the Court held that cross burning statutes are not *per se* violations of the First Amendment, and that states may ban cross burning in cases in which the perpetrator intended to intimidate when burning the cross.

In *R.A.V.*, and to a lesser extent in *Black*, the Supreme Court failed to understand fully a crucial fact that remains largely unrecognized in other

⁹ *Id.* at 827.

¹⁰ 505 U.S. 377 (1992). *R.A.V.* was the first Supreme Court case to consider a First Amendment challenge to the constitutionality of a statute aimed at regulating cross burning. In *R.A.V.*, the Supreme Court struck down a St. Paul statute that regulated the placement of symbols, including burning crosses, on the grounds that the statute was content-based regulation of protected speech. *Id.* at 391.

¹¹ Lederer, *Interview*, *supra* note 3, at 31.

¹² 553 S.E.2d 738 (Va. 2001), *aff'd in part, vacated in part*, *Virginia v. Black*, 538 U.S. 343 (2003).

¹³ *Black*, 553 S.E.2d at 742 ("Any question about the constitutional infirmity of such selective proscription of speech was resolved by the United States Supreme Court in [*R.A.V.*]").

¹⁴ 538 U.S. 343 (2003).

courts' opinions and legal scholarship in this area. This Article argues that the situational and the historical contexts of cross burnings are critical parts of how they should be analyzed. This expanded examination of context suggests that many cross burnings should be understood not as protected speech, but as unprotected activity that can be criminalized as hate crime.

First Amendment scholarship on threats has paid scant attention to the real-world circumstances in which cross burning takes place.¹⁵ Scholars and many courts examining First Amendment challenges in cross-burning cases seem to have forgotten that in First Amendment law, as in everything else, context matters. Much attention is paid to cross burning as a form of expressive conduct designed to convey racist views. Looking specifically to the empirical reality of cross burning reveals, however, that the primary aim of many who burn crosses is not to communicate racist views. Burned crosses are not intended as symbolic statements of racist views, but rather as instruments designed to terrorize. In fact, like the skinheads who terrorized the Joneses, cross burners have often already expressed their views verbally before the cross burning. Not content just to speak, these individuals must act to accomplish their goal—driving out minorities who have moved to white neighborhoods. By divorcing cross burnings from their situational context, these scholars and judges have reached bizarre results that are inconsistent with courts' approaches to other types of activities in similar contexts.

This Article shows how injecting the history of cross burning and its empirical reality into the debate over how we treat cross burning can assist courts and commentators to better understand the nature of cross burning and to situate assessment of cross burning activity within the appropriate line of precedent. The Article offers a context-based approach to First Amendment analysis of cross burning statutes. The proposed analysis places this form of conduct in its proper doctrinal place, as a hate crime.

In Part I, the Article places the general phenomenon of cross burning in its appropriate legal, social, and historical context. It begins by highlighting the importance of context to First Amendment doctrine, particularly in the area of threats. It continues by putting cross burning in historical and contemporary context, discussing the origins of cross burning and how the Klan and others have used and continue to use cross burning to terrorize and threaten Blacks and other minorities.

¹⁵ For a sample of articles on threats and cross burning that fail to discuss the historical context of cross burning, see, for example, Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281 (1995); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 TEX. J. WOMEN & L. 207 (1999); Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551 (2002); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993); Philip Weinberg, *R.A.V. and Mitchell: Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299 (1999).

Part II analyzes the ways in which states have approached cross burning. In this Part, the Article details several states' cross-burning statutes and the wide-scale failure of many state courts to appreciate the full context of cross burning. In Part III, the Article offers a critical perspective on *Virginia v. Black*, the Supreme Court's somewhat surprising decision to uphold state statutes that prohibit cross burning undertaken with intent to intimidate. In light of the Court's decision in *R.A.V.*, which remains good law, *Black* embodies a seemingly inconsistent approach to cross burning. This Part of the Article argues that the Court's decision in *Black* was not as favorable to victims as it has been described.

Part IV sets forth an alternative to the approach taken by the Supreme Court in *Black* and *R.A.V.*, as well as by several of the state supreme courts that have struck down crossburning statutes. This proposed approach advocates a victim-centered, context-based evaluation of cross burning for First Amendment protection. The Article argues that such an approach more realistically accounts for the intentions of the perpetrators and circumstances under which the vast majority of cross burnings occur. The Article contends that cross burnings specifically targeted at identified victims should be evaluated as hate crimes, rather than protected speech.

I. SPEECH, MEANING, AND HISTORY: THE BURNING OF CROSSES IN HISTORICAL CONTEXT

[C]ontext is critical This makes sense, because without context, a burning cross or dead rat mean nothing.¹⁶

A. Courts and the Context of Speech

Courts interpreting the First Amendment place a premium on protecting expression that has an identifiable message or meaning. Much attention is paid to identifying the message that the speaker is trying to communicate. The speaker's message is important because courts often look to whether the state has aimed the regulation at the content of the message. That content may therefore matter in determining whether the state was acting unconstitutionally in trying to silence him or her. A state would normally not be considered to have an impermissible purpose in, for example, regulating random sidewalk chalking, but a court would take a very different view if the state regulated only chalking that criticized the state's governor.

Though content-based regulation is generally impermissible, there are some exceptions under which the state may regulate particular categories of unprotected speech. One such exception has been delineated for

¹⁶ *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1078–79 (9th Cir. 2002).

so-called “true threats.” This Article argues that actions like the burning of the cross on the Joneses’ lawn are true threats that ought not be considered protected speech. In *Watts v. United States*,¹⁷ the seminal case on true threats, the Supreme Court highlighted the need for words to be viewed in context. When considering the extent to which the First Amendment protects speech that may be threatening, it is especially important to evaluate the factual context in which the speech or symbolic expression occurred.¹⁸ *Watts* involved a protestor convicted of violating a 1917 statute that prohibits an individual from “knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States.”¹⁹ At an anti-war rally at the Washington Monument, Watts, an eighteen-year-old protestor, said:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers.²⁰

The fact that Watts was speaking at a public anti-war rally, and that the crowd did not take his remarks to represent a serious threat to kill the President, were important contextual variables relevant to the Court’s decision that Watts’s speech was not a true threat. The Court found that the defendant’s words constituted protected crude political language rather than constitutionally regulable true threats. The Court reversed Watts’s conviction, reasoning that true threats could be distinguished from political hyperbole, and that Watts’s speech fell into the latter category. The context of the words used, their conditional nature, and the reaction of the listeners all suggested to the Court that the defendant meant only to be critical of the government, rather than actually to threaten the President’s life.²¹

Since *Watts*, the Supreme Court has never examined the boundaries of the true threats exception.²² Lower courts, however, have fashioned tests for what constitutes a true threat²³ in the process of analyzing threats

¹⁷ 394 U.S. 705 (1969).

¹⁸ See John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 *BUFF. L. REV.* 653, 672 (1994).

¹⁹ *Watts*, 394 U.S. at 705.

²⁰ *Id.* at 706.

²¹ *Id.* at 708.

²² See *Planned Parenthood*, 290 F.3d at 1074 (“Apart from holding that Watts’s crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment.”).

²³ See Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 *HARV. J.L. & PUB. POL’Y* 283, 302–13 (2001) (discussing circuit court opinions).

to kill the President,²⁴ the speech of protestors,²⁵ and cross burning.²⁶ Several federal circuits have defined true threats as involving intentional behavior that entails serious expressions of intent to harm.²⁷ Courts have looked to context to help decipher the meaning of the language used because the context in which the speech is made is an important marker of whether the speech constitutes a true threat or protected expression.²⁸ Contextual variables include the setting in which the speech was used; the identities of the speakers and listeners; the intent of the speaker; the groups to which the speaker and listener belong and the current and historical relationships between those groups; the mode and manner of expression chosen by the speaker; and the reaction of listeners and witnesses.

Courts have held that a speaker's words constitute a threat even in the absence of the speaker's testimony that he or she intended to threaten. For example, in *Roy v. United States*,²⁹ the Ninth Circuit upheld a soldier's conviction on charges that he had threatened to kill the President, despite evidence that he had not intended to actually threaten the President's life. Roy, a U.S. Marine waiting to be flown from Camp Pendleton to Vietnam, told a telephone operator, "I hear the President is coming to the base. I am going to get him."³⁰ Despite evidence that Roy made the statements because he wished to be reassigned to a location in the United States, the court held that the words used by Roy, given the context and circumstances in which they were said, constituted a threat.

If a threat is made in a context or under such circumstances wherein it appears that it is a serious threat . . . even though the maker of the threat does not have an actual intention to assault the President, an apparently serious threat may cause the mischief or evil toward which the statute in part was directed.³¹

²⁴ See, e.g., *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002); *United States v. Miller*, 115 F.3d 361 (6th Cir. 1997); *United States v. Howell*, 719 F.2d 1258 (5th Cir. 1984); *United States v. Welch*, 745 F.2d 614 (10th Cir. 1984); *United States v. Carrier*, 672 F.2d 300 (2d Cir. 1982); *United States v. Fredrickson*, 601 F.2d 1358 (8th Cir. 1979); *Roy v. United States* 416 F.2d 874 (9th Cir. 1969); *United States v. Ogren*, 54 M.J. 481 (C.A.A.F. 2001).

²⁵ See, e.g., *Planned Parenthood*, 290 F.3d 1058 (finding that abortion protestors' posters were true threats). Cf. also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-29 (1982) (despite civil rights protestor's call for violence, context of speech meant that statements were protected).

²⁶ See, e.g., *United States v. Magleby*, 241 F.3d 1306, 1310 (10th Cir. 2001); *United States v. Hartbarger*, 148 F.3d 777, 781 (7th Cir. 1998); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *Singer v. United States*, No. 94-3039, 1994 WL 589562, at *1 (6th Cir. Oct. 24, 1994).

²⁷ Rothchild, *supra* note 15, at 212-13.

²⁸ Nockleby, *supra* note 18, at 673.

²⁹ 416 F.2d 874 (9th Cir. 1969).

³⁰ *Id.* at 875.

³¹ *Id.* at 877.

A similar result, in which examining context meant finding a threat despite the defendant's intentions to the contrary, occurred in *United States v. Ogren*.³² The defendant in *Ogren* had been in pre-trial confinement awaiting court-martial on an unrelated charge when he told Petty Officer Lyell: "Fuck off. And fuck the rest of the staff. Fuck Admiral Green. Hell, fuck the President, too. . . . [As] a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard."³³ When asked if he owned guns, Ogren replied that he had access to them. Ogren later claimed he was just blowing off steam. Although there was no evidence that Ogren had made assassination plans, after evaluating the context—he yelled the words from his cell, he asked whether receiving a dishonorable discharge would prevent him from getting weapons, and he was surrounded by listeners who took him seriously—the court held Ogren's words to be a true threat.³⁴

Several circuits have used the hearer's perception of the statement's seriousness as a deciding factor.³⁵ The Ninth Circuit, for example, applied a "reasonable speaker" test³⁶ in *Planned Parenthood v. American Coalition of Life Activists*.³⁷ The court in *Planned Parenthood* evaluated the extent to which the First Amendment protected the Internet publication of "Wanted" posters naming doctors who had performed abortions. Doctors depicted on similar "Wanted" posters had been shot and killed. That fact, combined with the fear that the "Wanted" posters caused, signaled to the court that the posters constituted a true threat. In identifying the posters as a true threat, the court made an analogy to cross burning. "The posters are true threats because, like . . . burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message."³⁸

A full examination of the context of the threat requires courts to look to the surrounding events to determine whether an individual's speech actually constituted a threat. This includes the circumstances in which the statement was made and the defendant's behavior while engaged in the expression at issue.

³² 54 M.J. 481 (C.A.A.F. 2001).

³³ *Id.* at 482.

³⁴ *Id.* at 487–88.

³⁵ Rothman, *supra* note 23, at 302. See, e.g., *Watts v. United States*, 394 U.S. 705 (1969); *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993); *United States v. Ogren*, 54 M.J. 481 (C.A.A.F. 2001).

³⁶ The Ninth Circuit's test, applied in *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990), 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." *Id.* at 1265.

³⁷ 290 F.3d 1058, 1088 (9th Cir. 2002).

³⁸ *Id.* at 1085.

B. The Ku Klux Klan and Burning Crosses

As described above, courts applying the First Amendment have looked to the context of the expression to evaluate whether or not it deserves protection. According to these courts, the context may be drawn from the ways in which the expression is used, and may involve related events that occur either at the time the expression occurs or in the immediate aftermath.

Attempting to expand this issue of context somewhat, this Article argues that particular events can have both historical and situational context. Events like cross burning, which have occurred repeatedly in the same or similar ways over a period of time, have both a historical context and a situational context. The historical context describes the way in which a particular type of event, such as the burning of a cross, has been generally used and understood by a particular group of people over a discrete period of time. I use the term situational context to refer to the circumstances of a particular event, for example the cross burning on the Joneses' front lawn. This Article argues that courts should take into account both situational and historical context in considering the extent to which the First Amendment protects cross burning. This Part begins by describing the historical context in which cross burning must be understood.

The meaning of a burning cross is strongly, perhaps indelibly, connected with the Ku Klux Klan ("KKK" or "Klan"). From its founding during Reconstruction, the Klan used violence and terror to "re-establish control of the black labor force, and restore racial subordination in every aspect of Southern life."³⁹ The Reconstruction Klan had faded into obscurity by the turn of the century, but a second Klan soon reappeared, sparked by D.W. Griffith's 1915 film, *Birth of a Nation*, and based on Thomas Dixon's novel *The Clansman*.⁴⁰

³⁹ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 426 (Henry Steele Commager & Richard B. Morris eds., Perennial Library 1989) (1988). See also GAIL WILLIAMS O'BRIEN, THE COLOR OF LAW: RACE, VIOLENCE AND JUSTICE IN THE POST-WORLD WAR II SOUTH 114-18 (1999). Klan violence during Reconstruction was maintained by individual klans set up throughout the South. Violence wrought by the Klan during this time period included threats, floggings, mutilation and murders. See, e.g., DAVID M. CHALMERS, HOODED AMERICANISM 10 (3d ed. 1981); O'BRIEN, *supra*, at 114-18.

⁴⁰ *The Clansman* depicted Reconstruction Klansmen burning crosses as they defended threats to the honor of the South posed by Northerners. Some have speculated that the burning cross originated from Dixon's imagination. Historian Wyn Craig Wade writes:

Burning crosses had never been part of the Reconstruction Ku-Klux. They had come from the exotic imagination of Thomas Dixon, whose fictional Klansmen had felt so much tangible pride in their Scottish ancestry, they revived the use of burning crosses as signal fires from one clan to another.

Birth of a Nation depicts the ravaging of a young white woman (played by actress Lillian Gish) by a lust-filled Black man. It goes on to depict members of the Klan as they find and lynch the perpetrator, and then gather, hooded, around a flaming cross. The film, which had private screenings at the White House for President Woodrow Wilson and Justices of the Supreme Court, enjoyed great popular success.⁴¹ In fact, not until *Gone with the Wind* was released in 1939 was *Birth of a Nation* surpassed in attendance.⁴²

The 1915 lynching of Leo Frank demonstrated the Klan's resurgence and the importance of the burning cross in avenging disruptions to the social order. Frank, a Jewish businessman in Atlanta, was falsely convicted of the rape and murder of a thirteen-year-old girl, Mary Phagan.⁴³ Phagan quickly became a symbol of the need to protect the South from carpetbaggers and Blacks. A group that called itself the "Knights of Mary Phagan," fearing that Frank might be pardoned, dragged him from prison and hanged him.⁴⁴ After the murder the group climbed Stone Mountain and burned a huge cross that was said, in one account, to be "visible throughout the city."⁴⁵

The revival of the Klan did not occur spontaneously. William Simmons, a professional promoter of fraternal orders, capitalized on the hysteria after Frank's murder and the notoriety surrounding *Birth of a Nation*. Simmons gathered new members, including two members of the Reconstruction Klan. At the initiation of the 1915 revival of the Klan, held on Stone Mountain, Simmons lit a sixteen-foot tall cross.⁴⁶ He recalled:

[B]athed in the sacred glow of the fiery cross, the Invisible Empire was called from its slumber of half a century to take up a new task and fulfill a new mission for humanity's good and to call back to mortal habitation the good angel of practical fraternity among men.⁴⁷

By the 1920s, the burning cross was linked indisputably with the Klan. In the 1920s, an Indianapolis-based magazine called *The Fiery Cross* was strongly aligned with the Klan.⁴⁸ Enormous burning crosses were part

⁴¹ JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 176 (1984).

