

Advocacy, True Threats, and the First Amendment

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Introduction

*Brandenburg v. Ohio*¹ is thought by many to represent an extremely speech protective doctrine.² Yet, much of the protection offered by *Brandenburg* can easily be swallowed up by the true threat doctrine, which provides the basis for a robust exception to First Amendment protections. Both the *Brandenburg* protections and the true threat exception are important to maintain—the great challenge for the Court is to include both within the formulation and articulation of First Amendment jurisprudence so that sufficient protection is afforded to the implicated societal and individual interests represented by each. Regrettably, rather than provide helpful guidelines that would establish the contours of *Brandenburg* and the true threat exception, the Court has instead focused on highly contested exceptions within First Amendment jurisprudence, leaving lower courts to fend for themselves. The current jurisprudence is hopelessly confused, and courts are reaching radically different results in relevantly similar cases. Unless and until the Court changes

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1. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

2. See, e.g., Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193, 1195 (2009) (discussing “the ‘outside’ speech principle of *Brandenburg v. Ohio*, which protects all speech in the street (or elsewhere in society outside of specific institutional contexts), that is not likely (or intended) to ‘incit[e] . . . imminent lawless action.”). See also S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1201 (2000) (“Although the *Brandenburg* test properly protects political speech advocating the overthrow of the government or other abstract promotion of lawlessness, it has proven to be overprotective of nonpolitical speech that directly facilitates physical harm against others.”).

its approach to help clarify matters, one can only expect the great disparity in reasoning and result in this area to increase.

Part I of this article describes the evolving constitutional jurisprudence, noting that the Court has missed several opportunities to clarify the relevant jurisprudence and instead has chosen to muddy it further. Part II describes some of the debates in the lower courts, focusing on how the outcome of these debates would often not have much effect as a practical matter. Ironically, some of the more significant and difficult issues are simply being ignored, making it all the more difficult to make any headway in articulating a consistent jurisprudence that takes adequate account of the competing interests at play. The article concludes that unless the Court addresses the current inconsistencies in the jurisprudence, the interests both in security and in having robust political debate will continue to be sacrificed.

I. Advocacy and True Threat Jurisprudence

The current chaotic state of the *Brandenburg* and true threat jurisprudence can be attributed to several causes, not least of which is that members of the Court sometimes compartmentalize speech too readily and too absolutely, apparently failing to appreciate that in many instances speech characterized as advocacy might also be characterized as threatening. The Court's failure to acknowledge that speech might reasonably be taken either way forces lower courts to make guesses about whether the Court would characterize particular speech as one rather than the other and also what protections, if any, are afforded by the First Amendment for speech that might reasonably be characterized as both advocating and threatening. Until the Court explains which threatening speech is nonetheless protected, no headway will be made in clarifying the jurisprudence.

A. *Brandenburg v. Ohio*

Brandenburg announced 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."³ This very speech-protective holding arose in the context of a prosecution of Clarence

3. *Brandenburg*, 395 U.S. at 447–48.

Brandenburg under Ohio's Criminal Syndicalism Statute for advocating terrorism as a means of accomplishing political reform.⁴ Brandenburg was a Ku Klux Klan leader⁵ who had invited a TV reporter to attend a rally,⁶ where the events were filmed and later broadcasted.⁷ The film included "scattered phrases . . . that were derogatory of Negroes and, in one instance of Jews."⁸ It also included the following language: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."⁹

The Court examined the Ohio statute at issue, "which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."¹⁰ The statute could not pass constitutional muster,¹¹ although the Court did not make clear whether the statute was being applied to the derogatory language involving Jews and Blacks or, instead, was being applied to the language suggesting possible "revengeance" against members of the different federal branches. The Court's lack of clarity was likely due, at least in part, to the unhelpfulness of the opinions below.¹²

Someone who suggests that "revengeance" may be necessary need not be suggesting that the law will or even should be broken. Such a person might instead be suggesting that unless policies are changed, the voters will manifest their displeasure in the voting booth. Indeed, a person threatening voter retaliation might, in addition, suggest that there will be a march on Washington D.C.¹³ without thereby advocating anything illegal. Thus, if the Court was focusing on what

4. *See id.* at 444–45.

5. *See id.* at 444.

6. *Id.* at 445.

7. *Id.*

8. *Id.* at 446.

9. *Id.*

10. *Id.* at 449.

11. *Id.*

12. *Id.* at 445 ("[T]he intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, 'for the reason that no substantial constitutional question exists herein.' It did not file an opinion or explain its conclusions.").

13. *See id.* at 446 ("We are marching on Congress July the Fourth, four hundred thousand strong.").

was said in the films with respect to the “revenge” that might be taken against members of the federal government, it is not surprising that the Court quoted what it had already said in *Noto v. United States*¹⁴ 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.’”¹⁵ While the “revenge” language might have been suggesting some sort of violence, it might also have been suggesting that legal means would be utilized to achieve the speaker’s desired results.

Other language in the film was more ominous, e.g., “Send the Jews back to Israel” and “Let’s give them back to the dark garden.”¹⁶ More ominous still was “Bury the niggers.”¹⁷ These would seem to be suggesting illegal actions—killing American citizens or forcing them to leave the country. Perhaps the Court believed this kind of advocacy merely abstract or insufficiently imminent. Or, perhaps, the Court was not focusing on these statements but, instead, solely on those discussing “revenge.”¹⁸

At least two further points might be made about the film in *Brandenburg*. First, one might understand the comments against Jews and Blacks as not involving mere advocacy about what others should do but, instead, as an announcement about what the speaker and his colleagues plan to do. In that event, the language is more appropriately characterized as threatening rather than as (mere) advocacy. Second, the Court briefly mentioned in passing that the film included a cross burning.¹⁹ The Court did not say whether the segment including the cross burning was broadcast, instead merely noting that some portions of the film were on TV, without specifying

14. *Noto v. United States*, 367 U.S. 290 (1961).

15. See *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297–98).

16. *Id.* at 446 n.1.

17. *Id.*

18. See Seth D. Berlin, *Are The Nuremberg Files and ‘Wanted’ Posters Protected Advocacy or Unprotected Threat?* 20 COMM. LAW. 1, 28 (“In *Brandenburg v. Ohio*, the U.S. Supreme Court held that speech advocating violence—there, a Ku Klux Klan member’s statement ‘there might have to be some revenge taken’—was constitutionally protected unless it was directed to and likely to incite imminent lawless action.”).

19. See *Brandenburg*, 395 U.S. at 445 (“They were gathered around a large wooden cross, which they burned.”).

which parts had been seen by a local or national audience.²⁰ Yet, if indeed the cross burning was televised, some viewers would not merely see the film as political advocacy, however repugnant, but instead or in addition as something terrifying.²¹

Regrettably, the Court did not focus on the terrifying aspect of the film at issue in *Brandenburg*, and thus it is difficult to know whether the *Brandenburg* doctrine *only* covers speech involving advocacy or covers other speech as well. Thus, it is difficult to say whether *Brandenburg* should be read as protecting speech involving political advocacy even when that speech also involves elements that might reasonably be viewed as threatening or if, instead, *Brandenburg* should only be read as limited to speech involving advocacy.²² The fact that the speech at issue in *Brandenburg* could have been characterized in another way may simply have been ignored by the Court, so it is simply impossible to say whether *Brandenburg* has implications for threatening or terrorizing speech.

B. True Threat Analysis

Ironically, the Court had recently articulated some aspects of its threatening language jurisprudence, having decided a case dealing with an alleged threat against President Lyndon B. Johnson only a few months before *Brandenburg* was handed down.²³ *Watts v. United States* involved an individual who had been convicted of “knowingly and willfully threatening the President.”²⁴ Robert Watts was an 18-year-old who had received a 1-A draft classification and had been told to report for his physical.²⁵ After saying that he was not going to

20. *See id.* (“Portions of the films were later broadcast on the local station and on a national network.”).

21. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 999 (2008) (“The televised broadcast of a blazing cross and hooded armed Klansmen making thinly-veiled threats surely would unnerve if not terrify at least some Ohio viewers, a state with a long Klan history.”).

22. *Cf. Stewart v. McCoy*, 537 U.S. 993 (2002) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari, discussing “a most important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than ‘mere advocacy’”) (quoting *Brandenburg*, 395 U.S. at 449).

23. *Brandenburg v. Ohio* was handed down on June 9, 1969. *Watts v. United States*, 394 U.S. 705 (1969), was handed down on April 21, 1969.

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

25. *Id.*

go,²⁶ he further suggested, “‘If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.’” because “[t]hey are not going to make me kill my black brothers.”²⁷

When reviewing the conviction, D.C. Circuit Court judges disagreed about whether the statute under which Watts was convicted required that he have a particular intent. The *Watts* majority construed the statute as prohibiting “the knowing and willful act of threatening the life of the President,”²⁸ explaining that “it is the threat which must be ‘knowingly and willfully’ made”²⁹—the statute’s intent requirement did not require an “intent to execute the content of the threat.”³⁰ Rejecting the defense that Watts had merely been making a jest,³¹ the court held that “[a]ppellant’s words, considered in context, reasonably permit an inference that he was uttering a threat.”³²

In dissent, Judge Skelly Wright worried that a conviction might be based on offensive language “which was meant as jest, as rhetoric, or as hyperbole.”³³ He argued that the statute required “a willful expression of an intent to carry out a threat against the Executive.”³⁴ Two issues should not be conflated: (1) Did the person intend to make the threat?, and (2) Did the person intend to carry out the threat?

Someone who says something in jest does not intend to make or carry out a threat. Someone who makes an empty threat wants the listener to perceive a threat, even though the person making the threat has no intention of carrying out the threat. Arguably, the jest is not a threat at all, whereas the empty threat is a threat, albeit one that will not be effectuated.

One of the issues dividing the judges on the D.C. Circuit was whether Congress had intended to criminalize making a jest about harming the president. A different but related issue was whether the

26. *Id.*

27. *Id.*

28. *Watts v. United States*, 402 F.2d 676, 678 (D.C. Cir. 1968), *rev’d*, 394 U.S. 705 (1969).

29. *Id.* at 680.

30. *Id.*

31. *Id.* (“Nor is it a defense that the words were intended merely as a jest.”).

32. *Id.* at 681.

33. *Id.* at 689 (Wright, J., dissenting).

34. *Id.* at 687 (Wright, J., dissenting) (quoting 53 CONG. REC. 9378 (1916), where Congressman Webb, the bill’s chief spokesperson, explained the requirement).

First Amendment to the United States Constitution imposes limitations on what Congress can criminalize, i.e., whether it is within Congress's power to criminalize making such a jest.

