Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism

Nina Petraro
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INTRODUCTION

'Free speech' is a phrase often utilized in many political, academic, business and social forums, and carries with it tremendous patriotic meaning. Even the average American, however, knows that its parameters are not unlimited. What is and should be included under the First Amendment’s realm of protection? How should various non-verbal conduct and symbolic communication be treated under this analysis? And does a symbol’s meaning transform over time as its significance changes? Should threatening speech be limited? And what about terrorist threats? All of these questions raise issues regarding First Amendment jurisprudence. On the one hand, various supporters argue that such threats should be afforded the broadest Constitutional protection possible, comparing these acts to everyday speech falling within the parameters of the First Amendment’s Free Speech Clause.1 On the other hand, many

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1 See W. Wat Hopkins, Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v. Black and Why It Didn’t, 26 HASTINGS COMM. & ENT. L.J. 269, 308–09 (2004) (drawing distinction between intimidating speech and “true threats,” arguing that the prior should be protected by the First Amendment while the latter should not); Matthew G. T. Martin, True Threats, Militant Activists, and the First Amendment, 82 N.C.L. REV. 280, 308–10 (2003) (describing Professor C. Edwin Baker’s view that threatening speech should be protected under the First Amendment, unless it involves direct violence or coercion to another); Jennifer E. Rothman, Article, Freedom of Speech and True Threats, 25 HARV. J.L. & PUB. POL’Y 283, 289 (2001) (proposing
argue that the danger of threatening speech outweighs its minimal social or discursive value, thereby justifying its limitation. This Note will argue that the First Amendment's right to free speech should be safely limited through the 'True Threats Doctrine,' so that the State can regulate speech and behavior which intimidates or causes fear of the directed listener's life or physical well-being. Specifically, the Note will follow the analysis of Virginia v. Black, a Supreme Court case which held that cross-burning with an intent to intimidate was a type of true threat, and consequently proscribable conduct under the Free Speech Clause of the First Amendment. Finally, this analysis will then be applied to the so-called speech rights of terrorist groups, while utilizing the jurisprudence and political theories behind symbolic speech, as well as recent federal and state cases adjudicating this issue, to argue that certain types of terrorizing and intimidating speech and conduct do not fall under the protection of the United States Constitution.

I. VIRGINIA V. BLACK: THE CASE USED AS A LENS FOR THESE ISSUES

The recent Supreme Court case Virginia v. Black addressed the broad issue of whether the symbolic conduct of burning a cross was protected by the First Amendment. The Court, in doing so, evaluated the effects of threats, intimidation and terrorizing activity on First Amendment freedoms and analyzed threatening speech should be restricted only if proved that offender had subjective intent to frighten or coerce target and that offender suggested threat would be carried out).

2 See Jennifer Elrod, Expressive Activity, True Threats, and the First Amendment, 36 CONN. L. REV. 541, 608 (2004) (stating that proscription against threats is based on sound policy that threats have little or no value because they "do not foster debate, they do not encourage diversity of views, they do not enhance political participation, they do not prompt discussion on issues of public concern, and they do not permit the expression of opinion"); Steven G. Gey, A Few Questions About Cross Burning, Intimidation, and Free Speech, 80 NOTRE DAME L. REV. 1287, 1325 (2005) (explaining Court's justification for excluding "true threats" from constitutional protection lies in the threats' slight social value measured against the desire for societal "order and morality").


4 Black, 538 U.S. at 363 (defining cross burning as "virulent form of intimidation and unprotected by First Amendment").


6 Id. at 347 (framing constitutional issue of case); see Amanda J Congdon, Note, Burned Out: The Supreme Court Strikes Down Virginia's Cross Burning Statute in Virginia v. Black, 35 LOY. U. CHI. L.J. 1049, 1082 (2004) (explaining challenge Supreme Court faced regarding constitutionality of statutory prohibition against cross burning).
the historical hatred and meaning behind such symbols. Consequently, \textit{Black} establishes the jurisprudence that limits intimidating types of speech and symbolic expression, and as this Note will argue, the threats and frightening speech of all terrorist organizations and individuals.

\textit{Virginia v. Black} involved two distinct factual stories. In the first, Richard Elliott and Jonathan O'Mara, burned a cross on the front yard of African-American James Jubilee, allegedly in response to Jubilee's complaint regarding Elliott shooting a gun in his backyard. In the second, just four months later, Barry Elton Black, the Imperial Wizard of the Keystone Knights of the Ku Klux Klan, led a rally held by permission on private property. All parties were thereafter arrested and convicted under Virginia's cross-burning statute. Elliott and O'Mara's convictions, unlike Black's, were upheld in each state and federal court due to a proper jury instruction, and analysis of their claims ends here for purposes of this Note.

The procedural posture of Barry Elton Black's conviction and case is not as complicated as the constitutional issues behind it. At trial, Black was convicted under the Virginia state cross-burning statute which stated, "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." In terms of evidentiary purposes, the law explained, "Any such burning of

\begin{itemize}
  \item \textit{Black}, 538 U.S. at 359–60 (discussing case law regarding "true threats" and intimidation, and applying such concepts to cross-burning).
  \item 538 U.S. 343 (2003).
  \item \textit{Black}, 538 U.S. at 348–51 (laying out facts regarding respondents Barry Black, Richard Elliott and Jonathan O'Mara); see Congdon, supra note 6, at 1082–83 (telling stories of Barry Black, Richard Elliott, and Jonathan O'Mara).
  \item \textit{Black}, 538 U.S. at 350 (noting facts of case); see Congdon, supra note 6, at 1083 (describing facts of Elliott's and O'Mara's cross burning activities); Mark S. Enslin, Case Note, \textit{Domestic Terrorism or Protected Free Speech: The Supreme Court Decides the Cross-Burning Question in Black v. Virginia}, 26 HAMLIN L. REV. 178, 182 (2002) (detailing facts of Elliott's and O'Mara's actions).
  \item \textit{Black}, 538 U.S. at 348 (giving facts of Black's Klan rally); see Congdon, supra note 6, at 1082 (discussing Black's Klan rally); Enslin, supra note 10, at 183 (discussing facts of Black's Klan rally).
  \item VA. CODE ANN. § 18.2-423 (1996).
  \item See Congdon, supra note 6, at 1083–85 (discussing in detail state court decisions and rationale); Enslin, supra note 10, at 184–87 (citing Virginia state courts ruling on Black's conviction).
\end{itemize}
a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.\textsuperscript{16} The trial court instructed the jury on the meaning of "intent to intimidate" and that the burning of the cross itself is sufficient to infer the requisite intent.\textsuperscript{17} Black objected to this last instruction on First Amendment grounds and appealed the judgment to the Court of Appeals of Virginia, arguing that the cross-burning statute should be declared unconstitutional.\textsuperscript{18} Nonetheless, the Virginia Court of Appeals affirmed Black's conviction and he therefore appealed to the Supreme Court of Virginia.\textsuperscript{19} There the highest court in the State held the act facially unconstitutional, citing to its impermissibly discriminatory content-based nature, and its overbroad prima facie evidence provision.\textsuperscript{20} Three justices dissented however, and argued that the Virginia cross-burning statute only applied to conduct that constituted a "true threat" and was therefore constitutional.\textsuperscript{21} The dissenters also disagreed with the majority opinion with regard to the prima facie provision, noting that Virginia still had the burden of proof to prove intent to intimidate.\textsuperscript{22} Subsequently thereafter the United States Supreme Court granted certiorari.\textsuperscript{23}

The Supreme Court in \textit{Virginia v. Black}\textsuperscript{24} there affirmed the reversal of Black's conviction, vacated in part and remanded back

\textsuperscript{16} \textit{Id.} (quoting \textit{Va. Code Ann. § 18.2-423}).

\textsuperscript{17} \textit{Black}, 538 U.S. at 349 (restating trial court's jury instructions); see Chris L. Brannon, \textit{First Amendment Permits Ban on Cross Burning When Done with the Intent to Intimidate}, 73 Miss. L.J. 323, 324 (2003) (reviewing procedural posture of case); Congdon, supra note 6, at 1083 (discussing jury instruction given in trial court).

\textsuperscript{18} \textit{Virginia v. Black}, 538 U.S. 343, 349-50 (2003) (discussing Black's objections to trial court's holding and his appeal to Court of Appeals of Virginia); see Brannon, supra note 17, at 324 n.6. (recounting Black's objection to trial court's jury instructions concerning inference of intent on First Amendment grounds).

\textsuperscript{19} \textit{Black}, 538 U.S. at 350-51 (citing procedural posture); see Brannon, supra note 17, at 324–25 (discussing Black's appeal).

\textsuperscript{20} \textit{Black}, 538 U.S. at 351 (explaining Supreme Court of Virginia's decision); see Brannon, supra note 17, at 325 (discussing Court's holding).

\textsuperscript{21} \textit{Black}, 538 U.S. at 351–52 (quoting Virginia justices' reasons for dissent); see Enslin, supra note 10, at 187–89 (explaining Justice Hassell's interpretation of Virginia statute); see also discussion infra Part III (discussing 'true threats' doctrine).

\textsuperscript{22} \textit{Black}, 538 U.S. at 352 (discussing dissent's arguments in Virginia Supreme court decision); see Congdon, supra note 6, at 1085 (noting dissent's position that statutorily-created inference alone was insufficient to establish intent to intimidate beyond a reasonable doubt).

\textsuperscript{23} \textit{Virginia v. Black}, 538 U.S. 343, 352 (2003) (granting certiorari); see Brannon, supra note 17, at 325 (following procedural posture of case).