⁴² *Id.*

⁴³ WADE, *supra* note 40, at 143. Frank was exonerated of all wrongdoing by a witness's deathbed statement in 1982. *Id.*

⁴⁴ *Id.* at 144.

⁴⁵ *Id.* (punctuation omitted).

⁴⁶ *Id.* at 144-46; RICHARD K. TUCKER, *THE DRAGON AND THE CROSS: THE RISE AND FALL OF THE KU KLUX KLAN IN MIDDLE AMERICA* 18 (1991).

⁴⁷ JOHN MOFFATT MECKLIN, *THE KU KLUX KLAN: A STUDY OF THE AMERICAN MIND* 5 (1924).

⁴⁸ WADE, *supra* note 40, at 226.

of many outdoor Klan rallies. The rallies were often held on high places where the enormous “burlap-wrapped and kerosene-soaked wooden cross” could be seen from a distance.⁴⁹ Attendees sang “Onward Christian Soldiers” and the cross was then lit. The lighting of the cross was followed by an “explosion of kerosene” and a “rush of flames.”⁵⁰ In some areas, Klansmen added to the spectacle by detonating dynamite.⁵¹ As the cross burned, audience members raised their left arms in salute and sang “The Old Rugged Cross.”⁵²

The burning cross came to be so closely associated with the Klan and its violent tactics that it was the perfect instrument of terror. The Klan used burning crosses to terrorize Blacks, labor organizers, and anyone who transgressed social boundaries.⁵³ “The burning cross symbolized the Ku Klux Klan. Usually when a cross burned, a lynching followed The burning cross signaled [people] to come out and start a fire or burn or flog a Negro.”⁵⁴ By the 1940s, the burning cross was used solely for intimidation; it was no longer associated with religion in Klan dogma.⁵⁵ Crosses were burned in the early 1960s to terrorize Blacks involved in civil rights activism. In January 1964, for example, more than 150 crosses were burned near Black homes and churches in Louisiana.⁵⁶

C. Contemporary Uses of Cross Burning

For minorities and enemies of the Klan there were few, if any, innocent cross burnings. The association between the burning cross and violent intimidation of racial, ethnic and religious minorities—or anyone else who might be an enemy of the Klan—was strengthened as cross burnings continued to be accompanied by acts of violence. Frequently, cross burnings served as a precursor to other types of violence.⁵⁷ In other cases,

⁴⁹ *Id.* at 185.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* at 263–64, 279, 290. For example, in June 1949 Klansmen broke into the home of a woman they believed to be renting rooms to unmarried couples. They dragged her outside where she was forced to watch them burn a cross on her lawn. *Id.* at 290.

⁵⁴ DeNeen L. Brown, *Cross Case Stirs Debate Over Rights: Fairfax Judge Calls Law Unconstitutional*, WASH. POST, Apr. 21, 1991, at D5 (quoting Kenneth S. Tollett, Professor, Howard University) (internal quotation marks omitted).

⁵⁵ *Id.*

⁵⁶ WADE, *supra* note 40, at 329.

⁵⁷ *See* Brief of Amicus Curiae the United States at 3, 4 & n.2, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107); Charles H. Jones, *Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression*, 18 WM. MITCHELL L. REV. 935, 948 (1992); Rubinowitz & Perry, *supra* note 5, at 342 (discussing the possibility of calculated campaigns to eject families, beginning with acts such as cross burnings, window breaking, or threatening phone calls, and culminating in the bombing of the family’s home).

cross burnings formed part of a series of violent actions, such as gunshots, assaults, fire bombings and murder.⁵⁸

Non-Klansmen capitalized upon the connection between the burning cross and Klan-inspired terror. After the 1960s, burning crosses were used as an instrument by whites who were not connected with the Klan. Individuals who engaged in violence against minorities did not necessarily share the same white supremacist ideology as the Klan. Rather, their struggles were focused solely on restricting minority migration to white neighborhoods. During the postwar years, in both the North and the South, "the most explosive issue (literally) stemmed from efforts by whites to keep Blacks out of their neighborhoods."⁵⁹

Cross burning was part of a long list of violent actions used by those who opposed minority integration to police neighborhood boundaries. In cities around the country, white residents resorted to bombings, arson, battery, vandalism and harassment to drive the "intruders" from "their" neighborhoods. In Cleveland, Detroit, Boston, Chicago, and other cities, minority newcomers faced organized violent opposition to their presence, as neighborhood residents sought to "collectively establish and enforce an extralegal 'right' to practice racial discrimination."⁶⁰

Minorities moving into all-white neighborhoods have faced this violence in spite of civil rights laws and general criminal laws designed to protect their rights. One example involved Mattie Harrell, whose family experienced five incidents of gunfire at their new home during the first five months that they lived in an all-white neighborhood in Vineland, New Jersey in 1994.⁶¹ Harrell and her family were the first African Americans to move to the neighborhood. After five months, the police arrested a white man, Charles Apprendi, who told them he had fired at the house because he wanted to give Ms. Harrell and her family the message that they were not wanted.

Harrell said that the gun shots had a tremendous effect on the family: "It tore the whole family up We will never be the same."⁶² The first bullet pierced the wall near her eight-year-old son Michael's bed. Six years later, Michael still had trouble sleeping.⁶³ The violence experienced by families like the Harrells and the Joneses (whose story is recounted at

⁵⁸ See MICHAEL NEWTON & JUDY ANN NEWTON, *THE KU KLUX KLAN: AN ENCYCLOPEDIA* 583 (1991) (describing a series of cross burnings and vandalism directed at Jewish fishermen); Rubinowitz & Perry, *supra* note 5, at 382 (detailing cross burning and brick throwing targeted at a Jewish office holder).

⁵⁹ O'BRIEN, *supra* note 39, at 110.

⁶⁰ Margalynne Armstrong, *Protecting Privilege: Race, Residence and Rodney King*, 12 *LAW & INEQUALITY* 351, 361 (1994). See also REYNOLDS FARLEY ET AL., *DETROIT DIVIDED* 145-49 (2000); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960*, at 40-67 (1983).

⁶¹ Maria Newman, *Victim of Hate Crime Calls High Court Ruling a "Slap in the Face,"* N.Y. TIMES, June 27, 2000, at B5.

⁶² *Id.* (internal quotation marks omitted).

⁶³ *Id.*

the beginning of this Article) encouraged resident minorities to leave white neighborhoods and discouraged other minorities from moving in. Several years after the incident, Ms. Harrell and her children were still the only African American family living in the neighborhood.⁶⁴

In the 1990s, with the increasing passage of local and state hate crime laws, incidents of violence directed against minorities in and around their homes began to be recognized as hate crimes. In several cities, a significant percentage of reported hate crimes occurred in neighborhoods that were integrating. For instance, in Chicago between 1985 and 1990, half of the 1129 incidents reported as hate crimes occurred in ten communities undergoing racial demographic change.⁶⁵ In Los Angeles, sixty percent of the racially motivated hate crimes reported to the city's Human Relations Commission involved African Americans; seventy percent occurred at the victim's residence.⁶⁶ Blacks moving into white neighborhoods in the 1980s and 1990s faced similar violence in Philadelphia, Boston, and New York City.⁶⁷ A study of 365 cases investigated by the Hate Crimes Unit of the Boston Police Department revealed that the third most frequent reason for hate crime was "moving to a neighborhood."⁶⁸ So frequent are such acts of violence that scholars have a specific name for the phenomenon: "move-in" violence.⁶⁹

Social scientists have established a clear link between racially motivated crime and minority integration of white neighborhoods. One study of bias-motivated crime in the 1980s and 1990s in New York City found that increases in anti-Black, anti-Latino, and anti-Asian crime tracked movement by each of these groups into white strongholds.⁷⁰ In the study, the greatest proportion of anti-minority attacks in the city occurred in formerly all-white neighborhoods that minorities were in the process of integrating. Researchers speculated that racism, nostalgia, and self-interest, in conjunction with "exclusionary sentiment and tacit support (or active encouragement) of neighbors leads to a heightened propensity for action

⁶⁴ *Id.*

⁶⁵ DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID* 90 (1993).

⁶⁶ *Id.* at 90-91. See SOUTHERN POVERTY LAW CENTER, "MOVE-IN VIOLENCE": WHITE RESISTANCE TO NEIGHBORHOOD INTEGRATION IN THE 1980s (1987); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1116 (1998); Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2290 (2001); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and The Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 118 (1997).

⁶⁷ MASSEY & DENTON, *supra* note 65, at 91. For more discussion of this phenomenon, see Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995).

⁶⁸ JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 246 (1993).

⁶⁹ *Id.*

⁷⁰ Donald P. Green et al., *Defended Neighborhoods, Integration, and Racially Motivated Crime*, 104 AM. J. SOC. 372, 397 (1998).

when racial homogeneity is threatened.⁷¹ Despite minorities' attempts to protect themselves through the use of hate crime statutes and other civil rights laws, neighborhood resistance to minority integration may be accompanied by a failure of the local police to enforce the law against perpetrators engaged in racist violence aimed at new homeowners.⁷²

From the 1970s to the 1990s, all over the country, whites unaffiliated with the Klan used cross burnings to threaten African Americans or biracial couples who had moved into formerly all-white neighborhoods. Cross burnings were a particularly powerful choice for those trying to threaten newcomers, in part "because of their historical symbolism of white supremacists and the extreme threats that they conjure up of the aftermath."⁷³ Some perpetrators were charged under the federal Fair Housing Act for interfering with individuals' housing rights.⁷⁴ The record in many cross burning cases prosecuted under the Fair Housing Act makes clear that crosses were burned to threaten and drive out Black families who were living in white neighborhoods.⁷⁵

The history of the use of the cross as a weapon by Klan members and others opposed to racial integration of white neighborhoods suggests that the burning cross is viewed as a symbol of violence in the overwhelming majority of situations in which it is used. The combination of the Klan's violent history of threatening minorities and the contemporary use of the burning cross by those who oppose the integration of white neighborhoods should lead us to the conclusion that cross burning is an act of terror.

⁷¹ *Id.*

⁷² See, e.g., HIRSH, *supra* note 60, at 97–98 (1983) (describing police in Chicago who were sympathetic to anti-integrationist protestors); STEPHEN MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 132 (2000) (asserting that acts of terrorism aimed at minorities that were integrating had "broad support among officials including peace officers and others charged with protecting citizens"); Rubinowitz & Perry, *supra* note 5, at 339–40 (contending that local and state police as well as other law enforcement officers have displayed a pattern of minimal law enforcement in cases involving housing related crimes committed against minorities).

⁷³ Rubinowitz & Perry, *supra* note 5, at 385.

⁷⁴ See, e.g., *United States v. Hartbartger*, 148 F.3d 777 (7th Cir. 1998); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993).

⁷⁵ See *Hartbartger*, 148 F.3d 777 (cross burned to force biracial couple to move from trailer park); *United States v. Smith*, 161 F.3d 5 (4th Cir. 1998) (cross burned to frighten biracial couple so they would move from the area); *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995) (cross burned on lawn of Black family because perpetrators wanted to communicate that they "were not wanted" in the all-white neighborhood); *J.H.H.*, 22 F.3d 821 (cross burned because burner was disgusted at having an African American family living in the neighborhood); *United States v. Montgomery*, 23 F.3d 1130 (7th Cir. 1994) (cross burned to drive out shelter for homeless Black veterans); *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993) (cross burned to "scare off" African Americans); *United States v. Long*, 935 F.2d 1207 (11th Cir. 1991) (cross burned on lawn of Black family in formerly all-white neighborhood to intimidate them because of their race).

D. Cross Burning vs. Flag Burning

Because of its history and contemporary use, cross burning will rarely fail to be interpreted as a symbol of intimidation. This consistency of meaning attributable to the burning cross contrasts sharply with the disparate meanings attributable to the burning flag, another symbol that has received repeated attention in First Amendment jurisprudence. A flag that been set on fire possesses a different meaning for protestors opposed to U.S. government policy, for example, than it does for many war veterans. The Supreme Court confronted the conflict between these two interpretive communities in *Texas v. Johnson*.⁷⁶ *Johnson* reexamined Gerry Lee Johnson's conviction under a Texas law that criminalized intentionally desecrating a state or national flag. Johnson set fire to an American flag as part of a political demonstration. In its decision, the Supreme Court recognized that the myriad possible interpretations of Johnson's actions. Johnson construed his actions as a legitimate form of political protest.⁷⁷ The state maintained that Johnson's actions were punishable because they caused offense that had the potential to result in a breach of the peace, and because they cast doubt on the idea of nationhood and national unity.⁷⁸

Although the Supreme Court acknowledged these different meanings of the protest in its decision, one interpretation was privileged. Even though the act of burning a flag may be offensive to one interpretive community (many veterans and patriots), the Court reiterated that the First Amendment prevents the government from crafting legislation aimed at suppressing such expression. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁷⁹ The Court held that it was not consistent with the First Amendment to allow the state to foster its own view of the flag by prohibiting expressive conduct counter to that view.⁸⁰

The Court's decision in *Johnson*, as in all First Amendment cases, had powerful implications for the relative power of different actors in debate. The Court is often quite careful not to sanction a particular viewpoint. Nevertheless by recognizing particular expression as "political"

⁷⁶ 491 U.S. 397 (1989).

⁷⁷ Johnson's protest was conducted in Dallas while the Republican National Convention was taking place. The demonstration was designed to protest the policies of the Reagan administration and several Dallas-based corporations. Of the protest, Johnson said, "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech . . . couldn't have been made at that time." *Id.* at 406.

⁷⁸ *Id.* at 401.

⁷⁹ *Id.* at 414.

⁸⁰ *Id.* at 415.

and preventing its legal suppression the Court legitimates the interpretive communities that hold that view.⁸¹

The myriad interpretations of a flag—as vehicle for protest or sacred sign of national unity—contrast sharply with the single meaning that a burning cross has for the vast majority of Americans. Those who revere that flag and are offended by its desecration not only have different reactions to seeing a burning flag than those who might burn one in protest, they interpret what a burning flag means in *such* a different way that other meanings, those of protestors, for example, may be hidden from them. By contrast, the burning cross does not have such a flexible meaning. Its use in this country, as the Article details below, has created a single meaning, as a threat of violence, which is shared by the vast majority of users and viewers alike.

