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INTRODUCTION

In *Virginia v. Black*, the Supreme Court held by a 7-2 vote that cross burning is constitutionally protected speech.[1] This will come as something of a surprise to members of the general public who merely glanced at newspaper headlines about the decision because most of the nation's major newspapers reported that the Court reached precisely the opposite conclusion. Many newspapers bluntly announced that the Court had decided to permit states to ban cross burning.[2] Other newspapers hedged their characterization somewhat, but the clear implication of even these reports was that free speech claims surrounding the act of cross burning were significantly weakened by the Court's action.[3]

The newspaper headlines may be correct in suggesting that the Court's decision in *Black* significantly reduced free speech protection of radical and antagonistic speech in the cross-burning case. Then again, they may not. The simple fact is that we have no way of knowing exactly what *Black* portends for free speech because (to put the matter unkindly) Justice O'Connor's opinion in the cross burning

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1 Virginia v. Black, 538 U.S. 343 (2003).

2 *See Court Upholds Ban on Cross-Burning*, NEWSDAY, Apr. 8, 2003, at A28; Linda Feldmann, *High Court Upholds Ban on Cross Burning*, CHRISTIAN SCI. MONITOR, Apr. 8, 2003, at 3; Steve Lash, *Court Rules States Can Ban Cross-Burning*, ATLANTA J.-CONST., Apr. 8, 2003, at A1; Patty Reinert, *High Court Upholds Cross-Burning Ban*, HOUS. CHRON., Apr. 8, 2003, at 1A; Edward Walsh, *State Bans on Cross Burning Upheld*, WASH. POST, Apr. 8, 2003, at A1.

3 Lyle Denniston, *Court Rules Cross Burning Can Be Crime*, BOSTON GLOBE, Apr. 8, 2003, at A2; Bob Egelko, *Most Cross Burning Ruled Illegal*, S.F. CHRON., Apr. 8, 2003, at A14; Jan Crawford Greenburg, *High Court Limits Ban on Burning of Crosses*, CHI. TRIB., Apr. 8, 2003, at 1; Linda Greenhouse, *Justices Allow Bans on Cross Burnings Intended as Threats*, N.Y. TIMES, Apr. 8, 2003, at A1; David G. Savage, *Justices Limit Cross Burners' Claim to Free Speech*, L.A. TIMES, Apr. 8, 2003, at A20.

case borders on the incoherent. The Court sends several different messages about free speech in *Black*, many of which contradict each other. At least some of these messages may signal significant and troubling changes in the constitutional standard applicable to political advocacy—the cornerstone of modern First Amendment free speech jurisprudence.

There are several layers of conflicting messages in *Black*. To cite only the most prominent examples: first, although the Court held that the act of cross burning contains constitutionally protected expressive elements, the Court also upheld the Virginia statute criminalizing instances of cross burning in which the speaker acted "with the intent of intimidating any person or group of persons."[4] Second, although the Court held that "intimidating" speech is merely a subset of constitutionally unprotected "true threats,"[5] the Court declined to identify the elements of a "true threat." Although the Supreme Court has never deigned to define the term, some lower courts have interpreted the concept of a "true threat" to cover particularized speech directed toward a specific and identifiable target.[6] If this definition is accurate, then it is inconsistent with the Court's expansion of the category to cover speech intended to "intimidate" large and undifferentiated groups of people. Third, although Justice O'Connor began her majority opinion with a long description of the burning cross as a universal and singular symbol of hatred, which is used specifically to intimidate and terrorize, she rejected Justice Thomas's contention that the expressive value of cross burning is overwhelmed by its invariable use as a "signal of impending terror and lawlessness," which "almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[7] Fourth, although Justice O'Connor held unconstitutional the portion of the Virginia statute that made the burning of a cross prima facie evidence of an intent to intimidate, she refused to hold the statute unconstitutionally overbroad, thus casting doubt on what constitutional standard *was* used to strike down part of the statute. Finally, although Justice O'Connor's plurality opinion effectively permits the state to prosecute those who burn a cross if the state can prove an intent to intimidate, she remanded only two of the three cases before the Court for a determination of the requisite intent.[8] The Court rejected any such recon-

4 VA. CODE ANN. § 18.2-423 (Lexis 2004). Although in 2003 the Supreme Court declared § 18.2-423 unconstitutional, the section remains in the 2004 Virginia Code.

5 *Black*, 538 U.S. at 360.

6 *See infra* notes 193–260 and accompanying text.

7 *Black*, 538 U.S. at 391 (Thomas, J., dissenting).

8 *Id.* at 367–68 (plurality opinion).

sideration of the third case, suggesting that in some circumstances the expressive value of cross burning is so overwhelming that the First Amendment prohibits the government from prosecuting the burning of a cross even if the action is undertaken with the requisite intent. Thus, although it seems that some element other than a general intent to intimidate is required before the state can prosecute the burning of a cross, Justice O'Connor does not discuss what this additional factor may be.

None of this would matter much if *Black* were nothing more than a solitary instance of the Court looking the other way while a state government criminalized an isolated example of highly unpopular speech by a small handful of political crackpots. If *Black* could be explained away in this manner, the opinion would be subject to criticism as sloppy, intellectually dishonest, or perhaps a lamentable deviation from the Holmesian tradition of protecting even the speech of politically reviled "poor and puny anonymities,"[9] but it would not do serious damage to the general range of First Amendment free speech protections. Unfortunately, *Black* cannot be dismissed so lightly. *Black* is another in a growing number of decisions (in both the Supreme Court and the lower courts) that carve out expansive doctrinal exceptions to the very cornerstone of the First Amendment: the nearly absolute protection of political advocacy and radical dissent. Other recent examples of this trend include decisions denying constitutional protection to speech communicating a disfavored motive for illegal actions,[10] cases involving speech that teaches the methods of illegal activity,[11] and cases broadly defining the concept of "true threats."[12] In *Black*, the Court has now added to this list the new and potentially expansive category of "intimidating" speech.

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9 Abrams v. United States, 250 U.S. 616, 629 (1919).

10 *See* Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (upholding a Wisconsin hate crime enhancement statute).

11 *See* Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (reversing the district court's summary judgment holding that the First Amendment bars a civil cause of action); *see also* Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., opinion respecting denial of petition for writ of certiorari) (arguing that the imminent lawless action component of the *Brandenburg v. Ohio* standard for political advocacy "does not necessarily adhere to some speech that performs a teaching function").

12 *See* Planned Parenthood v. Am. Coalition of Life Activists, Inc., 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) (holding that actions of anti-abortion activists in publicly disclosing information about abortion providers through "Guilty" posters and the "Nuremberg Files" website constituted "true threats" and thus was beyond the protection of the First Amendment).

This Article is a critique of the Court's new category of "intimidating" speech and how that new category of speech fits into the series of ongoing judicial attempts to undermine basic First Amendment protections of radical political speech and dissent. Part I describes in more detail the many inconsistent themes of the case summarized above. Part II addresses the contradictions between settled doctrine regarding content and viewpoint discrimination, and the Court's willingness to uphold such discrimination against cross burners. Part III discusses yet another doctrine mangled by the Court's decision in *Black*: the overbreadth doctrine. Part IV addresses the relationship of intimidating speech and the concept of the "true threat," focusing on the Supreme Court's consistent refusal to define the latter category and the continuing efforts in the lower courts to define a "true threat" in the face of the Supreme Court's silence. Part V addresses the heart of the matter: how can "intimidating" speech be denied First Amendment protection in light of the fact that several major First Amendment free speech cases decided during the last century dealt with speech that contained overtones of intimidation indistinguishable from those in *Black*?

As a final introductory note before turning to the merits of *Black*, this Article is about the burning of crosses only in the most superficial sense. However reviled Klansmen and their speech may be, they are not the only hated political group in this culture. The same legal principles that apply to speech by the Klan also will permit the dominant political culture to penalize, criminalize, and otherwise seek to suppress the speech of other groups of political outsiders. It is by now a First Amendment commonplace that these tendencies will inevitably intensify during times of crisis. The Court may have even hinted at the broader implications of its doctrine in *Black* itself. The words "terror" or "terrorism" appear eleven times in the various *Black* opinions. In these days when such words get tossed around freely by law enforcement officials and politicians, the potential implications of *Black* reach far beyond the handful of anachronistic miscreants who were the defendants in that case.

I. THE MIRRORED WALLS OF *VIRGINIA V. BLACK*

The mark of a badly written opinion is that the reader has more questions about the state of the law after reading the opinion than before. By that measure Justice O'Connor's *Black* opinion is very badly written. The facts, at least, are relatively straightforward. Virginia has a statute prohibiting "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, a highway or other public place."[13] The statute also contains a provision allowing the requisite intent to be presumed from the act itself: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[14]

The three individuals whose appeals were joined in *Black* were convicted separately under the statute. Two of the defendants were convicted after burning a cross in the front yard of their neighbor to "get back" at the neighbor for complaining about the defendants' habit of using their backyard as a firing range.[15] The cross was burned approximately twenty feet from the neighbor's house.[16] The neighbor was African American and the defendants were white, although there was no evidence the defendants were affiliated with the Ku Klux Klan.[17]

The third defendant was a member of the Ku Klux Klan. He was convicted under the Virginia statute because of his involvement as "the head of" a Klan rally at which a cross was burned.[18] The rally was held on private property, with the permission of the property owner.[19] The cross burning that led to the third defendant's conviction involved a twenty-five- to thirty-foot-high cross, which was placed approximately 300 to 350 yards away from a public road, from which the cross could be seen.[20] The rally was observed by a woman from the lawn of her in-laws' house located in the vicinity of the rally.[21] The woman was white and was related to the owner of the property used by the Klan.[22] Her testimony provided the main evidence of intimidation flowing from the rally.[23] She testified that the cross burning made her feel "awful" and "terrible." The Supreme Court summarized her testimony:

> During the rally, [the woman who observed the rally] heard Klan members speak about "what they were" and "what they believed in." The speakers "talked real bad about the blacks and the Mexicans." One speaker told the assembled gathering that "he would love to

13 VA. CODE ANN. § 18.2-423 (Lexis 2004).
14 *Id.*
15 Virginia v. Black, 538 U.S. 343, 350 (2003).
16 *Id.*
17 *Id.*
18 *Id.* at 349–50.
19 *Id.* at 348.
20 *Id.* at 348–49.
21 *Id.* at 348.
22 *Id.*
23 *Id.* at 349.

> take a .30/.30 and just random[ly] shoot the blacks." The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to . . . the black people." [The woman] testified that this language made her "very . . . scared."[24]

There are obvious differences between the facts of the first two cases and the facts of the third. The first two defendants were engaged in activity that would fit a range of different criminal and civil offenses that are not directly concerned with expressive activity. The action of these defendants could plausibly be construed as reckless endangerment, arson, criminal mischief, trespassing, intentional infliction of emotional distress, or an ordinary threat. The third defendant was in a very different situation than the first two. His actions would not fit any of the offenses noted above. In fact, but for the Virginia statute targeting the act of cross burning, his action would not be criminal at all. His expression occurred in the context of a political rally on private property, far removed from any direct target of the group's aggressively racist message. Although the rally could be seen from neighboring properties and a nearby public road,[25] the Klansmen's speech seems to have been directed primarily at supporters of the Klan's message.

At first glance, these factual differences between the two sets of defendants lend credibility to the Court's ultimate decision in *Black*. The Court's decision was to reverse the conviction of the third defendant and remand the cases of the first two defendants for a factual determination of whether they indeed had the requisite intent to intimidate their neighbor.[26] This result seems correct, except for the fact that it does not follow from any of the analysis of the statute in Justice O'Connor's opinion.

As is typical in First Amendment cases, the defendants did not assert that the First Amendment protected their behavior from all legal sanctions; they merely claimed that the statute under which they were convicted constituted a facially overbroad content-based regulation of speech. The Court rejected this legal claim. Although the Court held unconstitutional the presumed intent portion of the statute, it upheld the statute's basic thrust—i.e., that "intimidating" speech taking the form of cross burning can be punished by criminal sanctions. In light of this conclusion, it is difficult to understand why the third defendant's conviction was reversed. Although his speech was not directed at a specific target, as was the speech of the first two

24 *Id.* at 348–49 (citations omitted).

25 The sheriff who arrested Black had watched the rally from this road. *Id.*

26 *Id.* at 367–68.

defendants, it is not hard to construe the act of burning a cross at a Klan rally as motivated by (in the words of the Virginia statute) the "intent of intimidating any person or group of persons."[27] How could statements made in conjunction with the cross burning, such as "[I] would love to take a .30/.30 and just random[ly] shoot the blacks,"[28] be construed as anything but evidence of an intention to intimidate African Americans?

A routine application of the Court's existing First Amendment jurisprudence could easily explain why the third defendant's conviction was overturned, but under this analysis all three defendants' convictions should have been overturned because the statute under which they were convicted violates three basic First Amendment doctrines. First, under *R.A.V. v. City of St. Paul*,[29] the statute constitutes an unconstitutional regulation of content and viewpoint by singling out a particular expressive act for special legal regulation. Second, under *United States v. O'Brien*[30] and *Brandenburg v. Ohio*,[31] the statute is an unconstitutional regulation of symbolic speech and political advocacy because it attaches criminal sanctions to symbolic speech communicating a message of protected political advocacy. Third, since much of the speech covered by the statute is constitutionally protected, the statute is unconstitutionally overbroad under *Broadrick v. Oklahoma*.[32] Under the routine application of existing First Amendment doctrine, therefore, it is simple to explain why the Court overturned the third defendant's conviction, but impossible to explain why—at least with regard to their prosecution under this particular statute—the Court allowed the state to retry the other two defendants.

The central problem with Justice O'Connor's opinion for the Court in *Black* is that she rejects all of the standard First Amendment doctrinal critiques of the Virginia cross burning statute. As for the content- and viewpoint-regulation problem, O'Connor first emphasizes the distinctively harmful nature of cross burning as a justification for legal regulation.[33] She then reverses course to assert that cross burning has serious First Amendment value because the symbolic action has significant political content.[34] She then reverses course once again to hold that, at least in the context of "intimidating" speech,

27 VA. CODE ANN. § 18.2-423 (Lexis 2004).
28 *Black*, 538 U.S. at 349.
29 505 U.S. 377 (1992).
30 391 U.S. 367 (1968).
31 395 U.S. 444 (1969) (per curiam).
32 413 U.S. 601 (1973).
33 *Black*, 538 U.S. at 352–57.
34 *Id.* at 365–67.

Virginia can single out cross burning on the basis of content as a criminal activity.[35] The plurality's position on the overbreadth claim is even more mysterious because Justice O'Connor never addresses the issue, and never responds to Justice Scalia's scathing critique of her failure to address the issue. Again, the question is why the majority overturned the third defendant's conviction. If the statute did not impermissibly regulate his speech on content or viewpoint grounds, and if the statute was not overbroad for some other reason, then his conviction seemingly should have survived First Amendment scrutiny.

The third First Amendment issue involves the bedrock principle that political advocacy is protected from government regulation unless the advocacy takes the form of incitement, the advocacy occurs in a context where an immediate concrete harm follows from the speech in question, and the speaker intends his or her speech to instigate the immediate harm. These are the essential elements of the First Amendment analysis for political advocacy set forth in *Brandenburg v. Ohio*.[36] As with her discussion of content and viewpoint regulation, Justice O'Connor's *Black* plurality opinion seeks to have it both ways. On one hand, she cites *Brandenburg* for the proposition that cross burning in the context of a political rally "'would almost certainly be protected expression.'"[37] On the other hand, she permits the state to single out the expressive act of cross burning in its intimidation statute "because burning a cross is a particularly virulent form of intimidation."[38] The problem is that the very fact that a burning cross is a "particularly virulent form of intimidation" is also the reason the burning cross is a potent political symbol to groups such as the Klan. The mystery is how the message communicated by the burning cross can simultaneously be immune from state regulation as protected political speech and also the sole expressive target of a state criminal statute.

Justice O'Connor's route around this doctrinal gridlock is to treat the category of "intimidation" as a subset of the unprotected category of "true threats."[39] As Justice O'Connor notes, "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[40] Having found a First Amendment pigeonhole into which she could shove the speech at issue in the Virginia statute, Justice

35 *Id.* at 361–63.

36 395 U.S. at 447–49.

37 *Black*, 538 U.S. at 366 (plurality opinion) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 402 (1992) (White, J., concurring in the judgment)).

38 *Id.* at 363.

39 *Id.* at 360.

40 *Id.*

O'Connor chose not to investigate the nature of that pigeonhole or to analyze whether cross burning is analogous to other forms of speech already lodged in the "true threats" slot. She also chose not to take note of the fact that her explanation proves too much and once again is inconsistent with her ultimate decision to protect the speech of the third defendant. If, as is certainly true, "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence,"[41] then it is also true that this history is most directly applicable to the Ku Klux Klan and its members, who brought the symbol to prominence and imbued it with the ominous significance it still carries today. Yet the Court releases from custody the one defendant who was an active member of the Klan.

As noted earlier, if these puzzles merely related to a few rusty remnants of a moribund hate group, it would not be worth spending the time to parse the multiple inconsistencies of the *Black* majority opinion. But the way in which the *Black* majority opinion treats these central features of First Amendment doctrine says a lot about the current trajectory of free speech jurisprudence. Thus, it is worth dissecting each of the Court's primary doctrinal focal points: the standards governing content and viewpoint regulation, overbreadth, "true threats," and radical political advocacy. The following four Parts consider each of these areas in turn.

II. If This Is Not Content and Viewpoint Discrimination, Then What Is Left of *R.A.V. v. City of St. Paul*?

After carefully dissecting the majority opinion in *Black*, a conscientious reader will know little more than that cross burning is constitutionally protected, except when it is not. The majority opinion does not clearly demarcate the boundaries of the First Amendment protection that cross burning sometimes enjoys, and much of what the majority opinion *does* say contradicts what the Court has said recently in other cases raising similar issues. The confusion and contradictions do not end with Justice O'Connor's plurality opinion. The other four opinions in the case are equally problematic, and if anything those opinions make it even harder to understand what effect the decision has on existing First Amendment doctrine. The most glaring incongruity among the four other *Black* opinions is Justice Scalia's apparent abandonment of his previous views regarding content and viewpoint regulation of speech. He articulated these views in a controversial ma-

41 *Id.*

jority opinion in a case remarkably similar to *Black*, which was decided only a few years earlier. The *Black* majority's contrary treatment of the Court's earlier content-regulation rules, coupled with Justice Scalia's apparent indifference to this shift in attitude, may signal a sea change in one of the most basic principles of free speech jurisprudence. The fact that this change occurs with virtually no comment does nothing to diminish the importance of the matter.

A. R.A.V., *the Content Neutrality Mandate, and the Virulence Exception*

The content- and viewpoint-regulation rules at issue in *Black* are a crucial but complicated bit of First Amendment esoterica. In 1992, Justice Scalia authored the majority opinion in *R.A.V. v. City of St. Paul*.[42] *R.A.V.* involved a St. Paul, Minnesota, hate speech ordinance. The ordinance defined as disorderly conduct the act of placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[43] This action was punished as a misdemeanor. The Minnesota Supreme Court upheld the statute as a regulation of constitutionally unprotected "fighting words."[44]

The Supreme Court unanimously reversed, but split 5-4 on the rationale. Four Justices voted to strike down the statute because the Minnesota Supreme Court had not interpreted the concept of fighting words narrowly enough to satisfy the constitutional standard, thus rendering the statute unconstitutionally overbroad.[45] The five-Justice

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42 505 U.S. 377 (1992).

43 *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

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

45 *R.A.V.*, 505 U.S. at 413 (White, J., concurring in the judgment) ("The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad."). The origins of the constitutionally unprotected category of "fighting words" can be found in the Court's majority opinion in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the Court famously held that some forms of expression "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572. The Court noted that fighting words are an example of this category of socially useless speech. The Court defined the concept of fighting words as words "which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Id.* The Court has subsequently focused on the "breach of the peace" component of this definition and limited the concept to words that are essentially the first blow in a physical fight. As in the incitement area, *see infra* notes 181–89 and accompanying text, the key to the

majority did not reach the overbreadth claim, but ruled instead that the statute was an impermissible regulation of both the content and viewpoint of speech.[46] Writing on behalf of the majority, Justice Scalia assumed, for the purposes of considering the content and viewpoint regulation issue, that the statute had been limited to the narrow category of fighting words.[47] Even so, Justice Scalia concluded, the statute impermissibly regulated content because the statute singled out only those fighting words pertaining to particular subjects—i.e., race, color, creed, religion or gender.[48] "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[49] Justice Scalia went on to hold that the statute was actually a regulation of viewpoint as well as content, since in many instances only one side of a debate about bigotry would be permitted to use certain expressive symbols or displays:

> One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.[50]

Four members of the Court refused to join Justice Scalia's majority opinion on the subject of content and viewpoint regulation. The basic point of contention between the two factions was the issue of content regulation within a category of unprotected speech. The four members of the Court who did not join the majority essentially took the position that if the government regulates a category of speech that is by definition not protected by the Constitution—such as fighting words—then the government legitimately can choose to regulate any subset of that category without being constrained by the ordinary rules prohibiting the government from regulating the content or viewpoint of speech.[51] According to this approach, the government may

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Court's modern interpretation of fighting words is the emphasis on the concept of immediacy. *See* Gooding v. Wilson, 405 U.S. 518, 524 (1972) (underscoring the aspect of the *Chaplinsky* opinion limiting fighting words to those having "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"); *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (describing fighting words as a "direct personal insult or an invitation to exchange fisticuffs").

46 *R.A.V.*, 505 U.S. at 381.

47 *Id.*

48 *Id.* at 391.

49 *Id.*

50 *Id.* at 391–92.