\textsuperscript{24} 538 U.S. 343 (2003).
to state court.\textsuperscript{25} \textit{Black} held that although a state's ban on cross burning with the intent to intimidate was, in fact, constitutional under the First Amendment,\textsuperscript{26} the prima facie provision given by the jury instruction made the Virginia statute facially unconstitutional.\textsuperscript{27} Justice Sandra Day O'Connor, writing for the plurality, explained that such a provision compelled the jury to convict in every cross-burning case, because they would automatically find the intent to intimidate regardless of the individual facts of the case.\textsuperscript{28} Justice John Paul Stevens concurred in \textit{Black} simply because he believed the Virginia cross-burning statute was overbroad and therefore unconstitutional under the First Amendment.\textsuperscript{29}

Supreme Court Justice Clarence Thomas dissented separately, arguing that cross burning should never be constitutionally protected conduct.\textsuperscript{30} He reminded the Court that the Ku Klux Klan is the oldest and most persistent terrorist organization in the world, known to harass, murder and torture, and use the burning cross as a way to terrorize, frighten and intimidate.\textsuperscript{31}

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\item \textsuperscript{25} \textit{Black}, 538 U.S. at 367 (discussing holding of United States Supreme Court); see Brannon, supra note 17, at 325 (summarizing \textit{Black}'s holding).
\item \textsuperscript{26} \textit{Black}, 538 U.S. at 363. The Court stated that "burning a cross is a particularly virulent form of intimidation." \textit{Id.} It instructed Virginia that instead of prohibiting all intimidating messages, it may choose to regulate cross burning in light of its "long and pernicious history as a signal of impending violence." \textit{Id.} Thus, "just as a State may regulate only that obscenity which is the most obscene due to its prurient content," the Court explained, "so to may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm." \textit{Id.} For an explanation of this holding see Melanie Bradford, \textit{State Statutes May Prohibit Cross Burning Performed with the Intent to Intimidate Without Violating the First Amendment}, 34 CUMB. L. REV 607, 609 (2003).
\item \textsuperscript{27} \textit{Black}, 538 U.S. at 367 (noting prima facie provision given by jury instruction); see Bradford, supra note 26, at 609 (justifying Court's decision rendering statute unconstitutional due to clause which allowed act of cross burning to be considered in prima facie evidence of intent to intimidate). \textit{But see} Congdon, supra note 6, at 1103 (condemning Supreme Court in incorrectly holding that prima facie provision rendered entire statute unconstitutional).
\item \textsuperscript{28} Virginia v. \textit{Black}, 538 U.S. 343, 365 (2003) (announcing rationale for holding regarding prima facie evidence provision); see Bradford, supra note 26, at 609 (detailing Court's holding that prima facie provision of Virginian cross-burning statute allowed jury to convict based on act committed, not upon defendant's intent or lack of intent).
\item \textsuperscript{29} \textit{Black}, 538 U.S. at 368 (discussing Justice Stevens' concurring opinion); see Brannon, supra note 17, at 339 (summarizing Justice Stevens' concurrence).
\item \textsuperscript{30} \textit{Black}, 538 U.S. at 388 (noting Justice Thomas' dissent); see Brannon, supra note 17, at 342 (explaining Justice Thomas' reasons for disagreeing with majority's conclusions).
\item \textsuperscript{31} \textit{Black}, 538 U.S. at 388–89 (noting Klan's long and violent history); see Brannon, supra note 17, at 342 (discussing Justice Thomas' dissent as reviewing Klan's vile history); Maribeth G. Berlin, Article, \textit{The Shortcomings of the Supreme Court's Viewpoint
Justice Thomas continued by citing to culture and history which establishes the solitary meaning of a burning cross – instilling in its victims a well-grounded fear of physical violence.\(^{32}\) Finally, Justice Thomas concluded that this conduct, using hate, terrorism and intimidation to express an idea, falls outside the realm of First Amendment analysis.\(^{33}\)

Justice Antonin Scalia finally concurred in part and dissented in part to the plurality opinion in *Virginia v. Black.*\(^{34}\) He concurred with the Majority that a state can constitutionally prohibit cross burning with an intent to intimidate,\(^{35}\) but dissented because of the lack of justification to invalidate the provision on its face due to the prima facie provision.\(^{36}\)

The case law and jurisprudence leading up to and relied upon by the Court establish the limits and parameters of the First Amendment which allow for the *Virginia v. Black* rationale to hold cross-burning with the intent to intimidate as proscribable constitutional conduct.\(^{37}\) The Court first explains that protections to freedom of speech are not absolute; the government is able to constitutionally regulate certain categories of communicative

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\(^{32}\) *Brannon,* supra note 17, at 342 (noting Justice Thomas' assertions regarding cross burning and its meaning to victims); *see also* Berlin, supra note 31, at 160 (discussing historical meaning of cross burning in United States to certain target groups).

\(^{33}\) *Virginia v. Black,* 538 U.S. 343, 394-95 (2003) (discussing Justice Thomas' dissent); *see Brannon,* supra note 17, at 342-43 (explaining view that statute prohibited only conduct and therefore raised no First Amendment issues); *see also* Berlin, supra note 31, at 160 (observing Justice Thomas' argument that cross burning should have been classified as conduct, and not expression governed by First Amendment).

\(^{34}\) 538 U.S. 343, 368 (2003).

\(^{35}\) *Black,* 538 U.S. at 368 (stating Court's majority holding); *see Brannon,* supra note 17, at 339 (explaining Justice Scalia's concurrence with majority); *see also* Berlin, supra note 31, at 158 (discussing Justice Scalia's agreement with plurality insofar as a state may regulate cross-burning without infringing on First Amendment).

\(^{36}\) *Black,* 538 U.S. at 368 (rejecting Supreme Court's majority opinion with regard to prima facie provision of statute); *see Brannon,* supra note 17, at 339-40 (discussing Justice Scalia's argument that in Virginia, prima facie evidence is sufficient only if it goes unrebuted and noting Justice Scalia's rejection of plurality's conclusion that statute was overbroad); *see also* Berlin, supra note 31, at 158-59 (noting Justice Scalia's dissent in part, where he explained that prima facie evidence provision was mere inference and did not give prosecution so large an advantage so as to render statute substantially overbroad).

\(^{37}\) *Black,* 538 U.S. at 368 (noting justification for Supreme Court's holding); *see also* Brannon, supra note 17, at 336-37 (commenting on holding of *R.A.V.* v. St. Paul, 505 U.S. 377 (1992), and noting that because Virginia statute falls within exception to general rule set by *R.A.V.*, it is constitutional).
expression. Those areas in which the First Amendment allows restrictions are “of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality.” One such area is speech inciting an immediate breach of the peace, which states are therefore permitted to limit and punish. This kind of constitutionally proscribable speech is referred to as “fighting words,” which are “personal abusive epithets,” generally known to likely provoke violent reaction when addressed to the ordinary person. The First Amendment also permits a state ban on threats of violence, as well as intimidation. Therefore, the Court held that Virginia’s statute did not violate the First Amendment by banning a threat of violence and form of intimidation – cross burning with the intent to intimidate.

38 Black, 538 U.S. at 358 (stating government’s powers to regulate speech despite First Amendment); see Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (stating that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem”; see also Bradford, supra note 26, at 609-10 (examining Chaplinsky and how it established narrow exceptions to First Amendment’s protection).

39 Virginia v. Black, 538 U.S. 343, 358-59 (2003) (commenting on narrow restrictions on First Amendment) (quoting R.A.V., 505 U.S. at 382-83 (1992)); see Chaplinsky, 315 U.S. at 572 (declaring that “[i]t has been well observed 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 might be derived from them is clearly outweighed by the social interest in order and morality”); see also Bradford, supra note 26, at 610 (explaining Chaplinsky holding that words having direct tendency to cause acts of violence fall outside protection of First Amendment).

40 Black, 538 U.S. at 359 (summarizing case law from First Amendment jurisprudence); see Bradford, supra note 26, at 610 (breaking down ‘fighting words’ exception as being determined by what a reasonable person would consider to be likely to incite violence by addressee).

41 Black, 538 U.S. at 359 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)); see Chaplinsky, 315 U.S. at 572 (defining fighting words and the injury derived from the utterance of such words).

42 Black, 538 U.S. at 359 (defining “true threats” as “those statements where the speaker means to communicate a serious expression of an intent to commit and act of unlawful violence to a particular individual or group of individuals”) (citing Watts v. United States, 394 U.S. 705, 708 (1969)); see Brannon, supra note 17, at 328 (noting Watts distinction between “true threats” which could be prohibited and constitutionally protected speech).

43 Black, 538 U.S. at 360 (defining “intimidation in the constitutionally proscribable sense of the word [as] 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”); see Brannon, supra note 17, at 336 (citing Court’s determination to prohibit intimidation as type of “true threat”).

44 Virginia v. Black, 538 U.S. 343, 362 (2003) (finding part of Virginia statute constitutional due to “true threats” and intimidation exception to First Amendment); see Bradford, supra note 26, at 616 (explaining Black’s decision that conduct in a threatening manner falls outside protective scope of First Amendment and is therefore proscribable).
R.A.V. v. St. Paul, as Black's direct predecessor, took a quite different approach to the cross-burning statute issue. In R.A.V., a group of teenagers assembled a cross using broken chair legs and burned it inside an African-American family’s fenced yard. They were thereafter convicted under the city of St. Paul’s Bias-Motivated Crime Ordinance, which criminalized burning a cross on the basis of race, color, creed, religion or gender. The juvenile petitioner, given the name “R.A.V.” for anonymity purposes, moved to dismiss the conviction, claiming the ordinance violated the First Amendment due to its impermissibly overbroad nature. The trial court granted this motion, but the Minnesota Supreme Court reversed, ruling that the St. Paul ordinance reached only expression which is not protected by the First Amendment. Finally, the United States Supreme Court reversed, ruling that the ordinance was unconstitutional on its face because it prohibited otherwise permitted speech on the basis of the subject which the speech addressed. The Court held that such a law was unconstitutional because it discriminated based on the speech's content, targeting only people who