II. CROSS BURNING AS PROTECTED SPEECH

States have taken a variety of approaches to the problem of cross burning. In the 1950s, largely in response to cross burning by the Ku Klux Klan, several states passed statutes explicitly penalizing cross burning. Generally, the statutes that penalize cross burning specifically do so as part of a law that criminalizes the placement of crosses, other religious symbols, and Nazi swastikas when aimed at individuals in a manner that is intimidating or terrorizing.⁸² Other states penalize cross burning under statutes that prohibit malicious intimidation, terrorism, or harassment.⁸³ Some state statutes that generally prohibit malicious harassment list cross burning as a particular action prohibited by the statute.⁸⁴ If the state does have a statute that penalizes cross burning by name, the level of intent that the statute requires varies depending on what type of action it criminalizes. A few states have created strict-liability cross-burning statutes. Such statutes prohibit the placement of a burning cross in a public place or on the private property of another without obtaining consent, regardless of the perpetrator's intent.⁸⁵ So long as the perpetrator has burned the cross in a public place or without permission of the property owner, he or she is guilty of violating this type of statute. Frequently, violations of these types of statutes are misdemeanors.

⁸¹ The litigants themselves may feel that the courts' decisions have legitimated their points of view. Recall the skinhead celebration, described *supra* text accompanying note 11, after the St. Paul statute was struck down in *R.A.V.*

⁸² See, e.g., CAL. PENAL CODE § 11411 (West 2000); D.C. CODE ANN. § 22-3312.02 (2001); VT. STAT. ANN. tit. 13, § 1456 (1989); VA. CODE ANN. § 18.2-423 (Michie 1975).

⁸³ See, e.g., GA. CODE ANN. § 16-11-37 (2003); MONT. CODE ANN. § 45-5-221 (2003); WASH. REV. CODE § 9A.36.080 (2000).

⁸⁴ See, e.g., IDAHO CODE § 45-5-221 (Michie 1993); MONT. CODE ANN. § 45-5-221 (2003).

⁸⁵ See, e.g., CONN. GEN. STAT. § 46a-58 (1984); DEL. CODE ANN. tit. 11, § 805 (2001); FLA. STAT. 876.18 (2000); N.C. GEN. STAT. § 14-12.12 (2003).

Other state statutes, like the Virginia statute at issue in *Virginia v. Black*, require the perpetrator to evince a particular degree of intent when he or she engages in the cross burning.⁸⁶ Such statutes generally prohibit cross burning when it is done with the intent to intimidate, harass, or threaten.⁸⁷ In most cases, these statutes require that a perpetrator possess the intent to intimidate the victim of the cross burning.⁸⁸ Statutes that delineate what it means to intimidate or terrorize have defined it as causing a person to fear for his or her personal safety.⁸⁹ Violations of this type of statute are often felonies.

A. R.A.V. v. City of St. Paul

R.A.V. v. City of St. Paul was the first case to come before the Supreme Court involving a challenge to a conviction for cross burning. In *R.A.V.*, Robert A. Viktora⁹⁰ was charged under the only misdemeanor statute available, the one-year-old St. Paul Bias-Motive Ordinance, for having burned a cross on the Joneses' lawn.⁹¹ The ordinance prohibited the placement of "any object, such as burning cross or swastika, that one has reason to know arouses anger or alarm in others on the basis of race, color, creed or gender."⁹² Viktora challenged his conviction on the grounds that the St. Paul ordinance was substantially overbroad and impermissibly content-based, and therefore facially invalid under the First Amendment.

⁸⁶ VA. CODE ANN. § 18.2-423 (Michie 1996).

⁸⁷ See, e.g., CAL. PENAL CODE § 11411 (West 2000); D.C. CODE ANN. § 22-3312.02(a)(3) (2001); GA. CODE ANN. § 16-11-37 (2003); MONT. CODE ANN. § 45-5-221 (2003); N.J. STAT. ANN. § 2C:33-10 (1995); N.C. GEN. STAT. § 14-12.12 (2003); S.D. CODIFIED LAWS § 22-19B-1 (Michie 1998); VT. STAT. ANN. tit. 13, § 1456 (1989).

⁸⁸ Cf. CAL. PENAL CODE § 11411 (West 2000). California's statute, which prohibits burning or desecration of a cross or other religious symbol with intent to terrorize, is unusual in that it explicitly states that "reckless disregard of the risk of terrorizing" meets the statutory test for liability, so long as the perpetrator intentionally burned the cross. *Id.*

⁸⁹ See, e.g., CAL. PENAL CODE § 11411(d) (West 2000); D.C. CODE ANN. § 22-3312.02 (2001).

⁹⁰ Because Viktora was seventeen years old when he was arrested and charged with violating the St. Paul statute, court documents referred to him as R.A.V. His actual name is used in this Article because he is no longer a minor and his name has been used in several published articles. See, e.g., Michael Degan, *Adding the First Amendment to the Fire: Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1117 (1993); Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 48 (1995); Fredrick Lawrence, *Enforcing Bias Crime Laws without Bias: Evaluating the Disproportionate Enforcement Critique*, 66 LAW & CONTEMP. PROBS. 49, 53 (2003).

⁹¹ Tom Foley, the prosecutor in the case, argued that his office could not have used other criminal laws, like trespass, vandalism, or arson, because some of the statutory elements of those crimes were missing. He decided against charging the three juveniles involved in the cross burning under the state's terroristic threats statute because the adult involved in the cross burning pled guilty to a misdemeanor. Laura J. Lederer, *The Prosecutor's Dilemma: An Interview with Tom Foley*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 195 (Laura Lederer & Richard Delgado eds., 1995) [hereinafter Lederer, *Prosecutor's Dilemma*].

⁹² ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

The Minnesota Supreme Court rejected the defendant's claims, holding that the ordinance prohibited only unprotected "fighting words" and did not prohibit any protected speech.⁹³ The court concluded that the ordinance was not impermissibly content-based because it was a narrowly tailored way of accomplishing a compelling government interest—protecting the community against bias-motivated threats to public safety and order.⁹⁴

The Supreme Court reversed Viktora's conviction.⁹⁵ Although Justice Scalia, writing for the majority, expressed disapproval of Viktora's action at the end of his opinion,⁹⁶ the rest of the opinion reads as a sharp rebuke of St. Paul's attempt to craft a response to cross burning. The Court rejected the city's argument that it had a right specifically to regulate fighting words that provoked violence on the basis of race, color, creed, religion or gender. One reason the Court may have been able to reject St. Paul's argument so easily was because Justice Scalia chose to ignore the situational context of the skinheads' actions—which were by the skinheads' own admissions designed to drive the Joneses out of the neighborhood. Instead of approaching the regulation of cross burning as a threat, Scalia approached it somewhat more innocuously, as a message of racial hatred—just another viewpoint along the spectrum of possible perspectives. Thus, in passing a statute which named the particular ills it was trying to address, the city, according to the Court, was trying to suppress the message inherent in these words, or symbols. The Court held that St. Paul had impermissibly "imposed special prohibitions on those speakers who express views on disfavored subjects."⁹⁷ According to the Court, singling out particular fighting words on the basis of race, color, creed, religion, or gender constituted content-based discrimination in violation of the First Amendment.

Even if a statute is a content-based regulation of speech, Scalia noted that it may be deemed constitutional so long as it fits into one of three exceptions to the general prohibition on content-based regulation. The first exception provided by the Court is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."⁹⁸ The government may also engage in content-based regulation of speech when the apparently content-based statute has content-neutral intentions, because the statute aims at the "secondary effects" of the targeted speech, so that the regulation is "justified without reference to the content of the . . . speech."⁹⁹ Finally, the Court will per-

⁹³ *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

⁹⁴ *Id.*

⁹⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁹⁶ *See id.* at 396 ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible.")

⁹⁷ *Id.* at 391.

⁹⁸ *Id.* at 387.

⁹⁹ *Id.* at 389 (quoting *Renton v. Playmate Theaters, Inc.*, 475 U.S. 41, 48 (1986)).

mit content-based regulation of expression when “there is no realistic possibility that official suppression of ideas is afoot.”¹⁰⁰

The Court found that the St. Paul statute did not fit into any of these exceptions. Justice Scalia wrote that by regulating cross burning, St. Paul had not selected a group of fighting words that are communicated using an especially offensive mode of expression. The Court also rejected the city’s argument that the ordinance was intended to protect against the secondary effects of bias-motivated violence—the victimization of vulnerable groups. Justice Scalia maintained that the St. Paul ordinance was directed not at the secondary effects of the speech but rather to its primary effect—the emotive impact of the speech on its intended audience.¹⁰¹ Finally, according to Justice Scalia, it was abundantly clear from the city’s statements that the ordinance did not fall into the general exception permitting selectivity when there is no indication that the ordinance is prompted by the official suppression of ideas.¹⁰²

In *R.A.V.* the Court substantially limited St. Paul’s ability to regulate bias-motivated behavior, even behavior as egregious as the harassment experienced by the Joneses.¹⁰³ The actions of the skinheads were part of a decades-long pattern of intimidation of minorities in white neighborhoods. In balancing the need of the state to combat group hatred with the interest of the skinheads in expressing their message, the Court decried the use of content-specific measures to address anti-integrationist speech. “The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech.”¹⁰⁴ The Court held that while the ordinance was created to serve a compelling interest, it was not narrowly tailored to serve that interest.¹⁰⁵ According to the Court, content-based discrimination was not required to serve the city’s interest, because “[a]n ordinance not limited to the favorite topics . . . would have precisely the same beneficial effect.”¹⁰⁶

B. State Court Interpretations of *R.A.V.*

The decision in *R.A.V.* became something of a moving target, leading state courts and commentators to interpret the decision in myriad ways.

¹⁰⁰ *Id.* at 390.

¹⁰¹ *Id.* at 394.

¹⁰² *Id.* at 395.

¹⁰³ Akhil Amar has noted the irony in the fact that when discussing the types of speech that a government may regulate because of secondary effects, Justice Scalia cites federal housing statutes prohibiting discrimination in housing. Amar comments that perhaps Justice Scalia does not realize that 42 U.S.C. § 1982 would prohibit speech like the words, “No Blacks Allowed” on a For Sale sign. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 129 (1992).

¹⁰⁴ *R.A.V.*, 505 U.S. at 392.

¹⁰⁵ *See id.* at 395–96.

¹⁰⁶ *Id.* at 396.

Perhaps because in *R.A.V.* the Supreme Court was limited to the Minnesota Supreme Court's construction of the St. Paul ordinance as addressing fighting words, scholars have frequently considered *R.A.V.* a hate speech case.¹⁰⁷ Although the Supreme Court had devoted little, if any, space to defining cross burning as protected expression, many state courts interpreted the decision in *R.A.V.* as holding cross burning categorically protected by the First Amendment. Soon after *R.A.V.* was decided, several state statutes aimed at cross burning were challenged on First Amendment grounds.¹⁰⁸ Although state court judges have paid lip service to the historical legacy of cross burning, they have ignored the threat inherent in burning a cross and have consequently struck down cross-burning statutes.

*State v. Talley*¹⁰⁹ serves as an excellent example of a state court's belief that *R.A.V.* categorically protected cross burning. Three separate cross-burning cases were joined at the appellate stage to address the constitutionality of Washington's malicious harassment statute. Talley, one of three respondents along with Myers and Stevens, burned a four-foot-tall cross on his own lawn in the presence of a mixed-race family, the Smiths, who were planning to move in next door.¹¹⁰ He had previously complained that "having niggers next door" would ruin his property value.¹¹¹ Once the cross was burning, Talley, who had a clean-shaven head and was wearing fatigues, combat boots, and a Harley-Davidson T-shirt, began to "hoot and holler."¹¹²

Talley was charged under Washington's malicious harassment statute, section 9A.36.080 of the Washington Code.¹¹³ The first section of the

¹⁰⁷ See, e.g., Robert J. Corry, Jr., *Burn This Article: It is Evidence in Your Thought Crime Prosecution*, 4 TEX. REV. L. & POL. 461, 478-80 (2000); Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 353 (1991); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29 (1992).

¹⁰⁸ See, e.g., *State v. Sheldon*, 629 A.2d 753 (Md. 1993); *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993); *State v. Talley*, 858 P.2d 217 (Wash. 1993).

¹⁰⁹ 858 P.2d 217 (Wash. 1993).

¹¹⁰ *Id.* at 220.

¹¹¹ *Id.*

¹¹² *Id.* When Mrs. Smith asked if there was a problem, he responded that he didn't talk to her "kind" and ordered her off his property. The Smiths were frightened and decided not to finalize their purchase of the property. *Id.*

¹¹³ Section 9A.36.080 provides:

(1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

(a) Causes physical injury to the victim or another person;

(b) Causes physical damage to or destruction of the property of the victim or another person; or

(c) Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all

statute states that a person is guilty of malicious harassment if he or she behaves with intent to intimidate a person because of his or her race, color, religion, and history, national origin, or mental, physical or sensory handicap.¹¹⁴ In order to violate the statute, the perpetrator must either cause physical injury, cause property damage, or use words or conduct that place the victims in reasonable fear of harm to their person or property.¹¹⁵ The second section provides that the burning of a cross on an African American victim's property or the defacing of a Jewish victim's property with a swastika raise an inference that the malicious harassment statute has been violated.¹¹⁶

The respondents challenged the statute on three grounds. First, they argued that it was unconstitutional because it directly regulated the communicative impact of the speech. They also contended that the statute as a whole was overbroad because legitimate protected speech was encompassed within the statute's ambit and that the statute chilled free speech. Finally, respondent Stevens maintained that the first section of the statute violated the Equal Protection Clause and was impermissibly vague.¹¹⁷

With respect to the first section of the statute, which prohibited malicious harassment with intent to intimidate because of race, color, religion, or other categories, the Washington Supreme Court found little similarity between the St. Paul ordinance considered in *R.A.V.* and the Wash-

the circumstances. For purposes of this section, a "reasonable person" is a reasonable person who is a member of the victim's race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

(2) In any prosecution for malicious harassment, unless evidence exists which explains to the trier of fact's satisfaction that the person did not intend to threaten the victim or victims, the trier of fact may infer that the person intended to threaten a specific victim or group of victims because of the person's perception of the victim's or victims' race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap if the person commits one of the following acts:

(a) Burns a cross on property of a victim who is or whom the actor perceives to be of African American heritage; or

(b) Defaces property of a victim who is or whom the actor perceives to be of Jewish heritage by defacing the property with a swastika.

This subsection only applies to the creation of a reasonable inference for evidentiary purposes. This subsection does not restrict the state's ability to prosecute a person under subsection (1) of this section when the facts of a particular case do not fall within (a) or (b) of this subsection.

WASH. REV. CODE ANN. § 9A.36.080 (West 2000).

¹¹⁴ *Id.* § 9A.36.080(1).

¹¹⁵ *Id.* § 9A.36.080(1)(b).

¹¹⁶ *Id.* § 9A.36.080(2)(a).

¹¹⁷ *Talley*, 858 P.2d at 221.

ington statute. Judge Madsen, who wrote the majority opinion in *Talley*, insisted that because the Washington statute regulated the perpetrator's selection of a victim, the statute was aimed at criminal conduct, not speech.¹¹⁸ The court found further evidence that the statute punished conduct in the fact that the legislature took care to specify that speech does not constitute malicious harassment unless it causes fear of harm.¹¹⁹

The second section of the statute, which explicitly prohibited cross burning, did not fare as well as the first, largely because the court believed that the U.S. Supreme Court's decision in *R.A.V.* governed. Despite its earlier pronouncement of facial dissimilarity between the two statutes, the court recognized that both the St. Paul ordinance and section 2(a) of the Washington statute prohibited cross burning. In the eyes of the Washington Supreme Court, because the state legislature had intended to punish cross burning, the statute was aimed at punishing speech because of its offensive message.¹²⁰ With little other explanation save a citation to *R.A.V.*, the court found that the statute was punishing symbolic hate speech and was therefore unconstitutional. The Washington Supreme Court thus struck down the cross burning portion of the statute.¹²¹

The approach taken by state courts in Maryland, New Jersey, and South Carolina that similarly struck down their states' cross burning statutes after *R.A.V.* suggests that courts understood *R.A.V.* to have declared cross burning categorically protected. As *R.A.V.* has been interpreted by courts, the clearer and more odious the message of violence and bigotry, the greater cross burners' needs for First Amendment protection. For instance, in striking down Sections 10 and 11 of New Jersey's hate crime statute on First Amendment grounds, the New Jersey Supreme Court wrote:

When a person places a Nazi swastika on a synagogue or burns a cross in an African-American family's yard, the message sought to be conveyed is clear: by painting the swastika or by burning the cross, a person intends to express hatred, hostility, and animosity toward Jews or toward African-Americans Such messages are not only offensive and contemptible, they are all too easily understood In fact, the sort of conduct regulated by Sections 10 and 11 is a successful, albeit a reprehensible, vehicle for communication [T]hey address conduct that is heavily laden with an unmistakable message. Those sec-

¹¹⁸ *Id.* at 222.