The *Watts* Court explained that it was important to distinguish between a threat on the one hand and protected speech on the other,³⁵ noting the disagreement among the judges on the D.C. Circuit with respect to whether the statute at issue included a requirement that the speaker "have intended to carry out his 'threat.'"³⁶ While refusing to construe the statute, the Supreme Court expressed "grave doubts" that the court below had interpreted the statute correctly.³⁷ Instead of specifically stating the basis for these grave doubts, the Court referred generally to Judge Skelly Wright's dissent.³⁸

Although taking no position on what the willfulness requirement entailed,³⁹ the Court adopted part⁴⁰ of Wright's position by pointing out that the "statute initially requires the Government to prove a true 'threat.'"⁴¹ Noting that Watts's statement was made during a political debate,⁴² the threat was conditioned on an event that Watts had said would never take place, and that Watts and his audience had laughed after the statement had been made,⁴³ the Court found that the Government had not met its burden of establishing that a true threat had been made.⁴⁴ The Court concluded that the petitioner's "only offense here was 'a kind of very crude offensive method of stating a political opposition to the President,'"⁴⁵ suggesting that the statement

35. *Watts*, 394 U.S. at 707 ("What is a threat must be distinguished from what is constitutionally protected speech.").

36. *Id.* at 707.

37. *See id.* at 708.

38. *See id.* (citing *Watts v. United States*, 402 F.2d at 686-93 (Wright, J., dissenting)).

39. *See id.* ("whatever the 'willfulness' requirement implies").

40. Judge Wright wrote: "a conviction under Section 871 can be sustained if (1) the defendant made the alleged threat with specific intent to execute it, and (2) in the context and circumstances the statement unambiguously constituted a threat upon the life or safety of the President." *See Watts*, 402 F.2d at 691 (Wright, J., dissenting). The Supreme Court nowhere implied that it interpreted the statute to require a specific intent to execute the threat, assuming that executing a threat means carrying it out.

41. *Watts*, 394 U.S. at 708.

42. *Id.* at 707.

43. *Id.*

44. *See id.* at 708 ("We agree with petitioner.").

45. *Id.*

by Watts could not be interpreted otherwise,⁴⁶ D.C. Circuit interpretation to the contrary notwithstanding.

Six years later, the Court reversed the conviction of George Rogers for having made threats against the life of President Richard Nixon.⁴⁷ Rogers, a 34-year-old alcoholic, had wandered into a coffee shop early one morning, behaving in a “loud and obstreperous manner.”⁴⁸ Among other things, he had claimed to be Jesus Christ,⁴⁹ and had announced his opposition to Nixon’s going to China “because the Chinese had a bomb that only he [Rogers] knew about, which might be used against the people of this country.”⁵⁰ Rogers also announced that he “was going to go to Washington to ‘whip Nixon’s ass,’ or to ‘kill him to save the United States.’”⁵¹

The police were called.⁵² When discussing his plan to attack the President with the police, Rogers said that he was going to walk to Washington, D.C. from Shreveport, Louisiana, because he did not like cars,⁵³ providing yet further reason to believe that his statements were not credible. Rogers was not charged with any crimes under state law.⁵⁴ However, when the police reported to a local Secret Service agent what Rogers had said, the agent had petitioner arrested on federal charges.⁵⁵

The *Rogers* majority reversed the conviction and remanded the case because of what the judge had told the jury. Apparently, after almost two hours of deliberation,⁵⁶ the jury foreman had asked the judge whether he would “accept the Verdict—‘Guilty as charged with extreme mercy of the Court.’”⁵⁷ The judge responded in the affirmative.⁵⁸ Five minutes later, the jury came back with a verdict of

46. *Id.*

47. *See* *Rogers v. United States*, 422 U.S. 35, 36 (1975) (“the conviction must be reversed”).

48. *See id.* at 41 (Marshall, J., concurring).

49. *Id.* (Marshall, J., concurring).

50. *Id.* at 41–42 (Marshall, J., concurring).

51. *Id.* at 42 (Marshall, J., concurring).

52. *Id.* (Marshall, J., concurring).

53. *Id.* (Marshall, J., concurring).

54. *Id.* (Marshall, J., concurring).

55. *Id.* (Marshall, J., concurring).

56. *See id.* at 36.

57. *Id.*

58. *Id.*

“guilty with extreme mercy.”⁵⁹ The United States Supreme Court reasoned that the jury’s reaching a verdict five minutes after the judge had manifested a willingness to accept the extreme mercy recommendation “strongly suggests that the trial judge’s response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise.”⁶⁰

Justice Marshall urged in his *Rogers* concurrence that the conviction be reversed on substantive grounds. He argued that the prevailing standard, whose validity had been cast into doubt in *Watts*, “would support the conviction of anyone making a statement that would reasonably be understood as a threat, as long as the defendant intended to make the statement and knew the meaning of the words used.”⁶¹

The test to determine whether the requisite intent was present was described in the following way:

The jury was instructed in effect that it was not required to find that the petitioner actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat. Instead, the jury was permitted to convict on a showing merely that a reasonable man in petitioner’s place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.⁶²

Justice Marshall argued that the objective construction test was too broad.⁶³ After noting that “threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out,”⁶⁴ Justice Marshall nonetheless suggested that the relevant standard should require “proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature.”⁶⁵

59. *Id.* at 40.

60. *Id.* (citing *United States v. Glick*, 463 F.2d 491, 495 (2d Cir. 1972)).

61. *Id.* at 43 (Marshall, J., concurring) (citing *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969); *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918)).

62. *Id.* at 43–44 (Marshall, J., concurring).

63. *Id.* at 44 (Marshall, J., concurring).

64. *Id.* at 46–47 (Marshall, J., concurring).

65. *Id.* at 47 (Marshall, J., concurring).

Such a standard would be less forgiving than the objective construction standard, under which a “defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention.”⁶⁶ Basically, Justice Marshall argued that the objective construction standard in effect “embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.”⁶⁷

A requirement that the speaker intends that his statement be taken as a threat itself requires further elaboration. One interpretation would be that the speaker’s subjective intent would have to be established—proof that the speaker wanted her comments to be construed as a threat would be required. Justice Marshall did not go that far. Although an analysis of “the circumstances under which the statement was made”⁶⁸ would be necessary, he neither stated nor implied that the only relevant circumstances would be those establishing the speaker’s subjective state of mind. For example, “if a call were made to the White House threatening an attempt on the President’s life within an hour, . . . the caller might well be subject to punishment under the statute.”⁶⁹ Justice Marshall did not suggest that it would be necessary to prove that the speaker was conscious of the likelihood that others would interpret her statement as a threat, although he cautioned that permitting the “jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area.”⁷⁰

A few points might be made about the exchange between the *Rogers* majority and concurrence. First, the Court did not adopt Justice Marshall’s view, although it also did not offer any reasons to reject it. One cannot tell whether the Court disagreed substantively with the position offered by Justice Marshall or whether, instead, the majority simply saw no reason to reach the substantive issues, given the procedural error that had occurred.

Second, the “threat” made by George Rogers seemed no more credible or “true” than the threat made by Robert Watts, although for different reasons. The statement by Rogers seemed to be political

66. *Id.* (Marshall, J., concurring).

67. *Id.* (Marshall, J., concurring).

68. *Id.* at 48 (Marshall, J., concurring).

69. *Id.* (Marshall, J., concurring).

70. *Id.* (Marshall, J., concurring).

hyperbole, while the statements by Watts seemed to be the ravings of someone who had had too much to drink. If, for example, the Secret Service could only maintain surveillance on one of these individuals, e.g., because of limited resources, it simply is not clear who would be thought the more serious risk. But if that is so, then it is not clear that either statement could meet the objective reasonableness test used to show that a threat had actually been made.

Third, while Justice Marshall's test may be more protective of speech than the objective test he criticizes, even his test might result in a finding that someone had made a threat when in fact the individual had only been saying something in jest. Justice Marshall's standard raises the bar so that an individual who had negligently failed to perceive how her statement might be understood would not be found to have made an actionable threat. However, his test, which incorporates consideration of the circumstances in which a statement had been offered, leaves room for a jury to find that a threat had been made when a person had recklessly failed to perceive how her statement might be understood.

C. Threats versus Advocacy

Ironically, two of the cases most closely associated with *Brandenburg*,⁷¹ *Hess v. Indiana*⁷² and *NAACP v. Claiborne Hardware Co.*,⁷³ involved language that might reasonably have been construed either as advocacy or as threats. Gregory Hess was convicted of having engaged in disorderly conduct⁷⁴ when he had said either "We'll take the fucking street later"⁷⁵ or "We'll take the fucking street again"⁷⁶ during a demonstration. There was testimony that he

did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone,

71. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 667 (2009) ("Aside from *Hess*, the Court has applied *Brandenburg* in only one other case . . . *NAACP v. Claiborne Hardware Co.*").

72. *Hess v. Indiana*, 414 U.S. 105 (1973).

73. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

74. *Hess*, 414 U.S. at 105 ("Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute.").

75. *Id.* at 107.

76. *Id.*

although loud, was no louder than that of the other people in the area.⁷⁷

Testimony to the contrary notwithstanding, the trial court found that Hess was attempting to incite lawless action, but the United States Supreme Court suggested that the state could not meet the high standard set in *Brandenburg*. Indeed, the Court questioned whether the statement could be read as inciting illegal behavior at all, since it “could be taken as counsel for present moderation.”⁷⁸ Even were the statement interpreted to be more ominous, it “at worst . . . amounted to nothing more than advocacy of illegal action at some indefinite future time.”⁷⁹

In his dissent, then Justice Rehnquist argued that Hess’s language might be interpreted differently and that “there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police.”⁸⁰ He was joined by Chief Justice Burger, who had written the majority opinion in *Watts* when he was on the D.C. Circuit bench.⁸¹

No one on the Court expressly considered whether the language could be considered a threat, presumably because the trial court had characterized Hess’s language as incitement. The difficulty pointed to here is that it is simply unclear whether the Court would have held Hess’s speech protected had the language been characterized as a possible threat. For example, neither *Watts* nor *Rogers* suggests that imminence is one of the criteria to be considered when assessing whether a threat was constitutionally protected.⁸² Yet, the lack of imminence in Hess’s advocacy was what made it protected speech under *Brandenburg*.⁸³ If indeed a different result might have been

77. *Id.*

78. *Id.* at 108.

79. *Id.*

80. *Id.* at 111 (Rehnquist, J., dissenting).

81. See Jay, *supra* note 21, at 1009 (noting that that D.C. Circuit Court opinion was written by “Judge (and soon to be Chief Justice) Warren E. Burger, who thought that Watt’s ‘words, considered in context, reasonably permit an inference that he was uttering a threat’”).

82. *Watts* involved something that would never occur, because Watts was not going to the physical. See text accompanying note 26, *supra*. *Rogers* did not involve anything imminent, since the alleged threat could only be effectuated after Rogers had walked from Louisiana to Washington D.C. See text accompanying note 53, *supra*.