46 Compare Black, 538 U.S. at 367 (holding statute prohibiting cross burning with the intent to intimidate constitutional), with R.A.V., 505 U.S. at 396 (holding statute prohibiting cross burning unconstitutional).
48 ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990) (stating that “[w]hoever places 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 commits disorderly conduct and shall be guilty of a misdemeanor”); see Brannon, supra note 17, at 333 (describing ordinance).
49 R.A.V., 505 U.S. at 380 (discussing what activities were criminalized under statute); see Demaske, supra note 47, at 297 (summarizing St. Paul's Bias-Motivated Crime Ordinance); Rosenfeld, supra note 47, at 1539 (citing to criminal ordinance).
51 R.A.V., 505 U.S. at 381 (stating ordinance “reached only expression that the first amendment does not protect” (internal quotations and citations omitted)); see Berlin, supra note 31, at 150-51 (reviewing state court's decision and rationale); see also Demaske, supra note 47, at 297 (following procedural posture of case).
52 R.A.V., 505 U.S. at 381 (concluding ordinance unconstitutional); see Demaske, supra note 47, at 298 (noting Supreme Court overturned state court's ruling); Rosenfeld, supra note 47, at 1539 (summarizing Court's unanimous decision invalidating act which criminalized some incitement but not others).
provoked violence on one of the reasons listed in the law, while not criminalizing individuals using “fighting words” on other bases, such as political affiliation, union membership or homosexuality. Such a content-based discrimination allowed the city “to impose special prohibitions on those speakers who express views on disfavored subjects,” and was therefore held unconstitutional in *R.A.V.*

Only four Supreme Court Justices, however, concurred in the judgment, agreeing with the result of reversal and proclamation of the ordinance as unconstitutional, but strongly disagreeing with the plurality’s rationale. They believed the case should have been decided on a ground raised by the parties, rather than what they viewed as the plurality’s departure from First Amendment jurisprudence in creating their own grounds for invalidating the St. Paul Ordinance. The concurrence in *R.A.V.* argued that the challenged cross-burning statute was overbroad, criminalizing not only protected expression, but also expression constitutionally protected by the First Amendment. The four justices thus characterized the St. Paul ordinance as an overbroad law which prohibited expressive conduct that is

53 Virginia v. Black, 538 U.S. 343, 361 (2003); see Rosenfeld, *supra* note 47, at 1539 (rationalizing Court’s explanation that ordinance did not criminalize similar expression equally likely to incite violence on other bases); see also Berlin, *supra* note 31, at 151 (discussing Court’s observation that ordinance did not prohibit bias-motivated messages directed at other groups, such as homosexuals).

54 *Black*, 538 U.S. at 361 (2003) (quoting *R.A.V.*, 505 U.S. at 391); see Demaske, *supra* note 47, at 298 (discussing Court’s finding that ordinance was impermissibly content-based because it only restricted subset of fighting words based solely on content); Rosenfeld, *supra* note 47, at 1539 (classifying ordinance as impermissible viewpoint discrimination).

55 *R.A.V.* v. City of St. Paul, 505 U.S. 377, 397 (1992) (acknowledging that Justice White, Justice Blackmun, Justice Stevens and Justice O’Connor agreed “with the majority that the judgment of the Minnesota Supreme Court should be reversed,” but noting that “[the] agreement ends there”); see Demaske, *supra* note 47, at 303 (describing Justice White’s disagreement with majority’s application of “content neutrality to proscribable categories of speech” in *R.A.V.*).

56 *R.A.V.*, 505 U.S. at 397–98 (1992) (White, J., concurring) (arguing plurality “holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases. . .’’); see Demaske, *supra* note 47, at 305 (describing Justice White’s frustration with majority’s reasoning).

57 *R.A.V.*, 505 U.S. at 397 (White, J., concurring) (explaining why St. Paul’s ordinance was facially overbroad); see Demaske, *supra* note 47, at 305 (pointing out majority’s rejection of traditional First Amendment “overbreadth” doctrine while instituting new First Amendment “underbreadth” doctrine).
protected by the First Amendment and is therefore constitutionally invalid on its face. 58

Federal and state cross-burning statutes after R.A.V. v. St. Paul 59 faced varying constitutional results in court. 60 On the one hand, the Maryland Court of Appeals, South Carolina Supreme Court, and New Jersey Supreme Court found their respective states’ cross-burning statutes unconstitutional. 61 On the other hand, Florida’s Supreme Court and the California Court of Appeals upheld cross-burning statutes as being “proscribable conduct” under the First Amendment. 62 Moreover, each federal appellate court deciding the issue post-R.A.V. upheld cross-burning statutes as constitutional. 63 These state supreme and federal appellate court decisions paved the way for Black’s

58 R.A.V., U.S. at 414 (explaining that Constitution does not protect expressive conduct that only causes hurt feelings, offense or resentment and that any law banning such conduct in addition to unprotected speech, according to “underbreadth doctrine,” must be invalidated on its face); see Demasek, supra note 47, at 305 (recounting Justice White’s conclusion that new Court approach to First Amendment doctrine embraced by majority left legislatures with “little room to prosecute certain harms”).


60 See Hopkins, supra note 1, at 284 (observing that United States government and many states continued to punish cross burning despite R.A.V. ruling and reviewed each state and federal court case on matter); Enslin, supra note 10, at 193 (noting that state courts have been split on whether cross-burning statutes are constitutional).

61 Hopkins, supra note 1, at 288–93 (discussing State v. Sheldon, 629 A.2d 753 (Md. 1993), State v. Ramsey, 430 S.E.2d 511 (S.C. 1993), and State v. Vawter, 642 A.2d 349 (N.J. 1994), each of which found cross burning to be a form of protected speech); Enslin, supra note 10, at 194–95 (reviewing Maryland and South Carolina’s decisions to uphold their respective state’s cross-burning statutes).

62 Hopkins, supra note 1, at 290–91 (discussing State v. T.B.D., 656 So.2d 479 (Fla. 1995) and People v. Steven S., 31 Cal. Rptr.2d 644 (Cal. Ct. App. 1994), which found messages conveyed by cross-burning to be threats and beyond First Amendment protection, and explaining T.B.D. court’s likening of “unauthorized cross-burning by intruders in one’s own yard” to “lynchings, shootings, whippings, mutilations, and home-burnings”); see Enslin, supra note 10, at 195–97 (reiterating states’ finding that their cross-burning statutes did not violate free speech clause of First Amendment because such conduct constituted true threats of violence, fear and intimidation and therefore was legitimate governmental regulation).

63 See, e.g., United States v. Stewart, 65 F.3d 918 (11th Cir. 1995) (holding defendants can be convicted for cross burning on grounds that it is a conspiracy to violate a person’s civil rights and because it is a threat to a person’s right to remain in their domicile regardless of their race); United States v. McDermott, 29 F.3d 404 (8th Cir. 1994) (ruling threats of violence are not privy to First Amendment protection); United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994) (agreeing that cross-burning statutes are designed to punish any threat or intimidation, or a conspiracy to threaten or to intimidate and that they are not directed at limiting protected speech); United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993); see also Hopkins, supra note 1, at 285 (noting that federal government has been more successful in prosecuting defendants who burned crosses).
decision regarding the right of a government to ban cross-burning.\textsuperscript{64}

Although the Black Court did not overrule or even criticize R.A.V. v. St. Paul's holding, it did not follow its content-neutral categorical approach rationale regarding state cross-burning statutes.\textsuperscript{65} Black differentiated the Virginia statute from St. Paul's ordinance, characterizing it as a permissible, content-neutral regulation of a proscribable category of speech.\textsuperscript{66} It also further distinguished and clarified R.A.V.'s holding, thereby limiting the importance of R.A.V.'s content-neutral approach.\textsuperscript{67} Virginia v. Black additionally argued that R.A.V. did not prohibit all forms of content-based speech discrimination and that it was constitutional to ban only a particular type of threat.\textsuperscript{68} Their

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\item \textsuperscript{65} Black, 538 U.S. at 361-62; R.A.V. v. City of St. Paul, 505 U.S. 377, 386-87 (1992) (finding that categorical approach has become engrained in First Amendment jurisprudence). But see Hopkins, supra note 1, at 281–82 (criticizing R.A.V. decision).
\item \textsuperscript{66} Black, 538 U.S. at 362 (distinguishing the two statutes by stating, "[u]nlike 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 specific disfavored topics" (internal quotations and citations omitted)); see Berlin, supra note 31, at 156 (rationalizing that Virginia statute prohibited all cross burnings done with intent to intimidate and did not allow state to selectively regulate cross burnings only when speech expressed disfavored views, as St. Paul ordinance did); see also Enslin, supra note 10, at 201 (distinguishing two statutes from these two cases).
\item \textsuperscript{67} Black, 538 U.S. at 361–62 (noting statute in R.A.V. was unconstitutional because it used content based discrimination in targeting only persons who "provoke[d] violence on a basis specified in the law" and not covering those who used fighting words "in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality" (internal quotations and citations omitted)); R.A.V., 505 U.S. at 387 (1992) (noting "[t]here is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content"); see Demaske, supra note 47, at 298–99 (pointing out that R.A.V. Court focused less on fighting words doctrine and more on applying principle of content neutrality to First Amendment analysis and arguing that the case weakened the categorical approach in First Amendment jurisprudence and caused questioning of the strength of this content neutrality principle); see also Jonathan M. Holdowsky, Out of the Ashes of the Cross: The Legacy of R.A.V. v. St. Paul, 30 NEW ENGLAND L. REV. 1115, 1115 (1996) (emphasizing that "[n]ew cases in recent years have confused the landscape of First Amendment jurisprudence more than R.A.V. v. St. Paul").
\item \textsuperscript{68} Black, 538 U.S. at 361–62 (clarifying that R.A.V. did not hold that First Amendment prohibits all forms of content-based discrimination but, rather, that some types of content discrimination do not violate the first amendment); see R.A.V. 505 U.S. at 388 (clarifying that it is constitutional to discriminate based on content within a particular class of speech which is proscribable, for example, prohibiting only the most prurient obscene speech); see also Berlin, supra note 31, at 157 (noting that Black focused on R.A.V. exceptions, rather than general rule that content-based regulations within categories of proscribable speech are prohibited).
\end{itemize}
reasoning was because a State could regulate certain types of very obscene speech—it could prohibit forms of intimidating speech which incited fear of bodily harm—a subset of intimidation, an area of proscribable speech. Consequently, a ban on those cross burnings with an intent to intimidate is constitutional under the First Amendment and this holding was still consistent with R.A.V. v. St. Paul.