¹¹⁹ *Id.* at 226-27 ("The express language of subsection (1)(b) protects such discriminatory ideas and philosophies where they are not combined with criminal acts.").

¹²⁰ *Id.* at 231.

¹²¹ *Id.* at 230.

tions therefore regulate speech for purposes of the First Amendment.¹²²

The concern courts have shown for extending First Amendment protection to cross burners is often supported by evidence of legislative and executive disapproval of cross burners' ideas. In some cases, the legislative history of the statute provides evidence to the court that the statute was intended to suppress cross burners' speech. For example, the New Jersey governor's remarks, combined with the location in which the state's hate crime statute was signed, signaled to the New Jersey Supreme Court that the statute was a content-based regulation of expressive conduct.¹²³ In both *State v. Vawter*, the case striking down New Jersey's cross burning statute, and *State v. Sheldon*,¹²⁴ the case striking down Maryland's cross burning statute, the presence of cross burning statutes when alternate schemes existed to address fires was seen as a sign of legislative disagreement with the ideas expressed by the cross burners.¹²⁵

C. *The Inadequacy of State Court Interpretations*

As the history in Part I, *supra*, suggests, for a state court to view cross burning as run-of-the-mill political speech requires blindness to history and to the context in which many cross burnings occur. This blindness to history was evident in *State v. Sheldon*,¹²⁶ the Maryland case that overturned that state's cross burning statute on First Amendment grounds. In *Sheldon*, the court considered appeals by two defendants who had been convicted under the state's hate crime statute for burning crosses. The first defendant had burned a cross on public property; the other, on the lawn of two Black families. Both were charged under Maryland's cross burning statute, which required individuals wishing to burn crosses or other religious symbols to: (1) secure the permission of the property owner where the burning is to occur; and (2) notify the local fire department prior to engaging in the burning.¹²⁷

The Maryland Court of Appeals interpreted the statute as a content-based regulation of speech. The opinion by Judge Murphy typifies a court's failure to interpret the statute in light of the situational context in which cross burnings occur. Although the court acknowledged the historical legacy of cross burning, Judge Murphy did not discuss the terror that cross burning inspires in those at whom it is directed. The history of cross burning was relevant only in defining the action as expressive.

¹²² *State v. Vawter*, 642 A.2d 349, 354–55 (N.J. 1994).

¹²³ *Id.* at 356.

¹²⁴ 629 A.2d 753 (Md. 1993).

¹²⁵ *See id.* at 759–60; *Vawter*, 642 A.2d at 356.

¹²⁶ *Sheldon*, 629 A.2d 753.

¹²⁷ *Id.* at 755–56.

The open and deliberate burning of religious symbols is, needless to say, odious to thoughtful members of our society. Such acts, which allow the cowardly to avoid articulating and defending their irrational beliefs, display contempt for the targeted religious groups and, when crosses are burned, for blacks in particular. The hostility which surrounds these acts makes it imperative, therefore, for us to remain mindful of a most important axiom in assessing the constitutionality of Maryland's cross burning statute: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹²⁸

Although it described cross burning as a "cowardly" act that substitutes for the articulation and defense of "irrational beliefs," the court did not consider cross burning to be a threat, but rather described it merely as a way of displaying contempt toward minorities.

The court offered two reasons that the statute was impermissible under the First Amendment. The first sign to the court that the statute was content-based came from the fact that the cross burning statute added little to Maryland's existing scheme for the punishment of fire-related offenses. The court also suggested that the legislative history revealed the legislature's disagreement with the expressive message sent by cross burning.¹²⁹

After finding the statute content-based, the court in *Sheldon* considered whether it could, as the state had argued, be justified under the exceptions for regulations aimed at secondary effects caused by the speech. The state argued in particular that the statute was aimed at the damage to property that cross burning causes.¹³⁰

In its response to the state's secondary effects argument, the court seemed to suggest that the legislature was unable to craft a constitutional statute aimed specifically at the act of burning a cross, given that it had an existing scheme for fire protection. The failure of the cross burning law to provide benefits beyond those offered by other, more general prohibitions on setting fire to property led the court to conclude that the cross burning statute was targeted at the primary effect of the speech. "[T]he State aimed plainly at the 'primary effect' of the cross burning, that is, the political idea it expresses."¹³¹

In deciding that the secondary effects exception was inapplicable, the court ignored the history of cross burning and the terror burning crosses have inspired. The court distinguished cross burning from the nude

¹²⁸ *Id.* at 757 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

¹²⁹ *Id.* at 759–60.

¹³⁰ *Id.* at 761–62.

¹³¹ *Id.* at 761.

dancing that had been at issue in *Renton v. Playtime Theatres*,¹³² which the Supreme Court had held could be regulated because of its discernible secondary effects. In the court's eyes, cross burning was just another fire. As such, it was viewed as less damaging than the prostitution and other crime allegedly spawned by the nude dancing. "Here, by contrast, *there is nothing particularly unique or dangerous in the act of burning a religious symbol* relative to other kinds of open fires which justifies special precautions for the former."¹³³

Once the Maryland court was satisfied that the statute was content-based and that it did not fall into any of the exceptions to First Amendment protection, it used strict scrutiny to evaluate the statute. The court rejected the state's argument that it had a compelling interest in protecting the community against bias-motivated threats to public safety and order:

[T]he Constitution does not allow the *unnecessary trammeling* of free expression for even the noblest of purposes Maryland's cross burning law simply cannot be deemed "necessary" to the State's effort to foster racial and religious accord [I]t is safe to say that the cross burning statute, which merely inconveniences a tiny handful of individuals who would openly burn religious symbols, will not prove indispensable to the endeavor for justice.¹³⁴

Similar to St. Paul's limited prohibition on the use of particular types of symbols, the Maryland statute's failure to prohibit all cross burnings was a detriment. The fact that individuals could burn crosses if they notified the local fire department and secured the permission of the owner indicated to the court that the statute did not effectively regulate its intended ill, bias-motivated threats.¹³⁵ Thus, the Maryland Supreme Court struck down the statute.

In short, *R.A.V.* sparked a dramatic change in state courts' approaches to bias-motivated conduct in the form of cross burning. Relying on *R.A.V.*, state courts invalidated not only state cross-burning statutes but also, in some cases, bias-motivated violence and intimidation statutes because state judges and justices interpreted the Supreme Court's decision in *R.A.V.* to establish cross burning as protected symbolic conduct. As *Virginia v.*

¹³² *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (permitting the regulation of adult theaters because of the "secondary effects" that such establishments could have on a neighborhood, such as attracting prostitution and other crime).

¹³³ *Sheldon*, 629 A.2d at 762 (emphasis added). Though at several points the court in *Sheldon* referred to cross burning as the burning of a religious symbol, the burning cross has been divorced from religious symbolism. See WADE, *supra* note 40.

¹³⁴ *Sheldon*, 629 A.2d at 763 (emphasis added).

¹³⁵ *Id.*

*Black*¹³⁶ indicates, the perspective taken by those state courts is not mandated by the text of *R.A.V.*

III. *VIRGINIA v. BLACK* AND THE MYTH OF THE INNOCENT CROSS BURNING

Eleven years after its decision in *R.A.V.*, the Supreme Court again examined the constitutionality of a statute regulating cross burning in *Virginia v. Black*.¹³⁷ Although *Black* was the Supreme Court's second examination of the First Amendment protection for cross burning, there was an important restriction in *R.A.V.* that did not apply in *Black*. In *R.A.V.* the Court was limited to the Minnesota Supreme Court's construction of cross burning as "fighting words."¹³⁸ Therefore, in *R.A.V.* there was little examination of why the act of burning a cross constituted symbolic expression. There was no such limitation in *Black*, so the Court was free to examine the contours of the activity in which the defendants burned crosses.

Black was an appeal by the Commonwealth of Virginia from a decision of the Virginia Supreme Court.¹³⁹ Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were each convicted under Virginia's cross-burning statute, which prohibited the burning of a cross on the property of another or in a public place with the intent to intimidate.¹⁴⁰ The statute also made any cross burning *prima facie* evidence of intent to intimidate.¹⁴¹

A. *A Klan Rally, Retaliation Against a Black Neighbor*

The defendants who appealed their convictions under the Virginia statute burned crosses in very different circumstances. Barry Black was charged under Virginia's cross-burning statute after having presided over a Ku Klux Klan rally in Carroll County, Virginia during which a cross was burned. The rally occurred on a private field located near a highway with the permission of the owner.¹⁴² A white witness, Rebecca Sechrist, who

¹³⁶ 123 S. Ct. 1536 (2003).

¹³⁷ *Id.*

¹³⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

¹³⁹ *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001).

¹⁴⁰ *Black*, 123 S. Ct. at 1541. The statute provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons to burn, or cause to be burned, a cross on the property of another, or highway or other public place. Any person who shall violate any provision of this section shall be guilty of a class 6 felony.

VA. CODE ANN. § 18.2-423 (Michie 1996).

¹⁴¹ The provision provided that "[a]ny such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons." *Id.* § 18.2-423.

¹⁴² *Black*, 123 S. Ct. at 1542.

lived next door to the property testified that during the rally, in addition to disparaging Blacks and Mexicans, one Klan member told the group, "he would love to take a .30/.30 and just random[ly] shoot the [B]lacks."¹⁴³ Sechrist testified that she felt frightened. At the end of the rally, Klan members burned the twenty-five- to thirty-foot-tall cross. According to a local deputy sheriff present at the rally, the cross was visible along a three-quarter-mile stretch of state highway. He noted that one Black family driving down the highway stopped, saw the burning cross, and then "took off at a higher than normal rate of speed."¹⁴⁴ After the cross was burned, the sheriff arrested Black, who indicated that he was responsible for the burning.

At Black's trial, the jury was instructed that intent to intimidate meant "the motivation to intentionally put a person or a group of persons in fear of bodily harm."¹⁴⁵ However, the jury was not specifically required to examine whether that definition had been satisfied in Black's case, for it was also advised that the burning of a cross by itself was "sufficient evidence from which [it could] infer intent."¹⁴⁶ Black was convicted and his conviction was affirmed by the Virginia Court of Appeals.

Richard Elliott and Jonathan O'Mara were convicted for burning a cross in the yard of James Jubilee, an African American who lived next door to Elliott. According to the record in the case, unlike Black, Elliott and O'Mara were not affiliated with the Ku Klux Klan but rather burned a cross in retaliation for Jubilee's complaints about their backyard firing range. The remnants of the burning cross, which Jubilee discovered the next morning only twenty feet from his house, made Jubilee very nervous. The cross burning fit into a familiar pattern: African American immigration followed by violence. Jubilee and his family had moved to Virginia Beach from California just four months prior to the cross burning. Jubilee testified he was nervous because he "didn't know what would be the next phase . . . [A] cross burned in your yard . . . tells you that it's just the first round."¹⁴⁷

Unlike Black's trial, where the jury was allowed to infer intent to intimidate from the burning of a cross, at Elliott's trial, the jury was instructed that the Commonwealth was required to prove "the defendant had the intent of intimidating any person or group of persons."¹⁴⁸ The court did not supply an instruction on what it meant by intent to intimidate, nor was the jury instructed on the prima facie evidence provision. Elliott was found guilty of attempted cross burning. The Virginia Court of Appeals affirmed the convictions of both Elliott and O'Mara.

¹⁴³ *Id.*

¹⁴⁴ Petitioner's Brief at 6, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁴⁵ *Black*, 123 S. Ct. at 1542.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1543 (internal quotation marks omitted).

¹⁴⁸ *Id.*

The Supreme Court of Virginia accepted the Petitioners' argument that the Virginia cross burning law was facially unconstitutional.¹⁴⁹ Like state courts in New Jersey and Washington, the Supreme Court of Virginia saw clear similarities between Virginia's cross-burning statute and the one at issue in *R.A.V. v. St. Paul*. Calling the statute "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*," the Virginia Supreme Court maintained that by enacting the statute the Commonwealth had discriminated based on the content of the message that cross burners were trying to communicate.¹⁵⁰

Although the Virginia statute, unlike the statute at issue in *R.A.V.*, made no reference to race, the court said that the absence of such language did not mean that the state had not wished to proscribe the message of racial hatred that cross burning generally communicates.¹⁵¹ The Virginia court drew evidence of the Commonwealth's intent to discriminate against the message conveyed by cross burning from the historical and contemporary context of cross burning, and from the state's reliance on that context in the section of the statute that made cross burning prima facie evidence of intent to intimidate.¹⁵² The court relied on the historical context for the passage of the Virginia cross-burning statute, stating that, "[i]n an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech—the burning of a cross."¹⁵³ Finally, and perhaps most importantly, because the legislation was aimed at the action of cross burning, which had been acknowledged in a variety of court opinions as a powerful symbol, the court assumed that the legislature had intended to discriminate based on content.

After finding that the legislation was content-based, the Virginia Supreme Court rejected the argument that the legislation fell into one of the exceptions to the general prohibition against content-based legislation outlined in *R.A.V.* The legislation was not, it found, aimed at the secondary effects of cross burning because of the provision allowing prima facie evidence of intent to intimidate to be drawn from the act of burning a cross. In the court's eyes, this particular section of the statute indicated

¹⁴⁹ *Black*, S.E.2d at 746.

¹⁵⁰ *Id.* at 742, 743–44.

¹⁵¹ The Virginia Supreme Court cited *United States v. Eichman*, 496 U.S. 310 (1990), as evidence that the legislature intended to discriminate against cross burners' messages even without any language in the statute to this effect. *Eichman* examined the constitutionality of the Flag Protection Act of 1989. In defense of the Act, the United States had suggested that the absence of language in the Act addressing the content of speech indicated that the statute was not content-based. The Virginia Supreme Court noted that in *Eichman* the Supreme Court declined to adopt such a rigid textual approach to the government's motivation, and quoted the *Eichman* Court as saying that, "[a]lthough the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression." *Black*, 553 S.E.2d at 744 (quoting *Eichman*, 496 U.S. at 315) (alteration in original).

¹⁵² *Black*, 553 S.E.2d at 744.

¹⁵³ *Id.* at 745.

that the statute was aimed at regulating content. According to the court, the *prima facie* clause also made the statute overbroad. The statute was therefore struck down and the defendants' convictions were reversed.¹⁵⁴

On appeal before the U.S. Supreme Court, the Commonwealth argued that the cross-burning statute was a content-neutral manifestation of the Virginia legislature's desire to promote law and order by preventing a particularly egregious form of intimidation.¹⁵⁵ Pointing to the absence of evidence regarding legislative purpose, the Commonwealth contested Black's claim that the legislature had designed the Virginia statute to discriminate on the basis of content. In fact, the Commonwealth used Virginia's history of racial segregation to suggest that in passing the law the legislature was not attempting to demonstrate disapproval of white supremacy.¹⁵⁶ The Commonwealth outlined a long list of racially discriminatory statutes on the books in 1952 when the cross-burning statute was first passed.¹⁵⁷ The Commonwealth argued that the presence of these laws, along with the use of content-neutral language to proscribe cross burning, were proof that the Virginia statute was intended to reach only constitutionally regulable threats.