51 *Id.* at 401 (White, J., concurring in the judgment).

regulate speech freely within a category of unprotected speech, even on the basis of ideological or other content. In other words, the authority to regulate the greater (i.e., the unprotected category of fighting words) includes the authority to regulate the lesser (i.e., unprotected fighting words that also convey racist sentiments). As Justice White sums up this position:

> It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.[52]

Although there is a surface logic in this position, it is incompatible with the Court's application of content and viewpoint regulation rules in other free speech contexts. In public forum cases, for example, the Court has long permitted governments to impose time, place, and manner restrictions on speech. The constitutionality of time, place, and manner regulations depends, however, on a judicial determination that the regulation is not based on the content of the speech being regulated.[53] Thus, in other contexts the Court has rejected the *R.A.V.* concurring Justices' theory that the greater authority (i.e., the government's general authority to regulate speech that is in the wrong place, at the wrong time, or is just too loud for the context) includes the lesser (i.e., the authority to regulate only inappropriate speech carrying a particular message).

There is something intuitively unsettling about the *R.A.V.* concurrence's approach that is highlighted by the Court's unwillingness to accept content- and viewpoint-based applications of other First Amendment rules. It is one thing for the government to regulate speech that creates unreasonable noise or traffic congestion; it is quite another for the government to regulate only noise or congestion caused by Communists or Klansmen. The underlying problem (i.e., congestion or noise) may be one that robs speech of total First

52 *Id.* at 401 (White, J., concurring in the judgment) (citations omitted).

53 According to the Court, all expression "is subject to reasonable time, place, or manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Amendment protection, but if the problem is not addressed in a general fashion (i.e., with regard to all speech creating the same problem), then there is good reason to suspect that the government's real target is neither the sound nor the traffic, but rather the obnoxious ideas. Likewise, it is one thing for the government to stop a fight that is instigated by angry words; it is quite another for the government to put only politically unpopular fighters in jail for breaching the peace.

The logical flaws and unacceptable consequences that follow from the *R.A.V.* concurrence's greater-includes-the-lesser approach can be highlighted if the focus of analysis is broadened beyond the First Amendment. The main intuition behind the concurrence's conclusion is that speakers should not be able to raise a First Amendment defense to criminal sanctions if the expressive conduct they seek to defend is in general constitutionally unprotected. But suppose the City of St. Paul enacted a statute that prohibited only African Americans or Catholics (or some other specifically identified racial, ethnic, or religious group) from engaging in constitutionally unprotected fighting words. The obvious conclusion is that such a statute would violate the Fourteenth Amendment's Equal Protection Clause. But why would such a strange statute not be susceptible to the logic of the greater-includes-the-lesser approach? The basic notion of the *R.A.V.* concurrence is that one type of constitutional protection (for example, the general First Amendment rules prohibiting content regulation of speech) does not apply to behavior that is deemed unprotected on other constitutional grounds (for example, speech that is deemed unprotected under the Court's fighting words jurisprudence). Thus, the *R.A.V.* concurrence concludes that the government may choose to regulate only one content-based subset of the unprotected conduct—i.e., the subset of unprotected fighting words defined by hateful symbols such as a burning cross.[54] But if this is true, then why does that same logic not permit the government to regulate a somewhat different subset of the same unprotected conduct—i.e., unprotected fighting words uttered by members of a statutorily targeted racial, ethnic, or religious group? The easy answer to this is that the constitutional rules that deem the entire category of speech constitutionally unprotected have little to do with the constitutional rules prohibiting the government from singling out racial, ethnic, or religious groups for unfavorable treatment. But that same answer applies to the content-regulation rules discussed in *R.A.V.*: the reason the First Amendment permits the government to regulate fighting words has little to do with the reason the First Amendment

54 *R.A.V.*, 505 U.S. at 401 (White, J., concurring in the judgment).

does not permit the government to single out speech for unfavorable treatment based on the content or viewpoint of the speech. Thus, while the government may regulate *all* unprotected fighting words, it may not regulate only those fighting words uttered by a racial, ethnic, or religious group the government does not want to hear, and it also may not regulate only those fighting words that involve ideas disfavored by the government.

Justice Scalia's majority opinion in *R.A.V.* makes a similar point in a somewhat different way by noting that the First Amendment rules prohibiting content and viewpoint discrimination apply to every step of the government's decisionmaking process in regulating expression. Thus, while the government's initial decision to regulate a particular problem (such as fights) may be content-neutral, the subsequent decision to redress only particular examples of that problem may represent an overt attempt to suppress disfavored ideas. "[A] particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government)."[55] The government may not use its generalized authority at the first level of regulation to cloak its impermissible motives with regard to the second level of regulation.

The conceptual problem with the *R.A.V.* majority's theory is that it seems to lead to an all-or-nothing approach to the regulation of unprotected expression.[56] As Justice White complained in *R.A.V.*:

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55 *Id.* at 385.

56 The conceptual problem addressed in the text has been the focal point of criticism of *R.A.V.* within the Supreme Court. Academic criticism of Justice Scalia's *R.A.V.* opinion has tended to focus on a different problem. The main thrust of the academic criticism of *R.A.V.* is that *R.A.V.* ignores the constitutional values that justify hate speech regulations and other statutes imposing sanctions on racist expression. Akhil Amar authored one prominent example of this critique. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992). Amar argues that the St. Paul ordinance struck down in *R.A.V.* could have been upheld by interpreting the First Amendment protection of free speech in light of the government's Thirteenth and Fourteenth Amendment obligation to protect against racial discrimination. *See id.* at 151–60. In short, Amar argues that the First Amendment is limited by the Reconstruction amendments:

> All nine Justices analyzed cross burning and other forms of racial hate speech by focusing almost exclusively on the First Amendment. They all seemed to have forgotten that it is a *Constitution* they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well.

Id. at 125.

The basic argument is that racial hate speech is a badge of slavery, which the Thirteenth Amendment is intended to eradicate. *Id.* at 155. Thus, a narrow version of the St. Paul hate speech ordinance could be viewed as a legitimate exercise of

government authority to limit speech in order to advance a strong countervailing constitutional value.

There are many problems with this approach, which may explain why the courts—including the *Virginia v. Black* majority—have failed to adopt (and for the most part have largely ignored) this theory. The first problem is that the racial hate speech exception to the First Amendment would be very difficult to limit. Amar argues that the theory should be used only to deny constitutional protection to hate speech that "present[s] no realistic threat to the hard core of free speech." *Id.* at 157. Thus, Amar seems to support the constitutionality of hate speech regulations directed at racially hateful fighting words, *id.* at 157, but not of "obviously overbroad" statutes (such as a literally read St. Paul ordinance) that would "criminalize the display of swastikas, burning crosses, and other emblems of white supremacy at, say, a political rally in support of David Duke's presidential campaign." *Id.* at 127. It is understandable that Amar would want to stop short of criminalizing overtly political speech by a political candidate, but it is not entirely clear why an expressive badge of slavery would be robbed of its symbolic significance in one context and not another—especially when the racially hateful message is exactly the same in both situations. It is also difficult to see how Amar could limit his theory to racial hate speech. The Fourteenth Amendment protection against discrimination now extends to characteristics such as gender and religion, and so whatever limitations the Fourteenth Amendment imposes on the First Amendment logically should extend to other groups that enjoy heightened scrutiny status as well.

Finally, and most importantly, there is no reason to limit Amar's logic to the Reconstruction amendments. The same structural logic that would require the Court to balance First Amendment rights against the Thirteenth and Fourteenth Amendments would also seem to require the Court to balance the First Amendment against the powers and rights afforded under every other constitutional provision. Nor is there any reason to limit the argument to the first provision of the Bill of Rights. If the Thirteenth Amendment limits First Amendment constitutional protection of speech, then it should also limit the Fourth Amendment's constitutional protection against unlawful searches and seizures. The government should therefore be allowed to conduct searches of the property of alleged lawbreakers who are also Klansmen under more lenient rules than searches directed against ordinary lawbreakers.

The argument that the First Amendment and its companions in the Bill of Rights should be limited by the interests represented in other constitutional provisions, including the Thirteenth and Fourteenth Amendments, would rob the Bill of Rights of any significant substance. Moreover, the Court would have to revisit its modern attitude toward the Espionage Act opinions issued after the First World War. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). The reasoning supporting those convictions "has been thoroughly discredited by later decisions." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). But under Amar's structural approach the convictions appear quite reasonable. After all, the convictions were obtained under statutes Congress had enacted by exercising its authority under Article I to initiate a military draft in order to fight a declared war. One constitutional provision (the First Amendment) should thus be limited by another (Article I). Judge Alex Kozinski and Eugene Volokh have summed up this criticism of Amar's position: "In exercising its other powers . . . the government is entirely bound by the Bill of Rights. Why should it be any less bound in exercising its Thir-

"[S]hould the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words."[57] Justice Scalia responds to this by arguing that content-neutral justifications of some regulations may be used to distinguish among different manifestations of the unprotected category of speech.[58] Justice Scalia elaborates on this argument in *R.A.V.* by creating a series of exceptions to the general rule of content neutrality, which the *Black* majority would subsequently use (with the endorsement of Justice Scalia) to undermine *R.A.V.*'s basic rule prohibiting the government from engaging in content or viewpoint discrimination.[59]

In *R.A.V.*, Justice Scalia proposed three broad exceptions to the general rule that a statute may not regulate selected examples of unprotected speech. The first exception applies when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[60] This exception justifies government action to focus its regulatory attention on the most virulent instances of unprotected speech. Justice Scalia's list of examples of this exception includes statutes regulating extreme versions of obscenity, the federal statute singling out for special punishment threats to the President, and commercial speech regulations focusing on industries in which the risk of fraud is especially high.[61]

Justice Scalia's second exception permits the government to regulate "a content-defined subclass of proscribable speech" if "that . . . subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'"[62] This convoluted description applies primarily to situations in which words are part of a proscribed action (such as the use of words to communicate state secrets in a treason case) or a particular type of speech creates nonexpressive harms that the state must address. Examples include the regulation of rock concerts to control the noise affecting surrounding neighborhoods[63] or the regulation of adult bookstores or movie theaters to control the

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teenth Amendment Enforcement Clause power?" Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1649–50 (1993).

57 *R.A.V.*, 505 U.S. at 401 (White, J., concurring in the judgment).

58 *Id.* at 387.

59 *Id.* at 388–90.

60 *Id.* at 388.

61 *Id.*

62 *Id.* at 389.

63 *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

deleterious effects on the property values and the ambiance of surrounding neighborhoods.[64]

The final exception is a catch-all category that is the vaguest of the three. The third exception applies to any government action regulating speech in which "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[65] It is difficult to imagine when such a scenario might arise, and Justice Scalia's one hypothetical example of this exception is not helpful: "We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses."[66] This unlikely illustration, coupled with the broad phrasing of the exception, is not comforting. It seems to leave open the possibility of exempting from the ordinary rules any regulation of speech justified by a sufficiently public-spirited government motive. The problem is that historically *all* of the government's efforts to censor radical political speech have been motivated by the same ostensibly content-neutral reasons. Justice Sanford's 1925 opinion upholding the New York Syndicalism Act convictions of So-

64 *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1989); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976). Both of these cases involved zoning regulations that isolated adult entertainment establishments by prohibiting any regulated establishment from being located within a certain distance from any other such establishment or a residential area. In both cases the Court recognized that the statutes identified businesses based on the content of the speech disseminated within those establishments, but the Court nevertheless characterized this as a content-neutral regulation because the city's "predominant concern" was the secondary effects surrounding the theater rather than the content of the films inside the theater. *Playtime Theaters*, 475 U.S. at 47. In both cases the cities justified their ordinances by relying on assumptions and studies of the effects of adult establishments in other cities. *Id.* at 51 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities."). More recently, however, several members of the Court have announced that cities should be forced to prove the existence of secondary effects rather than simply assume that such effects exist. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 458 (2002) (Souter, J., dissenting) (asserting that cities should be forced to provide empirical justifications for assumptions about the secondary effects of adult business ordinances); *id.* at 453 (Kennedy, J., concurring in the judgment) (noting that if a city's "assumptions [about secondary effects] can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny"). It is unclear whether a majority of the Court takes this position because although Justice Breyer (along with two other Justices) joined Justice Souter's dissent in *Alameda Books*, Justice Breyer did not join the portion of Justice Souter's opinion that imposed the empirical evidence requirement.

65 *R.A.V.*, 505 U.S. at 390.

66 *Id.*

cialist Party activists in *Gitlow v. New York*,[67] for example, was predicated on his assertion that the state was punishing "not the expression of philosophical abstraction,"[68] but rather the abuse of this expression "by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace."[69] Translating this into the language of Justice Scalia's third *R.A.V.* exception, from Justice Sanford's perspective there was no realistic possibility that official suppression of ideas was afoot, since the state was merely trying to protect public order. But if that is so, then Justice Scalia's third exception revives a decision that has long been deemed overruled in favor of the Holmes and Brandeis approach, which the Court adopted in theory in *Dennis v. United States*[70] and in practice in *Brandenburg v. Ohio*.[71] Apparently Robert Bork was right about the limited scope of the First Amendment after all.[72]

Of course, the Court has not decided to revive *Gitlow*, and Robert Bork's views on First Amendment protection of political speech are still distinctly a minority position. But the fact that the phrasing of Justice Scalia's *R.A.V.* opinion could lead to these conclusions highlights a problem with the opinion. Moreover, the fuzzy substance of Justice Scalia's third *R.A.V.* exception is simply one example of an even larger problem. Although Justice Scalia attempted to give at least two of his three *R.A.V.* exceptions content by providing multiple examples from existing First Amendment case law, all three exceptions are phrased broadly enough to provide the Court an easy route around the basic holding of *R.A.V.*—which is that government regulation of speech based on viewpoint is always unconstitutional and regulation of speech based on content is unconstitutional in all but a very narrow range of exceptional circumstances.[73]

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67 268 U.S. 652 (1925).

68 *Id.* at 665.

69 *Id.* at 667.

70 341 U.S. 494, 507 (1951) ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.").

71 395 U.S. 444, 447 (1969) (per curiam) (noting that the Court's early free speech standard has been "thoroughly discredited by later decisions" and adopting the nearly absolute protection of advocacy discussed in Part V, *infra*).

72 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) (arguing that the Holmes and Brandeis approach to free speech issues is misguided and asserting that Justice Sanford's deferential approach and his rejection of the clear and present danger test "have never been discredited, or even met").

73 R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

In *Black* the Court demonstrated how easily Justice Scalia's exceptions could be used to circumvent the basic *R.A.V.* mandate of content and viewpoint neutrality. According to Justice O'Connor's *Black* majority opinion, the Virginia cross burning statute is an example of the first *R.A.V.* exception, which permits regulation of especially virulent examples of unprotected speech.[74] Building on her assertion that "intimidation" is merely a subset of unprotected "true threats,"[75] Justice O'Connor argues that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."[76] According to Justice O'Connor, cross burning is "particularly virulent" in light of "cross burning's long and pernicious history as a signal of impending violence."[77] This long history is presumably the association of cross burning with the Klan, a history recounted in some detail at the beginning of Justice O'Connor's majority opinion.[78] But if this is what makes cross burning "particularly virulent," then the virulence is a function of the symbolic politics of the Klan, which means that the state is basing a criminal punishment on the government's response to the extremist political views of a lawbreaker, which seems to be exactly the sort of content and viewpoint discrimination prohibited by the general rule described in *R.A.V.* Justice O'Connor rejects this interpretation. She notes that two of the three defendants may not have had Klan views at all[79] and denies that the burning cross has any association with racism or a political ideology based on hatred of religious groups.

> Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.[80]

But if *this* is true, then the cross is robbed of the very historical significance—"cross burning's long and pernicious history as a signal

74 Virginia v. Black, 538 U.S. 343, 361–63 (2003).

75 *Id.* at 360. The various flaws in this assertion are explored in Part IV, *infra*. *See infra* notes 151–289 and accompanying text.

76 *Black*, 538 U.S. at 363.

77 *Id.*

78 *Id.* at 352–57.

79 *Id.* at 363.

80 *Id.* at 362 (citations omitted).

of impending violence"[81]—that Justice O'Connor cites as the reason the burning cross is a "particularly virulent" form of intimidation. So which is it? Is the cross a historical symbol of impending violence tied to the Klan's hatred of certain racial and religious groups? If so, then the symbol is a content- and viewpoint-laden symbol of targeted hatred. Or is it a symbol now divorced from its history and therefore robbed of any particularized content of the sort conjured up by visions of night riders and lynchings? If so, then the symbol has no particular significance, and is just one of many methods of communicating a threat, which should not be used as the focal point of a specialized threats statute. The Court cannot have it both ways.

Justice O'Connor's attempt to finesse the logical difficulties of reconciling Virginia's cross burning statute with the Court's content- and viewpoint-regulation rules set forth in *R.A.V.* ends up producing an opinion that is both factually disingenuous and legally incoherent. The burning cross is an especially potent symbol precisely—and exclusively—because of its political overtones. It is a symbol inextricably bound up with the extremist political views of one particular group—the Ku Klux Klan. Even when that quintessential symbol of the Klan is used by non-Klansmen, and even when it is aimed at those who are not usually the focus of the Klan's ire—i.e., individuals other than racial or religious minorities—the speech in question is used specifically because of its heavily laden overtones of xenophobic exclusivity and overt hostility to those not conforming to the Klan's political ideal. The government is singling out this speech for special criminal sanctions for the same reason—because the symbol represents the ugly ideals of the Klan. But the very fact that everyone involved in disputes over cross burning focuses on the same clear meaning of the symbol is also why the speech must be constitutionally protected. This is the central meaning of Justice Scalia's majority opinion in *R.A.V.*: the government is always authorized to regulate threats or the verbal instigation of fights, but the government cannot use its power to suppress ideas with which it vehemently disagrees.

B. Virulence as Concrete Consequences

The only way to resolve the dilemma created by the introduction of a "virulence" exception to the general prohibition of content and viewpoint regulation is to read "virulence" as a completely speech-neutral term. In other words, the concept of an especially "virulent" subset of an unprotected category of speech should be limited to

81 *Id.* at 363.

examples of unprotected speech that produce a greater magnitude of concrete consequences than the ordinary speech falling into that category. For example, obscenity that is produced using children can be regulated more vigorously (and under a more lenient constitutional standard) than ordinary obscenity because of the consequences to the children who are forced to participate in the making of the expressive material.[82] Such speech "itself is the record of sexual abuse,"[83] and may be prohibited even though "some works in this category might have significant value."[84] The key to the constitutionality of such regulation is that it targets concrete consequences that are completely unrelated to the ideas being expressed.

To cite another example from Justice Scalia's *R.A.V.* opinion, a statute singling out threats against the President for special punishment is permissible because the concrete consequences flowing from such a threat are more extensive than the concrete consequences of a threat directed at an ordinary person. Even if the threats are not carried out, threats against the President will frequently cause security personnel to alter the schedule and behavior of the Chief Executive, which will in turn produce consequences for the country's entire political apparatus. A presidential threat statute is constitutional because, although threats against the President are more likely to be political in nature than ordinary threats, the government is regulating the expression because of its concrete consequences, not its political subject matter.

The notion that exceptions to the content- and viewpoint-neutrality rule should be limited to examples of exceptionally grave concrete

82 The Supreme Court has for many years applied a more lenient constitutional standard to sexually explicit material produced using children than to similar material depicting the activity of adults. *Compare* Miller v. California, 413 U.S. 15, 24 (1973) (describing the standard for adult obscenity, which requires the government to prove that the material in question is patently offensive, prurient, and lacks serious literary, artistic, or scientific value), *with* New York v. Ferber, 458 U.S. 747, 756–64 (1982) (describing the constitutional standard for sexually explicit material employing children, to which the three *Miller* requirements do not apply). The Court has recently clarified that the concrete consequences represented by the harm of sexual abuse to the children employed in producing such material—rather than the offensive ideas expressed by the depictions—is the sole reason justifying the lowered constitutional protection of child pornography. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250–51 (2002) ("*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

83 *Free Speech Coalition*, 535 U.S. at 250.

84 *Id.* at 251.

consequences is not an iron-clad protection against government efforts to surreptitiously target the offensive content of speech. Indeed, the concurring opinions in *R.A.V.* claimed that the St. Paul ordinance itself fit within the virulence exception described by Justice Scalia. According to Justice White: "A prohibition on fighting words . . . is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, . . . a message that is at its ugliest when directed against groups that have long been the targets of discrimination."[85] The key problem with Justice White's rendition of the virulence exception is that he focuses on the "message of personal injury and imminent violence" as opposed to the nature and magnitude of the violence itself. Justice White is wrong when he claims that the St. Paul ordinance regulates an especially virulent form of constitutionally unprotected fighting words because his description of the broader category misstates the fighting words doctrine. As Justice White himself notes later in his opinion,[86] the fighting words doctrine does not strip First Amendment protection from speech that sends a generalized "message of personal injury and imminent violence"; speech falls within the constitutionally unprotected category of fighting words only if that speech "tend[s] to incite an immediate breach of the peace."[87] This has been interpreted quite literally: "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[88] Thus, contrary to Justice White's conclusion, the St. Paul ordinance did not fit within Justice Scalia's virulence exception because the ordinance focused on the "message of personal injury and imminent violence" rather than the concrete consequences—i.e., the magnitude of the violence—caused by the speech.[89]

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85 R.A.V. v. City of St. Paul, 505 U.S. 377, 408–09 (1992) (White, J., concurring in the judgment).

86 *See id.* at 411–15 (White, J., concurring in the judgment).

87 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

88 *Id.* at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1942)).

89 It is frankly difficult to envision how the regulation of any subset of fighting words could ever be justified under a proper application of the virulence exception. The proper application of the virulence exception would limit the scope of a statute regulating some subset of fighting words to speech that in every circumstance caused a more serious fight than ordinary fighting words. But since every fight is different—and every verbal instigation of a fight equally sui generis—it is impossible to predict the pugilistic consequences of any specific type of antagonistic speech without regard to context or circumstances. The regulation of fighting words is thus unlike the regulation of presidential threats, in which a threat directed against the President will always and in every instance create more serious effects than a threat made against an ordinary person.