II. JURISPRUDENCE OF FIRST AMENDMENT FREEDOM OF SPEECH AND EXPRESSION

The First Amendment to the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Free Speech Clause has been interpreted differently from its textual meaning. Congress certainly has passed many laws abridging, or limiting an individual's right to free speech, and such laws have passed muster if within certain proscribable exception categories created by the Supreme Court. Furthermore, the right to free speech has progressed from the original interpretation of mere verbal and written words, extending to expressive and symbolic conduct.

In his famous dissent to Abrams v. United States, Justice Oliver Wendell Holmes established the later-followed rule that advocacy ought to be protected by the First Amendment and that free speech includes a free exchange of ideas, especially those we

69 Virginia v. Black, 538 U.S. 343, 363 (2003) (finding states may choose to prohibit speech which intimidates); see Cohen v California, 403 U.S. 15, 20 (1971) (stating that States may ban the use of "fighting words").

70 Black, 538 U.S. at 363 (stating 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"); R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (noting First Amendment protection "applies differently in the context of proscribable speech than in the area of fully protected speech").

71 U.S. CONST. amend. I.

72 Black, 538 U.S. 343 (discussing constitutionality of state ban on cross-burning); R.A.V. 505 U.S. at 382-383 (discussing constitutionality of cross-burning); Chaplinsky v New Hampshire, 315 U.S. 568, 572 (1942) (stating words which tend to incite an immediate breach of the peace are not proper forms of communication and are not constitutionally protected).

73 250 U.S. 616 (1919).
despise. Even while making quite a grand proclamation for his time, Holmes nevertheless acknowledged that such a right must be limited in certain circumstances. Stromberg v. California next clarified that the First Amendment grants Americans the right to engage in unfettered political discourse, but is not absolute, giving no one the authority to incite violence and crime. The more historically recent case Brandenburg v. Ohio distinguishes Holmes' advocacy from incitement, protecting the former as free speech under the First Amendment, and outlawing the latter as beyond the guarantees of this constitutional right.

Verbal messages are not the only type of 'speech' that the First Amendment protects; freedom of expression and symbolic speech also fall within the parameters of this right. Stromberg v.

74 Abrams, 250 U.S. at 630 (noting that "[w]e should be eternally vigilant against attempts to check the expression of opinions that we loathe"); see Elise Gabrielle Sweeney, Freedom of Speech: Protections and Limitations, 5 GEO. J. GENDER & L. 77, 78 (2004) (noting that Justice Holmes' famous dissent supports fundamental rights of individuals to engage in free exchange of ideas in marketplace, even if disputed speech is unpopular); see also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stressing the importance of open, uninhibited and robust discussion and criticism of political and governmental leaders, no matter how caustic, vehement and unpleasant such attacks might be).

75 Abrams, 250 U.S. at 630 (arguing that free speech must be protected unless it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"); see Tom Hentoff, Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test, 91 COLUM. L. REV. 1453, 1467 (1991) (noting the clear and present danger test protects only certain types of speech).

76 283 U.S. 359 (1931).

77 Stromberg, 283 U.S. at 368-69 (ruling First Amendment right is not absolute and allows for State to punish those who incite violence and crime, and engage in lawlessness); see Sweeney, supra note 74, at 88 (observing that Supreme Court has declined to extend First Amendment protections to speech that incites violence or other lawless action, and rationalizing that speech inciting violence has higher propensity than other forms of speech to produce lawless action and is therefore afforded few protections).


79 Brandenburg, 395 U.S. at 447 (noting past Supreme Court decisions "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"); see Elrod, supra note 2, at 565 (noting that "[a]s formulated in Brandenburg v. Ohio, incitement requires a nexus of three factors: 1) speaker must advocate the use of force or violation of the law, 2) his expression must be directed at inciting or producing imminent lawless acts, and 3) his speech must be likely to produce such actions with some immediacy"); see also Bradford, supra note 26, at 611 (further discussing Brandenburg's incitement test).

California first held the symbolic gesture of displaying a flag as opposition to organized government was protected as fundamental political discussion protected by the Free Speech Clause. Moreover, the seminal case of Tinker v. Des Moines Independent Community School District reaffirmed the extension of the First Amendment right beyond pure speech to political expression. Here, students were suspended for wearing black arm bands in protest of the Vietnam War, but the Supreme Court held such conduct as protected under the First Amendment because it expressed political views and was "closely akin" to pure speech. Cases decided thereafter have reaffirmed the principle that the safeguards afforded by the freedom of speech include expression, and not merely verbal and written words. The Supreme Court additionally extended this sanctified First Amendment right to conduct with elements of communication, such as the burning of the American flag. The

81 283 U.S. 359 (1931).
82 Stromberg, 283 U.S. at 369 (finding that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system" and holding that "[a] statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty . . . the first clause of the statute being invalid upon its face, the conviction of the appellant . . . must be set aside"); see Zick, supra note 80, at 2280 (discussing symbolism of American flag).
84 Tinker, 393 U.S. at 513 (holding First Amendment includes freedom of expression and emphasizing that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots"); see Zick, supra note 80, at 2277 (observing Court's ruling that certain acts of expression are included within protection of Free Speech Clause of the First Amendment).
85 Tinker, 393 U.S. at 504 (discussing students' statement and school's reaction); see Zick, supra note 80, at 2277 (reviewing facts of students refusing to remove armbands in violation of school policy and therefore receiving punishment of suspension).
86 Tinker, 393 U.S. at 513 (discussing why First Amendment protects more than pure speech and explaining that "we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom"); see Zick, supra note 80, at 2277 (explaining Court's ruling that this type of expression was close to pure speech, which has repeatedly been held to be protected by First Amendment).
87 See Dallas v. Stanglin, 490 U.S. 19, 25–26 (1989) (explaining that "freedom of speech" means more than simply the right to talk and write, but holding, in this case, that the "kernel" of expression was not sufficient to bring activity within the protection of First Amendment); see also Amy Mitchell Wilson, Public School Dress Codes: The Constitutional Debate, 1998 BYU EDUC. & L.J. 147, 151–152 (1998) (exploring contexts in which expression may be protected).
88 See Texas v. Johnson, 491 U.S. 397, 404 (1989) (acknowledging "that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments") (citing Spence v. Washington, 418 U.S. 405, 409 (1974));
inquiry utilized to determine whether a particular form of conduct contains sufficient communicative elements is whether there was an intent to convey a particularized message and whether there was a likelihood that the message would be understood by its viewers.\textsuperscript{89} Expression of offensive or repugnant ideas and conduct are also safeguarded, in the same manner as generally accepted or popularly held views.\textsuperscript{90} As is the case with most fundamental liberties, this First Amendment right to free expression contains its limitations, and not all conduct intended to express an idea is protected speech.\textsuperscript{91} United States v. O'Brien\textsuperscript{92} termed the long accepted rule that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."\textsuperscript{93}

The Free Speech Clause of the United States Constitution's First Amendment has consequently expanded to include expressive and symbolic conduct, but is not and never has been an absolute principle. Certain circumstances, such as the 'true

\textit{see also} Bradford, \textit{supra} note 26, at 612 (noting Court's decision to hold flag burning as symbolic speech protected by First Amendment). \textit{See generally} Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (providing rule that "[s]ymbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech") (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

\textsuperscript{89} Johnson, 491 U.S. at 404 (setting out test to determine involvement of First Amendment rights); \textit{see} Bradford, \textit{supra} note 26, at 612 (reviewing Court's decision in Johnson that if conduct intending to convey particular message was likely to convey that message, it would be considered speech falling within scope of First Amendment).

\textsuperscript{90} Johnson, 491 U.S. at 414 (stating "[i]f there is any fixed star in our constitutional constellation, it is 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") (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)); \textit{see} Rosenfeld, \textit{supra} note 47, at 1529-30 (discussing importance and value of First Amendment right to free speech and expression to American citizens, especially when speaking against government or popular belief).

\textsuperscript{91} \textit{See} O'Brien, 391 U.S. at 376 (holding destruction of registration certificate is not necessarily constitutionally protected activity and stating that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); \textit{see also} Zick, \textit{supra} note 80, at 2277 (noting that O'Brien defined burning of draft card as gesture which resided at outer reaches of First Amendment).

\textsuperscript{92} 391 U.S. 376 (1968).

\textsuperscript{93} \textit{Id.} at 376; \textit{see} Zick, \textit{supra} note 80, at 2277 (explaining that Court found government's interest in conducting draft was unrelated to suppression of expression and outweighed individual's interest in symbolic expression).
threats’ exception as discussed below, warrant limitation to the freedom of speech.

III. TRUE THREATS

The ‘true threats’ doctrine, utilized and applied in Virginia v. Black\(^94\) can be characterized as one of the justifiable limitations on Americans’ free speech rights.\(^95\) The Supreme Court first acknowledged this true threats exception to the First Amendment in Watts v. United States,\(^96\) ruling that a state is permitted to ban certain types of threatening speech.\(^97\) A ‘true threat’ is defined as a statement where the speaker communicates a serious expression of his or her intent to commit a violent, unlawful act against a particular person or group of persons.\(^98\) Thus, the speech is unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm.\(^99\) The three Watts factors used to guide a court’s decision on whether the contested speech falls within the true threats exception are the context in which the statement was made, the statement itself, and the reaction of listeners.\(^100\) The validity of a true threat is judged by the objective reaction of the individual

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\(^94\) 538 U.S. 343 (2003).

\(^95\) Black, 538 U.S. at 359–60 (defining true threats doctrine and describing it as exception to First Amendment guarantees); see Elrod, supra note 2, at 547 (stating Supreme Court has declared in several cases that true threats remain beyond circle of First Amendment protected speech).


\(^97\) Watts, 394 U.S. at 708 (permitting First Amendment to ban true threats, but not political hyperbole); see Elrod, supra note 2, at 558–59 (noting Supreme Court does not consider political exaggerations or statements made in jest “true threats”); see also Martin, supra note 1, at 283 (noting Supreme Court conceived true threats doctrine in Watts).