In the event that the Supreme Court found the Virginia statute to be content-based, the Commonwealth argued that the statute still was constitutional because it satisfied each of the exceptions outlined in *R.A.V. First*. *R.A.V. First* allowed content-based regulation of a subclass of expression within an exception to First Amendment protection, so long as the subclass has been singled out for the same reason the entire class of unprotected speech is regulable.¹⁵⁸ Adopting an argument centered on getting the Supreme Court to recognize the context of cross burning, the Commonwealth argued that cross burning could be regulated because it is a particularly virulent form of intimidation causing a great amount of disruption and violence.¹⁵⁹

In addition to being a threat, the Commonwealth argued that cross burning had secondary effects including creating retaliatory violence, depressing property values, and "generally transform[ing] our society into one reminiscent of Northern Ireland or the Balkans."¹⁶⁰ Finally, Vir-

¹⁵⁴ *Id.* at 746.

¹⁵⁵ Petitioner's Brief at 9–10, 17, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁵⁶ *Id.* at 23–24.

¹⁵⁷ *Id.* at 23 n.14. The Commonwealth also mentioned the Virginia General Assembly's massive resistance just two years later to the Supreme Court's decision in *Brown v. Board of Education* as evidence that the cross burning statute was not intended to discriminate against white supremacist viewpoints. *Id.* at 23–24.

¹⁵⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

¹⁵⁹ Petitioner's Brief at 37, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁶⁰ *Id.* at 39.

ginia argued that the statute satisfied the third exception in *R.A.V.*, because it banned all cross burning undertaken with intent to intimidate.¹⁶¹

Black countered that by targeting a specific symbol, the burning cross, the Virginia statute constituted content-based discrimination. Lawyers for Black maintained that neither the absence of legislative history showing the Commonwealth's ulterior motive, nor the fact that the statute required intent to intimidate cured the statute's content and viewpoint discrimination.¹⁶² Moreover, Black's lawyer claimed that the fact that Virginia's law reached all cross burnings committed with the purpose of intimidating did not lessen the statute's viewpoint discrimination.¹⁶³ Black's counsel insisted that, by singling out cross burning, the Commonwealth of Virginia had interfered with citizens' constitutionally protected right to use whatever symbols they wished to communicate. "Americans have the right to use symbols freely to communicate, to wave flags or trample on them, to worship crosses or to burn them."¹⁶⁴

The hardest issue for Black was whether the Commonwealth could regulate cross burning as a threat. Lawyers for Black contended that cross burning cannot be regulated as threatening behavior because some cross burnings constitute "abstract advocacy" or "violent rhetoric" protected from First Amendment regulation rather than actual lawless action, which remains unprotected.¹⁶⁵ Black argued that the *prima facie* evidence provision in the Virginia statute, which made no distinction between cross burnings that do not incite lawless action and those that do, therefore violated the distinction between abstract advocacy and lawless action established in cases like *Brandenburg v. Ohio*,¹⁶⁶ *Watts v. United States*,¹⁶⁷ and *Chaplinsky v. New Hampshire*.¹⁶⁸

B. The Supreme Court's (Limited) Appreciation of the Historical Context of Cross Burning

Both in the oral argument and in the opinion in *Black*, the Supreme Court seemed to take a different approach to the First Amendment implications of cross burning than it had in *R.A.V.* The case received significant media attention when Justice Thomas, the Court's only African American member, a Justice who frequently sides with the most conservative members of the Court, rebuked a member of the Solicitor General's office for

¹⁶¹ *Id.* at 40.

¹⁶² Respondent's Brief at 11, 19, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁶³ *Id.* at 15.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 42-43.

¹⁶⁶ 395 U.S. 444 (1969).

¹⁶⁷ 394 U.S. 705 (1969).

¹⁶⁸ 315 U.S. 568 (1942).

understating the effect of cross burning during oral argument.¹⁶⁹ Deputy Solicitor General Michael Dreeben was arguing for the Government on behalf of the Commonwealth of Virginia. The exchange came as a surprise not only because of his conservative politics but also because Justice Thomas had written an opinion maintaining that the Klan's erection of a cross in a public forum was a political act.¹⁷⁰

QUESTION [Thomas]: Mr. Dreeben, aren't you understating the—the effects of—of the burning cross? This statute was passed in what year?

MR. DREEBEN: 1952 originally.

QUESTION [Thomas]: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and—and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was—isn't that significantly greater than intimidation or a threat?

MR. DREEBEN: Well, I think they're coextensive, Justice Thomas, because it is—

QUESTION [Thomas]: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on—of and the effect of the cross, the burning cross. I—I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has—it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.¹⁷¹

Justice Thomas's comments reflected a clear appreciation of the role that cross burning has played in American history. The terror that cross burning inflicts on African Americans was also recognized in the majority opinion authored by Justice O'Connor. In sharp contrast to the Court's brief discussion of the cross burning in *R.A.V.*,¹⁷² the Court in *Black sup-*

¹⁶⁹ See Joan Biskupic, *Cross-Burning Case Agitates Thomas*, USA TODAY, Dec. 12, 2002, at 3A; Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1; *Justice Thomas Speaks Out—Against Free Speech*, NEWSDAY, Dec. 13, 2002, at A52, available at 2002 WL 103518284; Dahlia Lithwick, Editorial, *Personal Truths and Legal Fictions*, N.Y. TIMES, Dec. 17, 2002, at A35.

¹⁷⁰ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770–72 (1995) (Thomas, J., concurring).

¹⁷¹ Transcript of Oral Argument at 22–23, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁷² Justice Scalia's bare-bones statement of the facts in *R.A.V.* is just two sentences long. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992). For comment on Scalia's brevity in discussing the impact of this cross burning on the Jones family, see Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 790–91 (1992) [hereinafter Lawrence, *Cross-*

plied an extended, vivid description of the cross burnings.¹⁷³ This lengthy description of the cross burnings was followed by a long section primarily focused on contextualizing cross burning by examining the development of the Ku Klux Klan and its use of the burning cross as an instrument of terror. The burning cross, the Court asserted, was a “symbol of hate” that may be designed to communicate a message of intimidation aimed at inspiring fear of bodily harm.¹⁷⁴ This message, the Court insisted, is a threatening one:

The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan.¹⁷⁵

Justice Thomas’s comments during oral argument highlighting the terror that cross burning inspires among African Americans readied the stage for Justice O’Connor’s extended description of the historical context of cross burning. Some have argued that Justice Thomas’s comments significantly affected the other Justices.¹⁷⁶ Unlike so many state cross burning opinions which discounted the legacy of cross burning, in *Black* the majority opinion confronted the issue head-on.

C. Punishing Intimidation and Protecting “Innocent” Cross Burnings

Beginning the opinion with a long description of the historical use of cross burning by the Klan and a vivid picture of the intimidating nature of the burning cross left Justice O’Connor in an interesting doctrinal place. In *Black* the Court chose to walk the fine line between regulating all cross burnings and punishing only a select few. The Court was willing to acknowledge the fear caused by cross burning when intimidation was intended. At the same time, the Court held that the Constitution did not permit individuals to be penalized for burning crosses without intent to cause fear.

The opinion in *Black* contains two sets of categorizations with respect to cross burning. The first categorization the Court made was to divide cross burning into two categories, cross burnings in which the perpetrator intended to intimidate and cross burnings in which the perpetrator did not intend to intimidate, a category that Justice Thomas sarcas-

burning and the Sound of Silence].

¹⁷³ *Virginia v. Black*, 123 S. Ct. 1536, 1542–43 (2003).

¹⁷⁴ *Id.* at 1546.

¹⁷⁵ *Id.*

¹⁷⁶ See Greenhouse, *supra* note 169; Guy Uriel-Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, ____ GEO. L.J. ____ (forthcoming 2004).

tically but usefully designated “innocent” cross burnings in his dissent.¹⁷⁷ The Court held that cross burnings in which the perpetrator intended to intimidate the victim are not deserving of First Amendment protection, while “innocent” cross burnings are. The second categorization involves a division of the category of “innocent” cross burning into several types, including: (1) cross burning used as a statement of ideology; (2) cross burning used as a symbol of group solidarity, such as a cross burning used at a Klan gathering or rally;¹⁷⁸ and finally, (3) cross burning used as theater—cross burning that expresses neither ideology nor intimidation (i.e., in movies or plays).¹⁷⁹ With respect to the first two categories of “innocent” cross burning, Justice O’Connor described cross burning as core political speech.¹⁸⁰

What the Court missed in protecting cross burning not intended to intimidate is the effect of such cross burnings on African Americans, regardless of the intent of the cross burner. For victims, and those who sympathize with them, there is no other way of viewing cross burning except as highly threatening. A cross burning by the Klan at one of its gatherings, especially a gathering staged in a way that others will see it, is intended to serve two goals at the same time: promoting group solidarity and causing intimidation. Even cross burning at Klan rallies closed to outsiders was intended to intimidate. Historically, the Klan held rallies in places where they could burn crosses on top of tall hills so the burning cross would be a visible sign of Klan power for miles. The Court seems to be suggesting that if a cross is burned at a rally or Klan gathering, the speech and associational rights of the cross burners trump victims’ rights not to be intimidated.

There is a sharp contrast between the Court’s recognition of the power of Klan violence and its accommodation of “innocent” cross burning. The duality that the opinion presents—recognizing the harm of cross burning while at the same time preserving the space for “innocent” cross burning—is an important aspect of the Court’s ruling. Because the Court recognized that “innocent” cross burning is entitled to First Amendment protection, after *Black* the only cross burning statutes that do not violate the Constitution are those that only criminalize cross burnings committed with the intent to intimidate.

The decision in *Black* left *R.A.V.* intact. Justice O’Connor wrote that allowing states to punish cross burners who intend to intimidate stems from one of the three exceptions to *R.A.V.*—the exception that allows content-based regulation when the state is attempting to regulate a subset of messages that may be excluded for the reason the entire category may

¹⁷⁷ *Virginia v. Black*, 123 S. Ct. 1536, 1568 (2003) (Thomas, J., dissenting).

¹⁷⁸ *Id.* at 1551 (majority opinion).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

be prohibited. In *Black*, the Court noted that the First Amendment would not have prevented the Commonwealth from prohibiting all intimidating messages.¹⁸¹ In light of the history of cross burning as a symbol of violence, the Commonwealth chose instead to regulate only a particularly damaging subset of those messages.¹⁸²

Because the Court found that non-intimidating “innocent” cross burnings are entitled to First Amendment protection, the fact that under the Virginia statute the act of burning a cross constituted prima facie evidence of intent to intimidate rendered the statute unconstitutional.¹⁸³ The Court reasoned that the prima facie provision would permit the conviction of an individual who had burned a cross without requiring an inquiry into the issue of whether the defendant had intended to intimidate. Justice O’Connor suggested a parade of horrors that might occur were the Court to allow states to prohibit all cross burning—the chilling of political speech and the conviction of moviemakers and stage production companies.¹⁸⁴

The Virginia statute punished only cross burning performed with an intent to intimidate. Justice O’Connor reasoned that, because Virginia has the power to outlaw intimidation or threats under *Watts v. United States*,¹⁸⁵ it may also outlaw cross burnings committed with the intent to intimidate under the first *R.A.V.* exception as cross burnings are a particularly virulent form of intimidation.¹⁸⁶

Although Justice O’Connor cited *Watts* for the proposition above, rather than using a threat-based analysis that focuses on the perceptions of the recipient of a threat, the Court adopted an intent-based standard that focuses on the motivations of the person making the threat. While cross burning done with the intent to intimidate can be regulated, Justice O’Connor made clear that the Court’s desire was to protect cross burnings that are offensive, though not intimidating. O’Connor chose an interesting example of a cross burning which may be offensive but is not intimidating: a cross burning in a rally. Her answer to those who might argue that such displays arouse anger or hatred was that counter-speech may be the most effective response.¹⁸⁷

While *Black* was clearly more supportive of state efforts to punish cross burning than *R.A.V.*, looking at the decision closely reveals its limitations, especially given the history of cross burning. The Court’s requirement that statutes punish only cross burning undertaken with the intent to

¹⁸¹ *Id.* at 1549.

¹⁸² *Id.*

¹⁸³ *Id.* at 1550.

¹⁸⁴ “Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott’s *The Lady of the Lake*.” *Id.* at 1551.

¹⁸⁵ 394 U.S. 705 (1969).

¹⁸⁶ *Black*, 123 S. Ct. at 1549.

¹⁸⁷ See *id.* at 1551 (quoting Gerald Gunther’s admonition to denounce bigots without legally prohibiting the expression of hateful ideas).

intimidate fails to recognize fully both the violent intentions and the white supremacist goals of many cross burners. Distinguishing cross burning with the intent to intimidate from other types of more “harmless” cross burnings suggests, in a manner removed from history and contemporary social context, that cross burning is a symbol with myriad interpretations.

Justice O’Connor’s acknowledgement of the painful historical legacy of cross burning seems slightly at odds with the Court’s protection of “innocent” cross burning. In light of the terror that the Court recognized that burning crosses cause, it seems irrational to provide protection for some cross burning, irrespective of whether or not it was intended to cause terror. One way to rationalize the Court’s desire to provide protection for individuals wishing to engage in cross burning is the fact that cross burners in general may be a political minority whom the state often wishes to silence.¹⁸⁸ This understanding does not always reflect reality, however, and at times quite the opposite has been true. The Virginia statute was originally passed in 1952, in the wake of a rash of cross burnings.¹⁸⁹ At the time, individuals who supported segregation had much of the law on *their* side. When the statute was passed, Virginia mandated racial segregation in schools, public accommodations, and transportation.¹⁹⁰ The cross burning statute was arguably one of a few acts supporting racial tolerance in the state.

D. The Limitations of Intent to Intimidate—The Joking, Drunken, and Unaware Cross Burners

The implications of *Black* for state cross-burning statutes are significant. The Court endorsed the creation of a particular type of cross burning statute, one that recognizes that the cross burner who behaved with an intent to intimidate can be punished. Despite the history of cross burning and its contemporary use, the Court’s decision in *Black* holds that a jury may not infer that the defendant intended to intimidate viewers of the burning cross solely because the cross has been placed in public view or on another’s private property. In other words, the prosecution must prove that the defendant intended to intimidate when he or she burned the cross.

Placing on the prosecution the burden of proving that the defendant intended to intimidate may lead to a variety of troubling results. The first is that since Klan solidarity is a protected reason to burn a cross, defendants charged with cross burning may safely rely on assertions that that

¹⁸⁸ Mari Matsuda and Charles Lawrence recognize this rhetorical reversal in *R.A.V.*, where “[t]he reality of ongoing racism and exclusion is erased and bigotry is redefined as majoritarian condemnation of racist views.” Mari J. Matsuda & Charles Lawrence III, *Epilogue to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* 135 (Mari J. Matsuda et al. eds., 1993).

¹⁸⁹ Petitioner’s Brief at 22, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁹⁰ *Id.* at 23–24.

they burned a cross not to intimidate, but to show their pride in being Klansmen.