83. See text accompanying note 80, *supra*.

reached, had the trial court deemed Hess's language both threatening and inciting, then the *Brandenburg* test is likely far less protective than is sometimes thought.⁸⁴

The suggestion that *Hess* might have been decided differently if the language had been characterized as a threat rather than as advocacy might seem to be contradicted by *Claiborne Hardware*, which arguably subjected threatening language to the *Brandenburg* test.⁸⁵ *Claiborne Hardware* involved a suit by seventeen white merchants who sought damages against two corporations and 146 individuals resulting from an economic boycott.⁸⁶ All but eighteen of the original defendants were found jointly and severally liable for over 1.25 million dollars.⁸⁷ In addition, petitioners were enjoined from:

[S]tationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patrolling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property.⁸⁸

The Mississippi Supreme Court upheld the judgment of damages,⁸⁹ although the court dismissed the counts against certain defendants.⁹⁰ The court held the boycott unlawful, reasoning that "[i]f any of these factors—force, violence, or threats—is present, then the boycott is

84. Cf. Berlin, *supra* note 18, at 29 (discussing "the exacting standards of *Brandenburg* and *Hess v. Indiana*").

85. Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1331 (2005) ("The unmistakable message of *Claiborne Hardware* seems to be that at least in the context of threatening language with political overtones, a 'true threat' is defined by the three elements of the *Brandenburg* test: the words must be explicit, the words must be spoken in a context in which serious harm is imminent, and the speaker must possess the specific intent that the harm occur.").

86. See *Claiborne Hardware*, 458 U.S. at 889–90.

87. *Id.* at 893.

88. *Id.*

89. See *id.* at 894.

90. See *id.* at 896.

illegal regardless of whether it is primary, secondary, economical, political, social or other.”⁹¹

Charles Evers in particular had been found liable, based on his allegedly threatening language. For example, he had “stated that boycott violators would be ‘disciplined’ by their own people and had warned that the Sheriff could not sleep with boycott violators at night,”⁹² and also had been found to have stated, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”⁹³

One of the points at issue was what the “discipline” mentioned by Evers would involve. The *Claiborne Hardware* Court explained:

One form of “discipline” of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these “store watchers” were members of a group known as the “Black Hats” or the “Deacons.” The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the “Black Times.” As stated by the chancellor, those persons “were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites.”⁹⁴

The Court admitted that more violent forms of discipline were also used. For example, shots were fired at a house, a brick was thrown through a windshield, and a flower garden was damaged.⁹⁵ Other incidents included the confiscation of a bottle of liquor from a black man who had purchased it at a white-owned store⁹⁶ and a fight between four men and a commercial fisherman not honoring the boycott.⁹⁷ In addition, a group of young Blacks had pulled down the

91. *See id.* at 895 (citing *NAACP v. Claiborne Hardware*, 393 So.2d 1290, 1301 (Miss. 1980)).

92. *Id.* at 902.

93. *Id.*

94. *Id.* at 903–04.

95. *Id.* at 904.

96. *Id.* at 905.

97. *Id.*

overalls of an elderly man and spanked him because he had not observed the boycott.⁹⁸

The *Claiborne Hardware* Court noted that there had been no finding that any of these incidents had occurred after 1966,⁹⁹ which made it difficult to tie these incidents to the losses incurred years later.¹⁰⁰ The Court also noted that the boycott had been furthered by protected speech.

Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the “threat” of social ostracism.¹⁰¹

The Court then explained, “Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.”¹⁰²

Clearly, some of the activity at issue in the case was constitutionally protected, although that fact did not “end the relevant constitutional inquiry.”¹⁰³ For example, secondary boycotts could be prohibited.¹⁰⁴ Nonetheless, the Court held that the state did not have the power “to prohibit peaceful political activity such as that found in the boycott in this case,”¹⁰⁵ and that “the nonviolent elements of petitioners’ activities are entitled to the protection of the First Amendment.”¹⁰⁶

That nonviolent activities were protected did not immunize everything that had been done, because the “First Amendment does

98. *Id.*

99. *Id.* at 906.

100. *See infra* notes 107–15 and accompanying text (describing the kind of nexus that had to be established between the losses sustained and the alleged causes).

101. *Claiborne Hardware*, 458 U.S. at 909–10.

102. *Id.* at 910.

103. *Id.* at 912.

104. *Id.*

105. *Id.* at 913.

106. *Id.* at 915.

not protect violence.”¹⁰⁷ The state could impose liability for business losses attributable to violence or to threats of violence,¹⁰⁸ although the Court cautioned that when “such conduct occurs in the context of constitutionally protected activity, . . . ‘precision of regulation’ is demanded.”¹⁰⁹ Basically, only “those losses proximately caused by unlawful conduct may be recovered.”¹¹⁰

It was clear that some business losses resulted from protected activity,¹¹¹ and establishing which losses were attributable to the unprotected activity was no easy task. Such a task was made even more difficult considering that language advocating violence against those not complying with the boycott was protected unless it fell outside of *Brandenburg* protections. Evers’s speech was viewed as protected advocacy rather than as unprotected threats,¹¹² and thus business losses attributable to his speech were not recoverable. Because the Court characterized Evers’s speeches¹¹³ and because the Court found no other evidence of Evers having made threats,¹¹⁴ no liability could be imposed for his having made the statements at issue.¹¹⁵

Yet, this means that *Claiborne Hardware* should not be understood as having applied the *Brandenburg* factors to threats¹¹⁶ but, instead, as having skirted that issue by characterizing Evers’s speeches as advocacy rather than as threats.¹¹⁷ Regrettably, the *Claiborne Hardware* Court did not indicate how, in an unclear case, a

107. *Id.* at 916.

108. *Id.* (suggesting that no “federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence”).

109. *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

110. *Id.* at 918.

111. *Id.* at 921 (“The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present.”).

112. *Id.* at 928 (“The emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*.”).

113. *See id.*

114. *See id.* at 929 (“[T]here is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.”).

115. *Id.* at 929 (“The findings are constitutionally inadequate to support the damages judgment against him.”).

116. For this suggestion, see Gey, *supra* note 85, at 1331.

117. *See id.* (noting that “the Supreme Court persists in its refusal to confront the ‘true threats’ dilemma directly”).

court should go about deciding whether to construe particular language as advocacy or, instead, as a threat.

In *R.A.V. v. City of St. Paul*,¹¹⁸ the Court continued its almost willful refusal to provide help to lower courts wishing to distinguish between advocacy and threats. The case was based on the following set of events:

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying.¹¹⁹

The closest that the Court came to suggesting that the cross burning at issue involved a threat was in noting in a footnote that the conduct *might* have violated a Minnesota statute prohibiting “terroristic threats.”¹²⁰ The focus of the Court’s analysis was on the constitutionality of St. Paul’s Bias-Motivated Crime Ordinance,¹²¹ which provided:

Whoever 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.¹²²

The Minnesota Supreme Court interpreted the ordinance as only reaching “fighting words,” which were not protected by the Constitution.¹²³ The United States Supreme Court accepted that construction,¹²⁴ but nonetheless struck down the ordinance as

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

119. *Id.* at 379–80.

120. *See id.* at 380 n.1.

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

122. *R.A.V.*, 505 U.S. at 380.

123. *Id.* at 380–81.

124. *See id.* at 381 (“[W]e are bound by the construction given to it by the Minnesota court”) (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986)).

unconstitutional.¹²⁵ In explaining why the ordinance did not pass muster, the *R.A.V.* court noted that when it is said that although certain kinds of speech can “be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.),”¹²⁶ those kinds of speech cannot “be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”¹²⁷ Basically, the Court was suggesting that merely because speech could be criminalized on one basis would not make such speech immune to constitutional guarantees. For example, while it would be permissible to prohibit obscene speech, it would not be permissible to criminalize only obscene speech that was critical of the government.¹²⁸

The *R.A.V.* Court offered additional explanation of the distinction it was trying to draw, which only made matters more confusing. “A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.”¹²⁹ The Court then applied its theory to the case at hand:

Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on

125. *R.A.V.*, 505 U.S. at 381 (“Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the ‘fighting words’ doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”).

126. *Id.* at 383.

127. *Id.* at 383–84.

128. *Id.* at 385 (noting that the “proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace”).

129. *Id.* at 388 (citing *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991)).

the basis of political affiliation, union membership, or homosexuality—are not covered.¹³⁰

The *R.A.V.* majority did not seem to appreciate that this very exception seemed to provide the basis for upholding the ordinance at issue. Arguably, St. Paul had selected the categories at issue precisely because these fighting words were especially likely to cause a breach of the peace.¹³¹ Thus, St. Paul need not have been making a choice regarding which political views it found most offensive but, instead, might have been worried about which symbolic acts were greater threats to public health and safety.¹³²

The *R.A.V.* concurrence interpreted the majority to be holding that “a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech.”¹³³ They then suggested that such a holding made questionable the very statute that had been the focus of *Watts* and *Rogers*, that is a statute criminalizing making threats against the President. After all, “because the Government could prohibit all threats and not just those directed against the President, under the Court’s theory, the compelling reasons justifying the enactment of special legislation to safeguard the President would be irrelevant, and the statute would fail First Amendment review.”¹³⁴ Indeed, in a brief footnote with no elaboration, the concurrence noted that a law criminalizing threats “is content based in and of itself because it distinguishes between threatening and nonthreatening speech.”¹³⁵ But such a way of understanding what is content-based raises a whole host of issues regarding the requisite narrowness of tailoring for the regulation of threats.

130. *Id.* at 391.

131. *Id.* at 407 (White, J., concurring) (“The ordinance proscribes a subset of ‘fighting words,’ those that injure ‘on the basis of race, color, creed, religion or gender.’ This selective regulation reflects the city’s judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words.”).

132. See *In re Welfare of R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991), *rev’d*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (suggesting that the “ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order”).

133. *R.A.V.*, 505 U.S. at 404 (White, J., concurring).

134. *Id.* at 408 (White, J., concurring).

135. *Id.* (White, J., concurring).

Both the majority and the concurrence believed the St. Paul ordinance was unconstitutional, but disagreed about why it was. The concurrence argued that the Minnesota Supreme Court had not accurately captured the limitations imposed by the fighting words exception when suggesting that the ordinance only criminalized displays that would arouse anger, alarm, or resentment.¹³⁶ As the *R.A.V.* concurrence pointed out, the fighting words exception is much narrower than that, so the Minnesota statute, even as interpreted by that state's high court, would criminalize protected speech.¹³⁷

The *R.A.V.* Court implied that St. Paul was trying to criminalize political speech based on viewpoint,¹³⁸ whereas the *R.A.V.* concurrence suggested that the ordinance was fatally overbroad, because it criminalized both protected and unprotected speech.¹³⁹ Neither offered any helpful discussion of threats, even though the family in whose yard this cross had been burned could not help but understand that act as “an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.”¹⁴⁰

R.A.V. raised a number of questions, for example, whether the state violates constitutional guarantees when imposing special punishments on individuals for committing anti-social acts against particular groups. *Wisconsin v. Mitchell*¹⁴¹ made clear that *R.A.V.* does not preclude such legislation, although in so holding the Court nonetheless managed to avoid many of the difficult questions courts face when trying to apply First Amendment protections in cases involving hateful or threatening speech.