As noted, the key to limiting the expansiveness of the virulence rationale is to require that the concrete consequences used to justify singling out a particular example of speech are not consequences stemming from the listeners' reflective response to the antagonistic ideas expressed by the speaker. The failure to limit the virulence exception in this way would in effect allow the virulence exception to swallow the content- and viewpoint-neutrality rule. If the virulence exception is defined to include the listeners' generalized reactions to the frightening ideas communicated by a speaker, then every dissenter speaking on a highly contentious issue will fall within the exception. If a listener's reflective reactions could justify fitting a particular example of speech within the virulence exception, then the Court would have upheld the statute at issue in *R.A.V.*—a statute involving hate speech of the most egregious sort, which would almost always generate a hostile response by listeners reflecting on the message of that speech.

Limiting the virulence exception to situations involving a higher magnitude of concrete consequences follows from an analysis already familiar in the Court's time, place, and manner jurisprudence. In *Boos v. Barry*, the Supreme Court struck down a District of Columbia statute that prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'"[90] The Court held that the statute was impermissibly content-based.[91] The Court's rationale in *Boos* is consistent with a "concrete consequences" interpretation of the first *R.A.V.* exception: "Regulations that focus on the direct impact of speech on its audience present a different situation [than content-neutral time, place, and manner regulations]. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in [earlier cases]."[92] The justification for the regulation, in other words, can have nothing to do with the content of the speech, but must rest entirely on the concrete consequences of the speech, such as traffic, congestion, or physical obstruction of a building. In the case of *R.A.V.*, this means that the concrete consequences justifying singling out a particular subset of unprotected speech must be the same type of concrete consequences—a fight, the magnitude of reaction to a threat, etc.—that justify the denial of constitutional protection to the broader category.

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90 485 U.S. 312, 315 (1988).

91 *Id.* at 319.

92 *Id.* at 321.

Ironically, the author of the *Boos* majority opinion was Justice O'Connor—the same Justice O'Connor who wrote the majority opinion upholding the Virginia cross burning statute as a content-neutral regulation of the unprotected category of "intimidation."[93] Unfortunately, by the time she wrote the majority opinion in *Black*, she seems to have forgotten the lessons of her earlier opinion. There is simply no way to interpret the Virginia intimidation statute singling out the burning of a cross as anything but a regulation of the content of the expressive message that the cross burning communicates. Justice O'Connor even describes that message as reflecting "cross burning's long and pernicious history as a signal of impending violence."[94]

Logical inconsistencies aside, it is not terribly surprising that Justice O'Connor did not follow what seem to be the clear implications of *R.A.V.*; she was one of the concurring Justices in the earlier case, and thus was not a proponent of that case's analysis in the first place. It is far more troubling, on the other hand, that the author of *R.A.V.* joined Justice O'Connor's analysis in *Black* and did not seem to notice that the two opinions are inconsistent. Justice Scalia's *Black* concurrence devotes exactly one sentence to the *R.A.V.* issue.[95] Justice Scalia concludes curtly that *R.A.V.* does not prevent the state of Virginia from punishing speech involving a particular perspective on a particular subject matter—i.e., the unmistakably racist message communicated by a burning cross. Justice Scalia does not explain—nor for that matter even discuss—why the state of Virginia was permitted to single out and punish the expression of a particular viewpoint but the city of St. Paul was not. This leaves open the possibility that Justice Scalia (and thus perhaps a majority of the Court) is now willing to abandon or substantially modify the very basic rule against content and viewpoint discrimination embodied in *R.A.V.*—a radical change that deserves at least some justification. It would have been nice if the author of the original doctrine would have said a few words to acknowledge its passing.

III. If This Is Not Overbreadth, Then What Is It?

Justice Scalia may not have focused on the majority's deviation from the central holding of *R.A.V.* because he was too busy fighting

93 *See* Virginia v. Black, 538 U.S. 343, 363 (2003).

94 *Id.*

95 *See id.* at 368 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part) ("I agree with the Court that, under our decision in *R.A.V. v. St. Paul*, a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate." (citations omitted)).

another battle. Justice Scalia's main focus in his *Black* concurrence was the plurality's refusal to rely on the overbreadth doctrine to justify its holding that the Virginia statute was facially unconstitutional. Justice Scalia objected to this because under a straightforward application of the overbreadth doctrine the Court could not have held the Virginia statute unconstitutional because the statute was not "substantially" overbroad.[96] Whether the plurality's treatment of the requirement that a statute be "substantially" overbroad deserves the level of invective Justice Scalia directs at it[97] is questionable, but to Justice Scalia this is just another battle in the continuing war within the Court over the use of facial challenges to unconstitutional statutes generally. Regardless of whether Justice Scalia's outrage is misplaced, many of his criticisms do highlight another layer of confusion permeating Justice O'Connor's plurality opinion. The good news may be that this portion of the *Black* decision may be the one real victory for the First Amendment—and maybe for constitutional litigants in general—in an otherwise fairly bleak result.

A. *The Fracas Over Facial Challenges*

It is a daunting prospect even to attempt to succinctly describe the dispute between the *Black* majority and Justice Scalia to those not immersed in First Amendment lore. Recall the basic components of the Virginia statute: the statute made it a crime to burn a cross "with the intent of intimidating any person or group of persons," and then made the burning of the cross "prima facie evidence of an intent to intimidate a person or group of persons."[98] In interpreting the prima

96 *Id.* at 375 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part) ("The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful.").

97 As usual in this sort of Justice Scalia opinion, he is not subtle. According to Justice Scalia, the plurality's treatment of the overbreadth doctrine is "fanciful," *id.* (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part), "alarming," *id.* at 376 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part), "shocking," *id.* at 377 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part), "unjustified," *id.* at 378 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part), "unprecedented," *id.* (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part), and "truly baffling," *id.* at 379 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part). All of which leads him to conclude (somewhat inconsistently given the preceding jeremiad): "Words cannot express my wonderment at this virtuoso performance." *Id.* (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part).

98 VA. CODE ANN. § 18.2-423 (Lexis 2004); *see supra* note 4.

facie evidence provision, the state trial judge in one of the cases before the Supreme Court in *Black* had informed the jury that "[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent."[99] The plurality in *Black* held that "because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point."[100] It was the statute's inference of an impermissible intent to intimidate—not, as discussed in the previous section, the fact that the statute singled out the burning of a cross—that rendered the statute unconstitutional under the First Amendment. The Court remanded for reconsideration by the Virginia State Supreme Court the two cases involving the burning of a cross in the yard of a neighbor on the "theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described."[101] Then, to confuse things further, the plurality affirmed outright the dismissal of charges against the third defendant who had burned the cross at a political rally, implicitly holding that no possible interpretation of the statute could justify criminal sanctions against the third defendant's expressive act.[102]

Putting aside his verbal assault on the plurality, Justice Scalia correctly notes that it is confusing for the *Black* plurality to not rely explicitly on the overbreadth doctrine to strike down the Virginia statute in light of the fact that the situation was tailor-made for the application of that common First Amendment claim.[103] Without an overbreadth claim, it is difficult to see what doctrine justifies the plurality in holding that the statute is "facially invalid."[104] One reason the *Black* plurality may have been reluctant to rely on an overbreadth claim is because it may have been difficult to satisfy the "substantial-overbreadth" limitation on overbreadth claims, which forces litigants raising such claims to muster far more evidence of unconstitutional applications than (under the plurality's analysis described in Part II *supra*) would have been possible in this case.[105]

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99 *Black*, 538 U.S. at 364 (plurality opinion).

100 *Id.* at 367 (plurality opinion).

101 *Id.* (plurality opinion).

102 *Id.* at 367–68 (plurality opinion).

103 *See id.* at 373–76 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part).

104 *See id.* at 367 (plurality opinion).

105 *See id.* at 373–79 (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part).

By finding the Virginia statute "facially unconstitutional" without relying on the overbreadth doctrine, the *Black* opinion may have opened up an entire new avenue for litigants raising facial First Amendment challenges against statutes restricting free speech. This prospect is what exercised Justice Scalia. Justice Scalia's fears (and First Amendment advocates' hopes) may be justified. This new avenue may render the classic overbreadth challenge redundant in a large number of First Amendment free speech cases. To illustrate why this is so important, it is necessary to take a brief detour into the morass of First Amendment overbreadth doctrine.

The overbreadth doctrine "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[106] The Court's conventional explanation of the overbreadth doctrine has been to treat it as a kind of specialized third-party standing rule that was created to guard against the chilling effect of overly broad statutes regulating expression. "Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[107] In more recent years, however, the standing rules applicable to an overbreadth challenge have become complicated in a way that limits the effectiveness of an overbreadth claim and therefore undermines somewhat the original justification for the overbreadth doctrine. According to the Court's current overbreadth standing rules, a plaintiff engaged in speech protected by the First Amendment may raise only an as-applied challenge to an overbroad statute.[108] The successful litigation of an as-applied overbreadth claim will result in a narrow ruling carving out that plaintiff's expression from the reach of the statute, but leaving the statute as a whole intact.[109] A plaintiff engaged in speech that is not constitutionally protected, on the other hand, may raise a facial challenge to the

106 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002).

107 Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). For the most famous critique of this explanation, see Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282–86 (1984) [hereinafter Monaghan, *Third Party Standing*]. Monaghan argues that overbreadth can easily fit within the standard first-party standing framework, and that the overbreadth doctrine is simply a reflection of the "special status of first amendment claims[, which] reflects the high degree of means-ends congruence required under substantive first amendment law, and not any distinctive standing concept." Monaghan, *Third Party Standing*, *supra*, at 283.

108 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

109 *Id.*

statute, which if successful will result in the entire statute being struck down.[110] The counterintuitive aspect of these standing rules is that the individual engaged in constitutional behavior is granted a narrower challenge to an unconstitutional statute than an individual who is engaged in behavior that is unprotected by the constitution. By prohibiting speakers engaged in constitutionally protected speech from raising facial overbreadth claims, the rules effectively limit the range of plaintiffs who can successfully stand in for others not before the court whose speech is chilled by the existence of the statute, thereby undercutting what the Court itself has identified as the original point of the overbreadth doctrine.

Limiting the availability of the overbreadth doctrine in this and other ways[111] has become a recurrent theme in the Court's recent First Amendment jurisprudence. In this respect, the overbreadth doctrine has become caught up in a broader debate over the general use of facial challenges to unconstitutional statutes. The overbreadth doctrine is a First Amendment-specific exception to the general rule that a litigant challenging the constitutionality of a statute is limited to the claim that the statute is unconstitutional as applied to the litigant's own actions unless the litigant can demonstrate that the statute is unconstitutional in all circumstances, in which case the litigant can challenge the statute on its face. This broader principle—a.k.a. the *Salerno* rule—is the subject of an ongoing dispute between Justice Scalia and others on the Court. This dispute centers around the continuing validity of the following language from *United States v. Salerno*:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.[112]

Justice Scalia is a strong supporter of this standard for facial challenges to unconstitutional statutes, and cites it in his *Black* opinion to support his argument against the plurality's action in striking down the Virginia statute on its face.[113] Justice Scalia considers judicial rec-

110 *Id.* at 503–04.

111 *See infra* notes 125–27 and accompanying text.

112 481 U.S. 739, 745 (1987).

113 Virginia v. Black, 538 U.S. 343, 373 n.2, 375 n.4 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, dissenting in part).

ognition of facial challenges fundamentally incompatible with necessary limits on the Court's authority to exercise its power of judicial review.[114] Under this view, adherence to *Salerno* is necessary if the courts are to avoid issuing unconstitutional advisory opinions.

Justice Scalia's perspective has not been adopted by a majority of the Court, and various academic critiques have challenged the accuracy of Justice Scalia's basic contention that the as-applied challenge has been the norm in constitutional adjudication and the facial challenge has typically been permitted only in very rare circumstances. At least four current Justices have explicitly rejected the Scalia position. Justice Stevens—who is by far the most vociferous critic of the Scalia position—has called the *Salerno* rule "draconian" and argued that "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context."[115] Justices Ginsburg and Souter joined a plurality opinion written by Justice Stevens in which Justice Stevens rejected the application of *Salerno* to a facial challenge based on due process vagueness claims and concluded that "the *Salerno* formulation has never been the decisive factor in any decision of this Court, including *Salerno* itself."[116] Justice O'Connor (joined by Justice Souter) has disagreed with the application of *Salerno* in the abortion context.[117]

The weight of academic opinion also seems to be on the side of Justice Stevens and others who reject the Scalia position. Among others, Matthew Adler, Michael Dorf, and Marc Isserles have challenged Justice Scalia's assertions about the Court's hesitancy to consider facial challenges to unconstitutional statutes, and have also disagreed with Justice Scalia about the theory behind *Salerno*.[118] They

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114 *See* City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting).

> It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion—which a federal court should never issue at all, . . . and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non*advisory opinions. . . .

Id. (citations omitted).

115 Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., opinion respecting the denial of petition for writ of certiorari).

116 *Morales*, 527 U.S. at 55 n.22 (plurality opinion).

117 Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring).

118 *See, e.g.*, Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Michael C. Dorf, *Facial Challenges to State*

have argued that the Court's willingness to consider facial challenges to statutes is more a function of the nature of particular substantive constitutional limits on statutes rather than a procedural limit on the manner in which those statutes may be challenged. Professor Dorf argues further that all constitutional challenges to substantive regulations are in part facial challenges.[119] Professor Adler goes the next step and argues that "*[t]here is no such thing as a true as-applied constitutional challenge*" since "every constitutional challenge involves the facial scrutiny of rules" and "the court's task is to assess the predicate and history of the underlying rule against one or more rule-validity schema."[120]

Unfortunately, although Justice Scalia seems to be losing both the intellectual battle over the logic of *Salerno* and the judicial battle over the formal adoption of *Salerno*, his expressed desire to limit the courts' ability to order the facial invalidation of statutes already permeates even the First Amendment overbreadth doctrine, which is supposed to be the one universally accepted exception to the *Salerno* rule. Similar concerns about facial challenges to statutes have for many years motivated the Court to impose limits on the application of the overbreadth doctrine. Although everyone—apparently including Justice Scalia—continues to recognize that the overbreadth doctrine is an exception to whatever general rule exists disfavoring facial challenges to unconstitutional statutes, the Court emphasized recently that an overbreadth challenge to a statute unconstitutionally restricting speech "[r]arely, if ever, will . . . succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[121] Thus, in *Virginia v. Hicks* the Court rejected an overbreadth

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and Federal Statutes, 46 STAN. L. REV. 235 (1994); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998).

119 *See* Dorf, *supra* note 118, at 294 ("Every challenge to a statute is also facial in that it attacks the statute that authorized the contested government action.").

120 Adler, *supra* note 118, at 157.

121 Virginia v. Hicks, 539 U.S. 113, 124 (2003). Efforts to limit facial challenges to a narrow range of particular constitutional subjects got another boost in the Court's recent opinion in *Sabri v. United States*, 541 U.S. 600 (2004). In *Sabri*, a defendant was charged with violating a federal statute prohibiting bribery of state, local, or tribal officials of entities that receive at least $10,000 of federal funds. *See* 18 U.S.C. § 666(a)(2) (2000). The defendant argued that the statute was facially unconstitutional because it did not require prosecutors to prove a direct link between the federal funds and the bribery, thus rendering the statute an unconstitutional exercise of Congress's authority under the Spending Clause. *See Sabri*, 541 U.S. at 1945. Justice Souter's majority opinion rejected the defendant's attempt to raise a facial challenge to the statute. Justice Souter characterized the claim as an overbreadth claim and

claim against a public housing trespassing statute.[122] The statute limited First Amendment activities such as leafletting in the public areas of public housing project buildings.[123] The Court rejected the overbreadth challenge on the ground that the statute regulated a great deal of activity not involving speech or expression.[124] Similar limits on the use of the overbreadth doctrine would presumably apply to foreclose overbreadth claims in cases challenging, for example, the use of public park regulations to limit speech in a quintessential public forum[125] or the enforcement of public indecency statutes to restrict expressive activity such as nude dancing.[126]

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concluded that "[f]acial challenges of this sort are especially to be discouraged." *Id.* at 1948. Justice Souter went on to note that "we have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Id.* As examples of cases providing "weighty enough" reasons, Justice Souter noted cases involving free speech, the right to travel, abortion, and cases involving Congress's authority under Section 5 of the Fourteenth Amendment. *Id.*

One of the strange things about the Court's decision in *Sabri* is that Justice Scalia—who authored the language discouraging overbreadth challenges in the quotation accompanying this footnote—refused to join the portion of Justice Souter's *Sabri* opinion that discouraged overbreadth challenges. Instead, Justice Scalia joined Justice Kennedy's cryptic one-paragraph concurring opinion. Justice Kennedy rejected Justice Souter's discussion of overbreadth, and linked this rejection to other cases in which the Court struck down federal statutes under the Commerce Clause. *Sabri*, 124 S.Ct. at 1949 (Kennedy, J., concurring in part). There is a certain irony in Justice Scalia implicitly endorsing facial overbreadth challenges in Commerce Clause cases less than a year after his *Hicks* opinion limited the scope of the overbreadth doctrine in the constitutional area that gave birth to the overbreadth doctrine. In any event, the inconsistencies embedded in this dispute within the Court over the use of the overbreadth doctrine lends support to Professor Richard Fallon's argument that the availability of the doctrine has more to do with the substantive issues involved in a case than with context-neutral litigation rules. *See infra* note 145 and accompanying text.

122 *Hicks*, 539 U.S. at 124.

123 *Id.* at 121.

124 *Id.* at 123–24.

125 For an example of this logic, see *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (holding that the First Amendment procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965), cannot be the basis for a challenge to a city ordinance regulating activity (including expression) in a public park because the ordinance "is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park").

126 Although the Court has held that nude dancing is protected expression under the First Amendment, *see Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981), it has on two separate occasions also upheld the use of general public indecency statutes to regulate dancers at adult entertainment establishments. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 302 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501

More importantly, for several decades the Court has limited the overbreadth doctrine by requiring plaintiffs to prove that a law impermissibly regulating protected speech is "substantially overbroad." In the Court's phrasing of this limitation, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[127] Thus, the Court clearly intends the "substantial" overbreadth analysis to be comparative in nature, but the comparison is abstract, hypothetical, and largely governed by the creativity of the lawyers in creating possible scenarios (involving both protected and unprotected speech) that might be governed by the statute. This is necessarily so because the entire point of an overbreadth challenge is to permit one plaintiff to raise a statute's potential constitutional problems with regard to the expression of other speakers not before the court.

Thus, a judge faced with a substantial overbreadth challenge is supposed to compare the plaintiff's examples of the statute's hypothetical applications to protected speech with the government's examples of the statute's hypothetical applications to unprotected speech and reach some defensible conclusion about whether the statute's prohibition of protected speech is "substantial . . . judged in relation to the statute's plainly legitimate sweep."[128] Even if the lawyers in an overbreadth case could present anything approaching a representative sample of all the protected and unprotected expression governed by the statute, the judge is still left with little guidance about the legitimate proportional coverage permitted by the First Amendment. Is a statute constitutional if fifty percent of the speech prohibited by the statute is constitutionally protected? Thirty percent? Ten percent? Lower court judges are more or less on their own in this assessment since the Supreme Court has never even attempted to articulate clear rules about exactly how much of an unconstitutional effect is enough to render a statute "substantially" overbroad "in relation to the statute's plainly legitimate sweep."[129] It is little wonder that critics such as Richard Fallon have characterized the empirical demands of the substantial overbreadth analysis as calling for "uncabined judicial speculation in areas that are, at best, on the outer fringes of the courts'

U.S. 560, 572 (1991). Neither of these cases produced a majority opinion or a clear-cut holding. The basic message of both cases, however, is that a statutory mandate that dancers wear, in the Court's technical terminology, "pasties and a g-string," does not diminish the erotic message of the dancer's expression sufficiently to implicate the First Amendment. *See Pap's A.M.*, 529 U.S. at 284.

127 Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

128 *Id.*

129 *Id.*

practical competence."[130] Noting the contrary conclusions reached by Justices Brennan and Scalia regarding the substantial overbreadth of a child pornography statute, Fallon argues that neither Justice could produce a sensible conclusion since "neither [Justice], understandably, was able to furnish anything approaching a numerical estimate—much less a reliable numerical estimate—of how many acts by how many people, in any particular year, the statute might permissibly and impermissibly reach."[131]

Fallon argues that the proportionality analysis built into the modern overbreadth doctrine leads the courts to diminish the magnitude of the state's interests in regulating some speech.[132] But this criticism actually treats the substantial overbreadth doctrine as a liberalization of First Amendment free speech protection. In fact, the clear thrust of the requirement of "substantial" overbreadth is to *limit* overbreadth claims, not make them easier to win.

One of the main practical problems with the substantial overbreadth requirement is that it is subject to easy manipulation. The phrasing of the standard provides courts a simple mechanism to manipulate the analysis of a challenged law to undermine a substantial overbreadth claim. An overbreadth claim can be undermined by simply broadening the scope of what "law" is being challenged. If a narrow construction of a challenged law leads to the conclusion that the law regulates a substantial amount of protected speech, then courts seeking to deny the First Amendment claim can easily reduce the percentage of protected speech covered by the law by simply interpreting

130 Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991).

131 *Id.*

132 Fallon thus argues for a more direct balancing of interests in assessing the overbreadth of a statute. That is, the courts should seek to assess "whether the state's interest is truly compelling, and, if so, whether that interest justifies as much infringement on, and chilling of, protected speech as the statute effects." *Id.* at 895. While this may be a more forthright approach to the problem of overbreadth, it does not cure the indeterminacy problem Fallon notes in the proportionality analysis, and, if anything, the Fallon approach may make that problem worse. Although the state clearly has a compelling interest in applying criminal sanctions to the production of child pornography, what does that strong interest tell us about the legitimacy of a statute that is phrased broadly enough to criminalize the actions of a parent taking innocent pictures of a child on a bearskin rug? *See* Osborne v. Ohio, 495 U.S. 103, 131 (1990) (Brennan, J., dissenting) (noting that an Ohio statute would make it a criminal offense to possess "[p]ictures of topless bathers at a Mediterranean beach, of teenagers in revealing dresses, and even of toddlers romping unclothed"). The quantitative factors measured in a proportionality analysis may be imprecise, but the qualitative factors involved in the Fallon comparative interest analysis cannot be measured at all.

the particular legal provision being challenged as part of a more comprehensive statutory scheme, the bulk of which does not prohibit constitutionally protected speech.