Black may allow defendants to avoid being found guilty of cross burning as long as they offer some evidence demonstrating that they did not intend to intimidate. The requirement that cross burners possess the intent to intimidate may therefore create a significant loophole through which several groups of individuals who have burned crosses may escape punishment. There have been several cases when individuals have burned crosses, and later claimed that their behavior was a “prank” or a “joke.”¹⁹¹ A number of cases have involved cross burners who were drunk or high at the time of the cross burning.¹⁹² Naturally, it is easier for “pranksters” and those intoxicated at the time of the cross burning to argue that they had not intended to intimidate when placing the cross.

Although inebriated cross burners may not intend to cause harm, there are at least two justifications for meting out some punishment to pranksters and the intoxicated. The first justification is that the legacy of cross burning makes the impact of their behavior reasonably foreseeable. Their punishment may also be justified because similar harm results from burning the cross regardless of whether they intended to intimidate. Though the victim later learns the cross burning was just a “joke,” when she first experiences the burning cross she will naturally assume that it was intended as a serious expression of harm and likely will be quite frightened. The stance taken by the Court in *Black* suggests that even when a cross burning inspires great terror and fear of bodily harm in victims, it is not punishable under a cross burning statute if the perpetrator intended the incident only as a joke.

Consider the following hypothetical situation: twelve-year-old Michael is white. One of his classmates is Stephen, who is Black and who often visits his grandmother, who lives in a small, all-Black neighborhood near Michael. The neighborhood has a high concentration of elderly individuals who remember from their youth violence following cross burn-

¹⁹¹ See, e.g., *Newton v. Dep't of Air Force*, 85 F.3d 595, 597 (Fed. Cir. 1996) (appellant claimed burning cross displayed in African American's co-worker's work area was a joke); *Police Officers for Equal Rights v. Columbus*, 644 F. Supp. 393, 402 (S.D. Ohio 1985) (wearing of white sheets and burning of cross as a “joke”); *Allstate Ins. Co. v. Browning*, 598 F. Supp. 421, 493 (D. Or. 1983) (cross burner alleged action was “prank”); *United States v. Hooper*, 4 M.J. 830, 831 (A.F.C.M.R. 1978) (cross burners approach cross burned on military base as joke); *In re Steven S.*, 31 Cal. Rptr. 2d 644, 646 (Cal. Ct. App. 1994) (cross burned as a Friday-the-13th joke); *Garrison v. Conklin*, No. 234243, 2003 WL 356660 (Mich. Ct. App. Feb. 14, 2003) (cross burning alleged as part of a Halloween prank).

¹⁹² See, e.g., *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001) (cross burner drank heavily and took prescription pain medication); *United States v. Whitney*, 229 F.3d 1296, 1300 (10th Cir. 2000) (cross burners “drinking heavily” prior to cross burning); *United States v. Montgomery*, 23 F.3d 1130 (7th Cir. 1994) (cross burner consumed alcohol prior to cross burning); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993) (alcohol consumed prior); *People v. Carr*, 97 Cal. Rptr. 2d 143 (Cal. Ct. App. 2000) (cross burner was intoxicated); see also Neil Lewis, *A Judge, A Renomination, and the Cross-burning Case that Won't End*, N.Y. TIMES, May 28, 2003, at A16 (describing drunken cross burner).

ings. After Stephen beats Michael at chess, Michael cunningly decides to “get back” at Stephen by burning a cross in his front yard. Michael hits on this idea because he has seen the movie *Mississippi Burning* and has a vague idea that African Americans don’t like burning crosses. Michael later insists he did not want to scare Stephen, but rather just wanted to embarrass him.

Michael constructs a five-foot-high and three-foot-wide cross out of some scrap wood. Just before dark one evening when Stephen and his family are visiting for his grandmother’s birthday, Michael places the cross, which has been soaked with gasoline, on Stephen’s grandmother’s front lawn. Michael lights a few firecrackers to get the family’s attention and runs to the shrubbery to watch as everyone reacts. Almost all assembled guests, besides Stephen’s family, are residents of the neighborhood and are horrified when they see the burning cross. Stephen’s grandmother bursts into tears at the site of the flaming cross. The story of the burning cross spreads around the neighborhood, causing great concern and worry.

In this particular case, Michael did not intend to frighten anyone. Nevertheless, because of the legacy of the burning cross, his actions caused as much pain, terror, and emotional trauma as a cross burner who had intended to cause these disturbances. As in *Black*, Michael’s intention cannot be inferred from the mere existence of the burning cross or from the fear of those who observed it. There was evidence that the cross burning in *Black* caused fear, even in the unlikely event it was not so intended. In *Black*, the Commonwealth presented evidence that the car containing an African American family had viewed the cross and driven off at a high rate of speed.¹⁹³ Similarly, one white witness testified that the cross burning frightened her. This was not taken by the Court as evidence of *Black*’s intention to intimidate. In Michael’s case, under the rule established by the Court in *Black*, the state would be prohibited from using a cross burning statute to punish Michael or any others involved in this type of cross burning.

The inability to use a cross-burning statute to punish this type of action, though not always fatal, may significantly handicap a state’s efforts to bring the perpetrator to justice. While Justice Scalia claimed that the defendant in *R.A.V.* could have been prosecuted under a variety of content-neutral statutes, the prosecutor in the case claimed that this was not true. The prosecutor searched for a statute under which to prosecute Viktora but was unable to charge him with trespass, arson, or vandalism because required elements for each of these crimes were missing.¹⁹⁴ Cross burning

¹⁹³ Petitioner’s Brief at 6, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁹⁴ The Minnesota trespass law required a warning, and no warning was given. According to the prosecutor, some of the elements of arson were missing. Finally, the charge would have failed under the vandalism statute because there was no destruction of property. Lederer, *Prosecutor’s Dilemma*, *supra* note 91, at 195.

is notoriously difficult to prosecute under content-neutral laws because the act of burning a cross often does not cause damage to property.

Although in *Black* the Court provided a method for states to punish cross burning without violating the First Amendment, it did this by distinguishing cross burnings in which the perpetrator manifests the intention to intimidate his or her victim from “innocent” cross burnings. The Court’s focus on the perpetrator’s intent to intimidate sidestepped the question that ought to have been the Court’s focus: whether a cross burning has the actual effect of intimidating victims. Moreover, the Court’s rule created a significant loophole through which perpetrators causing serious damage to victims and communities may escape prosecution under cross burning statutes. Part IV suggests an alternative approach to weighing the gravity of the threat posed by cross burning against perpetrators’ First Amendment rights.

IV. A CONTEXT-BASED APPROACH TO CROSS BURNING

A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to circumstances and the time in which it is used.¹⁹⁵

In *Black* the majority opinion offered only a brief explanation as to why the act of burning a cross is ever entitled to First Amendment protection. Justice O’Connor wrote that cross burning is expressive conduct because it is dramatic and represents a message that the speaker wishes to communicate.¹⁹⁶ She cited *R.A.V.* for the proposition that cross burning is expressive conduct similar to burning a flag or wearing a black armband to protest the Vietnam War.¹⁹⁷ Once cross burning was lumped into the same category as other symbolic expressions protected by the First Amendment, the Court fell into a doctrinal bind. Unless there is a compelling reason to deny First Amendment protection, cross burning should be treated the same as similar expression in the category.

In *Black*, as in *R.A.V.*, the Court assumed with little discussion that cross burning merits some First Amendment protection because it communicates a message, giving cross burning the same legal status as, for example, anti-war protest.¹⁹⁸ To equate an act of violence like cross burning with protest activity fails to acknowledge the context of cross burning and the hardship, suffering, and trauma the act of cross burning visits on victims.

¹⁹⁵ *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

¹⁹⁶ *Virginia v. Black*, 123 S. Ct. 1536, 1549 (2003).

¹⁹⁷ *Id.* at 1548. For commentary on the lack of similarity between burning a cross and burning a flag, see Judith Butler, *Constitutions and “Survivor Stories”: Burning Acts: Injurious Speech*, 3 U. CHI. ROUNDTABLE 199 (1996).

¹⁹⁸ Butler, *supra* note 197.

Despite the Court's long description of the terror visited upon victims of cross burning, the ultimate path taken by Justice O'Connor was centered almost entirely on the perpetrator—what he or she intended when burning the cross. No mention was made of the victims' perception of the action. The primary concern Justice O'Connor expressed was with the perpetrator's state of mind. Because the state's power to regulate cross burning is restricted to crosses burned with the intent to intimidate, if the perpetrator meant no harm when burning the cross, then under a statute that conforms to *Black*, he or she would escape punishment.

A. *Toward a Victim-Centered Approach in Cross Burning Cases*

People of color victimized by cross burning are unlikely to see any cross burning as innocent. Victims may be frightened and feel threatened even when the cross burning was intended as a prank. Several scholars have advocated victim-centered approaches in two areas closely related to cross burning—hate speech¹⁹⁹ and hate crime.²⁰⁰ Victim-centered approaches like the one proposed by Mari Matsuda often locate solutions to legal problems in victims' social reality and experience.²⁰¹ For instance, in approaching the regulation of racist hate speech, Matsuda examines the experience and the effects of such speech on its victims. This methodology leads Matsuda to call for criminal and administrative sanctions for particular types of racist hate speech. Approaches like Matsuda's often fall into one of the "outsider" jurisprudence categories—feminist jurisprudence or critical race theory. Victim-centered approaches often mediate between absolutist approaches to the First Amendment and a perspective informed by the stories of people of color.²⁰²

At the outset, it is important to emphasize that advocates of victim-centered approaches to the First Amendment do not oppose free speech. Though outsider scholars who are critical of traditional approaches to First Amendment doctrine are often criticized as insufficiently concerned with free speech protections, the vast majority of those who offer victim-centered First Amendment approaches to hate crime and hate speech maintain a commitment to civil liberties and often express concern for the

¹⁹⁹ See, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Lawrence, *Cross-burning and the Sound of Silence*, *supra* note 172; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Steven Shiffrin, *Racist Speech, Outsider Jurisprudence and the Meaning of America*, 80 CORNELL L. REV. 43 (1994).

²⁰⁰ See generally BELL, *supra* note 5; FREDRICK M. LAWRENCE, *PUNISHING HATE BIAS CRIME UNDER AMERICAN LAW* (1999); Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799 (1999); Jones, *supra* note 57.

²⁰¹ Matsuda, *supra* note 199, at 2324.

²⁰² Alice K. Ma, Comment, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CAL. L. REV. 693, 702 (1995).

protection of the civil liberties of those whose views they find repugnant.²⁰³ Scholars offering victim-centered solutions maintain that the protection of victims' rights is entirely consistent with the protection of civil liberties.²⁰⁴

Ultimately, the primary difference between victim-centered and more traditional First Amendment perspectives is the way in which each view approaches power imbalances in social relations. More traditional First Amendment approaches, such as the one taken by the Court in *Black* and *R.A.V.*, are primarily concerned with the state's power to silence individuals. Wary of the misuse of state power, they want to be sure that citizens have adequate avenues for expression. Outsider legal scholars worry about the state, too, but are at least as concerned about power differentials between groups of citizens. Their concern with power imbalances dictates their agenda: harnessing the state's power to prevent the more powerful from silencing the less powerful.²⁰⁵ Victim-centered approaches therefore probe the scope of the possibilities for state intervention on behalf of victims.

The Supreme Court's opinion in *Black* seemed to imply that there were two types of cross burnings—cross burnings that were committed with the intent to intimidate, and those done without such an intent, or “innocent” cross burnings. Under the rule created by the Court in *Black*, only the former are regulable, while the latter are protected by the First Amendment.

The victim-centered view of the First Amendment protection afforded to cross burning that this Article articulates differs from the approach taken by the Court in *Black* by suggesting that cross burning deserves finer classification, and that more sweeping regulation than the Court currently permits is consistent with First Amendment principles. Close attention to the history of cross burning suggests that it may be better to divide cross burnings into three categories: (1) cross burnings targeted at an individual that are intended to threaten; (2) cross burnings aimed at an individual that are not intended to cause fear; and (3) cross burnings that are not directly targeted at an identified victim. Cross burnings in the first category, for example, would include the cross burned in *R.A.V.* and would be regulable under the rule established in *Black*. The second category would include crosses burned as jokes or pranks. Crosses burned at Klan rallies or marches would fall into the last category. Neither the second nor the third categories are regulable under the rule established by the Court in *Black*.

²⁰³ See, e.g., Lawrence, *Crossburning and the Sound of Silence*, *supra* note 172, at 789–98; Matsuda, *supra* note 199, at 2321–22; Shiffrin, *supra* note 199, at 92–97.

²⁰⁴ See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343 (1991) (arguing that campus anti-hate speech regulation need not offend the First Amendment); Delgado, *supra* note 199 (suggesting a tort action for racial words is consistent with the First Amendment).

²⁰⁵ See Matsuda, *supra* note 199, at 2324–26.

From a victim-centered perspective both the first and the second category of cross burnings should be regulable. A victim-centered approach to the First Amendment protection for cross burning is concerned with the terror that cross burning inflicts when it is directly targeted at identified victims. Victims are, of course, directly targeted if the cross is burned on their property. They may also be targeted if the cross is burned at another location close to their home and if there is also evidence to suggest that the cross burning is directed at them. For example, in *Singer v. United States*,²⁰⁶ Timothy Singer had an argument with his neighbors. After the argument, Singer told them that he had in his possession a half-stick of dynamite and was going to “blow up all those motherfucking niggers.”²⁰⁷ Singer and his co-defendant then constructed a cross nine feet tall and placed it near a fence that separated the houses of two of his Black neighbors. The following morning the words “Die Nigger KKK” and “KKK rules” were painted on the homes of Black families living near Singer.²⁰⁸ Though the cross was not placed on either family’s property, it was clearly directed at the Black families living in the cross burner’s immediate vicinity.²⁰⁹

The victim-centered perspective offered here is heavily based on the empirical use of cross burning as an instrument of terror and therefore takes much of its justification from the context in which the burning cross has been and continues to be used. It is for that reason that this perspective does not argue that the third and perhaps the most infrequent type of cross burning, those not aimed at an identified victim or victims, such as a cross burned at a Ku Klux Klan rally or a cross burned at a march should be regulable.²¹⁰ Not only are cases in which crosses are burned at rallies or marches with no intent to intimidate anyone rarer, but when they do occur they may be less harmful. Individuals are more vulnerable, and the *in terrorum* effect is greater—when they are targeted—individually singled out for threats.

A victim-centered approach to the First Amendment protection of cross burning would require the courts to look more closely at the impact

²⁰⁶ No. 94-3039, 1994 WL 589562 (6th Cir. Oct. 24, 1994).

²⁰⁷ *Id.* at *1.

²⁰⁸ *Id.*

²⁰⁹ *Id.* See also *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993). In *Lee*, the defendant burned a cross on a hill 386 feet from an apartment complex in which several African Americans resided. *Id.* at 1298. Though the Eighth Circuit reversed the defendant’s conviction for other reasons, it indicated that sufficient evidence existed for a jury to conclude the defendant’s actions were directed to the Black residents of the apartment building. *Id.* at 1303.

²¹⁰ There is an exception to the general rule this Article proposes that the state would not be able to regulate burning crosses at marches or rallies when circumstances suggest that the cross burning is directed at identified victims. The presence of a single group of minorities in an all-white town, for instance, may indicate that they are identified targets. Similarly, if Klan members travel to a neighboring all-Black town to hold a rally with a cross burning, this may signal that there are identified targets.

of each cross burning on the victim. Below I offer three doctrinal avenues that courts might use that are consistent with a victim-centered approach.