At issue in *Mitchell* was the constitutionality of a Wisconsin statute that enhanced the maximum penalty for an offense “whenever

136. *Id.* at 413–14 (White, J., concurring) (citing *Welfare of R.A.V.*, 464 N.W.2d at 510) (“Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that ‘the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.’”).

137. *Id.* at 414 (White, J., concurring).

138. *See id.* at 391 (majority opinion) (“The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. [] In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.”).

139. *Id.* at 397 (White, J., concurring) (“This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.”).

140. *Welfare of R.A.V.*, 464 N.W.2d at 508.

141. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

the defendant “[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person”¹⁴² Todd Mitchell’s sentence for aggravated battery had been increased¹⁴³ because he had selected his victim on the basis of race.¹⁴⁴

The Wisconsin Supreme Court struck down the statute, because the state would often be forced to present evidence of the defendant’s prior speech to establish the accused’s invidious intent.¹⁴⁵ Yet, as the *Mitchell* Court correctly pointed out, the state often uses speech to establish an individual’s intention or motivation, and the state’s doing so can hardly always be thought a violation of the First Amendment.¹⁴⁶ Nonetheless, *R.A.V.* at least seemed to pose an obstacle for the enhancement statute. For example, as the *Mitchell* Court acknowledged, “under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained.”¹⁴⁷ The *Mitchell* Court might also have pointed out that the penalty would be greater if the victim were selected because of his race rather than because of his union membership, which at least seemed to violate the spirit of *R.A.V.*¹⁴⁸

The *Mitchell* Court distinguished *R.A.V.* by noting that “whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., ‘speech’ or ‘messages’) . . . the statute in this case is

142. *Id.* at 480–81 (citing Wis. STAT. § 939.645(1)(b) (1993)).

143. *Id.* at 480 (“That offense ordinarily carries a maximum sentence of two years’ imprisonment. §§ 940.19(1m) and 939.50(3)(e). But because the jury found that Mitchell had intentionally selected his victim because of the boy’s race, the maximum sentence for Mitchell’s offense was increased to seven years under § 939.645.”) (citing Wis. STAT. §§ 940.19(1m) (1993), 939.50(3)(e) (1993) and 939.645(1)(b) (1993)).

144. *See id.* at 479.

145. *Id.* at 482 (“[I]n order to prove that a defendant intentionally selected his victim because of the victim’s protected status, the State would often have to introduce evidence of the defendant’s prior speech, such as racial epithets he may have uttered before the commission of the offense.”).

146. *Id.* at 489 (“The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”).

147. *Id.* at 484–85.

148. *Cf. R.A.V.*, 505 U.S. at 391.

aimed at conduct unprotected by the First Amendment.”¹⁴⁹ However, this was not the most convincing way to distinguish the cases, since cross burning is conduct that may violate a number of laws.¹⁵⁰ Further, the *Mitchell* Court’s suggestion that “the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm”¹⁵¹ was not the best way to distinguish *R.A.V.*, since this was the argument the *R.A.V.* concurrence had stated might have been put forth by St. Paul to save its ordinance.¹⁵²

While correct in suggesting that the First Amendment does not preclude the use of a person’s statements to establish her intention or motivation, the *Mitchell* Court’s method of distinguishing *R.A.V.* helped to highlight that *R.A.V.* does not have some of the robust implications that have sometimes been suggested.¹⁵³ The *R.A.V.* mode of analysis was further undermined in *Virginia v. Black*.¹⁵⁴

Black involved two different prosecutions for cross burning. One involved Barry Black, who had led a Ku Klux Klan rally on private property with the owner’s permission.¹⁵⁵ A sheriff who went to observe what was occurring at the rally noticed that forty to fifty cars passed by,¹⁵⁶ so many people witnessed the events at issue. Rebecca Sechrist, a relative of the property owner,¹⁵⁷ testified that she felt very scared after hearing Klan members speak at the rally.¹⁵⁸ At the end of the rally, a cross was burned, which made Sechrist feel “awful” and

149. *Mitchell*, 508 U.S. at 487 (citing *R.A.V.*, 505 U.S. at 392).

150. *R.A.V.*, 505 U.S. at 380 (“this conduct could have been punished under any of a number of laws”).

151. *Mitchell*, 508 U.S. at 487–88.

152. See *R.A.V.*, 505 U.S. at 407 (White, J., concurring) (“The ordinance proscribes a subset of ‘fighting words,’ those that injure ‘on the basis of race, color, creed, religion or gender.’ This selective regulation reflects the city’s judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words.”).

153. Cf. Mark S. Kende, *Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle’s Eye*, 2007 B.Y.U. L. REV. 1623, 1634 (2007) (“*R.A.V.* throws a monkey wrench into the Court’s neat, categorical First Amendment jurisprudence.”).

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

155. *Id.* at 348.

156. *Id.*

157. *Id.*

158. *Id.* at 349.

“terrible.”¹⁵⁹ Black was charged with burning a cross with the intent to intimidate.¹⁶⁰

The other prosecution involved events that occurred on a separate occasion¹⁶¹ in a different place.¹⁶² Richard Elliott and Jonathan O’Mara attempted to burn a cross in the yard of James Jubilee, Elliott’s next-door neighbor.¹⁶³ Apparently, Elliott and O’Mara were retaliating against Jubilee for having complained about shots being fired in the back of Elliott’s home.¹⁶⁴ When Jubilee noticed the partially burned cross the next day, he became very nervous about what to expect next.¹⁶⁵

The *Black* plurality recognized that “cross burnings have been used to communicate both threats of violence and messages of shared ideology,”¹⁶⁶ and that the Klan often “used cross burnings as a tool of intimidation and a threat of impending violence.”¹⁶⁷ Nonetheless, the plurality emphasized that “cross burning sometimes carries no intimidating message,”¹⁶⁸ for example, burning a cross strictly for Klan members might be “a sign of celebration and ceremony.”¹⁶⁹ That a cross burning can be used as an internal message of solidarity does not undermine the fact that “at other times the intimidating message is the *only* message conveyed,”¹⁷⁰ nor that “when a cross burning is used to intimidate, few if any messages are more powerful.”¹⁷¹ Indeed, the degree to which a cross burning is seen as intimidating is generally understood, which is why individuals not associated with the Klan “who wish to threaten or menace another person sometimes use

159. *Id.*

160. *Id.*

161. Black led the rally on August 22, 1998 whereas the other burning occurred on May 2, 1998, *see id.* at 348, 350.

162. The Klan rally occurred in Cana, Virginia, whereas the other cross burning occurred in Virginia Beach, Virginia, *see id.* at 348, 350.

163. *Id.* at 350.

164. *Id.*

165. *Id.*

166. *Id.* at 354.

167. *Id.*

168. *Id.* at 357.

169. *Id.* at 356.

170. *Id.* at 357.

171. *Id.*

cross burning because of this association between a burning cross and violence.”¹⁷²

The case at hand afforded the *Black* plurality an opportunity to discuss the true threat exception in First Amendment jurisprudence. “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁷³ There is no requirement that a speaker intend to carry out the threat,¹⁷⁴ since the prohibition on true threats is designed to protect individuals from the fear of violence and from the life disruption that such threats can cause.¹⁷⁵ The Court explained that intimidation “in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”¹⁷⁶

Understanding that the case before it, like the case before the *R.A.V.* Court, involved a cross burning prohibition, the *Black* plurality tried to explain why (some of) the Virginia statute passed muster even though the St. Paul ordinance did not:

Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.”¹⁷⁷

Yet, it might be argued, given the history of cross burning as an extreme method of racial and religious intimidation,¹⁷⁸ there is no need for the state to make explicit the reason for banning cross burning with an intent to intimidate—the state’s purpose would be

172. *Id.*

173. *Id.* at 359.

174. *Id.* at 360.

175. *Id.*

176. *Id.*

177. *Id.* at 362 (citing *R.A.V.*, 505 U.S. at 391).

178. *See id.* at 354–55.

understood by anyone aware of the statute. However, the plurality pointed out, “[I]t is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.”¹⁷⁹ Occasionally, individuals or groups might be targeted for other reasons,¹⁸⁰ and so the plurality believed the Virginia statute and the St. Paul ordinance distinguishable.

Emphasizing that “burning a cross is a particularly virulent form of intimidation,”¹⁸¹ the plurality explained that it was permissible for Virginia to “choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence”¹⁸² instead of prohibiting intimidating messages more generally.¹⁸³ Yet, this means that the prevailing jurisprudence makes a somewhat surprising distinction. Following *R.A.V.*, a state cannot criminalize cross burning that intimidates “on the basis of race, color, creed, religion or gender.”¹⁸⁴ However, following *Black*, a state can criminalize cross burning that intimidates more generally.¹⁸⁵ Further, following *Mitchell*, a state can enhance penalties if the accused selects his victim on the basis of “race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”¹⁸⁶ Thus, while it is not permissible to make a separate crime of targeting minorities through intimidating cross burning, it is permissible to criminalize cross burning that is meant to intimidate and also to enhance the penalty when it is done with the intent of targeting particular classes.

The *Black* plurality emphasized that while the “act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation,” it may also “mean . . . that the person is engaged in core political speech.”¹⁸⁷ Presumably, the Court was comparing the kinds of intimidation that occurred in Virginia Beach and St. Paul with the kind of speech that might occur at a *closed* Klan

179. *Id.* at 362.

180. *See id.* at 363 (discussing a lawyer and some union members who had been targeted).

181. *Id.*

182. *Id.*

183. *Id.*

184. *R.A.V.*, 505 U.S. at 380.

185. *See Black*, 538 U.S. at 362.

186. *Mitchell*, 508 U.S. at 480–81 n.1 (citing WIS. STAT. § 939.645(1) (1989-1990)).

187. *See Black*, 538 U.S. at 365.

rally, where no one would feel intimidated or threatened by the cross burning.¹⁸⁸ The plurality noted that “sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself.”¹⁸⁹ After making these points, the plurality concluded that a cross burning “at a political rally would almost certainly be protected expression,”¹⁹⁰ although failing to elaborate on why that was so.

The Virginia statute had included a provision “treating any cross burning as prima facie evidence of intent to intimidate.”¹⁹¹ Holding that provision unconstitutional,¹⁹² the plurality detailed some of the defects of such a presumption, for example, noting that such a presumption “does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim.”¹⁹³ Thus, the plurality was pointing out that the presumption, unless rebutted, established the intent to intimidate, when the actual intent might have been to cause anger or resentment rather than to intimidate. That difference might be important, because while a cross burning at a political rally may arouse “a sense of anger or hatred among the vast majority of citizens”¹⁹⁴ who witness the act, “this sense of anger or hatred is not sufficient to ban all cross burnings.”¹⁹⁵

The plurality’s suggestion that the sense of anger or hatred does not suffice to ban *all* cross burnings is ambiguous. The suggestion may be that the sense of anger and hatred suffices to justify banning *some* (but not all) cross burnings using a fighting words approach or, instead, that arousing such emotions can rarely, if ever, justify such bans. Consider the *R.A.V.* concurrence’s rejection of the Minnesota Supreme Court’s claim that “St. Paul may constitutionally prohibit expression that ‘by its very utterance’ causes ‘anger, alarm or

188. *Id.* at 365 (“a burning cross is not always intended to intimidate”).