Within the last year, the Supreme Court provided an example of how courts can deny a substantial overbreadth claim simply by broadening their focus of what law is being challenged. In *Virginia v. Hicks*,[133] the Court rejected an overbreadth challenge to a Richmond, Virginia, public housing policy authorizing the police to serve notice on any person lacking "a legitimate business or social purpose" for being on the public housing project premises.[134] Persons violating this notice were subject to arrest for trespassing. The state courts had found that the manager charged with carrying out this policy had imposed an unwritten rule "that demonstrators and leafleters obtain advance permission" before engaging in expressive activity on public housing property.[135] Based on this finding, the lower courts had held the entire public housing statute unconstitutionally overbroad because the law had given the public housing manager too much discretion to grant or deny access.[136] The Supreme Court disagreed, holding that the Virginia court had focused too narrowly on the unwritten rule employed by the manager rather than the overall policy prohibiting trespassing on public housing property.[137] The plaintiff's overbreadth challenge could not succeed, the Court ruled, "unless the trespass policy, *taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep."[138] The problem with this approach is that an overbreadth challenge is unlikely ever to succeed against an explicitly speech-specific portion of a statute if the courts routinely take into account the constitutional applications of the other parts of the statute that are not concerned with expressive activity. If "substantial" overbreadth means demonstrating that a large fraction of a law's applications are unconstitutional, then broadening the definition of the "law" and therefore significantly increasing the size of the denominator will by definition reduce the percentage of unconstitutional applications and therefore thwart many substantial overbreadth claims.[139]

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133 539 U.S. 113 (2003).

134 *Id.* at 116.

135 *Id.* at 121.

136 *Id.* (citing Commonwealth v. Hicks, 563 S.E.2d 674, 680 (Va. 2002)).

137 *Id.* at 123–24.

138 *Id.* at 122.

139 Justices Souter and Breyer filed a brief concurrence in *Hicks* to note that the Court did not decide "how to go about identifying the scope of the relevant law for overbreadth analysis." *Id.* at 125 (Souter, J., concurring). In *Hicks*, Justice Souter

The precise details of the various limitations recently imposed on the overbreadth analysis are less important than the larger theme, which is that the Court has significantly limited the overbreadth doctrine in recent decades and thereby made it significantly harder for First Amendment plaintiffs to successfully litigate overbreadth claims. This is why it is significant that Justice O'Connor failed to employ the overbreadth doctrine to strike down Virginia's cross burning statute. *Black* may offer plaintiffs the prospect of facial First Amendment challenges to statutes in situations in which the plaintiffs cannot satisfy the severe limitations of the substantial overbreadth doctrine. Unfortunately, it is unclear exactly what factors led the Court to grant the facial challenge in *Black*, and more importantly, it is unclear what limitations the Court intends to impose on similar claims in the future.

From all appearances, the *Black* plurality intended to place no limitations on facial challenges to statutes allegedly violating the First Amendment. The particular problem identified by the plurality—that juries could punish constitutionally protected instances of burning a cross without the intent to intimidate—was not something that would predictably occur in a significant number of cases. Thus, the unconstitutional element was not demonstrably "substantial" in the way that the Court requires in a successful overbreadth challenge. Nor was the type of constitutional violation in this case atypical, exceptionally severe, or especially onerous. The violation was a fairly typical example of sloppy legislative drafting, which broadened the scope of the statute just a few steps beyond what was permissible under the First Amendment. The statute simply provided insufficient guidelines to prevent factfinders from punishing speakers whose expression was unpopular but constitutionally protected, and also gave little guidance to speakers trying to figure out when they could use the burning cross as a political statement and when they could not. In this way, *Black* was analogous to a due process vagueness challenge, in which the Court routinely permits facial challenges to prevent these sorts of problems.[140] The point is that this was a fairly typical First Amend-

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argued the plaintiff had not demonstrated substantial overbreadth even under a narrow definition of the relevant law. *Id.* (Souter, J., concurring).

140 *See* City of Chicago v. Morales, 527 U.S. 41, 60–64 (1999) (plurality opinion) (holding unconstitutionally vague on its face a Chicago city ordinance prohibiting "criminal street gang members" from loitering in public places); Kolender v. Lawson, 461 U.S. 352, 361–62 (1983) (holding unconstitutionally vague on its face a California statute requiring persons loitering on streets to carry "credible and reliable" identification). In *Morales*, the plurality noted that "[w]hen vagueness permeates the text of such a law, it is subject to facial attack" even if the challenge would not have met the standards of the overbreadth doctrine. *Morales*, 527 U.S. at 55 (plurality opinion).

ment challenge to a fairly typical regulation of speech. If a facial challenge can be used in this case, the argument goes, then it can be used in virtually any First Amendment case.

The question remains: if this type of statute can be challenged without complying with the substantive and procedural rules attending an overbreadth challenge, why would any plaintiff ever rely on the overbreadth doctrine? Another question also comes to mind: if the facial challenge here was permitted in the context of a fairly ordinary case involving a statute that went just a bit too far into the realm of constitutionally protected personal liberties, then why should the implicit permission to bring facial constitutional challenges granted by *Black* be limited to First Amendment cases? Other than First Amendment cases, the Court has routinely permitted similar facial challenges in only two other areas: due process vagueness cases[141] and abortion cases.[142] Indeed, one of the main debates between Justice Scalia and Justice Stevens over the meaning and applicability of the *Salerno* rule arose in the context of a lower court's recognition that the Supreme Court has permitted facial challenges to abortion regulations that violate the implicit constitutional right of privacy even in the absence of a finding that the challenged statute is constitutional in "no set of circumstances."[143] *Black* may signal that the Court intends to broaden the range of permissible constitutional bases for facial challenges to statutes.

What the plurality does not say in *Black* may be as important as what it does say. It is notable that the *Black* plurality does not respond to Justice Scalia's *Salerno* salvos, and indeed does not even acknowledge that its facial unconstitutionality ruling is in any way extraordinary. The true significance of the facial unconstitutionality ruling in *Black* may lie in its mundanity. *Black* may signal the Court's movement away from the artificial limits imposed on the overbreadth doc-

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The plurality also described the two problematic characteristics of an unconstitutionally vague statute in a way that would apply to the statute in *Black*: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56 (plurality opinion).

141 *See supra* note 140.

142 *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992) (holding a husband notification provision of the Pennsylvania abortion regulation unconstitutional on its face as a substantial obstacle to a woman's right to abortion "in a large fraction of . . . cases").

143 *See* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., opinion respecting the denial of petition for writ of certiorari); *id.* at 1176–81 (Scalia, J., dissenting from the denial of certiorari).

trine and toward a regime of constitutional litigation such as the one described by Michael Dorf in which facial challenges are treated as routine and are extended to all "nonlitigation fundamental rights" (the bulk of which will involve the First Amendment or some aspect of the unenumerated constitutional privacy right).[144] Or at least it may move the Court toward embracing a constitutional litigation regime in which (as Richard Fallon has suggested) the Court permits facial challenges based on a more substantive analysis of whether other constitutional doctrines may be just as important (and therefore just as worthy of the strong medicine of facial invalidation) as the First Amendment claims that produced the overbreadth exception to the *Salerno* rule.[145]

B. *The Good News: Facial Relief Was Granted; The Bad News: The Wrong Facial Relief Was Granted*

If the conclusions in the immediately preceding section accurately reflect the implications of *Black*, then facial challenges to unconstitutional statutes may have just become easier to bring and win. This is good news to constitutional litigants in general and First Amendment litigants in particular. But First Amendment litigants received bad news along with the good. The bad news is that the Court granted facial relief in *Black* on the wrong grounds, or at least on a rationale that had an implicit premise that may do great harm in future First Amendment cases.

The *Black* plurality held the Virginia statute unconstitutional on the ground that the prima facie evidence provision of the statute unconstitutionally invited juries to infer the intent to intimidate from the mere fact that a defendant burned a cross.[146] According to the plurality this was unconstitutional because the statute as written "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim."[147] What initially sounds like a strong statement favoring First Amendment protection of unpopular speech in fact rests on an implicit premise that may undermine many of the protections the Court has previously afforded to radical politi-

144 Dorf, *supra* note 118, at 269.

145 Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1369 (2000) ("[T]he much controverted question whether 'overbreadth' doctrine should extend beyond the First Amendment is not a single question, but a series of questions about which other constitutional values, if any, should be afforded the type of protection that overbreadth doctrine currently provides to First Amendment values.").

146 Virginia v. Black, 538 U.S. 343, 347–48 (2003) (plurality opinion).

147 *Id.* at 366 (plurality opinion).

cal advocacy. This implicit premise is that with a properly drafted statute requiring proof of the relevant intent, the government is permitted to single out and apply criminal sanctions to particular examples of "intimidating" verbal or symbolic speech—today burning crosses, tomorrow swastikas, the next day some other symbol of some other radical political group that uses symbolic expression to put fear into the hearts of its mainstream opponents.

The core of the Court's disturbing concession that governments may mete out overtly content-based sanctions on speech is the Court's reference to the unprotected category of "true threats."[148] This reference is not that helpful, however, because the Court has never described in detail what speech falls into the category of "true threats." The lower courts are very much of different minds on this matter, and the Court passed up an opportunity to clarify the confusion less than three months after it issued its opinion in *Black* when it refused to review the Ninth Circuit Court of Appeals's opinion upholding a multi-million dollar judgment against anti-abortion activists who provided information to the operators of the Nuremberg Files website.[149] The Court's failure to clarify the category of "true threats" should give speakers little solace about the parameters of the new subcategory of "intimidating" speech. The Court's actions also should cause concern about the future prospects of the traditional protection of political dissent defined by *Brandenburg v. Ohio*.[150] *Black* is another in a growing list of cases in which the courts have channeled political dissent cases away from traditional free speech doctrine governing political advocacy and into various netherworlds of alternative expressive constructs that provide little First Amendment protection or are deemed to be outside the range of First Amendment protection altogether. This trend suggests the possibility that the traditional category of political advocacy will increasingly become a constitutional artifact that will ensnare only prosecutors and civil litigants who are too unsophisticated to recast their claims against speakers into one of the new alternative paradigms of speech regulation.

The next two Parts discuss this trend. Part IV addresses the many problems attending the category of "true threats" and its new subset "intimidation," and Part V addresses the larger problem presented by the proliferation of constitutional pigeonholes for unprotected speech.

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148 *See id.* at 359–60.

149 *See* Planned Parenthood v. Am. Coalition of Life Activists, Inc., 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003).

150 395 U.S. 444 (1969) (per curiam).

IV. If Intimidation Is a Threat, Then What Is a Threat?

The category of threats (or, as the Supreme Court likes to describe the relevant content, "true threats") is one of several categories of speech (others include obscenity, libel, and fighting words) that the Supreme Court has placed outside the protective boundaries of the First Amendment. The specific reasoning behind the exclusion of "true threats" from the First Amendment will be explored in this Part and the next, but the Court's classic explanation for the exclusion of threats and the other types of no-value speech is that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[151]

I have detailed elsewhere the many problems with the Court's current "true threats" jurisprudence,[152] and I will not repeat that detailed critique here. I am concerned here with the additional problems *Black* adds to the already unsatisfactory state of the Court's "true threats" jurisprudence. In particular, I am concerned here with the details of the new category (or in Justice O'Connor's conception, subcategory) of constitutionally unprotected "intimidating" speech, and specifically how that the Court's amended "true threats"/intimidation jurisprudence affects the Court's political advocacy jurisprudence. The definitional dilemma is crucial to this analysis: if a particular instance of speech is defined and categorized as intimidation or a "true threat," then that speech is wholly outside the First Amendment and under the holding of *Black* may therefore be targeted specifically by a criminal statute. If the same speech is defined and categorized as political advocacy, on the other hand, the speech receives what for all practical purposes amounts to absolute First Amendment protection under *Brandenburg* and its progeny. The line between absolute constitutional protection and none at all is very hazy. The deep ambiguity in the Court's sketchy efforts to demarcate the various categories greatly increases the danger of ideologically motivated punishment of political dissenters—a prospect that supposedly had been rendered difficult by the Court's renunciation of McCarthy-

151 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

152 *See* Steven G. Gey, *The* Nuremberg Files *and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541 (2000).

ite censorship in the 1950s[153] and virtually impossible by several important political speech decisions in the late 1960s.[154]

A. *The Supreme Court and the Mysterious "True Threat"*

As noted at the end of the last Part, the central problem with the Supreme Court's renunciation of constitutional protection for threatening speech is that the Court has never defined an unprotected "true threat." This oversight is magnified by the Court's new decision in *Black*, which purports to subsume another undefined category of unprotected speech—intimidation—into the already mysterious larger category. The situation is complicated further by the vast differences in how lower courts treat "true threats." Some lower courts apply a standard that is in some respects almost as rigorous as the Supreme Court's political advocacy test, while other courts apply a standard that affords expansive deference to a jury's virtually unguided determination of whether speech is sufficiently threatening to fall outside the range of First Amendment protection.[155] Before turning to the new twist provided by the concept of intimidation, a brief review of the Court's "true threats" jurisprudence is necessary.

The Supreme Court has addressed the category of "true threats" only long enough to identify a few examples of speech that the category does not contain. In its 1969 decision *Watts v. United States*, the Court considered an appeal from a man convicted of violating the federal statute prohibiting threats against the President.[156] The basis of this conviction was a statement the defendant made to a small group of people attending an anti-Vietnam War rally in Washington, D.C. This is the precise statement for which Watts was prosecuted: "[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."[157] The Supreme Court overturned the conviction on First

153 *See* Yates v. United States, 354 U.S. 298 (1957) (reversing Smith Act convictions of California Communist Party officials and significantly strengthening the lenient First Amendment standard it had announced in its previous Smith Act decision, *Dennis v. United States*, 341 U.S. 494 (1951)).

154 *See Brandenburg*, 395 U.S. 444; Watts v. United States, 394 U.S. 705 (1969) (per curiam); Bond v. Floyd, 385 U.S. 116 (1966).

155 See *infra* Part IV.B for a detailed description of the differing lower court standards.

156 *See* 18 U.S.C. § 871(a) (2000) (making it a criminal offense to "knowingly and willfully" threaten "to take the life of . . . or to inflict bodily harm upon the President of the United States").

157 *Watts*, 394 U.S. at 706.

Amendment grounds, holding that although the presidential threat statute was constitutional on its face, the statute's reach was limited by First Amendment considerations.[158] Thus, "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[159] The Court concluded that the constitutionally unprotected category of "true threats" did not include "the kind of political hyperbole indulged in by petitioner."[160] The Court went on to insist that the category of "true threats" must be limited by the recognition that political speech often would "include vehement, caustic, and sometimes unpleasantly sharp attacks" and frequently would be "vituperative, abusive, and inexact."[161] These limitations on the category of "true threats" are somewhat helpful, but although these descriptive terms give some indication of what a "true threat" is *not*, they do little to tell us what a "true threat" *is*. All we know from *Watts* is that nasty, abusive, and vehement political hyperbole is not the stuff of a "true threat."

The Court's only other opportunity to assess the constitutional parameters of the "true threat" is instructive because the Court considered language that to any layperson would constitute clear-cut threats. The Court, however, treated this language as pure political speech deserving the highest protection offered by the Constitution. In *NAACP v. Claiborne Hardware Co.*,[162] the Supreme Court confronted threatening speech uttered in the context of a heated, multi-year economic battle between white businesses and African American residents of a small Mississippi town.[163] The battle began over demands by the local black community to end racial segregation in the local public schools, the local police force, and the allocation of community services.[164] After the local white community resisted these demands, the NAACP led an economic boycott of white-owned businesses.[165] Three years after the boycott began, seventeen white businesses sued the NAACP and several individual leaders of the boycott.[166] The white businesses brought their suit in state court under a common law tort theory of malicious interference with business and sought to recover the reve-

158 *Id.* at 707–08.

159 *Id.* at 707.

160 *Id.* at 708.

161 *Id.* (quoting N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

162 458 U.S. 886 (1982).

163 *Id.* at 889.

164 *Id.* at 889–90.

165 *Id.* at 900.

166 *Id.* at 890.

nue lost because of the boycott.[167] The suit was tried by a chancellor in equity, who awarded the plaintiffs over one million dollars in lost business earnings and goodwill, interest, and attorney's fees.[168] The Mississippi Supreme Court upheld the judgment and rejected the defendants' First Amendment claims by referring to the threats doctrine:

> The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime.[169]

There was substantial evidence to justify the Mississippi court's conclusion. The boycott started in the mid-1960s. During the period after Martin Luther King, Jr., was assassinated in April 1968, the boycott was tightened and took a violent turn.[170] After a young black man was shot by a local policeman, Charles Evers—the Field Secretary of the NAACP and a leader of the boycott[171]—gave a speech in which he "stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night."[172] At another rally two days later, Evers stated: "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'"[173] To the several hundred members of the audience, this was not an empty promise. The boycott organizers organized "store watchers" to identify individuals breaking the boycott, and the names of those breaking the boycott were read at meetings and published in a boycott newsletter.[174] Acts of violence were directed against some individuals breaking the boycott. These acts included shots fired into houses, vandalism against property, fights, and other nonlethal physical violence.[175] Since Evers's speech plausibly could be interpreted to invite such action, the Mississippi Supreme Court understandably gave short shrift to his First Amendment defense.[176]

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167 *Id.* at 891–92.

168 *Id.* at 893.

169 NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd*, 458 U.S. 886 (1982).

170 *Claiborne Hardware Co.*, 458 U.S. at 901.

171 *Id.* at 898.

172 *Id.* at 902.

173 *Id.*

174 *Id.* at 903–04.

175 *Id.* at 904–06.

176 *See supra* note 169 and accompanying text.

The United States Supreme Court gave Evers's First Amendment claim a very different reception than it had received in the Mississippi courts. A unanimous United States Supreme Court ruled that Evers's speech was legitimate political advocacy protected in full by the First Amendment.[177] The Court acknowledged that "there is no question that acts of violence occurred," and also noted the obvious point that the First Amendment does not protect acts of violence or threats of immediate violence.[178] But in this case, the Court concluded, the speech in question fell within the range of constitutionally protected political advocacy. The Court gently acknowledged that Evers's statements about the possibility that his opponents' necks would be broken "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence,"[179] but rejected the Mississippi court's conclusion that these comments could be the basis for tort liability. In a now-famous section of *Claiborne*, the Court incorporated the facially threatening speech into the *Brandenburg* political speech framework and converted the case into one in which the entire result turned on the lack of an immediate violent reaction to Evers's speech.[180]

The *Brandenburg* analysis for political speech has three elements. Under *Brandenburg*, political advocacy loses its First Amendment protection only if the government can prove that the speaker (1) used explicitly inciteful words; (2) spoke those words in a situation in which violent or illegal action would immediately ensue in response to the speaker's incitement (the clear and present danger element), and (3) the speaker had the specific intent to instigate the illegal or violent reaction.[181] The focus on immediacy is the legacy of the famous Holmes and Brandeis dissenting and concurring opinions from

177 *Claiborne Hardware*, 458 U.S. at 916.

178 *Id.*

179 *Id.* at 927.

180 *Id.* at 928 ("The emotionally charged rhetoric of Charles Evers's speech did not transcend the bounds of protected speech set forth in *Brandenburg*.").

181 The *Brandenburg* Court's phrasing of these three elements is rather opaque. According to the Court, decisions leading up to *Brandenburg*

> have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). The description in the text is what this elusive language is generally construed to mean. *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 763 (1975) ("*Brandenburg* combines the most

Abrams v. United States,[182] *Gitlow v. New York*,[183] and *Whitney v. California*,[184] and incorporates into modern law the central theme of those opinions that, as Justice Holmes phrased the point, "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"[185] In *Claiborne Hardware*, no emergency existed because the beatings did not immediately follow from Evers's speech. The fact that the speech was phrased in the form of a contingent threat did not alter the analysis:

> In the course of [Evers's] pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with [one possible exception]—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."[186]

Claiborne Hardware should be the case that definitively resolves the dilemma of the "true threat." The Court was under no illusion about either the speaker's threatening words or the violent circumstances in which those threatening words were spoken and heard by the targets of the speech. The message to Evers's followers and the targets of the threatening language was clear: shop at the forbidden stores and you will be beaten and publicly humiliated and/or have your property damaged. The lower court spelled this out explicitly and the Supreme Court took notice of the point. The lower court held that Evers and the other defendants used "'[i]ntimidation, threats, social ostracism,

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protective ingredient of the *Masses* incitement analysis with the most useful elements of the clear and present danger heritage.").

182 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

183 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

184 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

185 *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

186 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (quoting N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

vilification, and traduction'" to effectuate the boycott.[187] The lower court also held that "the volition of many black persons was overcome out of sheer fear."[188] Yet the United States Supreme Court held that "[t]o the extent that the [Mississippi] court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment"[189]—again, presumably because there was no definitive evidence regarding the central *Brandenburg* element of immediacy. The unmistakable message of *Claiborne Hardware* seems to be that at least in the context of threatening language with political overtones, a "true threat" is defined by the three elements of the *Brandenburg* test: the words must be explicit, the words must be spoken in a context in which serious harm is imminent, and the speaker must possess the specific intent that the harm occur.

But if the *Claiborne Hardware* Court intended to absorb the "true threats" analysis into *Brandenburg*, they stopped just short of saying so. The Court's language coupled with the clear facts may leave no other plausible interpretation, but there is no explicit statement to that effect in the Court's opinion. This leads to the puzzle of *Black*, in which the Court focuses most of its attention on only one aspect of *Brandenburg*: the speaker's intent to intimidate. Meanwhile, the lower courts have mostly refused to provide *Brandenburg*-style protection to verbal messages with threatening overtones. So what is one to make of *Claiborne Hardware*? If *Claiborne Hardware* does not provide the standard for defining "true threats," what *is* the standard? And if the standard falls short of *Brandenburg*, then why was the lower "true threats" standard not applied to Charles Evers? All of these questions are rhetorical, because the Supreme Court persists in its refusal to confront the "true threats" dilemma directly. A glance at the competing lower court standards will illustrate why the clarification of this issue by the Supreme Court is long overdue.