\(^98\) Black, 538 U.S. at 359 (ruling that “[t]rue threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act or unlawful violence to a particular individual or group of individuals”); see Elrod, supra note 2, at 547 (recapping Justice O’Connor’s majority opinion in Black defining true threats). But see Martin, supra note 1, at 290 (claiming that Court in Black did not distinguish true threats from protected speech).

\(^99\) See Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (reaffirming Black’s true threats rule); see also Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (holding free speech protections do not extend to modes of expression such as obscenity, defamation, and fighting words).

\(^100\) Watts, 394 U.S. at 708 (discussing how speech in this case was not true threat); see Elrod, supra note 2, at 559 (setting forth some factors which Court used to determine if Robert Watts’ words rose to the level of true threats); see also Martin, supra note 1, at 284 (listing three factors which dominated Watts decision).
listener and not from the subjective mindset of the speaker.\textsuperscript{101} Consequently, the speaker does not need to actually intend to carry out the specific act which he or she threatens.\textsuperscript{102} Rather, the purpose of the true threats doctrine is to protect the individual listener or group of listeners from the fear of violence, and also to protect these individuals from the possibility that the threatened violence will occur.\textsuperscript{103} Additionally, mere advocacy of the use of force or violence is outside the realm of the true threat exception.\textsuperscript{104}

One type of true threat, as discussed in \textit{Black},\textsuperscript{105} is intimidation, where a speaker directs his or her threat to a person or persons with the intent of placing that victim in fear of bodily harm or death.\textsuperscript{106} \textit{Virginia v. Black} ruled cross burning as constitutionally proscribable conduct because it intimidated a targeted group of victims, causing them to fear imminent danger or physical harm.\textsuperscript{107}


\textsuperscript{102} \textit{Black}, 538 U.S. at 360 (explaining that for true threat exception to apply, intent of speaker is not necessary); \textit{see} Martin, supra note 1, at 290 (justifying rationale behind allowing states to proscribe true threats); \textit{see also} Frederick Schauer, Intentions, Conventions, and the First Amendment: The Case of Cross-Burning, 2003 SUP. CT. REV. 197, 216–17 (2003) (questioning intent's role in First Amendment analysis of true threat cases).

\textsuperscript{103} \textit{Black}, 538 U.S. at 360 (discussing how prohibition on true threats protects people from the fear of violence and from the possibility threatened violence will occur); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (ruling Federal Government can criminalize threats to protect people “from the fear of violence, from the disruption that the fear engenders, and from the possibility that the threatened violence will occur”).

\textsuperscript{104} Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (reiterating that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action”) (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)); \textit{see} Brannon, supra note 17, at 330 (promoting need to distinguish moral propriety of use of violent force from act of preparing and building courage of group to take such violent action).

\textsuperscript{105} 538 U.S. 343 (2003).

\textsuperscript{106} \textit{Black}, 538 U.S. at 360 (defining intimidation, a subset of true threat); \textit{see} Brannon, supra note 17, at 336 (discussing \textit{Black}'s determination that intimidation can be prohibited); Schauer, supra note 102, at 203 (discussing intimidation's role in Justice O'Connor's \textit{Black} decision).

\textsuperscript{107} \textit{Black}, 538 U.S. at 360 (proving cross burning as within definition of intimidation); \textit{see} Brannon, supra note 17, at 337 (noting Court's conclusion that Virginia statute fell within intimidation exception and therefore banning cross burning with intent to intimidate did not violate First Amendment); \textit{see also} Schauer, supra note 102, at 203 (discussing \textit{Black}'s conclusion that it was permissible for Virginia to ban cross-burning due to its intimidating nature, a quality which First Amendment does not protect).
The rationale used by judges and legal scholars in support of the true threats doctrine includes the detrimental effects such threats have on society and targeted individuals, coupled with the lack of discursive value provided by such intimidations. In other words, the harms clearly and fully outweigh the benefits, if any benefits in fact exist. The true threats' negative impacts consist of: the fear and apprehension the threat causes to the listener, the disruption provoked by said fear, and the costs of preventing, reducing or protecting against the threatened violence. Among such costs to the individual are the monies spent by the targeted individuals for safety measures, such as locked gates and security systems, and lost income due to reduced productivity caused by the distraction or fear for one's self or loved ones and psychological counseling. Society also bears a costly burden in paying additional taxes on the federal, state and local level for such services as properly educating and training law enforcement officers and funding agencies for investigatory and precautionary purposes. All these detrimental costs and impacts on the individual and society must then be weighed against the alleged benefits of according true threats First Amendment immunity. It is argued, however, that there are no positives in allowing such threats within the definition of free speech, because they obliterate all discussion, debate and divergent views, thereby eliminating all of the costs associated with true threats.

108 See Black, 538 U.S. at 360 (holding that prohibition on true threats serves to both protect individuals from fear of violence and from the disruption such fear engenders); see also Elrod, supra note 2, at 547, 550 (discussing negative impacts of true threats and little value of threats to cause bodily harm).

109 See Elrod, supra note 2, at 550 (quoting Professor Kent Greenawalt stating that “[s]ociety has a strong interest in providing people with a sense of security that their most basic rights will not be trampled upon” and that “[t]he threat that makes one feel vulnerable to just such a violation may properly be seen as an ancillary right to be secure in one’s rights”); see also Black, 538 U.S. at 360 (citing rationale for true threats doctrine as harm that threats of violence are apt to cause, both on a personal level and on a more general level in terms of undermining the safety that citizens feel as members of society).

110 See Virginia v. Black, 538 U.S. 343, 360 (2003) (listing both fear and disruption engenders as rationale for true threats doctrine); see also Elrod, supra note 2, at 547–48 (listing detrimental impacts on threatened individual).

111 See Elrod, supra note 2, at 548–49 (describing specific costs on individuals or groups of individuals whom are threatened); see also Alexander Tsesis, Hate Speech and Hate Crime: Regulating Intimidating Speech, 41 HARV. J. ON LEGIS. 389, 389 (2004) (discussing impact of hate speech in terms of undermining the sense of safety that citizens feel as members of society).

112 See Elrod, supra note 2, at 549 (determining societal costs due to such threats); Tsesis, supra note 111, at 389 (concluding that hate speech “intentionally used to intimidate others can drastically undermine public safety and social welfare”).
functions of the First Amendment. Therefore, there ought not to be a First Amendment concern in regulating true threats; in fact, it seems antithetical to the right to free speech's purposes of exchange of ideas, robust debate or discussions of political or social importance to allow for such true threats to go unpunished.

By utilizing and applying this analysis, a cross-burning that is carried out with the intent to intimidate, like that in *Virginia v. Black*, constitutes a true threat, and therefore creates an exception to the First Amendment right to free speech and expression. A burning cross placed on an individual's property conveys a threat of future physical harm or violence, and subjects that victim to fear and intimidation. Specifically in *Black*, victim James Jubilee testified that after seeing the cross on his front lawn, he was very nervous about what would happen next to himself and his family. Generally, all cross-burnings with the intent to intimidate are true threats because they communicate the speaker's or actor's intent to threaten or commit a violent act against the person, family, or group of people to whom the burning cross is directed. For centuries,

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113 See Elrod, *supra* note 2, at 552 (stating that true threats discourage debate by instilling fear and apprehension rather than encourage debate by stimulating the intellect); Tsesis, *supra* note 111, at 404 (summarizing Justice O'Connor's findings in *Black* that cross burning was of such slight social value that any benefit that may be derived from it is clearly outweighed by social interest); see also Demaske, *supra* note 47, at 289 (questioning necessity and logic of using First Amendment to protect speech that has no social value and that is socially and psychologically damaging to minority groups).

114 See *Black*, 538 U.S. at 360. Justice O'Connor argues that prohibitions on "true threats" serve not only to protect individuals from threatened violence, but also from the disruption of their lives that stems from such fear. Id. The fear of speaking freely is a likely component of such disruption. Id. True threats also fail to further the purposes of free speech by silencing opposing viewpoints. Elrod, *supra* note 2, at 551-52.


116 See Enslin, *supra* note 10, at 202 (applying definition that cross-burning that is carried out with the intent of intimidating any person or group constitutes true threat); see also Tsesis, *supra* note 111, at 402 (proffering interesting argument that Thirteenth Amendment prevents any hate speech which is rationally related to the badges or incidents of servitude).

117 See Enslin, *supra* note 10, at 195-98 (discussing California and Florida's rulings on such facts); see also Rosenfeld, *supra* note 47, at 1540 (explaining that "cross burning produced fears not only concerning the past but also the present and the future, and not based on events that had taken place across an ocean, but on events that had marked the sad history of race relations in the United States from the founding of the republic").

118 *Black*, 538 U.S. at 350 (summarizing facts of case and reaction of victims); see Enslin, *supra* note 10, at 203 (noting that *Black* provides additional evidence of threatening nature of cross-burning).

119 See *Black*, 538 U.S. at 363. Justice O'Connor clearly states that banning cross-burning with the intent to intimidate is consistent with the First Amendment. Id. Such a
cross burning has been associated with the Ku Klux Klan and its ideology of hatred and terrorism. The Klan used the burning of a cross as a tool of intimidation and a threat of impending violence, which was buttressed by the organization's actual participation in hundreds of murders, floggings, bombings, beatings, shootings, stabbings, mutilations, assaults and tar-and-featherings. As Virginia v. Black itself stated, "These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence." Still today, cross burnings convey this threat of violence towards the targeted victim, intended to instill a message of fear, and are therefore fully within the true threats exception to the Free Speech Clause of the First Amendment.

This same analysis of the true threats doctrine applies to terrorist threats and intimidating speech; a point into which this Note will further delve and support in Section V of this text.

Conclusion requires that these acts constitute true threats. See id. Additionally, cross-burning with the intent to intimidate fits the definitions of 'true threats' that have been offered by various courts, including the Black dissent. Enslin, supra note 10, at 202–03.

Virginia v. Black, 538 U.S. 343, 352–54 (2003) (explaining history of Ku Klux Klan and its use of cross burning and specifying that "[f]rom the inception of the ... Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology"); see Rosenfeld, supra note 47, at 1540 (noting that cross burning produces fears based on past events of racial violence).