1. *Cross Burning as a Threat*

The first of these approaches involves treating cross burning as a “true threat” and subjecting it to the full true threats analysis. Analyzing cross burning as a true threat is an approach that has been taken by lower courts, but was not the approach taken by the Supreme Court in *Black*.²¹¹ There is a clear justification to take this approach because part of the burning cross’s meaning to victims comes from its frequent use as a threat of violence.²¹² Victims understand cross burning to be a precursor to other violent behavior and understand the threat that the perpetrator wishes to communicate. A victim-centered approach to the regulation of cross burning could be grounded in the recognition that cross burning is threatening.

The Supreme Court recognized in *R.A.V.* that a state may prohibit non-verbal expressive activity, so long as the prohibition is aimed at the underlying conduct, and not its expressive content.²¹³ In *Black*, there was significant evidence to suggest the legislature had banned cross burning because of the action it entails, rather than because of its segregationist message. First, Virginia’s original cross burning statute was passed in the wake of numerous cross burnings on the lawns of Black business owners and those who lived in predominately white areas.²¹⁴ Moreover, in 1952 in Virginia the law mandated racial segregation in schools, public accommodations, association, and even marriage.²¹⁵ It seems unlikely that the legislature was attempting to express disfavor toward the *message* of cross burning.²¹⁶ As Justice Thomas wrote in his dissent in *Black*:

²¹¹ As the discussion *supra* Part III.C details, though *Watts v. United States*, 394 U.S. 705 (1969), was cited by the Court in *Black*, the Court adopts an intent-based standard, rather than approaching cross burning as a “true threat.”

²¹² See discussion *supra* Part I.

²¹³ *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

²¹⁴ *Virginia v. Black*, 123 S. Ct. 1536, 1565 (2003) (Thomas, J., dissenting).

²¹⁵ See, e.g., VA. CODE ANN. § 18-327 (Michie 1950) (repealed 1960) (requiring separation of “white” and “colored” in places of entertainment or public assemblage); VA. CODE ANN. § 20-54 (Michie 1950) (repealed 1968) (prohibiting racial intermarriage); VA. CODE ANN. § 22-221 (Michie 1950) (repealed 1972) (requiring segregated schooling). The petitioner’s brief and Justice Thomas’s dissent list several other segregationist practices in force in Virginia at the time. See Petitioner’s Brief at 23–24, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107); *Black*, 123 S. Ct. at 1565–66 (Thomas, J., dissenting).

²¹⁶ The defendant in *Black* argued that the cross-burning statute demonstrated the Virginia legislature’s attempt to express disfavor regarding the message of cross burning. While it is certainly possible for a segregationist society to implement a content-based law, in this case it is less likely that the law was aimed at the *message* behind cross burning. The existence of a legal regime mandating separation of the races suggests that the legislature had no problem with the message of Black inferiority inherent in cross burning, but rather with the violence of cross burning.

It strains credulity to suggest that a state legislature that adopted a litany of segregationist law self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable.²¹⁷

Expression may not be protected if it falls into the category of true threats as defined by *Watts*. Federal courts in several circuits have relied on the *Watts* true threats analysis to reject First Amendment challenges to convictions for cross burning under 18 U.S.C. § 241,²¹⁸ the federal statute that punishes interference with federal housing rights.²¹⁹ In each of these cases, whites burned crosses on the lawns of Blacks or minorities in an attempt to drive them from the neighborhood. Analyzing cross burning as a “true threat” not only recognizes the threatening nature of the activity, but also allows courts to consider openly the impact of the crime on cross burning victims as part of their analysis. In examining whether the cross burning was a true threat, the courts frequently looked to the factual record to discern the reaction of victims to the cross burning.

The examination of a victim’s reaction in a true threats case may be just one part of a sustained review of the context of the crime. For example, in *United States v. Magleby*²²⁰ the defendant was convicted of civil rights violations for having burned a cross on the lawn of an interracial family. On appeal, Magleby argued in part that the district court erred in instructing the jury that they could consider “the reaction of the victims and other witnesses to the cross burning in determining the defendant’s intent” to deprive the victims of their civil rights.²²¹

The district court’s instructions to the jury were heavily context-based. In addition to the victim’s reaction to the cross burning, the court also allowed the jury to consider as evidence of Magleby’s intent “the entire context in which the cross was burned,” including “the defendant’s actions before, during and after the cross burning,” and “the location at which the cross was burned and its nearness to the intended victims.”²²² In Magleby’s case the context of the crime included evidence that he had spent

²¹⁷ *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting).

²¹⁸ Section 241 prohibits any person or persons from conspiring “to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.” 18 U.S.C. § 241 (2000).

²¹⁹ *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001); *United States v. Hartbarger*, 148 F.3d 777 (7th Cir. 1998); *Singer v. United States*, No. 94-3039, 1994 WL 589562 (6th Cir. Oct. 24, 1994); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994).

²²⁰ 241 F.3d 1306.

²²¹ *Id.* at 1311.

²²² *Id.*

the day of the crime telling racist jokes, listening to racist CDs, and accessing internet hate sites.²²³

In evaluating *Magelby*'s arguments, the Court of Appeals held that evidence of the recipient's response is relevant to whether a true threat exists. In weighing the recipient's response, it used a "reasonable recipient" test—whether a reasonable person would find that the threat existed. In *Magelby*, the Tenth Circuit, as had the Seventh and Eighth circuits, found that the victims' reaction to the cross burning was relevant to the defendant's intention to deprive individuals of their civil rights.²²⁴

The *Watts* true threats analysis was also used by the California Court of Appeals to respond to a First Amendment challenge to a California statute prohibiting cross burning on the property of another without authorization and with intent to terrorize.²²⁵ In *Steven S.*²²⁶ the defendant was charged with violating the cross burning statute for burning a cross on the front lawn of a multi-racial family as a Friday-the-Thirteenth joke. He argued that the absence of any intent to intimidate meant his actions did not constitute a true threat under *Watts*.

Applying *Watts*, the court adopted a victim-centered analysis. In the court's view, in the case of malicious cross burnings, so long as the person intentionally or knowingly burned the cross and it could be reasonably foreseen that the victim "would construe a malicious cross burning as a serious expression of intent to do harm," then the true threat test of

²²³ *Id.* at 1308.

²²⁴ *Id.* at 1311.

²²⁵ CAL. PENAL CODE § 11411 (West 2000). The relevant portion of the statute provides:

(c) Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who burns, desecrates, or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars (\$10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars (\$5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars (\$10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars (\$15,000), or by both the fine and imprisonment for any subsequent conviction.

(d) As used in this section, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety.

²²⁶ *In re Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994).

Watts was satisfied.²²⁷ The court indicated that a victim would “surely” view cross burning as a “serious expression of intent to do harm.”²²⁸

In a way that further recognized the historical legacy and context of cross burning, the court looked to the issue of whether cross burning could constitute “fighting words.” According to the court, fighting words and cross burning are similar because “[a] malicious cross burning in the yard of one’s home is surely a terrifying experience, subjecting the victim to fear and intimidation. By its very commission it inflicts immediate injury.”²²⁹ According to the court, a cross burning was not a joke or type of prank that simply caused hurt feelings.

[T]he act we call malicious cross burning is directed at individuals—here, the Fosters—and it goes far beyond hurt feelings, offense, or resentment. It causes terror in specific victims. That aspect brings the context within the scope of the fighting words doctrine.²³⁰

The California court was careful to distinguish the California statute from the St. Paul ordinance at issue in *R.A.V.*²³¹ Although the court found that the California statute was a content-based regulation of speech, it ruled that it fell within all three exceptions set forth in *R.A.V.* Unlike the St. Paul statute, the California statute only prohibited malicious cross burning—unauthorized cross burning on another person’s property—while the St. Paul statute at issue in *R.A.V.* proscribed *all* cross burning.²³² This was important to the court because it was a sign that the legislature had focused its attention on a particular type of cross burning, proscribable for the same reason that fighting words and true threats generally are proscribable.²³³

The California court also indicated that there was no realistic possibility that the cross-burning statute had been passed as an attempt to suppress the views of cross burners. The court cited the legislature’s declaration of intent as evidence that the statute was not designed to suppress expression. The California legislature indicated that “[i]t is not the intent of this chapter to interfere with the exercise of rights protected by the Constitution of the United States. The Legislature recognizes the constitutional right of every citizen to harbor and express beliefs on any subject whatsoever and to associate with others who share similar beliefs.”²³⁴

²²⁷ *Id.* at 648.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 649.

²³¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²³² *Steven S.*, 31 Cal. Rptr. 2d at 650.

²³³ *Id.*

²³⁴ *Id.* at 651.

The difference between the true threats approach to cross burning, and the approach taken by the Supreme Court in *Black*, lies in the expressive value each approach recognizes in cross burning. The California court maintained that burning a cross on someone else's lawn did not have a high degree of expressive value. The California court clearly appreciated the racialized context within which many cross burnings occur. Even without the legislature's declaration of intent, the court wrote, "it is evident that the expressive element of an unauthorized cross burning on another person's property is incidental at best. At its core, this is an act of terrorism that inflicts pain on its victim, not the expression of an idea."²³⁵

Although it may allow a court to focus more on the victim, a true threats analysis is not a magic bullet. An approach that requires courts to determine whether a particular cross burning is a threat leaves much to the judgment of individual judges. While the various devices to which courts have resorted to ascertain the existence of the threat—for example, attention to the reasonable listener, or attempting to divine factual circumstances of the speech—are more likely to capture victims' perspectives, this scheme may obscure a court's role in evaluating, and eventually legitimizing through the use of "reasonableness," particular speakers and hearers. In other words, courts pick and choose what circumstances are relevant. The mere specification of a "reasonable speaker" or "reasonable listener" test does not in itself imply a method for understanding how listeners interpret messages, and the flexibility that these tests therefore leave to courts will leave cross burning doctrine unpredictable and insufficiently protective of victims. As the cases involving challenges to convictions for threatening to kill the President demonstrate, one person's threat is another's joke or political statement. The true threats analysis does not answer how as a society we should choose among competing views of threats to better interpret meaning in different contexts.

2. *Regulating the Secondary Effects of Cross Burning*

A second way that the Court in *Black* might have approached the defendants' challenge from a victim-centered perspective would have been to evaluate whether Virginia's cross-burning statute was justified by the secondary effects of cross burning. States may regulate a particular subclass of speech when that subclass "happens to be associated with particular 'secondary effects' . . . so that the regulation is '*justified* without reference to the content of the speech.'"²³⁶

²³⁵ *Id.*

²³⁶ *R.A.V.*, 505 U.S. at 389 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

In *Renton v. Playtime Theatres*,²³⁷ the Supreme Court upheld an ordinance that restricted the location of adult movie theatres to greater than 1000 feet of any church, residential zone, park or within one mile of any school.²³⁸ The city justified the ordinance based on the secondary effects—crime, decreased property values, and decline in the value of the city’s neighborhoods, and other quality of life issues that it argued sexually oriented businesses cause.²³⁹ Finding the articulated governmental interest substantial, and that the city had allowed alternate avenues for communication, the Court rejected a First Amendment challenge to the ordinance.²⁴⁰

The Supreme Court has rejected as a secondary effect the emotive impact of the speech, such as insult or offense victims may feel in response to the speech.²⁴¹ In the Supreme Court’s view, the emotive impact of the speech is a primary rather than secondary effect of the speech. By contrast, a victim-centered perspective might identify the emotional harm of cross burning as more salient. For instance, the California Supreme Court held in *Steven S.*, “the fear and intimidation of the victim of a malicious cross burning crosses the line between emotive reaction and tangible injury.”²⁴² It defined those secondary effects to include “the infliction, upon a specific victim, of immediate fear and intimidation and a threat of future harm.”²⁴³

The purpose of the secondary effects exception is to allow states to regulate the negative byproducts of speech or behavior that are removed from the activity itself. In *Black*, the Commonwealth of Virginia articulated several negative byproducts of cross burning similar to those accepted in *Renton*—negative effects on commerce, property values, and race relations.²⁴⁴ Cross burning has been frequently used to run minorities out of the neighborhood and thus prevent the integration of white neighborhoods. A court could easily find that states have a significant interest in preventing such obstacles to integration.

The reasoning in *Wisconsin v. Mitchell*²⁴⁵ provides additional support for states’ ability to regulate the secondary effects of bias-motivated conduct like cross burning. In *Mitchell*, Chief Justice Rehnquist cited amicus briefs that indicated that bias-motivated crimes cause particular harms— they are more likely to provoke retaliatory crimes, they may inflict ex-

²³⁷ 475 U.S. 41 (1986).

²³⁸ *Id.* at 44.

²³⁹ *Id.* at 48.

²⁴⁰ *Id.* at 49–55.

²⁴¹ *R.A.V.*, 505 U.S. at 394.

²⁴² *In re Steven S.*, 31 Cal. Rptr. 2d 644, 651 (Cal. Ct. App. 1996). *See also* State v. Talley, 858 P.2d 217, 226 (Wash. 1993).

²⁴³ *Steven S.*, 31 Cal. Rptr. 2d at 650.

²⁴⁴ Petitioner’s Brief at 39, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

²⁴⁵ 508 U.S. 476 (1993).

treme emotional harm, and they may incite community unrest.²⁴⁶ The Court viewed these consequences as “an adequate explanation” for the state legislature’s creation of a penalty enhancement statute.²⁴⁷ The additional harm caused by bias-motivated conduct could justify greater penalties: “[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.”²⁴⁸

Though the secondary effects approach may at first seem particularly attractive, especially given the ancillary effects of cross burning, this approach has doctrinal flaws. Fear and intimidation caused by cross burning are communicative effects that flow directly from the message of hatred the perpetrator is sending by burning the cross. The harms of cross burning, especially the resulting fear and terror, are related to the threatening messages that cross burners send. These are not secondary effects in the same way that prostitution is a secondary effect of the establishment of businesses that offer nude dancing.²⁴⁹ While the government may regulate secondary effects, the First Amendment prohibits the government from using content-based regulation to prevent the primary effects of expression.

3. Cross Burning as a Hate Crime

Following the Supreme Court’s construction of cross burning in *R.A.V.*, many courts have approached cross burning primarily as speech. As this Article argues, the act of burning a cross is indisputably conduct, albeit conduct with an expressive element.²⁵⁰ Analyzing cross burning as discriminatory bias-motivated conduct—hate crime—recognizes its historical and situational context, and also the victim’s perspective. Hate crimes are crimes motivated by bias based on race, religion or sexual orientation. Most, if not all, cross burners have white supremacist goals, suggesting that their actions are bias-motivated.

²⁴⁶ *Id.* at 487–88.

²⁴⁷ *Id.* at 488.

²⁴⁸ *Id.*

²⁴⁹ There is not a perfect relationship between nude dancing and the harms that the Court considered relevant in the case of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Although there is not a direct causal link between nude dancing and prostitution, Justice Souter’s concurrence noted that prostitution correlates with nude dancing. *Barnes*, 501 U.S. at 584 (Souter, J., concurring in the judgment). Despite the correlation, Justice Souter concurred in the Court’s opinion upholding the regulation against First Amendment challenge because the harm of prostitution does not flow from nude dancing as expression. *Id.* at 586.

²⁵⁰ The argument I make here that cross burning is bias-motivated conduct is distinct from the one made by Justice Thomas in his dissent in *Black v. Virginia*, 123 S. Ct. 1536, 1562 (2003) (Thomas, J., dissenting). Thomas, who would have voted to uphold the Virginia statute, argues that cross burning is conduct devoid of any substantial expressive component. *Id.* at 1556.