B. "True Threats" and the Lower Courts

It would be a serious understatement to say that in the absence of Supreme Court guidance the lower courts have developed no consistent standard to measure a "true threat." The unfortunate reality is that the standards used in various courts stretch from one end of the

187 *Id.* at 921 (quoting NAACP v. Claiborne Hardware Co., 398 So. 2d 1290, 1300 (Miss. 1980)).

188 *Id.* (quoting NAACP v. Claiborne Hardware Co., 398 So. 2d 1290, 1300 (Miss. 1980)).

189 *Id.*

protective continuum to the other. On the protective end of the continuum is the approach used by the Second Circuit, which stops short of providing *Brandenburg*-level protection, but nevertheless insists on some evidence that the speaker used words communicating an imminent harm before being prosecuted for expressing a "true threat."[190] Also located somewhere on the protective end of the continuum, the Sixth Circuit uses a standard that focuses on evidence specifically relating to the idiosyncratic nature of a threat as an instrument to coerce a change in the target's behavior.[191] In the absence of proof that the speaker engaged in the expression with that specific intention, the Sixth Circuit will not place the speech in the unprotected "true threats" bin. At the censorial end of the continuum, on the other hand, is the standard used by the Ninth Circuit. For all practical purposes, the Ninth Circuit standard provides no consistent or systematic constitutional protection of any sort for speakers using words that could be reasonably construed (in the vernacular sense of the term rather than any specialized legal sense) as threatening.[192] These courts cannot even agree on whether the constitutional standard applied to "true threats" of a political nature are related to *Brandenburg*-style political speech protections, much less on how to apply or modify the components of *Brandenburg* to fit the special needs of regulating threatening speech.

This background of ongoing disputes over the breadth of the "true threats" doctrine in the lower courts does not inspire confidence regarding these same courts' abilities to consistently apply the new "intimidation" twist on the "true threats" doctrine introduced by *Black*. At best, lower courts will simply treat the new subcategory of intimidation as indistinguishable from the "true threats" category to which, according to Justice O'Connor, it belongs. At worst, lower courts that have been hostile to claims of constitutional protection for generically threatening speech (in particular the Ninth Circuit) may read *Black* as confirming the legitimacy of their refusal to acknowledge the implications of *Claiborne Hardware*. Even worse, the Ninth Circuit and other courts taking their cue from the Ninth Circuit may take *Black* as their signal to extend the scope of the "true threats" category of unprotected speech beyond the context of speech targeting particular, identifiable victims. If the lower courts take the latter tack, then there is a serious risk that *Black* will undermine *Brandenburg* and the *Brandenburg* legacy of near-absolute protection of antagonistic

190 *See infra* note 199 and accompanying text.

191 *See infra* note 215 and accompanying text.

192 *See infra* notes 219–53.

political speech. These possibilities will be explored further after a brief review of the three major approaches to the concept of "true threats" in the lower courts.

The Second Circuit Court of Appeals uses one of the most protective standards for "true threats" of any federal circuit, although the Second Circuit standard falls far short of the level of protection offered to political speech under *Brandenburg* and *Claiborne Hardware.* The Second Circuit announced its standard almost three decades ago in *United States v. Kelner.*[193] Like *Claiborne Hardware,* the threatening speech in *Kelner* had strong political overtones. The case involved a prosecution brought under the federal threats statute.[194] The defendant was a member of the Jewish Defense League who threatened to kill Yasser Arafat during Arafat's 1974 visit to the United Nations in New York City. The threat was made during a press interview in which the defendant was seated at a table dressed in military fatigues with a gun on the table in front of him.[195] The defendant stated that "we are planning to assassinate Mr. Arafat," and made several other equally explicit statements indicating that the details of the assassination had already been arranged.[196]

The defendant's defense to the prosecution was based on the argument that the threats were never serious because they were simply defensive in nature. According to the defendant Kelner, "his sole objective was to show the PLO that 'we (as Jews) would defend ourselves.'"[197] Kelner's alternative free speech argument asserted that under *Watts* his speech was nothing more than "political hyperbole."[198] The court rejected both of these claims and held that the speech in question fell within the unprotected category of "true threats." Although the defendant lost his free speech claim, the standard announced by the court was very protective of free speech values: "So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to

193 534 F.2d 1020 (2d Cir. 1976).

194 *See id.* at 1020 (involving 18 U.S.C. § 875(c), which makes it a federal criminal offense to "transmit[ ] in interstate or foreign commerce any communication containing any threat . . . to injure the person of another").

195 *Id.* at 1021.

196 *Id.* ("'We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave the country alive . . . . Everything is planned in detail.'").

197 *Id.* at 1021–22.

198 *Id.* at 1024.

the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."[199]

By requiring proof of what the *Kelner* court called "qualities of unequivocal immediacy and express intention,"[200] the court effectively crafted a kind of weak *Brandenburg* surrogate for the identification of a "true threat." Two of the three *Brandenburg* elements are present in the Second Circuit's standard: an explicitness requirement that is analogous to *Brandenburg*'s incitement component and a weakened intent analysis to ensure that the speaker really did intend to initiate the relevant harm. The third *Brandenburg* element—the immediacy/clear and present danger element—is not part of *Kelner*. The court held that in prosecuting a "true threats" case the government does not have to prove that the defendant has "a present ability to carry out his threat."[201]

The *Kelner* court focused much of its attention on the intent element. The Second Circuit rejected the defendant's argument that he could be convicted of issuing a threat only if the government proved that he specifically intended to carry out the threat.[202] The court held instead that speech could be prosecuted as a threat based on evidence that the speaker intended the speech to induce fear in the target, even if the speaker had no intention of following through on the threat.[203] In *Watts* the Supreme Court expressed "grave doubts" about a similarly lax interpretation of the intent requirement by the lower court in that case.[204] The Second Circuit nevertheless insisted that this intent standard satisfied the First Amendment because it required some proof of the speaker's "gravity of purpose."[205] Even if that is so, the *Kelner* intent requirement will often be inferred from the speech itself—especially if the defendant does not testify and there is no extrinsic evidence about the speaker's intent. Since the defendant's threatening intention will often turn on the nature of the threatening communication, the explicitness requirement provides the real teeth in the *Kelner* standard. Under a rigorous application of *Kelner*, a factfinder should not be able to infer a "true threat" from speech that on its face does not specifically announce the speaker's desire to harm or coerce some specified target. As with the similar incitement element of *Brandenburg*, this explicitness requirement

199 *Id.* at 1027.
200 *Id.*
201 *Id.* at 1023.
202 *Id.* at 1024–25.
203 *Id.* at 1026.
204 *See* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).
205 *Kelner*, 534 F.2d at 1026.

functions as a mechanism with which appellate courts can check overreaching juries and limit the scope of "true threat" prosecutions to a fairly narrow range of precise expressive acts.

Unfortunately, the *Kelner* standard has not always worked so protectively. In more recent cases the Second Circuit has not been particularly vigilant in enforcing the key limitation of *Kelner*. In *United States v. Malik*, for example, the Second Circuit interpreted the *Kelner* standard to permit trial courts to submit to juries ambiguously threatening statements if extrinsic evidence was introduced to bolster inferences that the expression was intended to convey a threatening message.[206] Although the facts of *Malik* were very different than *Kelner*—*Malik* involved a personal threat communicated privately in a letter rather than the *Kelner* scenario of threatening language incorporated into a political statement communicated to the world at large at a public news conference—nothing in the language of the court's *Malik* opinion limits its interpretation of *Kelner* to that context.

A more meaningful intent requirement can be found in the second major lower court variation on the theme of the "true threat." In *United States v. Alkhabaz*,[207] the Sixth Circuit Court of Appeals addressed the parameters of the same federal threats statute applied by the Second Circuit in *Kelner*. The case involved an e-mail exchange between Alkhabaz—a University of Michigan student who also was known as Jake Baker—and an anonymous Canadian named Arthur Gonda.[208] The e-mails were discovered when authorities investigated a fictional rape fantasy posted by Alkhabaz on the "alt.sex.stories" newsgroup.[209] The e-mails contained explicit references to the authors' interest in committing various acts of sexual violence.[210] Alkhabaz and Gonda only sent the e-mails to each other, and neither person did anything to carry out any of their violent fantasies.[211] After its investigation, the government decided not to prosecute Alkhabaz for the fictional story he posted on the newsgroup, but brought charges under the federal threats statute based on several of the e-mails.[212]

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206 16 F.3d 45, 50 (2d Cir. 1994) ("Once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient familiar with the context of the letter would interpret it as a threat, has been adduced the trial court should submit the case to the jury.").

207 104 F.3d 1492 (6th Cir. 1997).

208 United States v. Baker, 890 F. Supp. 1375, 1379 (E.D. Mich. 1995), *aff'd sub nom.* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997). The name Arthur Gonda was apparently a nom de plume, and Gonda was never identified or found.

209 *Id.*

210 The e-mails are summarized in the district court's opinion. *See id.* at 1387–90.

211 *Id.* at 1379.

212 *Id.* at 1380.

The district court granted the defendants' motion to quash the indictments, holding that the e-mails could not meet the *Kelner* "unequivocal, unconditional, immediate and specific" requirement because both the intended victims and the intended action were too imprecise.[213] The court of appeals affirmed the dismissal of the indictments, but on different grounds. The court of appeals chose to discuss the meaning of a threat in the context of interpreting the terms of the statute, rather than providing a direct analysis of the First Amendment concept of "true threats."[214] Nevertheless, the Sixth Circuit's statutory interpretation is instructive in understanding the proper constitutional analysis of these issues because identical factors are at the root of the constitutional distinction between "true threats" and protected speech. The key to the Sixth Circuit panel's approach to the problem is the court's focus on the nature of a threat as language intended "to have some effect, or achieve some goal, through intimidation."[215] Based on this understanding of the nature of a threat, the appellate court held that the simple proof that a speaker intended to do bodily harm was insufficient. Instead, the court held that in order to prove a threat, the government must prove that the speaker's serious intention to do bodily harm was actually communicated to someone who would perceive such expression as threatening.[216] The relevant intention, in other words, is not the intention to communicate a threat, but the desire to communicate a threat in order to obtain some concrete benefit or response from the victim. Although this may seem like an academic distinction, it may be very important in cases where the threatening speech is embedded in an overheated political diatribe. In such cases it will often be the case that the speaker has no reasonable cause to believe that the object of the speaker's wrath would do anything in response to the speech. In such cases, the threatening language is—much like the use of the word "fuck" in *Cohen v. California*[217]—simply a way of communicating the intensity of the speaker's feelings about the speaker's political opponent.

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213 *Id.* at 1389–90.

214 United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997).

215 *Id.* at 1495.

216 *Id.*

217 403 U.S. 15, 26 (1971) (holding that the First Amendment protects the phrase "fuck the draft" sewn onto the back of a jacket worn in a courthouse, and noting that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated").

The Sixth Circuit panel upheld the dismissal of the indictments against Alkhabaz and Gonda because the threatening communications were never communicated to anyone except the two correspondents themselves, and therefore could not possibly satisfy the intent element of a threat.[218] As will be discussed below, the Sixth Circuit's use of the term "intimidation" is very different from the use of the same term by the Supreme Court in *Black*. The Sixth Circuit used the term "intimidation" to refer to the speaker's intent and the nature of the communication. In the Sixth Circuit's usage, the term "intimidation" limits the application of the concept of a threat to situations in which there is objective evidence that speech was undertaken with specific goals and specific targets in mind. The generalized language or symbols of intimidation (for example, a generic cross burning at a political rally) would not be sufficient to satisfy the Sixth Circuit's standard, nor would the use of any threatening speech in a *Claiborne Hardware*-type situation involving public, nonspecific expression to a diverse and generalized audience.

The Sixth and Second Circuits approach the concept of threats from different angles and introduce different types of First Amendment protection for speech containing threatening elements. The Sixth Circuit focuses on the need for evidence that the speaker specifically intended to induce an immediate response from the target of the threat; the Second Circuit (at least in *Kelner*, if not always in subsequent cases) focuses on the need for evidence of explicitly threatening language. Both courts, however, are addressing the same problem: the persistent possibility that prosecutors and civil litigants will use civil and criminal statutes to punish abrasive, insulting, and vulgar speech simply because that speech contains intimidating overtones.

Unfortunately, one of the most prominent recent cases addressing the nature of the standard for "true threats" proceeds as if the possibility of censorship through litigation does not exist. The Ninth Circuit Court of Appeals has issued a large number of decisions involving threats, and the standard used in these decisions provides a very low level of First Amendment protection for threatening speech. The Ninth Circuit's most recent decision on the subject reaffirms this unprotective approach and affirms a civil verdict that exemplifies the potential abuses of the "true threats" concept.

The recent en banc decision upheld a multi-million dollar verdict against anti-abortion activists who collected and then disseminated information about abortion providers on posters and the "Nuremberg

218 *See Alkhabaz*, 104 F.3d at 1496.

Files" website.[219] The case involved a civil action brought under a provision of the federal Freedom of Access to Clinic Entrances Act (FACE), which gives individuals and groups a right of action against anyone who by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services."[220] The case was brought against several anti-abortion individuals and groups by four physicians and two health clinics that provide abortion services.[221] The plaintiffs claimed that the defendants had intimidated them by producing and distributing anti-abortion literature.[222]

The entire case was based on three pieces of expressive material: first, a "Deadly Dozen" poster, which contained the names of thirteen doctors who provide abortion services and was captioned "GUILTY OF CRIMES AGAINST HUMANITY."[223] The poster also included the home addresses of three of the doctors, and offered a $5000 reward for "information leading to the arrest, conviction, and revocation of license to practice medicine."[224] Another poster contained the name of a single doctor, with a similar "GUILTY" caption and a reward offer. Third, and most famously, the "Nuremberg Files" website contained a litany of graphic anti-abortion material (such as dripping-blood graphics and repeated epithets such as "baby butchers" and "Satan"), along with a list of over 400 doctors, judges, politicians, law enforcement officials, and other abortion-rights supporters.[225] The list of names included some doctors who had been killed because of their work. The list reflected this fact by identifying living and working individuals in black font, wounded individuals in gray font, and striking through the names of individuals who had been killed.[226] Some of the many ironies of what became known in the popular press as the

219 Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1062 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

220 18 U.S.C. § 248(a)(1) (2000).

221 *Am. Coalition of Life Activists*, 290 F.3d at 1062.

222 *Id.*

223 *Id.* at 1064.

224 *Id.* at 1065.

225 *Id.* A mirror of the website is still available at http://www.xs4all.nl/~oracle/nuremberg/aborts.html, though it is no longer maintained by anti-abortion activists. The list is a particularly haphazard collection of names. It includes a random sample of government officials, in addition to individuals directly involved with the provision of abortion services, and a list of all present and some former Supreme Court Justices. The list of Justices inexplicably includes the name Byron White—who was one of only two dissenters to the Court's decision in *Roe v. Wade*. *See* Roe v. Wade, 410 U.S. 113, 221 (1973) (White, J., dissenting).

226 *Am. Coalition of Life Activists*, 290 F.3d at 1065.

Nuremberg Files case is that none of the defendants were responsible for posting the Nuremberg Files website (although the defendants apparently provided the names that were eventually posted on the site[227]), the person who was responsible for posting the site—Neal Horsely—was never sued,[228] and a mirror of the website itself is still available, although Mr. Horsely no longer maintains it.[229] In the end, the jury ruled in favor of the plaintiffs and awarded the plaintiffs approximately $120 million.[230] This figure included over a half million dollars in compensatory damages for the FACE violations, over $108 million in punitive damages for the FACE violations, and over eleven million dollars for violations of the federal racketeering laws in connection with the activity that violated the intimidation section of FACE.[231]

After a Ninth Circuit Court of Appeals panel reversed the jury's verdict on First Amendment grounds,[232] the Ninth Circuit granted rehearing en banc and upheld the verdict.[233] The court treated the issue of whether someone intended to "intimidate" under FACE as coextensive with whether the speech in question constituted a "true threat" under the First Amendment.[234] The problem for the court was that the speech in question did not fit the traditional model of threatening speech. First, the speech was not phrased in the terms of a threat. As the court acknowledged, none of the speech in question included "explicitly threatening language."[235] Also, there was no allegation that any of the defendants had ever carried out any of the alleged threats, intended to carry out the threats, or had any relationship with anyone else who intended to carry out the threats. The court skirted this problem by simply holding that such proof was unnecessary. "It is the making of the threat with intent to intimidate—not the implementation of it—that violates FACE."[236] In the end, however, the court was confronted with little more than repeated instances of aggressive, overwrought, and tasteless political protest.

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227 *Id.*

228 *Id.*

229 *See supra* note 225.

230 *Am. Coalition of Life Activists*, 290 F.3d at 1066 n.4.

231 *Id.*

232 Planned Parenthood v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001), *vacated and reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001).

233 *Am. Coalition of Life Activists*, 290 F.3d 1058.

234 *Id.* at 1071.

235 *Id.*

236 *Id.* at 1077.

The use of specific names on the posters and website did nothing to alter the highly political nature of the speech at issue in the case. All of the speech in question was organized around a blunt and inelegant attempt to link the provision of abortion services with the extermination of Jews and other minorities by the Nazis. This linkage was explicit in many of the documents[237] and in the website.[238] The very name "Nuremberg Files" highlights the theme. Thus, the listing of names was not gratuitous in light of the nature of the protest. From the peculiar perspective of the speakers—who expressed the view that abortion is genocide subject to subsequent prosecution when the world comes to its senses—the listing of the names was a crucial component of the protest. From the perspective of the protesters, it would be hard to develop "evidence" for future "trials" without talking about specific "defendants."

The Ninth Circuit dealt with all this by going beyond the particular defendants and their specific expressive acts. Instead, the court treated the defendants' speech as if it were intimately related to other examples of similar speech, and also as if the defendants' speech were intimately related to violent acts that occurred in other places at other times after other episodes in which similar posters were circulated by other people.[239] The Ninth Circuit upheld the jury's conclusion that the defendants' speech constituted a "true threat" because the jury was justified in taking into account other examples of similar speech engaged in by other persons at other times.

The Ninth Circuit reached this conclusion by a strange and convoluted route. The court implicitly acknowledged that if viewed alone the posters and website would not necessarily constitute a "true threat."[240] According to the court, it was the overall context of anti-abortion violence that made the posters and website problematic.[241]

237 *See id.* at 1064 (quoting the "Deadly Dozen" poster as stating that "'[a]bortion was provided as a choice for Eastern European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945–46) under Allied Control Order No. 10 as a "war crime"'").

238 *Id.* at 1080 (quoting the website's references to the inability to prosecute many Nazis at the post-World War II Nuremberg trials due to the loss of evidence, and noting the website's conclusion that "[w]e do not want the same thing to happen when the day comes to charge abortionists with their crimes . . . [and w]e anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)").

239 *See id.* at 1085 (explaining that the defendants' distribution of posters constituted threats because they fit the "poster pattern"—the distribution of a poster followed by a killing—established in other jurisdictions).

240 *Id.* at 1079.

241 *Id.*

With regard to the posters, the court emphasized that in other places two doctors named Gunn and Britton had been shot after posters had circulated that were similar to the ones distributed by the Nuremberg Files defendants identifying a doctor named Crist. The court noted: "Even if the Gunn poster, which was the first 'WANTED' poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers."[242] With regard to the website, the court noted that although the site named several hundred individuals, it grouped the individual names together in only a few categories. The court found it significant that one of the categories singled out "Abortionists" and also that the site noted through the use of strikeouts and gray fonts that some on the list had been killed or wounded.[243]

Why any of this matters is unclear. With regard to the posters, the Ninth Circuit majority opinion omits some crucial information about the use of "Wanted"-style posters prior to the Nuremberg Files litigation. Although, as the court emphasizes, it is true that previous posters had included the names of individual doctors who were later killed, in only one prior instance was a person who produced a poster also connected with the killing.[244] Even if it is true that the identification of abortion doctors on the posters facilitated some of the other killings, the significant element of the prior expression that facilitated the illegal action was the identification of the doctors, not the use of "Wanted"-style posters to communicate the relevant information.

Yet the Ninth Circuit upheld the jury's assessment of liability based on the particular expressive vehicle used to communicate the information—the particular style of posters—rather than the singular fact that the defendants communicated the doctors' names. There is a clear reason for the court's decision to emphasize the mode of the communication instead of the information being communicated. Presumably nothing in the Ninth Circuit's opinion would justify another jury's decision to issue a similar "true threats" ruling against a newspaper that printed the names of doctors providing abortions. Thus, the Ninth Circuit constructs a legal landscape in which dangerous information can be printed without fear of liability by speakers who do not use the "Wanted" poster style and do not express hostility toward the actions of the named individuals, but the very same dangerous information cannot be communicated by anyone using the dis-

242 *Id.*

243 *Id.* at 1080.

244 *See id.* at 1090–91 (Kozinski, J., dissenting).

favored format and expressing hostility toward the actions of the named individuals. Prior to the Nuremberg Files litigation, "Wanted"-style posters had become a common expressive vehicle for protesting abortion. After the Nuremberg Files decision, anti-abortion protesters will use this particular form of expression at their peril. So much for "the usual [First Amendment] rule that governmental bodies may not prescribe the form or content of individual expression."[245]

As for the website, it is unclear why the court relied on the fact that the hundreds of names on the site were categorized into groups. The inclusion of categories in no way added to the danger inherent in publishing the individual names, nor did it in any way communicate any greater degree of hostility toward one category of names rather than another. All of the names on the website are listed as potential "defendants" in a future Nuremberg-style "trial." It is also unclear why the notation of killed and wounded doctors made the list of names more dangerous or threatening. The notations were certainly tasteless. The notations were an expression of the website author's vulgar gloating over the tragic murder of his political opponents. But under no conception of the First Amendment could the government punish the expression of either tastelessness or the unseemly pleasure over the misfortunes of others. "[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[246]

On the other hand, the notation could be construed more ominously as statements of approval of the illegal action of killing the doctors. But we know from the modern political speech cases that the First Amendment protects expression praising the illegal actions of others. In the early days of the twentieth century, Eugene V. Debs was sent to federal prison for ten years for praising the actions of young men who illegally refused to be conscripted to fight in World War I.[247] Almost fifty years later, the Court reversed field and refused to allow the Georgia legislature to refuse to seat the young state Senator-elect Julian Bond because Bond had issued press releases on behalf of a civil rights organization praising the refusal of young men to be conscripted to fight in Vietnam.[248] So the website's praise for the illegal activities of others could not be the basis for legal liability. Finally, and most ominously, one could even go so far as to argue that the website was advocating more killings. But even if the latter interpreta-

245 Cohen v. California, 403 U.S. 15, 24 (1971).

246 *Id.* at 25.