189. *Id.* at 365–66.

190. *Id.* at 366 (citing *R.A.V.*, 505 U.S. at 402, n. 4 (White, J., concurring) (citing *Brandenburg*, 395 U.S. at 445)).

191. *Id.* at 347–48.

192. *See id.* at 348 (stating that the provision made “the statute unconstitutional in its current form”).

193. *Id.* at 366.

194. *Id.*

195. *Id.*

resentment,”¹⁹⁶ because such a construction of the fighting words exception was overbroad. The concurrence suggested that the “mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected”¹⁹⁷ because “such generalized reactions are not sufficient to strip expression of its constitutional protection.”¹⁹⁸ Presumably, the same might be said about anger¹⁹⁹ and would certainly be said about hatred.²⁰⁰ Thus, the fact that a display would cause anger or resentment would not alone establish that the display could be prohibited under the fighting words exception.

The criticism being leveled here does not undercut the plurality’s point that a presumption of intimidation might mask the difference between causing the victim to become angry and causing the victim to become intimidated, although a separate issue involves how difficult it is to overcome the employed presumption.²⁰¹ Rather, the criticism here is that the plurality seems to commit the very mistake that it criticizes, namely, adopting a position that also masks the difference between intending to cause the victim to become intimidated and intending to cause the victim to become angry.

When noting that cross burning at a political rally is almost certainly protected²⁰² and affirming the Virginia Supreme Court’s holding that Black’s conviction could not pass constitutional muster,²⁰³

196. *R.A.V.*, 505 U.S. at 414 (quoting *Welfare of R.A.V.*, 464 N.W.2d at 510).

197. *Id.*

198. *Id.*

199. In *Cantwell v. Connecticut*, 310 U.S. 296, 303, 308 (1940), the Court noted that although the defendant had caused those listening to be “incensed,” that which was heard was not “likely to produce violence in others.”

200. Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery that Mocks the Thirteenth Amendment*, 44 *HOW. L.J.* 311, 335 (2001) (“The Court has replaced and amended the *Chaplinsky* fighting words test to such an extent that words which are obviously meant to incite hatred are no longer deemed ‘valueless’ and outside of First Amendment protections.”).

201. *Compare Black*, 538 U.S. at 371 (Scalia, J., concurring in part and dissenting in part) (“presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal”) *with id.* at 385 (Souter, J., concurring in part and dissenting in part) (“As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.”).

202. *Id.* at 366 (quoting *R.A.V.*, 505 U.S. at 402).

203. *Id.* at 367.

the Court refused to consider two different political rallies: (1) a political rally that took place in a particular area precisely because it was likely to cause anger and resentment, and (2) a political rally that took place in a particular area precisely because it would threaten or intimidate the onlookers. Thus, the Court refused to address directly whether a political rally staged as a mode of intimidating particular individuals or groups would nonetheless be protected. Yet, by holding that Black's conviction could not stand, rather than remanding the case to find out whether the rally had been staged to intimidate those who might witness it, the plurality suggested that he could not be prosecuted even if he led a political rally that involved a cross burning *with the intent to intimidate individuals who would no doubt see the fiery display*. Given the plurality's reasoning, one would have expected a remand to discover whether in fact the intent to intimidate had been present. The plurality criticized Virginia's presumption of intent for sweeping too broadly, since it does not

distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission.²⁰⁴

The plurality's point here is well-taken insofar as the suggestion is that the law is making an assumption about why a cross would be burned (to intimidate), even were there no reasonable chance that anyone would find the display unwelcome. If the display is on property where the owner consents and is *only* seen by those who agree with the message, then the presumption about intimidation is misplaced. In contrast, when a cross is burned without permission on someone else's property, then such a presumption is much more reasonable.

Regrettably, the plurality failed to take its own point to heart. Even when there is a cross burning with permission of the owner, it may well be done with the intent to intimidate. Suppose, for example, that Elliott had burned a cross on his own property with the intent to intimidate his neighbor, Jubilee. Or, suppose that Elliott

204. *Id.* at 366.

had decided to have a political rally on his own land, including a cross burning, precisely because he wanted to intimidate his neighbor, Jubilee. That the cross burning occurred on private property with the owner's blessing would not negate the fact that this had been done with the intent to intimidate.

In his concurrence and dissent, Justice Souter noted that "the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten."²⁰⁵ He explained that "in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning."²⁰⁶ Sometimes the circumstances will establish an intent to intimidate,²⁰⁷ but at other times the evidence will be "equivocal,"²⁰⁸ for example, "where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public."²⁰⁹ Regrettably, Justice Souter seemed focused on what to do when a group had one intention (to rally the faithful) that might be misinterpreted as intended to intimidate. He, like the plurality, did not indicate what should be done when both intentions were present.

Often, individuals who communicate political messages have more than one intention, for example, they may intend to express solidarity with like-minded individuals and also to anger, dishearten, or intimidate individuals who are not like-minded.²¹⁰ The Court needs to explain the First Amendment protections for communications intended to serve multiple purposes. For example, political communications might be protected as long as *a* purpose or, perhaps, the *predominant* purpose does not involve intimidation.²¹¹ Or,

205. *Id.* at 385 (Souter, J., concurring in part and dissenting in part).

206. *Id.* (Souter, J., concurring in part and dissenting in part).

207. *Id.* (Souter, J., concurring in part and dissenting in part).

208. *Id.* Souter, J., concurring in part and dissenting in part).

209. *Id.* (Souter, J., concurring in part and dissenting in part).

210. *See, e.g.,* United States v. Lee, 6 F.3d 1297, 1303 (8th Cir. 1993) ("Looking at the evidence in this light, a jury could reasonably find that Lee intended to burn the cross for the purpose of advocating the use of force or violence and his actions were likely to produce such action. In addition, the record supports a jury finding that Lee intended to threaten or create a reasonable fear of violence among the Tamarack residents."). *See also* Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789, 806 (2006) ("Intentions are complicated, multiple and conflicting.").

211. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (discussing the predominant motivation test for evaluating whether voter districting offends constitutional guarantees).

political communication might not be protected as long as *one* of its purposes is to intimidate,²¹² even if the other purposes are beyond reproach. Support in the case law might be found for either approach, and there are important implications depending upon which is chosen. One is much more speech-protective than the other, with all of the benefits and drawbacks of protecting more (or less) speech.

A different but related issue involves what must be shown to establish that an individual intends to intimidate or threaten someone else. Lacking much guidance from the Supreme Court, lower courts have been trying to work out some of these issues and, unsurprisingly, have come up with very different views.

II. What Makes a Threat?

The United States Supreme Court has offered little guidance with respect to what constitutes a threat that is outside First Amendment protection. State and lower federal courts have been trying to make sense of this area of the law, sometimes seeking to refine what the Court has said and sometimes striking out on their own. While there is something to be said for permitting lower courts to work out some of the details of a doctrine, the Court has given so little direction that courts are offering radically different accounts of what the Constitution requires. The Court must bring some consistency to a currently chaotic jurisprudence.

A. What is a True Threat?

Courts agree generally about how to define a true threat, although there are some matters in dispute. True threats involve “words which are voluntarily and intentionally uttered which avow a present or future determination to inflict physical injury on an individual or individuals.”²¹³ A true threat “must convey a serious or genuine threat, and must be distinguished from idle, careless talk, exaggeration, jests, or political hyperbole.”²¹⁴ There is no requirement that the “person threatened was even aware that the

212. See *Black*, 538 U.S. at 360 (discussing “[i]ntimidation in the constitutionally proscribable sense of the word”).

213. *People v. Prisinzano*, 648 N.Y.S.2d 267, 275 (N.Y. Crim. Ct. 1996).

214. *Id.* at 275–76 (citing *Watts*, 394 U.S. at 708).

threat had been made, so long as the threat was uttered or otherwise communicated to another person.”²¹⁵

An alleged threat could be communicated to one individual, a small group, or a mass audience. For example, in *United States v. Kelner*,²¹⁶ the Second Circuit reviewed a conviction of an individual who on a news show communicated his intention to assassinate Yasser Arafat.²¹⁷ The court rejected Kelner’s claim that his comments could not be construed as a threat because they were disseminated to such a wide audience, noting that publishing a “threat in 100 major newspapers, even though it would reach only an ‘indefinite and unknown audience,’ would be as sure a means of communicating the threat to the victim as would calling him on the telephone.”²¹⁸

Often, threats are made to secure some further objective, for example, to gain political advantage,²¹⁹ to convince individuals to stop performing abortions,²²⁰ to grant a student a requested schedule change,²²¹ or to get someone else in trouble.²²² A separate question, however, is whether a statement will only be construed as a true threat if the possible infliction of harm is somehow linked to attaining some further goal.

In *United States v. Alkhabaz*,²²³ the Sixth Circuit construed an important federal statute to say that “a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is also conveyed

215. *Id.* at 276 (citing *Watts*, 394 U.S. at 708).

216. *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976).

217. *See id.* at 1022.

218. *Id.* at 1023.

219. *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (discussing *Kelner*, 534 F.2d 1020 ((2d Cir. 1976))).

220. *See United States v. Dinwiddie*, 76 F.3d 913, 918 (8th Cir. 1996) (“Dr. Crist, Ms. Brous, and other members of Planned Parenthood’s staff testified that Mrs. Dinwiddie’s conduct has caused them to fear for their personal safety. Dr. Crist stated that because of his fear of the defendant, he now wears a bullet-proof vest. Planned Parenthood has responded to Mrs. Dinwiddie by placing an armed guard at its front door.”).

221. *Lovell By and Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (“[T]here is no question that any person could reasonably consider the statement ‘If you don’t give me this schedule change, I’m going to shoot you,’ made by an angry teenager, to be a serious expression of intent to harm or assault.”).

222. *United States v. Zavrel*, 384 F.3d 130 (3d Cir. 2004) (discussing woman who, in retaliation for two boys having reported the criminal acts of her son, tried to make it appear that the boys had threatened numerous people).

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

for the purpose of furthering some goal through the use of intimidation.”²²⁴ That interpretation was rather surprising—the federal statute at issue read: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”²²⁵ The statute did not include a further requirement that the threat be made in furtherance of some objective, although such threats would also be covered by the statute.