The Supreme Court defined the degree to which the First Amendment protects bias-motivated conduct in *Wisconsin v. Mitchell* by ruling on a First Amendment challenge to a Wisconsin hate crime penalty-enhancement statute.²⁵¹ Mitchell was a Black defendant who had been convicted for aggravated battery after he incited a group of men and boys to attack a white teenager.²⁵² Immediately prior to the attack, Mitchell and the group of Black men and boys had been discussing the movie *Mississippi Burning*.²⁵³ After the discussion, Mitchell spotted the victim and told the group, "There goes a white boy; go get him."²⁵⁴ Because the jury agreed that the victim had been intentionally selected on account of his race, the maximum sentence for Mitchell's crime was increased under Wisconsin's hate crime penalty enhancement statute.²⁵⁵ That statute increases the maximum penalty if the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."²⁵⁶

Mitchell argued that the application of the penalty-enhancement provision used in sentencing violated his First Amendment rights.²⁵⁷ Relying on *R.A.V.*, the Wisconsin Supreme Court agreed.²⁵⁸ It held that by criminalizing the defendant's selection of particular victims, the Wisconsin statute was punishing thought protected by the First Amendment.²⁵⁹ The court found that punishing particular types of thought "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought."²⁶⁰

The Supreme Court reversed.²⁶¹ Chief Justice Rehnquist gave several reasons for upholding the Wisconsin statute. First, the Wisconsin statute was similar to constitutionally valid criminal statutes that punish the defendant differently depending on what motivated the crime.²⁶² Second, racial animus plays a similar role in the Wisconsin statute as it does under federal and state antidiscrimination laws also previously upheld as constitutional.²⁶³ Finally, *R.A.V.* is inapposite because it addressed a statute prohibiting "fighting words," whereas the Wisconsin statute addressed bias-motivated conduct, not speech.²⁶⁴

²⁵¹ 508 U.S. at 479.

²⁵² *Id.* at 479–80.

²⁵³ *Id.* at 480.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ WIS. STAT. § 939.645(1)(b) (1996).

²⁵⁷ *Mitchell*, 508 U.S. at 481; *State v. Mitchell*, 485 N.W.2d 807, 809 (Wis. 1992).

²⁵⁸ *Mitchell*, 485 N.W.2d at 815.

²⁵⁹ *Id.* at 811.

²⁶⁰ *Id.*

²⁶¹ *Mitchell*, 508 U.S. at 490.

²⁶² *Id.* at 485–86.

²⁶³ *Id.* at 487.

²⁶⁴ *Id.*

There are clear similarities between the punishment of cross burning under statutes aimed specifically at that activity and the punishment of other bias-motivated conduct as allowed by *Mitchell*. Both crimes consist of conduct that may be punished under content-neutral “general” criminal statutes. In addition, both are “message” crimes and therefore contain an expressive component.²⁶⁵ Both bias-motivated assaults and cross burnings are hate crimes, as well as “general” crimes, because of the perpetrator’s motive.

Analogies can be drawn between cross burning and the bias-motivated physical harm for which the Court permitted additional penalty in *Mitchell*. The Court suggested in *Mitchell* that an additional justification for penalty enhancement statutes was that bias-motivated attacks cause greater individual and societal harms.²⁶⁶ Similarly, cross burning aimed at racial and ethnic minorities in the neighborhoods in which cross burning often occurs also causes real harm—practical interference with housing rights. Cross burnings and other types of move-in violence happen so frequently that such incidents serve as incentives for victims to leave as well as disincentives for other minorities to move to white neighborhoods. The harm of lost housing and the practical restriction of minorities’ rights to live in a neighborhood of their choosing is the functional equivalent of the tangible harm of physical assault for which the Court authorized additional penalties in *Mitchell*.

A few courts have relied on *Mitchell* in cross-burning cases to support the notion that cross burning may be regulated. One such case was *United States v. Hayward*.²⁶⁷ *Hayward* did not involve a state cross burning statute, but rather a challenge to § 3631(b) of the Fair Housing Act on First Amendment grounds.²⁶⁸ This section of the Fair Housing Act is a federal misdemeanor statute that punishes violent interference with the housing rights of any person because of race, religion, sex, handicap, or familial status.²⁶⁹ One of the arguments that the defendants made on ap-

²⁶⁵ For example, jurisdictions that penalize bias-motivated assaults under a separate hate crimes statute allow prosecution both as an “ordinary” criminal assault and as a hate crime. See, e.g., MASS. GEN. LAWS ANN. ch. 265, §§ 37, 39 (West 2000).

²⁶⁶ See *Mitchell*, 508 U.S. at 488.

²⁶⁷ 6 F.3d 1241, 1250 (7th Cir. 1993).

²⁶⁸ 42 U.S.C. § 3631(b) (2000).

²⁶⁹ The relevant section of the statute provides:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex, handicap . . . , familial status . . . , or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting any dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or

peal of a conviction under the statute was that cross burning was protected speech.²⁷⁰

The defendants in *Hayward* were convicted for having burned two crosses on the property of Bob and Mary Jones, a white couple with Black friends who occasionally visited.²⁷¹ The first cross, which was approximately six feet tall and four feet wide, was set on fire in a concrete block that the defendants had placed in the Joneses' driveway. At midnight the same evening, a larger cross, approximately seven feet tall and five feet across, was burned in the driveway.²⁷²

In *Hayward*, the Seventh Circuit Court of Appeals acknowledged that there is a message in cross burning—that Blacks are unwelcome and association with them is not approved—but found that because cross burning promotes fear, intimidation, and psychological injury, it is not entitled to First Amendment protection.²⁷³ In rejecting the defendants' claims that § 3631(b) was unconstitutional, the Seventh Circuit also relied on *Mitchell*, finding the statute to be aimed at curtailing discriminatory conduct, not speech.²⁷⁴ The court also found that § 3631(b) was a proper exercise of congressional power under the Thirteenth Amendment.²⁷⁵ Moreover, the statute advanced an important and substantial government interest—protecting individuals' right to occupy housing free from threats or intimidation based on race.²⁷⁶ Because the statute was a content-neutral effort at regulating “the wrongful conduct of threats and intimidation,” it did not violate the First Amendment.²⁷⁷

Treating cross burning as a hate crime is the strongest of three victim-centered approaches. In addition to having stronger doctrinal foundations than the others, it goes much further than *Virginia v. Black* in allowing punishment for cross burning. Analyzing cross burning as a hate crime allows a court to punish all cross burnings that cause significant harm, rather than just punishing those that are intended to do so. Thus, individuals who burn crosses on people's lawns as jokes, without intending to intimidate, could be punished. By requiring an intent to intimidate, *Black* does not seem to allow the punishment of the “innocent”

any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex, handicap . . . , familial status . . . , or national origin, in any of the activities, services, organizations or facilities described in subsection . . . (a) of this section; . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both . . .

42 U.S.C. § 3631(a)–(b).

²⁷⁰ *Hayward*, 6 F.3d at 1249.

²⁷¹ *Id.* at 1243.

²⁷² *Id.* at 1244.

²⁷³ *Id.* at 1250.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1251.

²⁷⁷ *Id.*

cross burner who causes harm. Placing cross burning with other types of racially motivated crime also forces courts to recognize cross burning's historical legacy and the context in which it is used as tool of segregationist violence. This particular approach has the added benefit of allowing courts to acknowledge, as the Supreme Court did in *Wisconsin v. Mitchell*,²⁷⁸ the effect of perpetrators' actions on the community as whole.

With regard to racially motivated crime, frequently the law has not attempted to redress injuries against people of color. Critical scholars have recognized that, "[t]he places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live."²⁷⁹ Often, in cases of hate speech and bias-motivated crime, the justification offered for the failure to address targeted acts of racial violence is that the First Amendment does not allow such redress.

Adopting a victim-centered perspective and treating cross burning as bias-motivated crime recognizes the injury caused by cross burning. If cross burning is evaluated as a threat, courts may consider the victim's perception of the incident. If it is viewed as bias-motivated conduct, a court will be forced to evaluate a host of factors to determine whether the cross burning was actually motivated by bias. In both of these cases, rigorous attention to whether the defendant actually targeted victims and whether the behavior was pure speech or bias-motivated conduct will safeguard the First Amendment rights of those who hold racist views.

CONCLUSION: CROSS BURNING, RACE, SPACE, AND POWER

In white neighborhoods all across America, in cities, in the suburbs, in small towns, in the North (New York and Boston), in the South (Nashville and Louisville), in the West (San Diego), and in the Midwest (Chicago), crosses are burning.²⁸⁰ Some of these incidents involve crosses set on fire.²⁸¹ Others are less literal, consisting of acts of violence like broken windows and other forms of vandalism done to minority newcomers' cars and property.²⁸² The explicit threat that cross burning conveys is clear:

²⁷⁸ 508 U.S. 476.

²⁷⁹ Matsuda, *supra* note 199, at 2322. See also Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* (1990) (criticizing the failure of anti-discrimination law to recognize the multi-dimensionality of Black women's lives); Catherine A. MacKinnon, *The Sexual Politics of the First Amendment*, in *FEMINISM UNMODIFIED* (1987) (describing the failure of judges adjudicating First Amendment cases to recognize a variety of harms to women); Matsuda & Lawrence, *supra* note 188 (criticizing the failure of the Court to appreciate the victim's story in *R.A.V.*).

²⁸⁰ See Rubinowitz & Perry, *supra* note 5, at 401-13 (describing housing-related crimes in public and private housing in cities including Boston, New York, Chicago, Nashville, Louisville, and San Diego).

²⁸¹ *Id.*

²⁸² *Id.*

We may kill you, or hurt you badly. Believe it. We have already come to your home and we have done this hateful and dangerous thing in front of you. So, we don't just talk. We act. Next time we may torch your home. Or bomb your car. Or shoot into your windows. No one stopped us when we burned the cross. No one will stop us next time either. Fear us.²⁸³

By naming cross burning as a threat, this Article does not mean to suggest that the perpetrator does not intend to send a message. Burning a cross is "designed to communicate the message of white supremacy to the black community."²⁸⁴ But that supremacist message always carries the threat of violence. That threat makes people fear for their safety and has very real effects on the lives of minorities.

Many African Americans and other minorities who are looking to move to a neighborhood may be dissuaded by racial attacks.²⁸⁵ Such attacks restrict housing choices and enhance racial isolation in housing and community life. One of the distinctions between cross burners and others engaged in symbolic expression is that cross burners are often not content simply to express their views. Frequently accompanied or followed by physical violence, cross burning is not "mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to . . . violence."²⁸⁶ Moreover, cross burning on minorities' property is personalized. It is directed at a specific victim. A burning cross is a threat newcomers do well to take seriously.

Those who oppose statutes regulating cross burning have framed the issue as being about the right to hold racist views²⁸⁷ or to pursue racist politics.²⁸⁸ From this perspective, the injury of cross burning is a minor one, consisting largely of a victim's "offense" at the racist's views.²⁸⁹ To those who hold this perspective, cross burning laws constitute censorship, expressing the government's hostility to a cross burner's point of view.²⁹⁰

²⁸³ Petitioner's Brief at 35, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

²⁸⁴ Sherrilyn A. Ifill, *Ordinary Complicity*, *BALT. SUN*, June 17, 2001, at C4. *See also* Wang, *supra* note 200, at 843-51 (describing use of lynching to further white landowners' economic interests).

²⁸⁵ Rubinowitz & Perry, *supra* note 5, at 385.

²⁸⁶ *United States v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

²⁸⁷ *See, e.g.*, Smolla, *supra* note 15, at 569-83.

²⁸⁸ *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

²⁸⁹ *See* Respondents' Brief on Merits at 13, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107) (describing "undifferentiated fear" that those viewing cross burning may feel); Brief of Amicus Curiae The Rutherford Institute at 6, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107) ("No Supreme Court case holds that expressive conduct may be proscribed based upon its *offensive impact*." (emphasis added)).

²⁹⁰ *See, e.g.*, EDWARD J. CLEARY, *BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE 208-09* (1994); Respondents' Brief on Merits at 10, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107); Brief of Amicus Curiae The Thomas Jefferson Center for the Protection of Free Expression at 12, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107) (concluding that statute unmistakably targets view-

The First Amendment, this line of argument goes, preserves the right of cross burners to burn crosses in order to avoid suppressing the message expressed by those burning crosses.

Words are not crystals, as Justice Holmes has written, “transparent and unchanged.”²⁹¹ Rather, words assume meaning from their context and the ways in which they are used. The converse view, that words have transparent, fixed meaning irrespective of either use or context, rejects cross burning laws for First Amendment reasons. In doing so, it divorces cross burners’ views from their actions. Those who adopt this perspective ignore the context of the vast majority of cross burning that occurs in this country.

Attention to context when evaluating cross burning reveals that the circumstances in which cross burning occurs usually involve resistance on the part of whites to minority integration. It is not done to express a particular political view, but rather represents a struggle to preserve white neighborhoods at the expense of minorities’ housing options and a fully integrated community.²⁹² Cases detailing the use of cross burning and empirical research describing violence that has occurred in the wake of minorities moving into formerly all-white areas demonstrates that cross burners are fighting against the presence of minorities, with the minority homes the battle ground and a burning cross a principal weapon.

In this war against minority “intrusion,” once fought by the Klan, now largely waged by those unaffiliated with formally organized extremist groups, cross burning is a particularly effective weapon. It is so effective a threat because of its power to communicate the precise nature of the threat in such a chilling way. Victims understand, and are frightened.

The tragedy of racial violence directed at minorities integrating white neighborhoods is magnified by the inadequacy of existing social and legal responses. Other members of their new neighborhood may openly support the desire of the perpetrators to drive the intruders out.²⁹³ Because racially motivated crime is often underenforced by police officers who side with the perpetrators, few of these crimes may be investigated and eventually prosecuted.²⁹⁴ Unwilling to risk their families’ safety, some minorities

point that symbolic act conveys); Brief of Amicus Curiae The Rutherford Institute at 4, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107) (arguing the Commonwealth is trying to prohibit “controversial” speech because of its impact).

²⁹¹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

²⁹² See Lawrence, *Crossburning and the Sound of Silence*, *supra* note 172, at 796.

²⁹³ See BELL, *supra* note 5, at 84 (describing white residents’ support for perpetrators of racial violence); JONATHAN RIEDER, *CANARSIE* 171–202 (1985) (detailing white community support for anti-integrationist activities in Canarsie, N.Y.); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* 230–58 (1996); Howard Pinderhughes, *The Anatomy of Racially Motivated Violence in New York City: A Case Study of Youth in Southern Brooklyn*, 40 *SOC. PROBS.* 478, 489–91 (1993) (describing community support for racially motivated violence in Brooklyn, N.Y.).

²⁹⁴ The underenforcement of bias-motivated crimes like cross burnings is not inevitable. Cross burning may be investigated by police in a way that is victim-centered, provided

who had had high hopes of staying in their new homes leave, having been “crimed out” by racists.²⁹⁵

If properly written and interpreted, cross-burning statutes can be an important tool in the arsenal of those wishing to address neighborhood violence and to help promote housing integration. The most effective statutes would be those which give states broad leeway to prosecute those burning crosses directed at victims, not just those whom the state can show intended intimidation. The Supreme Court’s decision in *Black*, while it goes further than *R.A.V.* in appreciating the harm caused by cross burning, does not represent a victim-centered perspective. By restricting the power of state statutes to address particular types of cross burning, *Black* limits the power of states to address a harm which the Court has identified as significant. A context-based, victim-centered approach to applying First Amendment protection to cross burning recognizes that cross burning is not protected hate speech, but constitutionally proscribable hate crime.

that the appropriate legal and policy structures exist. See, e.g., BELL, *supra* note 5, at 90–106 (describing aggressive investigation of cross burning by specialized hate crime unit).

²⁹⁵ See, e.g., *id.* at 34–35, 46–47 (detailing story of victim of neighborhood violence who eventually left the neighborhood).