247 *See* Debs v. United States, 249 U.S. 211 (1919).

248 *See* Bond v. Floyd, 385 U.S. 116 (1966).

tion were correct, the advocacy certainly could not satisfy the immediate harm requirement of *Brandenburg* and *Claiborne Hardware*.[249]

At the end of the day, the Ninth Circuit has very little to support its case that the speech in question constituted a "true threat." There was no threatening language, the authors did not indicate any intent to carry out the unstated threat, and the court implicitly conceded that it was most concerned about the form in which the dangerous information was expressed rather than the communication of the dangerous information itself. The verdict against the speakers was upheld despite this flimsy evidence because the Ninth Circuit operates within a conceptual standard for judging "true threats" that essentially provides factfinders with unfettered discretion to view speech as dangerous or threatening. This standard is devoid of objective constraints of the sort that is routinely deemed necessary in the political advocacy context to protect the expression of unpopular speech. The Ninth Circuit standard for "true threats" is a simple reasonableness test: "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[250]

This standard imposes no significant limits on the ability of judicial factfinders to characterize political speech as a "true threat." Unlike the Second Circuit's *Kelner* standard, the Ninth Circuit does not insist that a threat be "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution [for], the statute [to be] properly be applied."[251] Unlike the Sixth Circuit, the Ninth Circuit does not require evidence that the speaker communicated directly to the target the speaker's specific intention of obtaining some immediate benefit.[252] According to the Ninth Circuit, the simple intention to say the words alone is sufficient to satisfy whatever First Amendment protection exists for threatening speech—without regard to the speaker's intention to carry out the threat, without regard to whether the threat would ever be carried out, and apparently without regard to the

249 *See supra* notes 181–89 and accompanying text.

250 Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1074 (9th Cir. 2002) (en banc) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

251 United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

252 United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997).

speaker's expectation of any immediate benefit.[253]

The Ninth Circuit's lenient standard for "true threats" looks remarkably like the equally lenient test applied to radical political advocacy in the era before Justice Holmes and Justice Brandeis began refashioning First Amendment jurisprudence into the form we know today. The test in the early free speech cases was "whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute."[254] Both tendency and effect were issues of fact to be determined by juries. Bound only by their own sense of verbal decorum and political risk aversion, juries were generally hostile to most of the defendants who came before them, with the unsurprising result that "[w]hatever the offending language, surrounding circumstances, or jury instructions, almost all prosecutions led to guilty verdicts."[255] Judges were not immune to these punitive inclinations. Geoffrey Stone recently reviewed the history of the Espionage Act of 1917, which was the statutory basis for most of the early free speech prosecutions.[256] Stone notes that most of the repressive results went beyond the scope of the legislature's intent and were the product of judges "operating in a feverish atmosphere, not the most conducive to careful judicial reflection. Too often, they gave in to the pressures of the time and to their own fears and distaste for 'disloyalty.'"[257] Before evolving into the great First Amendment hero with his later opinions, Justice Holmes's early and unprotective rendering of his clear and present danger analysis merely rephrased the "tendency and effect" standard, and was applied in such a way as to uphold the conviction of speakers without any concrete evidence that their speech had produced any negative effect whatsoever.[258]

Although it may judge the Ninth Circuit too harshly to say that that circuit's standard for measuring "true threats" will result in similar repression as the early Espionage Act cases, the analogy between the modern Ninth Circuit standard and the early political speech anal-

253 *See Am. Coalition of Life Activists*, 290 F.3d at 1075 ("It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.").

254 Shaffer v. United States, 255 F. 886, 888 (9th Cir. 1919).

255 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 257 (1997).

256 *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003).

257 *Id.* at 357.

258 *See* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

ysis is not unfair. The Ninth Circuit standard provides little or no protection for speech phrased in the form of a threat, and does not provide any clear and consistently applicable measure to enable an appellate court to determine when a jury has gone too far. This narrower criticism is damning enough: the development of the modern standard for protecting political speech under the First Amendment was designed specifically to tie the hands of hostile factfinders, especially during periods in which juries and the public in general, in Learned Hand's description, became "demoralized in all its sense of proportion and toleration."[259] The only way to protect unpopular speech during these periods is to apply a constitutional standard that is, again in Learned Hand's phrase, "a qualitative formula, hard, conventional, difficult to evade."[260] The Ninth Circuit test fails to offer any such protection. The tests used by other circuits are not as bad, but all of the tests currently employed by the lower courts to assess the existence of a "true threat" fall far short of the protections afforded even the most incendiary political advocacy.

C. *"Intimidation" and the True Threat*

All of which brings us back to *Black* and the issue of "intimidation." The question is this: by describing intimidation as a type of true threat, did the *Black* majority intend to expand the concept of "true threats" to cover generally threatening statements expressed in public and directed at a general audience? Also, in its description of intimidation, did the Court implicitly embrace any of the lower court ap-

259 Gunther, *supra* note 181, at 761 (quoting Letter from Learned Hand to Justice Oliver Wendell Holmes (Nov. 25, 1919)).

260 *Id.* at 770 (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921)). Robert Blakey and Brian Murray argue that achieving an "essentialist" definition of a "true threat" is "quixotic." G. Robert Blakey & Brian Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 921 n.233. "What is needed, we believe, is an identification of the interests involved and a careful balancing of them." *Id.* The question is who is to do this balancing and how do the courts ensure that the First Amendment interests are entered into the balance correctly? Ironically, Blakey and Murray quote Hand to support their fluid standard for "true threats": "[There is] no escape in each situation from balancing the conflicting interests at stake with as detached a temper as we can achieve." *Id.* (quoting LEARNED HAND, SPIRIT OF LIBERTY 179 (Irving Dillard ed., 3d ed. 1960)). As the quotation in the text accompanying this note indicates, Hand was far from sanguine about juries achieving the preferred condition of a "detached temper" in a case involving antagonistic and unpopular speech, especially in times of social turmoil, and for that reason he preferred to achieve the appropriate balance through strict definitions that flexed as little as possible.

proaches to the concept of the true threat? There are conflicting indicators in *Black* regarding both issues.

According to the *Black* majority opinion, "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[261] "Means to" indicates that the Court is focusing on the speaker's intent. Like the Second and Ninth Circuits, the *Black* majority indicates that the relevant intent is merely the intent to utter whatever words are found to be threatening. "The speaker need not actually intend to carry out the threat."[262] Thus, it is sufficient to satisfy the Constitution if the speaker intended to say the thing that created fear in a listener. The Court does not mention a *Kelner*-type explicitness requirement, nor does it mention anything approximating an immediacy or clear and present danger analysis. The Court then describes "intimidation": "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[263] This simply repeats the description of "true threats" quoted above, which appears in the same paragraph in the Court's opinion.

This is as close as the Court gets to providing anything like a definition of either "true threats" or intimidation, and it generates more questions than answers. For example, under the Court's theory, does any statement indicating the possibility of future violence potentially fall into the category of intimidation? Is there any requirement that the threatened harm or violence be immediate? Is there any requirement that the threatened harm or violence be probable, or is the remote possibility of harm or violence sufficient? Does a speaker's statement constitute constitutionally proscribable "intimidation" if it is clear from the context in which the statement is made that the speaker is neither likely to carry out the threat personally or direct those who do carry out the threat? In other words, does simply creating an atmosphere in which dangers become more acute for the speaker's opponent constitute "intimidation"? Does the speaker have to obtain some personal benefit from the intimidating speech, or is a generic political benefit (i.e., causing a political opponent to refrain from some activity that does not personally benefit the speaker) sufficient to rob the speech of constitutional protection? Are public state-

261 538 U.S. 343, 359 (2003).

262 *Id.* at 359–60.

263 *Id.* at 360.

ments containing veiled intimidation—e.g., "we know who you are"—proscribable?

These questions matter because as the Court fits more generic speech into the "intimidating speech" category, the category of unprotected "intimidating" speech begins to look like exactly the sort of political advocacy strongly protected under *Brandenburg* and *Claiborne Hardware*. Consider the facts of *Brandenburg*: a member of the Ku Klux Klan brandishes guns and ammunition, speaks at a rally attended by other Klansmen in masks, claims "hundreds" of sympathetic members, talks about taking "revengeance" on his adversaries, singles out African Americans and Jews in several statements with violent overtones, and announces an impending march to further the group's hostile goals.[264] Why does this speech not fit the *Black* description of proscribable intimidation? The speaker certainly intended to put fear into the hearts of African Americans and Jews, specifically referred to violence, brandished guns to underscore that violence, and hinted that there were others in society that would carry out these goals. The speaker's language was specific and his intent to intimidate was clear. It was uncertain when the attack promised by the speaker would occur, but according to Justice O'Connor in *Black*, "[t]he speaker need not actually intend to carry out the threat."[265] So why should it matter that the facts in *Brandenburg* did not indicate that the threatened violence was impending?

For that matter, given Justice O'Connor's broad description of both threats and intimidation, it is not clear why the Court held that Virginia could not constitutionally apply its cross burning statute to the Klansman defendant who had burned a cross at a political rally. Like the Klansman in *Brandenburg*, the Klansman defendant in *Black* almost certainly had the requisite intent to intimidate the enemies of the Klan (specifically, African Americans, Mexicans, and, according to the record on appeal, Bill and Hillary Clinton).[266] Although the *Black* majority opinion implicitly (and correctly) characterizes the Klan speech as political speech,[267] it is difficult to argue that the speaker did not also have the "intent of placing the victim in fear of bodily harm or death."[268] So why did the *Black* majority refuse to permit the

264 Brandenburg v. Ohio, 395 U.S. 444, 445–46 & n.1 (1969) (per curiam).

265 *Black*, 538 U.S. at 359–60.

266 *Id.* at 349.

267 This is a necessary implication of the *Black* majority's decision to affirm the lower court's reversal of the Klansman's conviction and not permit the state to resubmit his case to a jury for a new determination of intent. *See id.* at 367.

268 *Id.* at 360.

state of Virginia to retry the Klansman under a properly limited interpretation of its cross burning statute?

It is possible to explain this anomaly, but only by interpreting the concept of "true threats" more narrowly than the Court seems to intend in its general discussion of the concept in *Black*. The explanation would require the Court to adopt something like the framework that has been suggested in connection with the Nuremberg Files case.[269] The heart of this suggestion is that the Court's political advocacy standard should provide the framework for the Court's "true threat" jurisprudence. Thus, a "true threat" should be gauged by a version of the same three factors that are relevant to assessing the constitutional protection of radical political advocacy and speech urging violations of law: i.e., explicitness, immediacy of harm, and the speaker's intent to cause the harm to occur. The precise application of these factors should depend on two characteristics of the speech being challenged as a true threat: first, whether the threatening speech was personalized, and second, whether the speech occurred in public and was addressed to a general audience.

The limitation of the "true threats" concept to speech that is personalized is necessary to avoid denying constitutional protection to speakers engaged in controversial political speech about controversial topics. In disputes over the most contentious issues—war, abortion, sexuality, the death penalty—speakers will often resort to the language of threats and intimidation to communicate the depth of the speaker's feelings about the topic under discussion. The abortion dispute that spawned the Nuremberg Files is a case in point. Anti-abortion activists believe that individuals providing abortions are murderers who are probably condemned to eternal damnation and should be tried for their crimes by temporal courts. Abortion rights activists believe that radical anti-abortion activists are engaged in massive human rights violations by intruding into the private lives of women seeking the procedure, and also believe that many anti-abortion activists are capable of violence including murder to stop a medical practice with which the opponents disagree. The feelings of each side about the other are deep and visceral, and each side believes it must communicate in the most direct fashion its willingness to do anything to achieve ultimate victory. Resort to the language of threats and intimidation is inevitable in disputes such as this, and the First Amendment should (and in the political speech arena, already does) take this into account. As Justice Harlan reminded us in *Cohen v. California*, the First Amendment free speech protection incorporates the rec-

269 *See* Gey, *supra* note 152.

ognition that "words are often chosen as much for their emotive as their cognitive force."[270] *Claiborne Hardware* applies this recognition to speech employing an explicitly threatening vocabulary.

The inevitability that speakers in emotional disputes will sooner or later resort to threatening and intimidating speech does not mean that all such speech operates on listeners the same way. The Court has said that the concept of "true threats" governs when it is necessary to protect individuals "from the disruption that fear engenders."[271] But this fear cannot be the generalized fear of individuals locked in an emotional dispute with their political opponents. This is true for two reasons. First, listeners do not respond with the same kind of fear to threats that do not single them out as targets of specific concern. Second, from a policing standpoint it is reasonable to assume that most speakers expressing generalized threats have not progressed to the point of actually carrying out threat. In contrast, it is reasonable to assume the worst of a speaker who is willing not only to announce a general threat, but also willing to name the target and describe the way in which the threat will be carried out.[272] *Kelner* is one example of such a case.

If the First Amendment is to remain meaningful in emotional debates, the only manifestation of fear that should be relevant to the application of the "true threats" analysis is the personalized and immediate fear of a person who is singled out and told in no uncertain terms that he or she is specifically targeted for attack. When threatening comments are made in public to a general audience and the speaker does not mention a particular target of the threat, the fear generated is too diffuse to justify government intervention to stop the speech. In the time of Justice Holmes and Justice Brandeis, the general population feared (not without some justification) violent revolution, yet both Justice Holmes and Justice Brandeis rejected the principle that generalized fear is a legitimate rationale for censoring speech because there is no way of limiting the application of that principle. The reason is obvious: if a generalized, diffuse fear can be used as a justification for sanctioning speech, then all aggressively antagonistic dissent will be subject to suppression. As Justice Douglas acerbically summed up the Court's repressive early application of the clear and present danger test: "[T]he threats were often loud but always

270 403 U.S. 15, 26 (1971).

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

272 *See, e.g.*, United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976).

puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous."[273]

If the Court is now willing to permit specific advocacy of violence up to the point at which the violence is about to occur, then it seems that generalized threats should also be permitted until the precision of the speaker's language indicates that the threat has been focused in a way that makes it reasonable to conclude that the speaker has gone beyond discourse and is well on the way to action. This seems to be the message of *Claiborne Hardware*. With regard to publicly uttered threats, therefore, some version of the three *Brandenburg* factors should be the focus of the "true threats" analysis. To be characterized as a true threat, the threat first should be explicit in the sense that the target of the threat is singled out and the speaker announces a specific intention to carry out the threat or help someone else carry out the threat. Second, the danger inherent in the threat should be immediate. This does not mean that the action being threatened is immediate, but rather that the target of the threat will react immediately in response to a threat that is specific, individualized, and proximate enough to support a reasonable judgment that the threat might be carried out. Thus, a "true threat" will require some relatively close temporal and geographic proximity between the person uttering the threat and the person being threatened. Third, the speaker should possess the intent to carry out the threat, or at least the specific intent to communicate a threat to a particular person in a manner that reasonably causes the target to alter his or her behavior or otherwise act in a way that benefits the speaker.

Privately communicated threats raise somewhat different concerns than threats communicated publicly to a general audience. The legal standard for identifying "true threats" should therefore be altered in a way that takes these concerns into consideration. There are two reasons justifying this conclusion. First, it is reasonable to assume that someone communicating a threat privately to the target of that threat has the singular purpose of coercing the target without any countervailing purpose of communicating ideas generally in the open political marketplace. This presumption diminishes the ordinary First Amendment concern with preserving the full emotive range of public speech and protecting speakers who engage in political hyperbole or rhetorical excess. The second reason to lower slightly the threshold for denying First Amendment protection to privately communicated threats is that such threats are far more likely to frighten the target of the threat and therefore far more likely to cause the coerced change

273 Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

in behavior that is the objective of someone issuing a "true threat." Threats communicated in public are more likely to generate support and protection for the target—if only because others (including the police) hear the threat at the same time—and do not have the inherently ominous overtones that a one-to-one communication conveys. A privately communicated threat also will often involve an invasion of personal space (a phone call to the home, for example) that increases the target's sense of assault and denies the target any sense of personal refuge or margin of safety from antagonists.[274] The very facts of invasion and personalization inherent in a privately communicated threat will often be enough in themselves to transmit the intimidating message.

Because the dynamics of the privately communicated threat are likely to be more coercive, the First Amendment standard should be altered to account for the different ways in which threatening gestures operate in private versus public contexts. In both contexts proof of a "true threat" should require proof of intent and immediacy (again, in the sense that the seriousness of the threat and the physical and temporal proximity of the person communicating the threat are such that a rational target of the threat would immediately respond by altering his or her behavior to avoid the threatened action). These factors are relevant in the same way to both public and private threats. On the other hand, the explicitness requirement should be refined in private

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274 The notion that everyone has a right to retreat into a personal refuge—especially their home—in which they may escape hostile speech has been used repeatedly by the Court to justify protecting speech more extensively in the public arena.

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.

Rowan v. U.S. Post Office Dep't., 397 U.S. 728, 738 (1970); *see also* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, . . . the home is different. . . . Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."); *Cohen*, 403 U.S. at 21.

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, . . . we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.

Id. (quoting *Rowan*, 397 U.S. at 738) (citation omitted).

threat cases to permit a finding of a "true threat" even in circumstances in which the speaker does not actually use explicitly threatening language. In some circumstances it should not be necessary to prove that the speaker communicating a threat privately actually employed explicitly threatening terms. If the surrounding circumstances are sufficiently menacing, the simple fact that the speaker sought out and privately communicated with the target of the threat will often be sufficient to justify construing the message as a "true threat." Context is still crucial, and rigorous judicial oversight of juries will still be necessary to ensure that heated private disagreements are not automatically interpreted as threatening, but given the appropriately sinister circumstances and background it may not be unreasonable to hold a speaker liable for communicating a threat through indirection and innuendo.[275]

Even conceding the more lenient treatment of privately communicated threats, the framework suggested here provides substantially more protection of threatening speech than all of the standards currently used by the lower courts. In defense of the proposed framework, this method of distinguishing "true threats" from protected speech is true to the spirit of both *Brandenburg* and *Claiborne Hardware*. The real question is whether the proposed framework is consistent with the Court's most recent excursion into the "true threats" area in *Black*. The analysis here is not intended to suggest that the Court has formally adopted this framework for analyzing "true threats," and the *Black* majority opinion is so imprecise that it is questionable whether any broad principle—much less a definitive legal standard—can be gleaned from the case. But it is at least clear from *Black* that the Court specifically held that the First Amendment definitively protected the

275 Diluting the explicitness requirement should answer Robert Blakey and Brian Murray's argument that the *Brandenburg* advocacy standard is inappropriate in the threats context because "the interests [the two standards] protect are different." *See* Blakey & Murray, *supra* note 260, at 1068 n.750. They argue that the explicitness requirement of *Brandenburg* "is more concerned with preventing violence than with preventing the bad results of the speech itself, that is, fear and disruption[, . . . whereas] threat statutes serve their most important purpose by focusing on fear and disruption." *Id.* This is true, but an explicitness requirement is necessary in the context of publicly expressed threats because an audience's undifferentiated fear is not a sufficient reason to suppress public speech to a general audience. Only particularized and proximate fear and disruption are sufficient cause to suppress speech that is not communicated privately. This is because it is reasonable to assume that the fear felt by most members of an audience listening to a generalized and public threat will be less intense than the recipient of a privately communicated threat, and also because the restrictions imposed on robust public discussion in order to protect ultra-sensitive listeners would be far too severe to satisfy the First Amendment.

speech of one of the three defendants whose convictions were at issue in the case, and we also know that in the course of reaching this conclusion the Court offered a list of factors to illustrate the difference between protected political speech and an unprotected true threat/intimidation. The ultimate holding of *Black* and the list of exemplary factors are entirely consistent with the *Brandenburg*-derived standard for "true threats" proposed here.

As for the Court's holding with regard to the three defendants before the Court in *Black*, recall that two of the three defendants (who were not affiliated with the Ku Klux Klan) had been arrested for burning a cross in the yard of their African American neighbor.[276] Although the Court upheld the reversal of their convictions because the Virginia statute impermissibly permitted the jury to infer that they had the requisite intent, the plurality remanded for possible reconsideration under a narrower interpretation of the statute that would require juries to actually find beyond a reasonable doubt that the defendants possessed the specific intent to intimidate the neighbor.[277] The third defendant, who was a leader of a local chapter of the Klan, had been arrested after burning a cross at a Klan rally held in a field with the permission of the property owner.[278] With regard to this defendant, the Court held simply that "his conviction cannot stand," and refused to remand for reconsideration[279]—presumably because the First Amendment prohibited any interpretation of the Virginia intimidation statute by which a speaker burning a cross under similar circumstances could be sent to jail.

The proposed "true threat" standard suggested above is consistent with both of the ultimate results in *Black*—i.e., that under some interpretation of the relevant facts the first two defendants could be convicted of expressing a true threat, but that the third defendant was engaged in expressive conduct that was absolutely protected by the First Amendment. The first two defendants were engaged in a privately communicated threat: the cross was burned in the front yard of the target and clearly directed to his attention. Therefore, under the standard proposed here, no proof of an explicit threat was necessary. As for the second component of the standard, the threat was both physically and temporally proximate, and therefore constituted an immediate threat. The presence of the third element of intent would depend (as the Court held) on the introduction of specific evidence

276 Virginia v. Black, 538 U.S. 343, 350 (2003).

277 *Id.* at 367–68 (plurality opinion).

278 *Id.* at 348–49.