At issue in *Alkhabaz* were a series of emails involving “sexual interest in violence against women and girls.”²²⁶ In addition, the accused had posted stories on the internet involving the “abduction, rape, torture, mutilation, and murder of women and young girls,”²²⁷ including one story involving the rape, torture, and murder of a woman who had the same name as one of the defendant’s college classmates.²²⁸

The Sixth Circuit reasoned that the communications at issue did not constitute true threats because even “if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation.”²²⁹ On the contrary, the court noted that the individuals sought to forge a bond based on their common sexual fantasies.²³⁰

In dissent, Judge Krupansky argued that the intention to intimidate or coerce was “irrelevant.”²³¹ Instead, he argued that the “pertinent inquiry is whether a jury could find that a reasonable recipient of the communication would objectively tend to believe that the speaker was serious about his stated intention.”²³² Admittedly,

224. *Id.* at 1495.

225. 18 U.S.C. § 875(c) (2006).

226. *Alkhabaz*, 104 F.3d at 1493.

227. *Id.*

228. *Id.*

229. *Id.* at 1496.

230. *Id.* (“Baker and Gonda apparently sent e-mail messages to each other in an attempt to foster a friendship based on shared sexual fantasies.”).

231. *Id.* at 1504 (Krupansky, J., dissenting).

232. *Id.* (Krupansky, J., dissenting) (citing *United States v. DeAndino*, 958 F.2d 146, 148–50 (6th Cir. 1992)).

the “stated intention” in this kind of case is somewhat different from someone’s reporting what he will do when he gets out of prison.²³³ Here, it is simply unclear whether these fantasies involving kidnapping, rape, and torture should be construed as a stated intention rather than as some kind of fiction, although it is true that stories might reasonably be construed as threats depending upon the context²³⁴ and, in any event, a trier of fact might find that these were not mere fantasies.

The disagreement dividing the Sixth Circuit illustrates some of the confusing aspects of the true threat jurisprudence. While the paradigmatic true threat is easy to identify, e.g., a serious statement that physical violence will be visited upon someone unless she acts in a way desired by the person making the threat, other kinds of statements are more difficult to classify. The contents of the emails at issue in *Alkhabaz* would be terrifying to someone who might be the victim,²³⁵ although the emails were not sent to frighten or intimidate and were welcomed by those exchanging them.²³⁶ The defendant in *Alkhabaz* had suggested that his communications were protected by the First Amendment.²³⁷ The Sixth Circuit did not reach the constitutional question, instead holding that the communications at issue were not the sort of communications that Congress had

233. See, e.g., *United States v. Parr*, 545 F.3d 491 (7th Cir. 2008) (involving an individual’s telling his cellmate about plans to blow up a federal building after his release from prison).

234. See, e.g., *In re Douglas D.*, 626 N.W.2d 725, 741 (Wis. 2001) (“[W]hile we believe that Douglas’s story is crude and repugnant, we nonetheless must reject the State’s argument. To be sure, Mrs. C testified that Douglas’s story frightened her. Further, Douglas conveyed his message directly to Mrs. C, the alleged victim of the threat. However, there is no evidence that Douglas had threatened Mrs. C in the past or that Mrs. C believed Douglas had a propensity to engage in violence. . . . Had Douglas penned the same story in a math class, for example, where such a tale likely would be grossly outside the scope of his assigned work, we would have a different case before us. But in the context of a creative writing class, Douglas’s story does not amount to a true threat.”).

235. See *Alkhabaz*, 104 F.3d at 1497–1501 (Krupansky, J., dissenting).

236. *Id.* at 1496.

237. *Id.* at 1493 (“[T]he district court dismissed the indictment against Baker, reasoning that the e-mail messages sent and received by Baker and Gonda did not constitute ‘true threats’ under the First Amendment and, as such, were protected speech. The government argues that the district court erred in dismissing the indictment because the communications between Gonda and Baker do constitute ‘true threats’ and, as such, do not implicate First Amendment free speech protections. In response, Baker urges this Court to adopt the reasoning of the district court and affirm the dismissal of the indictment against him.”).

intended to criminalize,²³⁸ although there is reason to think that Congress's intent was more inclusive than the majority implied.²³⁹

The majority was correct that the Interstate Communications Act²⁴⁰ focused on express threats to kidnap or injure rather than on fantasies involving kidnap victims. However, the dissent was correct²⁴¹ that Congress nowhere suggested that an additional element of the crime was that the message recipient "would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus)."²⁴² Consider, for example, one individual who confides to another in an email that she plans to kidnap or injure some third party. Such a comment might not have been made to intimidate anyone and, indeed, might have been made with the expectation that the recipient would heartily approve of the proposed attack.²⁴³

The Sixth Circuit recognized that threats are prohibited, in part, because "of the fear caused by the threat, the disruption engendered by such fear, and the possibility that the threat of violence will occur."²⁴⁴ Yet, reports to third parties of impending violence might produce fear and disruption and, in any event, the threatened action might be carried out. Thus, the cited rationales would not support the construction offered by the Sixth Circuit.

238. *Id.* at 1496 (quoting *DeAndino*, 958 F.2d at 147) ("Ultimately, the indictment against Baker fails to "set forth ... all the elements necessary to constitute the offense intended to be punished" and must be dismissed as a matter of law.").

239. *See id.* at 1501–02 (Krupansky, J., dissenting) ("The words in section 875(c) are simple, clear, concise, and unambiguous. The plain, expressed statutory language commands only that the alleged communication must contain *any threat* to kidnap or physically injure *any person*, made for *any reason* or no reason. Section 875(c) by its terms does *not* confine the scope of criminalized communications to those directed to identified individuals and intended to effect some particular change or goal.").

240. *See* 18 U.S.C. § 875 (2006).

241. *See Alkhabaz*, 104 F.3d at 1502 (Krupansky, J., dissenting) (discussing "the majority's extra-legislative graft upon specific Congressional language").

242. *Id.* at 1495 (majority opinion).

243. *Cf. In re A.S.*, 626 N.W.2d 712, 715 (Wis. 2001) (discussing a student's threat to hurt individuals other than those to whom the threat was communicated). In *A.S.*, however, one of the recipients of the information found the oral communication quite frightening, and repeatedly asked the communicator to stop making the threats. *See id.* at 724.

244. *Alkhabaz*, 104 F.3d at 1496 (citing *R.A.V.*, 505 U.S. at 388). For a discussion of some of these costs, see Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 547–50 (2004) (discussing the possible costs to the victims, their families, and the taxpayers).

In *United States v. Twine*,²⁴⁵ the Ninth Circuit also interpreted the provision of the Interstate Communications Act and suggested that Congress required that specific rather than general intent be established as an element of the crime. The *Twine* court reasoned that “the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior (e.g., negligence, recklessness).”²⁴⁶ Because of this higher threshold, a diminished capacity defense to the statute could be maintained.²⁴⁷ For example, if the individual “lacked the capacity to entertain the intent necessary to commit these offenses,”²⁴⁸ then he could not be found guilty, even if his comments might have been construed to be a threat.

In *United States v. DeAndino*,²⁴⁹ the Sixth Circuit explained the difference between specific and general intent:

The issue in the present case is whether the second element—“the communication containing a threat”—requires general intent or specific intent. If the statute contains a general intent requirement in regard to the threat element of the offense, the standard used to determine whether or not the communication contained an actual threat is an objective standard, i.e., would a reasonable person consider the statement to be a threat. If the statute contains a specific intent requirement, the standard is a subjective standard, i.e., did the particular defendant have the subjective knowledge that his statement constituted a threat to injure and did he subjectively intend the statement to be a threat.²⁵⁰

The *DeAndino* court rejected the *Twine* analysis requiring specific intent, because even if a “statute containing the word ‘threat’ has only a general intent requirement, the prosecution must still prove that the threat is a ‘real threat’ as opposed to a mistake or inadvertant [sic] statement.”²⁵¹ Regrettably, the Sixth Circuit does not seem to have appreciated the difficulty that the Ninth Circuit pointed out.

245. *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988).

246. *Id.* at 680.

247. *See id.* at 679 (“*Twine*’s defense at trial was that he could not have violated 18 U.S.C. §§ 875(c) and 876 because he lacked the capacity to entertain the intent necessary to commit these offenses.”).

248. *Id.*

249. *United States v. DeAndino*, 958 F.2d 146 (6th Cir. 1992).

250. *Id.* at 148.

251. *Id.* at 149.

Suppose that an individual purposely and voluntarily says something in jest but is reasonably interpreted by someone else to be making a threat. The *Twine* approach would not classify the statement as a threat, whereas the *DeAndino* approach would, because the subjective intent to make a threat was lacking, even though a reasonable listener might have construed the statement as a threat.

The Supreme Court has thus far avoided this issue. Consider *Watts*, where the Court suggested that no reasonable person could have interpreted Watts's comments as a genuine threat against the President.²⁵² But this meant that the Court simply did not need to address whether a statement intended as a jest but reasonably interpreted by others as a threat could be considered a threat for constitutional or statutory purposes.²⁵³

Other circuits have not embraced the Ninth Circuit's construction of the Interstate Communications Act. For example, in *United States v. Fulmer*, the First Circuit held that a violation of the Act could be established as long as a reasonable person would have interpreted the relevant communication as a threat, even if it had not been so intended by the individual making the statement.²⁵⁴ Yet, even those circuits agreeing that only general intent is required, do not agree about how to spell out what that requirement involves.²⁵⁵ The focus of their disagreement is on "the appropriate vantage point."²⁵⁶ Basically, the fear is that focusing on the perspective of the (reasonable) person making the statement might yield different

252. See *supra* note 46 and accompanying text.

253. It might be noted that the *Twine* court distinguished between the kind of intent that had to be established when a threat against the President was at issue and the kind of intent that had to be established when threats against others were at issue. See *Twine*, 853 F.2d at 681 (citing *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969)) ("Because of the distinction drawn in *Roy*, between the President and private citizens, it is clear that the general intent to threaten required by § 871 is not sufficient for a conviction under §§ 875(c) and 876. These latter sections, concerned with private citizens and other public officials, logically require a showing of a subjective, specific intent to threaten."); *but see* *United States v. Fulmer*, 108 F.3d 1486, 1490–91 (1st Cir. 1997) (refusing to distinguish among these statutes with respect to the kind of intent required).

254. See *Fulmer*, 108 F.3d at 1491.

255. See Paul T. Crane, Note, 'True Threats' and the Issue of Intent, 92 VA. L. REV. 1225, 1244–48 (2006) (discussing some of the different versions of the reasonableness standard).

256. *Fulmer*, 108 F.3d at 1491.

results than would focusing on the perspective of the (reasonable) hearer.²⁵⁷

The First Circuit offered the following test—“the appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.”²⁵⁸ This standard was viewed as preferable, because it “not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the ‘reasonable-recipient standard,’ namely that the jury will consider the unique sensitivity of the recipient.”²⁵⁹ The *Fulmer* court wanted to avoid the possibility of conviction using a hearer-based standard—“were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.”²⁶⁰ By the same token, when construing the general intent standard, the Ninth Circuit has described the test as “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”²⁶¹

It is simply unclear whether the difference between the perceptions of the reasonable statement maker and those of the reasonable recipient would yield a different result in many cases. Presumably, in many instances, both a reasonable statement maker and a reasonable listener would understand that a particular statement might be construed as a threat, even if there were good reason to believe that it was not intended to be one.²⁶²

257. *See id.* (distinguishing between “what a person making the statement should have reasonably foreseen or what a reasonable person receiving the statement would believe”).