Black, 538 U.S. at 548–49 (condemning Ku Klux Klan's participation in threats, intimidation and actual violence); Id. at 388–89 (Thomas, J., dissenting) (explaining that the Ku Klux Klan is "[t]he world's oldest, most persistent terrorist organization," that it was actively harassing, torturing and murdering in the United States "[f]ifty years before the Irish Republican Army was organized [and] a century before Al Fatah declared its holy war on Israel," and that "its members remain fanaticallly committed to a course of violent opposition to a social progress and racial equality in the United States"); see Eric John Nies, The Fiery Cross: Virginia v. Black, History and the First Amendment, 50 S.D. L. REV. 182, 198–99 (2004) ("The Klan has not stopped at mere intimidation; a burning cross often has been followed by violent Klan activity, including assault and even murder.").


Id. at 355.

See Black, 538 U.S. at 357 (stating that "[t]he person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan ... [a]nd when a cross burning is used to intimidate, few if any messages are more powerful"); Rosenfeld, supra note 47, at 1540 (describing fears produced by cross-burning due to past events and history of race relations).
IV. SYMBOLIC SPEECH AND THE MEANING AND IMPORTANCE OF SYMBOLS

As established in Section II of this Note, the United States Supreme Court includes symbolic expression and communicative conduct within the parameters of the Free Speech Clause of the First Amendment, affording such speech the same Constitutional safeguards. Symbols such as cross burning or terrorist fear tactics are therefore subject to First Amendment jurisprudence and limitations, including the true threats rule. If spoken words have meaning, symbols speak legions, and should be regulated with increased proportion, especially when their threatening nature is heightened.

Certain actions carry messages, or express the actor’s viewpoint on an issue he or she regards as important. The Free Speech Clause of the First Amendment applies its protections, rules and exceptions to weak or forceful messages alike whether expressed in words, symbols, or symbolic actions. Symbolic speech is the combination of speech and non-speech elements which together create expressive conduct.

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125 See supra Part II (outlining evolution of free speech jurisprudence); see also Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-06 (1969) (noting that the Supreme Court has repeatedly held symbolic gestures “closely akin to ‘pure speech’” are entitled to comprehensive First Amendment protection).

126 See supra Part III (describing true threats doctrine); see also Black, 538 U.S. at 359 (2003) (discussing various forms of speech that are subject to restrictions, including true threats).


128 See MARK SABLEMAN, MORE SPEECH, NOT LESS 35 (Southern Illinois University Press) (1997) (describing conduct carrying message as symbolic speech); Joshua Waldman, Symbolic Speech and Social Meaning, 97 COLUM. L. REV. 1844, 1844 (1997) (The doctrine of symbolic speech holds that some conduct, for example flag burning, may be sufficiently communicative to warrant First Amendment protection.

129 See Sableman, supra note 128, at 35 (arguing that First Amendment protections must apply to symbolic expression in same way as verbal and written speech); Edward J. Eberle, Cross Burning, Hate Speech, and Free Speech in America, 36 ARIZ. ST. L. J. 953, 964 (2004) (noting dichotomy between expressive conduct, which is protected, and proscribable conduct, which is not).

130 See Sweeney, supra note 74, at 83 (defining symbolic speech); see also Texas v. Johnson, 491 U.S. 397, 404 (1989) (exploring which forms of expressive conduct surpass thresholds of speech protected by First Amendment).
symbolic speech to fall within First Amendment parameters, it must have a communicative impact and contain clear elements of communication rooted in the conduct. If a symbol has numerous potential meanings, the examining court—in order to choose the most likely meaning—must examine the symbol itself, the use of the symbol by the specific individual actor and the use of the symbol in that particular context.

Symbols have special importance in American politics and jurisprudence, urging courts to fully discern their meaning before too hastily concluding an issue regarding its First Amendment protections. The meaning or truth that Americans attach to certain symbols is more telling than what the symbol originally represented or claimed to signify. Symbols such as the flag, the Great Seal and the slogan e pluribus unum, for example, have both a historical role in politics and an effect in influencing and self-identifying Americans as constituents in society.

131 See Sweeney, supra note 74, at 83 (describing what symbolic speech must consist of, and explaining that Supreme Court delineated guidelines so that not all conduct is claimed as First Amendment protected speech); see also United States v. O'Brien 391 U.S. 367, 376–78 (1968) (upholding government restrictions on symbolic speech if “it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”).

132 See Zick, supra note 80, at 2348 (emphasizing that court will look to “the gesture itself, its history, its appearance in literary references and film, government attempts to regulate it, and finally, a broader cultural picture into which the gesture 'fits’” when examining symbolic behavior); see also Virginia v. Black, 538 U.S. 343, 354–57 (2003) (explaining evolving use of Ku Klux Klan’s symbolic use of burning crosses).

133 See WILLMOORE KENDALL & GEORGE W. CAREY, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 18 (The Catholic University of America Press) (1995) (highlighting symbols’ role in American politics and culture); see also The Supreme Court, 2002 Term: Leading Cases I. Constitutional Law: E. Freedom of Speech and Expression, 117 HARV. L. REV. 339, 341–42 (2003) (explicating Black Court’s careful consideration of symbolic meaning attached to cross burning before rushing to conclusions). See generally Zick, supra note 50, at 2272, 2347 (explaining that despite important cultural meaning of symbols, Supreme Court has often treated symbolic meaning with indifference or has avoided interpretation of symbolic meaning altogether, but adding that Virginia v. Black shows positive change in Supreme Court’s approach because the Court consulted historical, anecdotal, institutional, and other sources in building contexts for its ultimate interpretation of cross-burning symbols).

134 See KENDALL & CAREY, supra note 133, at 22 (discussing people’s own understanding of symbols and importance of this to society); ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS 53 (The University of Chicago Press) (1952) (stating that “[t]he symbols in which a society interprets the meaning of its existence are meant to be true; if the theorist arrives at a different interpretation, he arrives at a different truth concerning the meaning of human existence in society”).

135 See KENDALL & CAREY, supra note 133, at 18 (listing examples of important symbols in American history and political culture); see also Virginia v. Black, 538 U.S.
philosopher Eric Voegelin illustrates, “The self-illumination of society through symbols is an integral part of social reality, and one may say even its essential part; for through such symbolization the members of society experience it as more than an accident or a convenience; they experience as part of their human essence.”

Culture is entrenched in symbolism. In fact, culture itself is a system of symbols, with the mastery of symbolic meaning representing the self-actualization to personal development and cultural robustness. The Voegelin view of symbolism teaches that every human society has an understanding of itself through various symbols. Voegelin also points out that symbols do not have a stagnant meaning in society; rather, as time passes, these symbols develop, enrich or impoverish in meaning and importance, or fade, allowing new symbols to replace them. Interestingly enough, this theory views the basic symbols within Western civilization as variants of the original symbolization from the Judaeo-Christian religious tradition.

Because many symbols have such a rich and full meaning behind them, a symbol of hatred or violence means much more than simple verbal expression and thus is likely to invoke

343, 388 (2003) (Thomas, J., dissenting) (stating that “[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend”).

See VOEGELIN, supra note 134, at 27.

See Zick, supra note 80, at 2272 (discussing First Amendment and culture of symbolic gestures); see also Rosenfeld, supra note 47, at 1529–30 (reviewing historic cases regarding limits of hateful symbols within free speech).

See Zick, supra note 80, at 2272 (stating that “[i]nterpretive ethnographers recognize that cultures are laden with symbolism”); see also Rosenfeld, supra note 47, at 1529–30 (noting free speech afforded by First Amendment is itself a symbol of American culture).

See KENDALL & CAREY, supra note 133, at 23 (discussing Voegelin’s philosophy regarding meaning of symbols in society); VOEGELIN, supra note 134, at 27 (professing that human society is reflected in various symbols showing “condition of their self-realization”).

See KENDALL & CAREY, supra note 133, at 24 (discussing Voegelin’s view of changing meaning of symbols); VOEGELIN, supra note 134, at 28–29 (stating that “[i]n the course of this process some of the symbols that occur in reality will be dropped because they cannot be put to any use in the economy of science, while new symbols will be developed in theory for the critically adequate description of symbols that are part of reality”).

See KENDALL & CAREY, supra note 133, at 24 (noting basic symbolizations in Western civilization are variants of Judeo-Christian religious traditions); Robert L. Tsai, Sacred Visions of Law, 90 IOWA L. REV. 1095, 1102–03 (2005) (explaining that notions of “constitutional iconography” embed Judeo-Christian traditions and symbols in American legal culture).
extreme, disturbing emotion and fearful responses. Most symbols are used for their communicative impact. Therefore, symbols — like a burning cross, swastika or pictures of an airplane flying into a burning skyscraper — speak volumes to the targeted individual. Hate groups will utilize symbols connected with past destructive episodes to incite violence and hatred in the present.

As the famous adage teaches, "a page of history is worth a volume of logic." The symbolic meaning of a burning cross and the hatred and violence it conveys is no exception to this rule. Virginia v. Black faced this issue by studying and reviewing historical, anecdotal, and institutional sources in creating the context to interpret the true meaning of this symbol. As the court in Black declared:

[T]he burning of a cross is a symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

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142 See Zick, supra note 80, at 2289 (discussing that symbols are often intended to evoke ranges of emotional response); see also Eberle, supra note 129, at 953–54 (discussing how symbols including burning crosses are indicative of hate or degradation).

143 See Zick, supra note 80, at 2289 (listing different symbols that spark intense emotion within certain cultures and why they are of interest to particular groups); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (disagreeing that Ku Klux Klan's use of a cross was politically symbolic rather than religious because of historical perspective).

144 See Virginia v. Black, 538 U.S. 343, 352 (2003) (noting that, for the Klan, cross burnings are tools of intimidation and threats of impending violence, but also remain potent symbols of shared group identity and ideology); see also Tsesis, supra note 111, at 389–90 (discussing Justice O'Connor's decision in Virginia v. Black, 538 U.S. 343 (2003)).