279 *Id.* at 367 (plurality opinion).

at the retrial. Assuming that this evidence exists, the defendants could be deemed to have had the necessary intent to scare the neighbor into refraining from objecting further about their backyard target practice.[280] Therefore, under the proposed standard the Court's ultimate decision as to the first two defendants is unobjectionable: they could indeed be deemed to have engaged in a "true threat."

The third defendant, on the other hand, could not be said to have satisfied any of the three elements of the proposed standard. The expression occurred in public and was addressed to a general audience. Therefore, the absence of explicitly threatening language fails the first part of the proposed standard. Because there was no immediately evident target, the second element also was not satisfied. Because the speech fails the first two components of the standard, any evidence of intent is irrelevant—which is precisely what the Court seems to have held.

The exemplary factors cited by the Court to distinguish protected speech from unprotected "true threats" reinforce the conclusion that the proposed standard is consistent with the Court's general approach to the concepts of intimidation and "true threats." In discussing the problems presented by the prima facie intent component of the Virginia statute, the Court noted that the Virginia statute

> does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission.[281]

These factors are similar to the concerns underlying the proposed standard. In particular, each of the factors mentioned by the Court implies that the nature of a "true threat" is an individualized verbal attack on a particular target, which must be expressed with the proper intent—i.e., to coerce the target to engage in behavior favorable to the speaker. Speech more general than that, or speech that is addressed to a broader audience than the target alone, simply does not fall into the narrow category of unprotected "true threats."

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280 *Id.* at 350.

281 *Id.* at 366 (plurality opinion).

This may be a Panglossian misreading of Justice O'Connor's opinion in *Black*. As noted previously, the opinion is so vague that it is possible to misread it in any number of ways. If this reading is wrong, however, then the case portends bad things for future speakers who transgress the normal rules of political decorum. A pessimistic reading of *Black* would lead to the equally pessimistic conclusion that the decision has all the ingredients of a First Amendment disaster. The first ingredient is the Court's continued embrace of the unprotected category of speech called "true threats." The second ingredient is the Supreme Court's reluctance to define that category precisely. The third ingredient is a series of lower court opinions that fill in for the Supreme Court by defining "true threats" in ways that focus only on one or two salient factors (as in the Second and Sixth Circuits), or by simply throwing the matter to an unguided jury. The fourth ingredient is the possibility that the government can broaden the category of "true threats" by prosecuting any broadly phrased speech that is "intimidating," with the further possibility that "intimidating" speech may not necessarily have to be focused in a precise way at a precise victim or expressed in a context where the danger to the target is evident and immediate. The fifth ingredient is the possibility that when the Court defines unprotected intimidation as a threat directed against "a person or group of persons"[282] it intends that definition to encompass speech directed against a large, undifferentiated, and geographically scattered group. If these ingredients are what the lower courts bring away from *Black*, then the government has been given a powerful new tool to use against individuals and groups that engage in angry political discourse.

This is unwelcome news because federal and state governments recently have enacted legislation giving officials the authority to regulate a broadly construed category of speech that is deemed "intimidating." For example, the state of Virginia enacted a statute in 2002 permitting the enhancement of crimes that also constitute "acts of terrorism." Such acts are defined as acts of violence "committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation."[283] Federal law contains a similar provision defining "terrorism" to include acts intended "to influence the policy of a government by intimidation or coercion."[284]

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282 *Id.* at 360.

283 VA. CODE ANN. § 18.2-46.4 (Lexis 2004); *see supra* note 4.

284 18 U.S.C. § 2331(1)(B)(ii) (2000) (defining international terrorism); *id.* § 2331(5)(B)(ii) (Supp. II 2002) (defining domestic terrorism).

Among other things, the federal definition of terrorism can be used as the basis of a civil suit by private individuals against organizations engaged in such acts.[285] At first glance this seems unexceptionable, until one ponders how such a statute would apply to anti-globalization protesters,[286] radical Islamic groups,[287] anti-abortion protesters, Greenpeace,[288] or other groups that commit minor acts of violence or civil disobedience with the intention to "influence the conduct or activities of the government of the United States, a state or locality through intimidation." The expansion of the concept of "intimidation" beyond the narrow range of one-on-one "true threats" threatens to restrict radical political advocacy by providing an alternative route to the highly protective *Brandenburg* model of First Amendment protection. This is the concern raised by the pessimistic reading of *Black*. This concern is heightened by the fact that this is only one of several *Brandenburg* alternatives the Court has approved recently. The next Part will address the collective effect of these alternatives on the constitutional protection of core political speech.

285 *See id.* § 2333(a) (permitting "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism" to sue in federal court and collect triple damages and attorneys' fees); *see* Boim v. Quranic Literacy Inst., 291 F.3d 1000 (7th Cir. 2002) (holding that 18 U.S.C. § 2333 does not apply to "funding, simpliciter," but may be applied to individuals contributing to terrorist organizations if the contributor "knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping").

286 Since violent confrontations between anti-globalization protesters and police at protests during free trade talks in Seattle in 1999, free trade meetings around the world have been the focal point of protests that usually result in scattered acts of violence and thousands of arrests. *See* Austin Bunn, *Them Against the World*, N.Y. TIMES, Nov. 16, 2003, § 6 (Magazine), at 58. Recent free trade meetings in Miami led to multiple arrests and allegations of serious and extensive police overreaction against protesters. *See* Abby Goodnough, *Group Wants Investigation of Police Tactics at Miami Trade Talks*, N.Y. TIMES, Nov. 27, 2003, at A24.

287 *See Boim*, 291 F.3d 1000.

288 The federal government recently indicted the organization Greenpeace under an obscure 1872 federal statute, *see* 18 U.S.C. § 2279, after several Greenpeace members boarded a ship to unfurl a banner protesting the illegal shipment of mahogany. *See* Adam Liptak, *Typical Greenpeace Protest Leads to an Unusual Prosecution*, N.Y. TIMES, Oct. 11, 2003, at A9. Although the individual Greenpeace members had already served time in jail for the unauthorized boarding of the ship, the United States Attorney's office indicted the group itself, arguing that "[t]he heart of Greenpeace's mission is the violation of the law." *Id.*

V. IF THIS IS NOT POLITICAL SPEECH, THEN WHAT IS LEFT OF *BRANDENBURG V. OHIO*?

In its opinion upholding the $120 million judgment in the Nuremberg Files case, the Ninth Circuit refused to apply the *Brandenburg* political speech standard, and therefore went to great lengths to distinguish the Nuremberg Files facts from the equally threatening speeches deemed constitutionally protected in *Claiborne Hardware*. The court of appeals first noted that unlike its case, *Claiborne Hardware* did not arise under a threats statute, and then systematically diminished the seriousness of the speech at issue in the Mississippi case:

> To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.[289]

All these claims are literally true, but they also would seriously mislead anyone who is not familiar with the factual context of *Claiborne Hardware*. Evers's speech had a clearly and intentionally intimidating tone, the "break your neck" comment was made in a context where necks had been broken and so-called "black hats" or "deacons" were regularly posted outside of stores to "identif[y] those who traded with merchants,"[290] and no one living in the town with any common sense would fail to understand that if they intended to shop with the banned merchants, then Evers's speech was directed specifically at them. If anything, the intimidation stemming from the speech in *Claiborne Hardware* was much more direct and immediate than the intimidation flowing from the speech in the Nuremberg Files case. The speech in *Claiborne Hardware* occurred in a small town, the conflict was ongoing, and the threatening speakers and their potential victims lived virtually next door to each other. The posters and website at

289 Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1073–74 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

290 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 903 (1982). In stating that "necks had been broken," I am referring to the several violent acts that were committed: guns were fired at several houses, bricks were thrown at a car windshield, a beating occurred, and an old man was physically harassed. *Id.* at 904–05.

issue in the Nuremberg Files case, on the other hand, were handed out in various locales, the defendant speakers and their targets were geographically dispersed, and although the dispute between abortion opponents and proponents is ongoing and often intemperate, the nationwide nature of the dispute robs it of the claustrophobic atmosphere and the compressed intensity of the small-town boycott in *Claiborne Hardware*. None of this is intended to suggest that the threats in the Nuremberg Files case were any less frightening to the individuals named on the posters and website than the threats against those who did not comply with the boycott in *Claiborne Hardware*. This is merely to suggest that an objective assessment of the respective expressive acts in the two cases could plausibly lead to the conclusion that the speakers in *Claiborne Hardware* were more directly linked to a likelihood of immediate violence than the speakers in the Nuremberg Files case.

The important point, however, is not that the Ninth Circuit could distinguish the facts in *Claiborne Hardware* from those in the Nuremberg Files case; the important point is that the consequences of distinguishing *Claiborne Hardware* were to allow the Ninth Circuit to apply a different legal standard altogether. As a practical matter, a decision governed by the political speech doctrine set forth in *Brandenburg* and elaborated in cases such as *Claiborne Hardware* and *Hess v. Indiana*[291] is unlikely to uphold sanctions against speech in the absence of some concrete injury instigated immediately by the speech. If the Court's political speech decisions do not provide absolute protection of speech, they come very close. So upholding sanctions against speech requires an alternative to the *Brandenburg* standard.

A. *The Proliferation of Alternatives to* Brandenburg

The tendency to distinguish the Supreme Court's important political speech cases in order to apply a different—and markedly less rigorous—First Amendment standard is increasingly common. The Supreme Court and lower courts have invented a number of alternative speech-regulation constructs that provide a way around the nearly absolute protections offered by *Brandenburg* and its ilk. These alternative speech constructs greatly lessen—and sometimes eliminate altogether—First Amendment protection for speech that is often indistinguishable from speech that is incontrovertibly protected under *Brandenburg*. There are two troubling aspects of this trend.

291 414 U.S. 105, 107 (1973) (overturning on First Amendment grounds the disorderly conduct conviction of a student who faced a crowd of antiwar demonstrators and shouted: "We'll take the fucking street again [or later]").

The first is that the courts display very little recognition that they are gradually shrinking the territory covered by the crown jewel of the First Amendment—*Brandenburg* and the other political speech cases that embody the legacy of the classic Holmes and Brandeis free speech opinions. Second, the courts have fragmented the First Amendment landscape without making any effort to coordinate the fragments by reference to an overarching principle of free speech protection. We have been told by various courts why threats are troublesome, but we have not been told why the First Amendment standard these courts apply to threats is several orders of magnitude less protective than the standard for political speech. After all, if threats are worrisome, then so is incitement to political violence or revolution.

There is no grand principle to explain the development of the "true threat" alternative to *Brandenburg*. As discussed in the preceding section, the cases dealing with "true threats" (and now with the intimidation variant of "true threats") simply take the model of personal coercion and one-on-one duress and apply that model to contexts (such as the one surrounding the Nuremberg Files posters and website) involving much more generalized speech. In these cases, the fear felt by the target of the threat seems indistinguishable from the fear felt by the targets of the speech protected by the Court in *Brandenburg* or *Claiborne Hardware*. The courts have provided no comprehensive explanation for why such slight differences in the threatening contexts justify the application of such different levels of First Amendment protection.[292]

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292 The growing tendency to provide significantly lower levels of constitutional protection to different categories of speech involving very similar levels of risk undercuts the usual theoretical arguments supporting the categorization of speech within the First Amendment generally. The most compelling argument for providing different levels of First Amendment protection to different categories of speech is that the courts would otherwise reduce the protection offered "core" political speech or would simply exclude altogether certain types of speech from the First Amendment. In Frederick Schauer's classic rendition of this argument:

> [I]f we take the "full protection within" [the First Amendment] rule as the standard, there may be pressure to keep troublesome categories completely outside [the First Amendment]. When the choice is all or nothing, the difficulties of "all" may lead courts to choose "nothing." . . . If the creation of a separate category within the First Amendment is precluded, a tempting solution is merely to keep the speech that would constitute that category outside first amendment protection.

Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 300, 286 (1981).

There are two problems with this argument, both of which are illustrated by the description in the text accompanying this note regarding the proliferation of *Brandenburg* alternatives. First, the division of the First Amendment into higher and lower-

Aside from the "true threats" cases, another *Brandenburg* alternative involves the use of speech to enhance the penalty of ordinary crimes. One year after the Court decided unanimously in *R.A.V. v. City of St. Paul*[293] that the St. Paul, Minnesota, hate speech ordinance violated the First Amendment, the Court unanimously upheld the Wisconsin hate speech enhancement statute in *Wisconsin v. Mitchell*.[294] A full critique of this case can be found elsewhere;[295] the crucial aspect of the case for present purposes is that the Supreme Court approved the concept that the First Amendment imposes no limitation on penalties applied to speech if the speech occurs in conjunction with illegal conduct.[296] As with the cases applying the "true threats"

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value categories of speech does nothing to bolster the protection offered the higher-value categories of speech if the criteria defining the categories are so fluid that speech can easily be shifted from one category to another. Second, if the level of protection offered to disfavored speech within the First Amendment is so weak that it simply grants juries the kind of power to sanction unpopular speech that they exercised under the *Schenck/Frohwerk/Debs* version of the clear and present danger standard, then the practical result of categorizing speech within the First Amendment will be indistinguishable from the practical result of excluding that disfavored speech from the First Amendment altogether.

293 505 U.S. 377 (1992).

294 508 U.S. 476 (1993).

295 *See* Steven G. Gey, *What If* Wisconsin v. Mitchell *Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014 (1997).

296 The statute used in *Mitchell* permitted the enhancement of criminal penalties when the person committing the crime "select[ed] the person against whom the crime . . . [was] committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." WIS. STAT. § 939.645(1)(b) (1989–1990). In *Mitchell* itself, the statute was used to enhance the aggravated assault charge against a young African American man who joined several friends in assaulting a white man. The basic facts are that Mitchell and his friends were discussing the movie *Mississippi Burning* at a Kenosha, Wisconsin, apartment complex. *Mitchell*, 508 U.S. at 479–80. At some point, Mitchell said to the group: "Do you all feel hyped up to move on some white people?" *Id.* at 480. A few moments later, the white victim passed by Mitchell and his friends on the opposite side of the street. Mitchell said to the group: "You all want to fuck somebody up? There goes a white boy; go get him." *Id.* The group then attacked the victim, putting him in a coma for four days. *Id.* Mitchell was convicted of aggravated battery, which carried a maximum sentence of two years. *Id.* Under the Wisconsin enhancement statute, however, he could be sentenced to another seven years in prison because he had selected his victim on the basis of race. *Id.* Mitchell's jury found that his crime was racially motivated and sentenced him to four years in prison. *Id.* at 480–81.

There is no question that Mitchell could be sentenced to two years for aggravated battery. The question is whether the First Amendment permitted the state to sentence him to an extra two years merely because he uttered racist words before the crime. If Mitchell had not actually participated in the crime, then the question would

alternative to *Brandenburg*, the Court's short opinion in *Mitchell* provides no deep theoretical justification for its rather perfunctory conclusion approving the use of speech to justify the enhancement of criminal penalties. The implications of this approach are, however, quite extensive. This approach gives the government (and a political speaker's opponents) the ability to circumvent the First Amendment's protection of political speech simply by using a speaker's illegal action to justify penalizing the speech. The illegal action could range from serious crimes (such as in *Mitchell*) to low-level infractions (such as trespassing and parade permit ordinance violations, which commonly accompany political demonstrations) to any tortious act enforceable by civil sanctions. In all these circumstances, the same rule evidently applies: the Constitution allows the government to take the violator's expression into consideration in allocating sanctions and allows use of the violator's stated ideological objectives to justify punishing his or her conduct "more severely than the same conduct engaged in for some other reason or for no reason at all."[297]

The possibility that this principle will be used to sanction political protesters is not hypothetical. In one Oregon case, the Oregon courts cited *Mitchell* in upholding a punitive damages judgment assessed against the environmental group Earth First.[298] Members of the group had chained themselves to logging equipment, hung banners, and sang songs as acts of civil disobedience to protest logging activities in a national forest.[299] The protesters were arrested, charged, and convicted of criminal mischief in the third degree, for which they served two weeks in jail and paid $250.[300] They were then sued by the

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be whether he had incited his friends to commit the crime. Even under the stringent requirements of *Brandenburg*, the answer to this question would probably be "yes"; Mitchell made explicit statements urging the violence, the time frame in which the violence occurred was immediate, and he clearly indicated that he intended the violence to occur—thereby satisfying all three elements of the *Brandenburg* analysis. But the ultimate result under this analysis would be that Mitchell would be deemed to have aided and abetted the actual participants in the beating. From this perspective, incitement to a crime is a lesser-included offense of the actual crime. Therefore, one could not be convicted of both incitement and the crime. In the actual *Mitchell* facts, however, Mitchell had participated in the beating; thus, his incitement was merely one aspect of the crime of aggravated battery itself, for which he was sentenced to the maximum of two years. The extra two years of his sentence were for the words he expressed and the thoughts behind them. He was sentenced to two years for what he did and another two years for announcing why he did it.

297 *Id.* at 485.

298 Huffman & Wright Logging Co. v. Wade, 857 P.2d 101 (Ore. 1993).

299 *Id.* at 105.

300 *Id.*

logging company for lost revenues; a jury awarded the company $5717.34 and punitive damages of $25,000.[301] The Oregon Supreme Court rejected the protesters' First Amendment claim that they were being penalized because of their constitutionally protected beliefs. The court cited *Mitchell* for the proposition that the jury could take the protesters' motivations into consideration in determining punitive damages because "defendants' conduct, although accompanied by expressive activity, produced a special cognizable harm (an interference with plaintiff's possessory interest in its property), distinct from any communicative impact."[302] The effect of this approach may well be "the beginning of the end of civil disobedience in Oregon."[303] Any criminal or tortious activity occurring during an otherwise constitutionally protected protest may lead to ruinous damage assessments against protest groups and their members.

Another example of how courts have used *Mitchell* to circumvent First Amendment protections arises in challenges to the military rules excluding homosexuals. Courts frequently cite *Mitchell* to rebut First Amendment challenges to the military's "don't ask, don't tell" policy, which excludes admitted homosexuals who make their proclivities public. In many "don't ask, don't tell" cases verbal admissions of homosexuality (which would otherwise be regarded as constitutionally protected speech) are used to prove the forbidden homosexual actions. To many courts, *Mitchell* provides the route around the First Amendment: "Just as a jury might infer a criminal violation from statements of the accused, the Navy infers prohibited homosexual acts from admissions of homosexuality. This inference follows the common sense notion that those who identify themselves as homosexual have engaged and will engage in homosexual acts."[304] The point is that *Mitchell* provides a handy alternative to circumventing the politi-

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301 *Id.* at 106.

302 *Id.* at 112.

303 *See* Thomas A. Ped, Note, Huffman & Wright Logging Co. v. Wade*: The Beginning of the End of Civil Disobedience in Oregon*, 30 WILLAMETTE L. REV. 747 (1994). For other critical commentary on the use of *Mitchell*-type enhanced sanctions against demonstrators engaged in civil disobedience, see Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Model to Bring the Social Value of Political Protest into Balance*, 59 OHIO ST. L.J. 185 (1998); Kaarin L. Axelsen, Note, *Problems of Punitive Damages for Political Protest and Civil Disobedience*, 25 ENVTL. L. 495 (1995).

304 Selland v. Perry, 905 F. Supp. 260, 263–64 (D. Md. 1995). For other "don't ask, don't tell" cases using this tactic, see Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996), *aff'g* 895 F. Supp. 820, 824 (E.D. Va. 1995) (both the district court and court of appeals opinions relying on *Mitchell*); Hrynda v. United States, 933 F. Supp. 1047, 1053 (M.D. Fla. 1996); Watson

cal speech protections of *Brandenburg*: if governments or political opponents want to sanction speech they do not like, they can get around the strong protections of *Brandenburg* by linking the speech to some illegal act, in which case the First Amendment protections fall away and the speech becomes fair game for legal sanctions.

A third *Brandenburg* alternative involves what Justice Stevens has called "speech that serves a teaching function."[305] Such cases involve speech that goes beyond advocacy to actually teach the mechanics of dangerous or illegal activity. The Supreme Court has not yet reviewed a case of this sort, but in *Rice v. Paladin Enterprises, Inc.*,[306] the Fourth Circuit Court of Appeals issued a prominent and widely cited decision articulating a very narrow range of constitutional protection for "teaching" cases. The Fourth Circuit decision involved a short instructional book entitled *Hit Man*.[307] As the book's title implies, the book purports to be a how-to manual for assassins. It provides information on topics ranging from the proper dress for an assassination, to the best methods of killing, to how to dispose of the body after the "hit" has been accomplished. The case was a wrongful death civil action brought against the publisher of the book by the family of a woman killed by a contract killer hired by the victim's ex-husband.[308] The killer had a copy of *Hit Man* in his apartment at the time he committed the murder.[309] The district court granted the publisher's summary judgment motion on First Amendment grounds.

The legal merits of the court of appeals opinion in *Rice* are muddled by the decision of the publisher to stipulate to all three components of *Brandenburg*.[310] The publisher even stipulated that by selling the book he "intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes," and that he assisted "in particular in the perpetration of the very murders for which the victims' families now attempt to hold [the publisher] civilly liable."[311] For whatever reason—perhaps a taste for martyrdom or a desire to press the courts to grant protection even beyond the outer reaches of *Brandenburg*—the publisher's stipulations

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v. Perry, 918 F. Supp. 1403, 1418 (W.D. Wash. 1996); Philips v. Perry, 883 F. Supp. 539, 547 (W.D. Wash. 1995), *aff'd*, 106 F.3d 1420 (9th Cir. 1997).

305 Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., opinion respecting the denial of petition for writ of certiorari).

306 128 F.3d 233 (4th Cir. 1997).

307 REX FERAL, HIT MAN (1983).

308 *Rice*, 128 F.3d at 239.

309 *Id.*

310 *Id.* at 241.

311 *Id.*

provided the court of appeals with a simple means to reverse the district court's grant of summary judgment in favor of the publisher. Since the publisher essentially admitted that the plaintiffs had satisfied the *Brandenburg* test, it should have been easy for the court of appeals to reverse the district court once the appellate court decided to decline the publisher's invitation to go beyond *Brandenburg*.