258. *Id.*

259. *Id.*

260. *Id.*

261. *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990).

262. *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002) (“The debate over the approaches appears to us to be largely academic because in the vast majority of cases the outcome will be the same under both tests. The result will differ *only* in the extremely rare case when a recipient suffers from some unique sensitivity *and* that sensitivity is unknown to the speaker. Absent such a situation, a reasonably foreseeable response from the recipient and an actual reasonable response must, theoretically, be one and the same.”).

A different issue splitting the circuits is whether the U.S. Constitution requires that an individual who is accused of making a threat must have wanted that statement to be understood as a threat in order for her statement to lose its First Amendment protections. The resolution of this debate *might* be thought to have important implications for the true threat jurisprudence in particular and for First Amendment jurisprudence more generally.²⁶³

B. What Intent Requirement Is Constitutionally Mandated?

Recently, several circuits have examined *Black* to help determine what kind of intent is constitutionally required for a finding of a true threat. As is perhaps unsurprising, the circuits have split, some reading *Black* to provide more robust protections for those accused of having made a true threat. In *United States v. Cassel*,²⁶⁴ the Ninth Circuit offered its interpretation of *Black*, writing:

The Court laid great weight on the intent requirement. It offered this definition of unprotected “true threats” and “intimidation”: “True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.²⁶⁵

The *Cassel* court commented: “The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment,”²⁶⁶ i.e., “speech may be deemed unprotected by the First Amendment as a ‘true threat’ only upon proof that the speaker subjectively intended the speech as a threat.”²⁶⁷

263. *But see infra*, notes 290–93 and accompanying text (suggesting that this difference may not be so important as a practical matter in many cases).

264. *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005).

265. *Id.* at 631 (quoting *Virginia v. Black*, 538 U.S. 343, 359–60 (2003)).

266. *Id.*

267. *Id.* at 633. *See also* Roger C. Hartley, *Cross Burning–Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 CATH. U. L. REV. 1, 4 (2004) (“Moreover, *Black* deserves commendation for its implicit reaffirmation of the speech-protective principle that even when speech can be regulated because it creates a substantial evil such as

As further support for its reading of *Black*, the Ninth Circuit explained that the

Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another "prima facie evidence of an intent to intimidate."²⁶⁸

While correct that one provision of the Virginia statute was unconstitutional precisely because of its treatment of intent,²⁶⁹ the *Cassel* court failed to focus on the *Black* plurality's silence with respect to the constitutionally required test to determine intent. Because the Virginia presumption obviated the need to establish either subjective or objective intent, one simply cannot tell whether the statute would have passed muster if it had included a reasonable person standard for determining whether the cross burner had an intent to intimidate. Further, while the *Cassel* court offered a possible reading of the *Black* plurality opinion, other readings were not only possible but more plausible. For example, when saying, "True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"²⁷⁰ the *Black* Court cited to *Watts*. But the previous jurisprudence, including *Watts* and *Rogers*,²⁷¹ has been interpreted to merely require that the individual (1) meant to communicate, i.e., is acting voluntarily and understands what he is saying,²⁷² (2) a serious

intimidation, the state may not suppress it merely because it has that tendency. The speaker must intend that result.").

268. *Cassel*, 408 F.3d at 631.

269. *See supra*, notes 191–204 and accompanying text.

270. *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708).

271. *See supra*, notes 24–70 and accompanying text.

272. *See United States v. Ogren*, 52 M.J. 528, 535 (N-M. Ct. Crim. App. 1999) ("If the speaker intended to make the statement, knew what the words meant, and reasonably should have foreseen that the statements he made would be understood as indicating a serious intention to commit the act, then this element is satisfied."); *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 624 ("[T]he speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it."). *See also Crane*, *supra* note 255, at 1235–36 ("All objective tests

expression, i.e., is neither a jest nor political hyperbole,²⁷³ (3) with an intent to commit an act of unlawful violence, where that intent would be determined in light of what a reasonable person aware of the circumstances would interpret the statement to mean.²⁷⁴

The Court's discussion of intimidation as *one* type of true threat was not meant to exclude true threats that were not directed at the victim. Otherwise the Court would not have cited to *Watts* in the previous sentence, which involved an alleged threat against the President that certainly was not made to President Johnson directly and may well have never been communicated to him. By the same token, the alleged threat made by Rogers was not communicated directly to President Nixon and may well never have been communicated to him.

Cassel's holding has not gone unnoticed. In *United States v. White*,²⁷⁵ a federal district court in Virginia wrote,

This Court recognizes the potential for a conflict between the Supreme Court's definition of a true threat and an objective analysis of a true threat. At least two Circuit Courts of Appeal have seized upon this potential conflict, and resolved it by concluding that the Supreme Court's definition of a true threat in *Black* precludes an objective analysis.²⁷⁶

The White court cited *Cassel* and a decision,²⁷⁷ *United States v. Magleby*,²⁷⁸ in which the Tenth Circuit noted:

require one general intent element—the defendant must have knowingly made the statement. Therefore, the government must prove that the 'statement was not the result of mistake, duress, or coercion.' For example, 'a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.' Similarly, if the speaker involuntarily made the statement, it would not pass the objective test.") (internal citations omitted).

273. See *United States v. Pinkston*, 338 F. App'x 801, 802 (11th Cir. 2009) ("A true threat is a serious threat and not words uttered as mere political argument, idle talk, or jest."). See also *Watts*, 394 U.S. at 708 ("We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term.").

274. See *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 624 ("J.M. intended to communicate the letter and is therefore accountable if a reasonable recipient would have viewed the letter as a threat.").

275. *United States v. White*, No. 7:08-CR-00054, 2010 WL 438088 (W.D. Va. Feb. 4, 2010).

276. *Id.* at *8.

277. *Id.* at *8 n.6.

278. *United States v. Magleby*, 420 F.3d 1136 (10th Cir. 2005).

Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made "with the intent of placing the victim in fear of bodily harm or death."²⁷⁹

While the *White* court's reading of *Cassel* was correct, its reading of the Tenth Circuit opinion is much less firmly grounded. For example, the Tenth Circuit did not discuss in this passage whether to use an objective or subjective test to determine the intent of the actor, so this does not establish that the Tenth Circuit agrees with the Ninth. Indeed, while the Seventh Circuit reads *Magleby* as adopting the subjective test,²⁸⁰ the Tenth Circuit itself has since made clear that it interprets *Black* to be consistent with an objective intention test.²⁸¹

The *White* court rejected the suggestion that *Black* required a subjective test, both because the Fourth Circuit has used an objective test even after *Black*,²⁸² and because use of the subjective test would be less effective in promoting some of the purposes behind criminalizing true threats, e.g., preventing the disruption of lives and the fear of harm.²⁸³ Finally, the *White* court further noted that "there is 'nothing in the *Black* opinion to indicate that the Supreme Court

279. *Id.* at 1139 (citing *Black*, 538 U.S. at 359).

280. *See Parr*, 545 F.3d at 499 (7th Cir. 2008) (citing *Magleby*, 420 F.3d at 1139).

281. *See United States v. Wolff*, 370 F. App'x 888, 892 (10th Cir. 2010) ("The question is whether those who hear or read the threat reasonably consider that an actual threat has been made. It is the making of the threat and not the intention to carry out the threat that violates the law.' The trier of fact, therefore, must decide whether a 'reasonable person would find that a threat existed.'" (emphasis in original) (internal citations and quotations omitted)).

282. *See United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) ("Statements constitute a 'true threat' if 'an ordinary reasonable recipient who is familiar with the[ir] context . . . would interpret [those statements] as a threat of injury.'"). *See also United States v. Napa*, 370 F. App'x 402, 404 (4th Cir. 2010) ("The communication must be viewed using an objective standard, that is, whether 'an ordinary, reasonable person who is familiar with the context of the communication would interpret it as a threat of injury.'"). *Napa* was issued March 19, 2010, over a month after *White*, which had been issued on Feb 4, 2010.

283. *White*, 2010 WL 438088, at *8 ("If the prohibition on true threats is meant to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders,' then the subjective intent of the speaker cannot be of paramount importance.").

intended to overrule a majority of the circuits by adopting a subjective test when dealing with true threats.”²⁸⁴

A different decision mentioned by the *White* court should be mentioned. In *United States v. Parr*,²⁸⁵ the Seventh Circuit offered its own true threat analysis in light of *Black*. The court noted,

Traditionally, the law in this and most other circuits has [applied] . . . an objective “reasonable person” test . . . , an inquiry that asks whether a reasonable speaker would understand that his statement would be interpreted as a threat (the “reasonable speaker” test) or alternatively, whether a reasonable listener would interpret the statement as a threat (the objective “reasonable listener” or “reasonable recipient” test).²⁸⁶

While admitting the possibility that the “Court was not attempting a comprehensive redefinition of true threats in *Black*,”²⁸⁷ the *Parr* court suggested that it was “more likely, however, that an entirely objective definition is no longer tenable.”²⁸⁸ Two possibilities were offered. Either the Court was rejecting the objective approach²⁸⁹ or was now advocating a new approach adopting both subjective and objective elements—“the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker’s statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.”²⁹⁰

In many cases, it would not be difficult to establish that a true threat had been made even if both the subjective and objective tests were used. When someone says that he plans to blow up a federal building,²⁹¹ a jury might well find that the requisite subjective and

284. *Id.* (citing *United States v. D’Amario*, 461 F. Supp. 2d 298, 302 (D.N.J. 2006)).

285. *See generally Parr*, 545 F.3d 491.

286. *Id.* at 499 (citing *United States v. Stewart*, 411 F.3d 825, 827–28 (7th Cir. 2005)).

287. *Id.* at 500.

288. *Id.* (citing *Cassel*, 408 F.3d at 631–33).

289. *Id.* (suggesting that the Court may have wanted to “retire the objective ‘reasonable person’ approach”).

290. *Id.*

291. *See id.* at 495.

objective intent to commit a violent act.²⁹² Indeed, in many of these cases, when someone asserts what might reasonably be construed as a threat and cannot credibly claim that he was merely playing a practical joke or, perhaps, did not understand what he was saying, it would be unsurprising for a jury to find that the intent prong, however defined, has been met.