146 Black, 538 U.S. at 363 (holding states can outlaw cross burning by taking history of Ku Klux Klan into consideration); Zick, supra note 80, at 2264 (discussing ideology and operations of Ku Klux Klan).


148 Black, 538 U.S. 343, 352-57 (discussing historical context of cross burnings); see Zick, supra note 80, at 2347 (noting that "[t]he Court consulted historical, anecdotal, institutional and other sources in building context for its ultimate interpretation").


150 Id. at 360.
This specific type of communication has been linked with the hatred and violence of the Ku Klux Klan throughout American history. When a cross is burned, it symbolizes the Klan's celebration of former slaves' execution, the extreme racism its members have against Black Americans in response to civil rights movements, the bombing of churches, the murders of blacks as well as whites whom the Klan viewed as sympathetic towards the Civil Rights Movement, and intimidation. In short, "ritual cross burning has been a cultural symbol of hatred, racial animus, and violence." Black also points out that the burning cross also symbolizes shared identity and ideology, as the Ku Klux Klan often used the symbol for its own purpose of celebration and ceremony at meetings and rallies. "According to the Klan constitution (called the kloran), the 'fiery cross' was the emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." This Note argues that said symbolism of shared ideology only adds to the cross's meaning of intimidation, racism and hatred, because these are the ideological rules of which the organization espouses. The Black Court seemed to agree, concluding that the Ku Klux Klan's core cross burnings have predominantly embodied threats to those targeted, and therefore holding that states may ban cross burnings as symbolic acts intended to threaten.

151 See Black, 538 U.S. at 352 (observing that "[b]urning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan"); see also Zick, supra note 80, at 2349 (noting that "[t]he Court made a strong case that throughout American history and experience, the burning of the cross has been linked with the Klan"). See generally Tsesis, supra note 111, at 390 (arguing that cross burning refers to this country's history of involuntary servitude).

152 See Black, 538 U.S. at 353–57 (detailing various groups that Ku Klux Klan has attacked); Zick, supra note 80, at 2344–47 (explaining what burning cross meant to members of Ku Klux Klan).

153 Zick, supra note 80, at 2345.


155 Black, 538 U.S. at 356.

156 See Black, 538 U.S. at 357 (Thomas, J., concurring) (noting that "to this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a 'symbol of hate'"); Zick, supra note 80, at 2344–47 (detailing message sent through burning of a cross).

157 Black, 538 U.S. at 355 (describing local ordeals and protections set up in various states); see Zick, supra note 80, at 2347 (describing Supreme Court's rationale for holding cross burnings as threatening symbols).
In the same way the Ku Klux Klan’s burning cross emanates messages of violence and hatred, there can be a deep meaning behind terrorists’ symbolic speech, an issue into which the next and final section of this Note delves.

V. EFFECT OF VIRGINIA V. BLACK ON TERRORIST GROUPS AND THE HATE SPEECH THEY PROMOTE AND SYMBOLISM THEY USE

Intense meaning emanates from the fearful symbols and threatening behavior which terrorist groups utilize. Such expressive and communicative conduct can be characterized as symbolic speech, therefore being subject to the jurisprudence, protections and limitations of the First Amendment’s Free Speech Clause, including the true threats doctrine.\(^{158}\) It consequently follows that if such symbol or mode of communication made by the terrorist organization or individual expresses an intent to commit a violent and unlawful act against a particular person or persons, thereby satisfying the requirements of the true threats doctrine, it can be constitutionally regulated and limited. Examples of such proscribable speech might include: a threat of white powder resembling anthrax mailed to a person, a large, vivid poster used at a celebratory or planning rally with the morbid images of the Twin Towers on September 11, 2001, an Internet website targeted towards intimidating specific individuals,\(^ {159}\) a weapon recipes book, or other types of verbal, written, expressive or symbolic threats directed towards an individual or group of individuals.

This Note will use the State Department definition of terrorism, which is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups


\(^{159}\) See Peter Margulies, The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment, 2004 UCLA J.L. Tech 4 (2004) (arguing that threats on Internet intimidate others because of internet users’ resources to carry out threat and to reach specific individuals); see also Prana A. Topper, Note, The Threatening Internet: Planned Parenthood v. ACLU and a Content-Based Approach to Internet Threats, 33 COLUM. HUM. RTS. L. REV. 189, 211 (2001) (exploring Internet true threats and consequences).
or clandestine agents."\(^\text{160}\) The State Department, moreover, defines terrorist activity as:

- Any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person (as defined in Section 1116(b)(4) of Title 18) or upon the liberty of such a person; (IV) An assassination; (V) The use of any – (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; (VI) A threat, attempt, or conspiracy to do any of the foregoing.\(^\text{161}\)

For purposes of this Note, the threats of terrorists to partake in these illegal and violent activities will be juxtaposed with such organizations' claimed right to free speech under the First Amendment of the United States Constitution.

As discussed above, in addition to representing hatred and violence, symbols can define a culture at a specific time in history.\(^\text{162}\) For example, following and in response to the terrorist attack of September 11, 2001, patriotic expression, through the use of symbols, was prevalent throughout all parts of the United States of America.\(^\text{163}\) Americans more frequently than ever

\(^{162}\) See Kendall & Carey, supra note 133, at 22 (discussing importance of symbols to defining society's role in history); see also Vögelin, supra note 134, at 53 (stating symbols define meaning of "human existence in society"). See generally Zick, supra note 80, at 2272 (discussing First Amendment and culture of symbolic gestures).
attached flags from houses and cars, placed supportive sayings and ribbons on their bumpers and windows, played the Star-Spangled Banner, recited the Pledge of Allegiance, renamed the popular food to "Freedom Fries" in symbolic criticism of the French government, and sung God Bless America at their sporting events and public gatherings.  

Perhaps the most descriptive symbol of American culture and society representing our survival and recovery from the deadly September 11th attacks is the enduring image of the New York City firefighters hoisting the American flag on a steel beam amongst the wreckage of the World Trade Center buildings. 

This patriotic sentiment, as a response to the horrible attack on the United States home front, and as evidenced by these types of symbolic expressions, has extended into the public's view of the First Amendment. After September 11th, a large plurality of Americans immediately supported limitations on the right to free speech due to national security interests. The willingness of the American populace to sacrifice a certain amount of civil liberties is not unusual during a time of war or national emergency; nor is the courts' response to such times in their interpretation of constitutionally challenged wartime statutes.

164 See Wasserman, supra note 163, at 368 (noting such patriotic symbolic speech was prevalent throughout the country); see also Jack Curry, Flags, Songs and Tears, and Heightened Security, N.Y. TIMES, Sept. 18, 2001, at 15 (describing Major League Baseball's use of patriotic symbols during first games after events of September 11, 2001).

165 See Robert S. Chang, (Racial) Profiles in Courage, or Can We Be Heroes Too?, 66 ALB. L. REV. 349, 365 (2003) (noting image of firefighters raising flag at World Trade Center was "symbol of American courage in the face of darkness"); see also Wasserman, supra note 163, at 368 (remembering important image of America's immediate survival and recovery from the September 11th attacks).

166 See Meaghan E. Ferrell, Balancing the First Amendment and National Security: Can Immigration Hearings be Closed to Protect the Nation's Interest, 52 CATH. U.L. REV. 981, 981–82 (2003) (observing that "a New York Times poll conducted just before the first anniversary of the attacks revealed that forty-nine percent of Americans felt that the First Amendment's protections went too far in the context of the war on terrorism"); Paul Horwitz, Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment, 76 TEMP. L. REV. 1, 3 (2003) (noting that a poll taken in the fall of 2001 found that a slim majority of American public favored government censorship of news it believed was a threat to national security).

167 See Anthony Lewis, Civil Liberties in a Time of Terror, 2003 WIS. L. REV. 257, 264 (2003) (discussing instances in history where civil liberties have been limited when country was in time of war or national emergency); Liezl Irene Pangilinan, "When a Nation is at War:" A Context-Dependent Theory of Free Speech for the Regulation of Weapon Recipes, 22 CARDOZO ARTS & ENT. L. J. 683, 717 (2004) (observing that after September 11, 2001 attacks, the public, Congress and courts were fully supportive of President George W. Bush limiting certain civil rights).

168 See Horwitz, supra note 166, at 27 (pointing to United States v. Schenck, 249 U.S. 47 (1919) and other United States Supreme Court cases that upheld laws which limited
The Supreme Court has held that free speech is not absolute, and must be instead balanced against valid governmental interests, such as national security and safety during a war.169

It is this Note’s position that if terrorist groups invoke true threats through their use of symbols, intimidation or promotion of certain hate speech, their actions should be proscribable under the First Amendment and therefore fully regulatable by the state or federal government, in the same way as is a burning cross. With their history of hatred and violence carried out against those they hate, groups supporting or linked to organizations such as Al-Qaeda and Hamas are comparable to the Ku Klux Klan of our generation, and their actions should thus be regulated under the true threats exception. Just as the cross-burning American terrorist organization intimidated and threatened through its history of hundreds of murders, beatings and bombings, when Al-Qaeda threatens a specific American or group of Americans, it symbolizes and reminds the listener of its successful murderous plot against thousands of American workers. Hamas similarly instills the fear of all its car and suicide bombings when it threatens Israelis or possibly even Israeli-Americans. These symbolic threats send a powerful message about the target’s vulnerability, given the terrorist organization’s context of carrying out violence. Additionally, as established in the ‘True Threats’ section of this Note, such speech is exceedingly harmful with practically no positive social value or contribution towards the search for truth in the marketplace of ideas, buttressing the argument that it should therefore not be protected by the Free Speech Clause of the First Amendment.

A proscribable ‘true threat’ by such a terrorist organization would be defined by the courts in the same manner as used and

civil liberties during wartime or national emergency); Pangilinan, supra note 167, at 718 (noting differing standards in Supreme Court cases between wartime and peacetime issues).