The Fourth Circuit Court of Appeals saw things differently, however. Instead of accepting the publisher's ill-advised invitation to write a perfunctory reversal of the district court's summary judgment decision based on *Brandenburg*, the Fourth Circuit embarked on a meandering discussion—all of it unnecessary dicta—of why *Brandenburg* did not apply to this case at all. This is the portion of the *Rice* decision that provides the template for an alternative to *Brandenburg* in cases involving speech that teaches, rather than advocates illegal action. The basic theory is that such "teaching" speech amounts to aiding and abetting the crime: "[T]he First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word."[312] There was no allegation in *Rice* that the publisher knew the contract killer of the plaintiff's family member, or that prior to being sued the publisher even knew that the killing had taken place. Thus, applying the concept of aiding and abetting to this case involves a far more attenuated interpretation of the concept than is common in either criminal or civil cases. Although there are only scattered decisions in Virginia recognizing the tort of aiding and abetting, the standard that has been applied in such cases requires a much more direct connection to the underlying act than is present in *Rice*. One Virginia decision describes the relevant standard as requiring "substantial assistance by the aider and abetter in the achievement of the [underlying tort]."[313] However the description of the concept is phrased, the concept of aiding and abetting loses all meaning unless it requires active participation in the actual underlying tort. It is difficult to conceive of a person aiding and abetting a tort that he does not even know is occurring.

The Fourth Circuit's position is that the simple provision of information constitutes the relevant "aid," but the court amends this proposition by adding that the information can only be the subject of legal liability if it is coupled with the speaker's "purpose of assisting in

312 *Id.* at 244.

313 Sherry Wilson and Co., Inc. v. Generals Court, L.C., No. 21696, 2002 WL 32136374 (Va. Cir. Ct. Sept. 27, 2002).

the commission of crime."[314] But note the absence of a definite article in this quotation; the relevant intent is not the intent to assist the commission of *a* particular crime, but rather the intent of assisting with the commission of crime in general. The force of the Fourth Circuit's opinion stems from its insistence that the contents of *Hit Man* are dangerous and will lead inevitably to murder and mayhem. But in the end, the court does not permit courts to assign liability based on the information alone. The information is apparently not the real problem.[315] The court insists that a newspaper could publish exactly the same information without fear of liability because "neither the intent of the reporter nor the purpose of the report is to facilitate repetition of the crime."[316] The real problem, therefore, is the court's moral revulsion at the defendant's motive for publishing this information. According to the court, the intent requirement "would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment."[317] The court is not concerned with dangerous information; it is concerned with the publisher's civic immorality.

To the extent that this civic immorality poses any threat to the community, it is a threat that looks very much like the sort of incitement discussed by the Supreme Court in its political advocacy cases. The Fourth Circuit worries that "through powerful prose in the second person and imperative voice, [the book] encourages its readers in their specific acts of murder."[318] But if the problem with the book is that it "encourages . . . specific acts of murder," then the author of the book is engaged in incitement and the book is therefore subject to the *Brandenburg* immediacy analysis. The book still may seem problematic until one reflects on the three instances of speech that the modern Supreme Court has already deemed protected under *Brandenburg*: (1) Klansmen flaunting guns and talking about "revengeance,"[319] (2) angry civil rights advocates discussing "breaking necks" in a heated context where violence has already occurred,[320] and (3) during a large

314 *Rice*, 128 F.3d at 248.

315 Indeed, although the premise of the court's ultimate conclusion is that the raw information in the book is dangerous if not incendiary, several pages of the book's contents are reprinted in the Fourth Circuit's opinion, *see id.* at 235–41, and are available for downloading on the Fourth Circuit website.

316 *Id.* at 266.

317 *Id.* at 248.

318 *Id.* at 252.

319 Brandenburg v. Ohio, 395 U.S. 444, 446 (1968).

320 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 900 n.28 (1981).

demonstration in which students have just been moved off the street by the police, the defendant agitating the crowd by shouting either "we'll take the fucking street again" or "we'll take the fucking street later."[321] All three of these examples involve speakers who directly encourage an audience to commit acts of violence or illegal behavior, and two of them involve speech occurring in agitated situations in which violence could occur at any moment. If the immediacy requirement applies, it is hard to understand why these three instances of speech are protected but a book's "powerful" and "imperative" prose is not. The potential harm in the typical *Brandenburg* context is much more direct and immediate than the harm posed by the publication of a single book, no matter how "powerful" that book's prose may be. This absence of immediacy is, of course, why the Fourth Circuit had to devise a way around *Brandenburg*. Hence the different standard for "teaching" speech.[322]

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321 Hess v. Indiana, 414 U.S. 105, 107 (1973).

322 The absence of an immediate threat in *Rice* makes the court's strong rhetoric seem like something of an overreaction. This impression is bolstered by a review of the information contained in the book *Hit Man*. Most of the book's contents provides the most obvious and superficial kind of instructional material. For example, the book suggests wearing dark clothes if the crime is to be committed at night, driving a rental car instead of one that can be traced to the owner, staying in a hotel near the crime scene, and wearing gloves during the crime to avoid leaving fingerprints. *See Rice* 128 F.3d at 236, 240. The book's suggestions for disposing of a body are equally obvious, if a bit more gruesome. The book suggests, for example, that the "hit man" tie a concrete block to the body if depositing the body in a lake or river to prevent the body from floating to the surface when gasses form during decomposition. *Id.* at 238. The book also provides suggestions for disposing of a body on dry land: "Take the head to some deserted location, place a stick of dynamite in the mouth, and blow the telltale dentition to smithereens!" *Id.* Leaving aside the author's colorful descriptions, is any of this information going to come as news to even slow-witted criminals? Is it revealing a closely held secret of professional hit men that a stick of dynamite will eliminate most physical evidence?

The book *Hit Man* has a certain grand guignol quality that becomes more understandable once the volume's origins are understood. The book's author is listed as "Rex Feral." This name (Latin for "King of Beasts") is, of course, a pseudonym. Although the book's cover touts the author as a professional hit man, we now know that the real author was an unemployed mother of two who wrote the book to earn money to pay her property taxes. *See* David Montgomery, *If Books Could Kill: This Publisher Offers Lessons in Murder. Now He's a Target Himself*, WASH. POST, July 26, 1998, at F1. She originally submitted the book as a novel, but the publisher told her to rewrite it as a how-to book. According to a letter she sent to the publisher, she got her lethal ideas "from books, television, newspapers, police officers, my karate instructor, and a good friend who is an attorney." *Id.* Although the publisher's catalog described her as a "lethal weapon aimed at those he [sic] hunts," in fact the author did not even own a gun. *Id.* "But," she urged in the letter to the publisher, "don't tell anybody." *Id.*

Rice is by no means the only application of this *Brandenburg* alternative. For many years courts have been using this theory to punish individuals who give seminars and publish books and pamphlets urging people to refuse to pay taxes and offering suggestions for illegally avoiding the payment of taxes. The courts' routine explanation is that *Brandenburg* does not protect the speakers in these cases because the speech "explained how to avoid withholding . . . [and] incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of revenue."[323] In these cases the notion that the defendants "incited" the illegal conduct is used in only the loosest sense. The defendants offered various other individuals information, and those other individuals took that information and—after due consideration and under their own free will—violated the law.[324] This is far removed from the "fire in a crowded theater" concept of incitement—i.e., speech that causes a visceral, immediate, and unthinking reaction—that is the mainstay of the *Brandenburg* political speech standard. Several different circuits have treated speech that simply provides information on how to avoid taxes as evidence of aiding and abetting the ultimate tax fraud of the delinquent taxpayers who act on that information.[325] The Fourth Circuit itself employed the aiding and abetting theory to uphold a conviction of this sort over a decade before it decided *Rice*.[326] Some of these

323 United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978). The defendants' offense was giving a series of seminars to employees of the John Deere Tractor factory in Dubuque, Iowa. *Id.* at 622. According to the court,

> [m]ost of the testimony recalled speeches given by the defendants, the major portion of which dealt with the Constitution, the Bible, and the unconstitutionality of the graduated income tax. The evidence indicates that the discussions of the W-4 and W-4E forms occurred primarily during question and answer sessions following the speeches.

Id. With one exception, no individual taxpayer "testified that either defendant actually assisted him in preparing a W-4 or W-4E, or was with him when he filed such a form. Most testified to having other sources of information on tax evasion and other influences on his activity in the tax protest movement." *Id.* at 623. Thus, the only basis for the aiding and abetting charge was the defendants' public speech to a general audience.

324 Cases involving actual assistance in the preparation and filing of false tax forms are obviously different than the pure speech cases, and the direct assistance of illegal conduct takes these cases out of the First Amendment context. *See, e.g.*, United States v. Fletcher, 322 F.3d 508 (8th Cir. 2003) (defendants are convicted for aiding and abetting tax fraud based on evidence that they held seminars and actually met with and prepared tax returns for individual clients).

325 *See Buttorff*, 572 F.2d 619; United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985).

326 *See* United States v. Kelly, 769 F.2d 215 (4th Cir. 1985).

cases even approve injunctions ordering tax protesters to cease distributing books and other materials and also cease speaking at seminars at which they "incite" the audience to avoid taxes illegally.[327] Thus, the aiding and abetting theory has been used to circumvent not only *Brandenburg*, but also the traditional First Amendment prohibition on prior restraints.

These are merely two of the contexts in which lower courts have reviewed speech that teaches, rather than simply advocates illegal conduct under a First Amendment standard that falls far short of the *Brandenburg* incitement/immediate harm standard. The Supreme Court has thus far avoided reviewing any of these decisions. At least one Supreme Court Justice, however, has suggested that he might be sympathetic to a "teaching speech" alternative to *Brandenburg*. In *McCoy v. Stewart*,[328] the Ninth Circuit Court of Appeals affirmed the issuance of a writ of habeas corpus on behalf of a former gang member from California who attended a barbecue with members of an Arizona gang during which he offered his opinion about some of the Arizona gang's activities.[329] Based on these comments, the Arizona courts convicted the former gang member for participating in a criminal street gang.[330] The Ninth Circuit upheld a district court decision to issue a writ of habeas corpus on the ground that the former gang member's informal advice to the Arizona gang was protected by *Brandenburg*.[331] The Supreme Court denied certiorari, but Justice Stevens filed a separate opinion in which he noted that the imminence component of *Brandenburg* "does not necessarily adhere to some speech that performs a teaching function."[332] Although he does not definitively state that he would deny constitutional protection to such speech, Justice Stevens asserts that "oral advice, training exercises, and perhaps the preparation of written materials" should not "glibly" be characterized as advocacy and therefore afforded the strong protections of *Brandenburg*.[333]

Assuming that the context is not one in which the speaker is actively participating in a criminal enterprise, it is unclear why *Brandenburg* should not apply to speech that simply offers advice or gives

327 *See, e.g.*, United States v. Kaun, 827 F.2d 1144 (7th Cir. 1987); United States v. Schiff, 269 F. Supp. 2d 1262 (D. Nev. 2003).

328 282 F.3d 626 (9th Cir. 2002).

329 *Id.* at 628.

330 *Id.*

331 *Id.* at 631.

332 Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., opinion respecting the denial of petition for writ of certiorari).

333 *Id.*

instructions that may inform the possible behavior of others. The main thrust of the Court's political advocacy standard is that the responsibility for criminal conduct is on the person who engages in the conduct, not the person who encourages or advocates that conduct. In the advocacy context, the government may not censor speech simply because some people who hear that speech will take it to heart and engage in illegal conduct or other antisocial behavior. This is the central meaning of Justice Brandeis's admonition in *Whitney v. California*:

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[334]

There is no good reason that this admonition should not apply when the "falsehoods and fallacies" are packaged as instructional material as opposed to advocacy. In both instances the key to whether the government can censor the speech or sanction the speaker should be whether a listener has the opportunity to absorb the speaker's message, reflect on it, and then decide as a matter of free will to follow the speaker's bad advice or reject it.[335]

B. *Theoretical Consistency, First Amendment Jurisprudence, and the* Brandenburg *Paradigm*

The courts' lenient treatment of civil and criminal sanctions on antisocial instructional speech is only one manifestation of the main problem with all the various *Brandenburg* alternatives that have been devised recently by the lower courts. The main problem is that all of

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334 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

335 In his excellent new paper on the closely related subject of "crime-facilitating speech," Eugene Volokh argues that there should be no exception to the usual First Amendment protections of speech even in situations in which the speaker knew that the speech would aid those engaged in criminal activity but recklessly engaged in the speech anyway. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005). Professor Volokh draws two exceptions to this rule: first, when the information creates "extraordinarily serious harms," and second, when the speech "seems to have virtually no noncriminal uses." *Id.* at 1205–13, 1146–50. Volokh's analysis and conclusions are largely consistent with the arguments presented in this Article, although the protectiveness of Volokh's rule would depend on how narrowly the courts interpret Volokh's two exceptions. Volokh is aware of this problem, and is appropriately circumspect about the difficulties of defining the relevant harm threshold that triggers the exceptions to the rule. *Id.* at 1205–09.

these alternatives deviate from the central assumptions that permeate the Supreme Court's modern First Amendment political speech cases; in particular, the various *Brandenburg* alternatives violate the Court's basic theoretical understanding of the relationship between speech, risk, governmental control, and individual responsibility in the First Amendment context. This is not to say that it will ever be possible to devise a Grand Unification Theory of the First Amendment. The infinitely different number of factual scenarios in which free speech issues arise will always require several different First Amendment standards to reconcile collective security and efficiency interests with individual liberty. But the decisions that form the core of the *Brandenburg* paradigm—i.e., the iconic Holmes and Brandeis opinions in *Abrams*, *Gitlow*, and *Whitney*; *Brandenburg* itself; and post-*Brandenburg* elaborations on the themes of that case in decisions such as *Cohen*, *Claiborne Hardware*, and *Hess*—do not merely provide a standard for analyzing speech; they also implicitly define in a more general sense the proper role of speech and speakers in a democracy. Thus, even if the precise components of *Brandenburg* do not apply to a particular instance of speech, the *Brandenburg* paradigm should infuse every constitutional standard applied to the regulation of human expression—regardless of the mode of expression or the circumstances in which the expression occurs.

A summary outline of the *Brandenburg* paradigm would include at least five essential propositions. The first is the principle of ideological agnosticism. Perhaps the most basic premise of the Court's modern First Amendment jurisprudence is that the government cannot punish a speaker based on the government's view of the speaker's ideas. It is only a short step from this unassailable constitutional fact to the more general proposition that the government must be agnostic as to notions of universal truth and political righteousness. Justice Jackson's expression of this proposition—that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"[336]—is one of the most eloquent, but hardly unique in the constitutional literature. Although some critics of Justice Jackson's opinion have objected that the country could never effectively govern itself if it were truly guided by this ultimate form of political tolerance,[337] it would be difficult to make sense of most modern First Amendment law without reference to the principle

336 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

337 This is more or less the position taken by Justice Frankfurter in his *Barnette* dissent. *See id.* at 646 (Frankfurter, J., dissenting). For a thoughtful recent rendition

of ideological agnosticism. Just to cite one example, how could one explain the per se rule against government regulation of speech based on viewpoint[338] if the government could adopt and enforce through its criminal law a particular point of view?

The second essential component of the *Brandenburg* paradigm is the assumption that society must adopt a high level of collective tolerance for risk stemming from speech. This notion is embedded in the imminence component of the *Brandenburg* standard, and is based on Brandeis's notion that "[o]nly an emergency can justify repression."[339] At the same time, the notion of collective risk tolerance must be wedded to a Millian notion of concrete harm to others.[340] Thus, under the *Brandenburg* paradigm the government may not suppress speech to protect an amorphous concept of community morality or a social ethos. Decorum regulations are not permitted. The notion of collective risk tolerance must be further modified by Brandeis's insistence that to justify suppression of free speech "there must be reasonable ground to believe that the evil to be prevented is a serious one."[341] The only thing to add is that this collective tolerance for risk should be applied to the same extent with regard to all forms of speech. As noted above, there is no reason why the risks stemming from the dissemination of information should be treated any differently than the risks flowing from expressions of advocacy. Insofar as the First Amendment is concerned, risk is risk. The expressive form of that risk should not matter if the level of the risk falls below what would be

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of this objection, see Steven D. Smith, Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 615 (2003).

338 *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995).

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id.

339 *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

340 *See* JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., 1974) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.").

341 *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

tolerated under the baseline established in the political advocacy cases.

The third element of the *Brandenburg* paradigm is that the legal burden of violating the law should be on the lawbreaker, not the speaker who gives the lawbreaker the bad idea. The explanation for this is not, as the Court has occasionally suggested, that there are no "dangerous ideas."[342] The explanation, rather, is that there are *lots* of dangerous ideas, and if the government is given the power to suppress an idea (and its proponent) simply because of its inherent danger, the First Amendment would truly be worth nothing. As usual, the cynical Justice Holmes was nothing if not honest about the speech he sought to protect: "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[343] For that very reason, Justice Holmes recognized, the government could not be allowed to suppress any idea unless that idea could be said to lead to a "present conflagration."[344] Otherwise, there is little principled way of stopping short of a legally enforced regime of ideological purity.

The fourth component of the *Brandenburg* paradigm follows from the third. Because the Court's First Amendment standard assigns primary responsibility to listeners rather than speakers, the Constitution incorporates what might be termed a listener incredulity assumption. That is, the Constitution is interpreted under the assumption that the general public is not stupid, credulous, or evil. The theory (or, as Justice Holmes put it, the "wager"[345]) is that individual citizens will be able to sort out good from bad without the government intervening. The country will always produce a certain number of Ted Kaczynskis and Timothy McVeighs, but no free society would fashion its system of free speech by reference to those lowest common human denominators.

The final component of the *Brandenburg* paradigm is the practical consequence of the first four: censorship must be the government's last resort to address impending social harms. Again, in Justice Brandeis's phrase, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discus-

342 *See* Speiser v. Randall, 357 U.S. 513, 519 (1958) (holding unconstitutional a government program "'aimed at the suppression of dangerous ideas'" (quoting Am. Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950))).

343 Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

344 *Id.* (Holmes, J., dissenting).

345 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

sion."[346] In effect, this imposes a least restrictive means analysis whenever the government seeks to suppress speech. If any alternative is available to prevent the serious harm, then that alternative must be attempted before the government is allowed to resort to censorship.

None of these principles is particularly controversial in the political advocacy context. Each of these principles will be familiar to any student who has been led through the development of the Court's political speech jurisprudence from *Schenck* to *Brandenburg*. The apparent novelty is the suggestion that these same principles should apply with equal force to other categories of free speech challenges. There is no good reason why these principles should not also apply to the various categories of speech that have recently been devised by the courts and are currently being used to circumvent *Brandenburg*. This does not mean that the implementation of these principles will be identical in every context. As noted in Part IV, for example, the typical contexts in which private threats are communicated to their targets would require a change in the *Brandenburg* analysis to fully account for the relevant harm.[347] But if the implementation will sometimes vary, the *principles* should not change in the different contexts. There is no reason to deviate from the requirement that the government prove the existence of a serious and concrete harm before sanctioning speech in these other contexts. Likewise, there is no reason to abandon *Brandenburg*'s assumptions about the credulity and common sense of individuals reading books, watching videos, and listening to speakers—even if the speech involved does not fit the model of *Brandenburg*-style political advocacy.

Perhaps most importantly, there is no reason to forget the key lesson learned in the post-World War I period that was the crucible in which the modern First Amendment was forged. The lesson from those days is that radical dissent has a way of making those associated with the status quo very nervous, and judges, jurors, and legislators tend to be closely associated with the status quo. If the discomfort felt by those in society's mainstream becomes too great, it turns to terror, and the sources of the fear become perceived as terrorists. The legal landscape in which these social forces are now playing themselves out is not comforting. *Black* is just one example of a disturbing modern trend. This trend is defined by the proliferation of alternative First Amendment constructs to regulate antisocial speech. These constructs appear uncoordinated by any central principle and seem limited only by the ingenuity of plaintiffs and prosecutors in fitting

346 *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

347 *See supra* notes 273–75 and accompanying text.

familiar examples of antisocial speech into the new regulatory patterns. In this atmosphere, some overriding constitutional framework is needed to limit the expansion of the new categories and constrain the use of flexible terms such as "intimidation" and "terrorism." The *Brandenburg* paradigm was devised to serve precisely that function, if the courts would only use it.

CONCLUSION

It is impossible to predict the lasting consequences of *Black*. It may end up doing little to the civil liberties landscape, or it may end up being one of a number of small cuts that eventually bleed the life out of *Brandenburg* and subsequent cases that realized the promise of the Holmes and Brandeis free speech opinions. Justice O'Connor's opinion for the Court in *Black* certainly does not position the case as anything like an assault on basic First Amendment principles. Quite the contrary, Justice O'Connor treats the case as a simple application of existing exceptions to the general protections offered by the First Amendment. Unfortunately, this is perhaps the greatest danger posed by opinions like *Black*. Exceptions to the immediate harm principle represented by *Brandenburg* continue to multiply. The perception that these cases are unexceptionable footnotes to the First Amendment is more likely to corrode basic free speech protections than any frontal assault of the sort seen immediately following the two World Wars. Those crisis periods brought basic challenges to fundamental principles, which in turn generated equally basic defenses of those principles. The slow erosion of protections in the modern era is unlikely to produce equally vociferous defenses because the erosion is not even noticed until the landscape has already been fundamentally altered.

One of the few benefits society gains from going through a time of crisis is a forced reconsideration of that society's basic principles. During calmer times the importance of those basic principles is simply assumed, and therefore they seldom get defended in the intellectual marketplace. It is an odd but common phenomenon that the lack of constant defense allows principles to become brittle and weak, and therefore vulnerable to the sudden pressure generated during times of crisis to forego civil liberties for security in an environment when the country's very existence seems at stake. Vincent Blasi recognized this truth when he urged scholars and judges to view the First Amendment from a pathological perspective, with a view toward protecting

this most basic freedom when it is most susceptible to attack.[348] We are in the midst of another pathological period in American history. *Black* will do little to help us survive it.

348 *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) ("[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.").