Certainly, it is possible that a factfinder would say both that a reasonable person would interpret a particular statement in light of the circumstances as a threat and that the defendant credibly established that he had not intended to make a threat. Yet, the mere possibility that a jury would so find does not provide much protection in addition to what is afforded under the objective intent approach. Even where subjective intent must be established, a factfinder might not believe the defendant's statements regarding his having had no intention to make a threat,²⁹³ and might even reject testimony that the defendant could not form the requisite intent.²⁹⁴

The circuit courts have had numerous disagreements when trying to figure out what kinds of representations qualify as true threats. Most of these disagreements have focused on the proper test for intent. Yet, even with the most restrictive intent requirement—such as the *Parr* requirement which says that “the statement at issue must objectively *be* a threat and subjectively *be intended* as such,”²⁹⁵ there will be many cases in which arguably political speech falls into the true threat exception. Perhaps that is a desirable result but, if so, that result should be recognized and defended.

As is illustrated by the burning cross cases, no words need to be expressed in order for a jury to find that a true threat has been

292. *See id.* at 500 (“Parr put his intent at issue, and the jury was instructed to evaluate Parr’s statements for their objective meaning *and* Parr’s subjective intent.”).

293. *Id.* at 496 (“Parr testified and admitted making the statements (he could hardly do otherwise) but claimed he had been joking—just mouthing off to his cellmate.”); *id.* at 497 (“The jury was properly instructed that Parr’s statements qualified as a true threat if a reasonable person would understand that the statements, in their context and under all the circumstances, would be interpreted as ‘a serious expression of an intention to use a weapon of mass destruction to damage the Reuss Federal Plaza.’ The jury was also instructed that it must be satisfied that Parr ‘intended his statement[s] to be understood in that manner.’”); *id.* at 496 (“The jury convicted Parr . . .”).

294. *Cf. Twine*, 853 F.2d at 682 (“[W]e find that the district judge considered and was unpersuaded by Twine’s diminished capacity defense.”).

295. *Parr*, 545 F.3d at 500.

made.²⁹⁶ Consider an individual who parks two Ryder trucks outside of an abortion clinic,²⁹⁷ not long after the Oklahoma City bombing involving a Ryder truck occurred.²⁹⁸ While there might be testimony suggesting that the defendant knew that the Ryder trucks would be perceived as a bomb threat,²⁹⁹ such testimony might well not be required, especially if no non-threat-related reasons are offered to explain why the trucks had been left there.³⁰⁰

True threats can be distinguished from fighting words or advocacy of illegal conduct in that there is no required showing of imminence where true threats are concerned.³⁰¹ Further, there is no required showing that the threat can or will be carried out,³⁰² since many of the harms associated with true threats will occur as long as the victim believes that the threat is real.³⁰³

296. See, e.g., *Lee*, 6 F.3d at 1297 (Gibson, J., concurring) (“Bruce Roy Lee was convicted of conspiracy against civil rights in violation of 18 U.S.C. § 241 (1988), after he constructed and burned a cross on a hill near an apartment complex in which a number of black families resided.”).

297. See *United States v. Hart*, 212 F.3d 1067, 1069 (8th Cir. 2000).

298. *Id.* at 1069–70 (“On the morning of September 25, 1997, employees arriving at the clinics were alarmed by the presence of the trucks. Reminded of the catastrophic 1995 bombing of a federal office building in Oklahoma City, Oklahoma, involving a Ryder truck, employees of the clinics feared that the trucks contained bombs. They immediately left the buildings and notified the police. At each clinic, the area was evacuated, and a bomb squad was called in to investigate. The authorities determined, however, that the trucks contained no explosive materials.”).

299. *Id.* at 1070 (“Based on conversations with his son, Hart’s father concluded that Hart acted with the intent that ‘if people believed that there was a bomb on one or more of those Ryder trucks, that it would have been worth it in order to save at least the life of one baby.’”).

300. See *id.* at 1072 (“Hart offered no legitimate reason for leaving the trucks early that morning, and he provided no notice or explanation for his actions. These circumstances, coupled with the similarity to the well-known events of the Oklahoma City bombing, were reasonably interpreted by clinic staff and police officers as a threat to injure.”).

301. See, e.g., *United States v. Fullmer*, 584 F.3d 132, 154 (3th Cir. 2009) (“[W]hile advocating violence that is not imminent and unlikely to occur is protected, speech that constitutes a ‘true threat’ is not.”); *State v. DeLoreto*, 827 A.2d 671, 682 (Conn. 2003) (“[T]he threat need not be imminent to constitute a constitutionally punishable true threat.”); *Parr*, 545 F.3d at 497 (7th Cir. 2008) (“It is true that Parr gave no precise time for carrying out his plan and did not relay his threats directly to his intended victim. But neither point is dispositive. A threat doesn’t need to . . . specify when it will be carried out.”).

302. *Parr*, 545 F.3d at 498 (“It is well-established that the government is not required to prove that the defendant in a threat case intended or was able to *carry out* his threats.”).

303. See *R.A.V.*, 505 U.S. at 388 (discussing “the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the

That true threats are offered less protection than other kinds of expression is important. For example, the same statement might be constitutionally protected if construed as advocacy but subject to criminal penalty if construed as a threat. But such differential treatment can only be defensible if there is some clear way to distinguish between the two kinds of expression.

Regrettably, in many cases, there is no clear dividing line between advocacy and threats. It will not do to say, for example, that threats must be directed at specific individuals,³⁰⁴ because true threats can be made against groups.³⁰⁵ While it might be claimed that there is a clear difference between one's advocating that others perform a particular (violent) task and one's threatening to perform that very task oneself,³⁰⁶ such a distinction may not be helpful when interpreting a website posting.

Consider a website containing photographs of doctors who perform abortions. Suppose that in addition to the fact that the doctors' names and addresses are listed,³⁰⁷ and the physicians are described as "Guilty of Crimes Against Humanity."³⁰⁸ This would be terrifying to anyone whose picture was posted there, especially if other targeted doctors had recently been murdered.³⁰⁹ Nonetheless, it is not all clear whether to say that the website is advocating illegal conduct or, instead, threatening it.³¹⁰ Indeed, insofar as the posting is understood to be suggesting that people use legal means to try to convince these doctors to stop performing abortions, it would not be

disruption that fear engenders, and from the possibility that the threatened violence will occur").

304. See Elrod, *supra* note 244, at 543.

305. *Black*, 538 U.S. at 360 (describing a "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").

306. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002) ("[W]hile advocating violence is protected, threatening a person with violence is not.").

307. See *id.* at 1064–65.

308. See *id.*

309. See *id.* at 1066.

310. See *id.* at 1091 (Kozinski, J., dissenting) ("In order for the statement to be a threat, it must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.") (emphasis added).

either advocating or threatening illegal action,³¹¹ although it is of course true that a reasonable person might not view the posting as quite so benign.³¹²

Consider the language that was characterized as advocacy in *Claiborne Hardware*, e.g., “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”³¹³ Facially, the language would seem to a threat because it is an assertion about what *we* will do. But if this is advocacy rather than a threat, then there must be something distinguishing advocacy from threats that does not involve whether the speaker is in control of the threatened action.³¹⁴ Regrettably, the Court has offered no guidance on this matter, leaving the lower courts to guess whether there is some implicit distinction to be discovered and, if so, what that distinction might be.

Conclusion

The Supreme Court has made clear that advocacy of illegal conduct including violence is protected under the Constitution unless the *Brandenburg* factors have been met. The Court has also made

311. Cf. *id.* at 1090 (Kozinski, J., dissenting) (“[T]he two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so.”). The mere posting of personal information does not alone suffice to establish a true threat. Cf. *Brayshaw v. City of Tallahassee*, No. 4:09-cv-373/RS-WCS, 2010 WL 1740832, *3 (N.D. Fla. April 30, 2010) (“Merely publishing an officer’s address and phone number, even with intent to intimidate, is not a ‘true threat’ as defined in constitutional law jurisprudence.”). This might be especially true if the posting of information could be justified by a legitimate reason. See *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1272, 1286 (M.D. Ala. 2004) (discussing website seeking information about agents and informants and noting that although the website might appear threatening, “Carmichael has offered a legitimate use for his site, to solicit evidence regarding his case”).

312. See *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1090 (Kozinski, J., dissenting) (“Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities.”).

313. *Id.* at 1094 (Kozinski, J., dissenting).

314. Cf. Matthew G. T. Martin, *True Threats, Militant Activists, and the First Amendment*, 82 N.C. L. REV. 280, 314 (2003) (“The second element of a true threat is evidence that the speaker, or one controlled by the speaker, intends to carry out the threat. This requirement operates to narrow the subset of proscribable threats resulting from the objective test discussed immediately above.”). See also Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 289 (2001) (discussing “an actor prong which requires proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat”).

clear that while advocacy is protected, threatening speech is not. Yet, the Court has not offered ways to distinguish the two and, further, sometimes characterizes as advocacy what might reasonably, in addition or instead, have been characterized as a threat. To make matters even more confusing, many of the harms caused by threats, e.g., to the potential victim's feelings of security and well-being, might also be caused by advocacy. For example, the abortion-providers whose names and addresses were posted on the internet were not worried that those posting the information would come after them, but worried instead that unknown abortion-protesters might target them.³¹⁵ But this suggests that distinguishing between advocacy and threats in this kind of case does not make sense. Indeed, one wonders what the defendants could have done to assure that their posting would be treated as advocacy rather than as a threat.

Perhaps the Court believes that anything that could reasonably be characterized as a physical threat should not be protected. Such a position would not be particular speech-protective but would at least be understandable. Yet, that is not what the Court has said. By characterizing speech in various cases as advocacy or hyperbole even though the speech could have been construed differently, the Court is seeking to protect some threatening speech. Indeed, by refusing to consider whether one of the cross burnings in *Black* had been intended to intimidate, the Court sent confusing and contradictory signals. One cannot tell from *Black* whether certain core political speech is protected even if reasonably construed as threatening or if, instead, core political speech is protected only when it is not threatening.

People often have more than one intention when they express themselves, and the Court's pretending otherwise does a disservice to all. It may well be that certain types of political messages are threatening and should nonetheless be protected. But if that is so, then the Court should offer some way to distinguish between those kinds of threats that should nonetheless be protected and those that should not. Otherwise, lower courts will continue to reach radically different results in relevantly similar cases based on arbitrary

315. See *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1091 (Kozinski, J., dissenting) ("Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country.").

characterizations of speech that might reasonably be construed in any number of ways.

The current jurisprudence does not offer adequate protection for arguably political speech, and at the same time sometimes immunizes speech reasonably perceived as intimidating or threatening. Lower courts are not only given too little useful guidance, but are also offered distinctions and characterizations that cannot withstand scrutiny and can only serve to confuse.

In our increasingly contentious society, it will become even more important to establish what kinds of expression are protected and what kinds are not. The current *Brandenburg*/true threat jurisprudence must not only be clarified, but must be put on a different path that recognizes the legitimate competing interests that are implicated in these kinds of speech and that attempts to chart a course adequately accounting for all of these interests. The Court's almost willful refusal to address or even see the issues helps no one and almost guarantees a chaotic jurisprudence where relevantly similar cases are decided dissimilarly. The Court can and must do better.