169 See Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) (holding that “[a]t the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are ‘absolutes’ . . . .” (citation omitted)); see also Paul Rosenzweig, Civil Liberty and the Response to Terrorism, 42 DUQ. L. REV. 663, 663 (2004) (summarizing that “[i]n any civilized society the most important task is achieving a proper balance between freedom and order” and that “[i]n wartime, reason and history both suggest that this balance shifts in favor of order – in favor of the government’s ability to deal with conditions that threaten the national well-being”).
applied to the cross-burning case in Black. As opposed to mere advocacy of the position against so-called American Imperialism or in favor of Islamic fundamentalism or Palestinian freedom, if one of the mentioned groups or a member of a similar organization communicated a serious expression of his or her intent to commit a violent or unlawful act against a particular person or group of persons, such communicative conduct ought to be limited under the First Amendment's Free Speech Clause.

Thus, the Black jurisprudence and the true threats doctrine permits the government to regulate, limit or criminalize a terrorist's direct threats to a person or persons with the intent of putting them in fear of bodily harm or death.

A sprinkling of federal court cases have been decided regarding such threats of terror, finding various examples not protected by the First Amendment's Free Speech Clause. First, the Fourth Circuit in Rice v. Paladin & Murder Manuals held dangerous "weapon recipe" instruction manuals as unprotected speech under the First Amendment. Moreover, there are currently five statutory mechanisms which impose criminal liability for the dissemination of such weapon recipes. In United States v. Arian, defendants did not plan the attacks of the Palestinian Islamic Jihad Shiqaqi Faction (PIJ), but they did support the attacks and "promoted [the PIJ's] activities and organization,

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170 See Virginia v. Black, 538 U.S. 343, 359 (2003) (defining "true threat" as "those statements where the speaker means to communicate a serious expression of an intent to commit and act of unlawful violence to a particular individual or group of individuals"); Watts v. United States, 394 U.S. 705, 708 (1969) (noting "political hyperbole is not a true threat").

171 See Black, 538 U.S. at 352 (noting that States have authority to ban "true threats" (citing Watts v. United States, 394 U.S. 705, 708 (1969)); see also Elrod, supra note 2, at 547 (stating that Supreme Court declared in several cases that "true threats" lie outside limits of First Amendment protected speech).

172 See Black, 538 U.S. at 360 (noting that "speaker need not actually intend to carry out the threat"); R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992) (declaring that the First Amendment "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur").

173 128 F.3d 250 (4th Cir. 1997).

174 See Paladin, 128 F.3d at 250 (holding that the First Amendment does not bar plaintiff's action against publisher of book which contained instructions on how to be a "hit man"); Pangilinan, supra note 167, at 700–01 (discussing court's reasoning in Paladin).


raised monies to fund its terror operations, and gave succor to
the families of bombers in order to encourage a policy designed to
entice new human weapons."\textsuperscript{177} Given the violent nature of the
organization,\textsuperscript{178} as well as the risks the individual defendants
posed, the court granted the government's motion to detain the
two defendants.\textsuperscript{179} National security concerns trumped all other
individual interests when the government proved defendants
were ranking members in the organization who played an active
role in its violent goals and participated in terrorist events in the
Middle East.\textsuperscript{180}

Seemingly following the rationale of this Note, \textit{United States v.}
\textit{Zavrel}\textsuperscript{181} affirmed defendant's conviction for violating a federal
statute by mailing seventeen envelopes with a white powdery
substance intended to resemble anthrax to various local officials,
including President George W. Bush.\textsuperscript{182} The Third Circuit ruled
such expressive conduct as communication, as well as a true
threat, because a reasonable person opening an envelope
containing a white powdery substance during the anthrax scare
of 2001 would fear immediate and future injury.\textsuperscript{183}

\textsuperscript{177} \textit{Al-Arian}, 280 F. Supp. 2d at 1350–51.

\textsuperscript{178} \textit{Al-Arian}, 280 F. Supp. 2d at 1348. The Court explains:
The PIJ considers itself 'the vanguard of the Islamic Revolutionary Movement.' Its
creed is blunt, violent, and uncompromising. The PIJ rejects any peaceful solution to
the Palestinian question. It advocates the destruction of Israel, the elimination of
Western influence, particularly from the United States, in the region, and the
creation of an Islamist state. And it aims to achieve all this through terror – the
senseless, brutal murder of innocents in public places designed to instill fear,
instability and panic in the populace and the government of Israel. The PIJ killed
over a hundred in Israel and the occupied territories during the period referenced in
the indictment. It maimed many more. The roll call of dead and wounded included
Americans. \textit{Id.} Unlike other extremist groups, the "PIJ's sole tactic is violence." Tamara Lytle,
\textit{Violence Seen as a 'Natural Right'; Palestinian Islamic Jihad Succeeds in Creating

\textsuperscript{179} \textit{Al-Arian}, 280 F. Supp.2d at 1346, 1358-59 (stating and explaining court's
holding); see Elaine Silvestrini, \textit{Al-Arian Associate Plea Bargains In Another Case}, TAMPA
TRIB., Feb. 15, 2005, at 4 (stating that Al-Arian and Hammoudeh are still being detained).

\textsuperscript{180} \textit{See Al-Arian}, 280 F. Supp. 2d at 1347–49 (explaining extreme threat defendants
pose due to their intrinsic roles in terrorist group); \textit{see also} Rosenzweig, \textit{supra} note 169, at
689–90 (asserting that balance between civil liberty and national security has shifted
since Sept. 11, 2001 and, as such, no one argued in \textit{Al-Arian} that wiretapping alleged
terrorist was unlawful or unwarranted).

\textsuperscript{181} 384 F.3d 130 (3d Cir. 2004).

\textsuperscript{182} \textit{Zavrel}, 384 F.3d at 137 (affirming judgment of district court).

\textsuperscript{183} \textit{Id.} (concluding that mailing cornstarch in wake of 2001 anthrax scare constitutes
communication and that Zavrel's mailings constituted threats to injure recipient).
In *United States v. Sattar*, defendants were charged with helping an influential and high ranking co-conspirator communicate with terrorist organizations outside of prison, as well as conspiring to defraud the United States, conspiring to murder and kidnap persons in a foreign country, soliciting persons to engage in crimes of violence and providing and concealing material support for the aforementioned conspiracy. Although defendants claimed that the statute they were charged under was unconstitutional, the district court held that the First Amendment provided no protection for the conduct of providing resources knowing and intending that they are to be used for crimes of violence, nor with conspiring to murder and communicate with terrorist organizations outside of prison. Such expressive conduct was indeed constitutionally proscribable.

In contrast, a local anecdotal example of questionable threatening behavior occurred just weeks after September 11, 2001, when William Harvey handed out leaflets near Ground Zero with a picture of Osama bin Laden superimposed over the burning Twin Towers and praised bin Laden and the attacks. The District Attorney then brought charges to prosecute and the trial judge denied defendant's motion to dismiss based on First Amendment grounds. The trial judge further ruled, "[i]t is the reaction which the speech engenders, not the content of the speech that is the heart of disorderly conduct" and that Harvey should have expected a violent reaction, given his timing of the speech. The state later dropped the charges, so the probable result is not known, but this example illustrates the views of the

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185 *Sattar*, 314 F. Supp. 2d 279 (outlining various charges and counts against defendants).
186 *Sattar*, 314 F. Supp. 2d 279 (rejecting defendants' argument that certain charges against them were unconstitutionally vague).
187 See Wasserman, *supra* note 163, at 406 (describing course of events); see also Joe Bob Briggs, *Joe Bob’s America: Silencing Osama Lovers*, UNITED PRESS INT'L, MAR. 18, 2002 (illustrating how Harvey demonstrated his political message).
188 See Wasserman, *supra* note 163, at 407 (discussing procedural posture of case); see also *No Charges Against Bin Laden Supporter*, 227 N.Y. L.J. 6, 6 (April 26, 2002) (stating that after J. Ross' declined to dismiss charges against Harvey, District Attorney Morgenthau dropped case).
189 Wasserman, *supra* note 163, at 407 (noting "[i]t is the reaction which speech engenders, not the content of the speech, that is the heart of disorderly conduct' and that Harvey should have expected a violent reaction, given the timing of his speech" (internal citations omitted)); see also Tom Perrotta, *Man Faces Trial For Public Stir Over Bin Laden*, 227 N.Y. L.J. 1, 1 (Feb. 1, 2002) (recapping Judge Ross' quote).
public as well as the courts in limiting speech regarding threats and terrorism. Such expressive conduct probably lies on the outer limits of the true threats conduct and would likely not rise to the level of intimidating unprotected speech.

As illustrated above, the current case law regarding the topic of whether terrorist organizations have an unlimited right to threatening speech and expressive conduct is novel and rather sparse. The few cases decided on the issue, however, seem to apply Black's true threat exception when the actions rise to the level of instilling directed fear and intimidation, and agree that in those cases the speech or expressive conduct ought be limited.

CONCLUSION

There is no doubt that Americans' First Amendment right to free speech is fundamental and cherished within our United States Constitution, and furthermore that unpopular ideas should not be censored within the 'marketplace of ideas.' There are, however, certain areas of speech which have always been limited, and for rational and justifiable reasons. The true threats exception ensures that individuals are not placed in direct fear for their life or physical being and allows governments to punish such activity without working contrary to the Free Speech Clause. Just as the symbolic speech of burning a cross in Virginia v. Black was held to be proscribable as a true threat, so too ought similar threats from terrorist organizations. This Note proposes that certain intimidating communicative conduct should be considered within the true threats exception and therefore be limited by the United States and local state governments.

190 See Wasserman, supra note 163, at 407 (noting that state later dropped charges against Harvey because it was unlikely that any conviction would withstand First Amendment scrutiny on review); see also No Charges, supra note 188, at 6 (stating that District Attorney dropped Harvey's case).
191 See Wasserman, supra note 163, at 407 (noting that charges against Harvey would not withstand First Amendment scrutiny); see also Barber v. Dearborn Public Schools, 286 F. Supp 847, 849, 857 (E.D. Mich. 2003) (holding student's shirt with photograph of President Bush containing phrase "International Terrorist" constituted type of symbolic act protected by the First Amendment and did not cause substantial disruption of school activities).