Article

Inflammatory Speech: Offense Versus Incitement

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INTRODUCTION

First Amendment jurisprudence has produced a tense interplay between libertarian and public safety concerns.[1] While the Supreme Court has typically found content restrictions on speech to infringe the individual right to self-expression,[2] it has also determined that the regulation of intentional intimidation, group defamation, and advice to terrorists are constitutional.[3] These contrasting emphases on liberty and safety have been evident from the differing treatments of outrageous and threatening speech.

Most recently, the Court ruled in favor of belligerent funeral protestors' expressive interests over a mourner's claim that he suffered severe emotional distress from their bellicosity.[4] On a separate matter, the Court found that there is no

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1. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010) (discussing the political liberty and political equality approaches to the First Amendment); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 739–51 (2012) [hereinafter Tsesis, *Self-Government*] (explaining how principles of the Declaration of Independence impact First Amendment standards related to freedom and participation).

2. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

3. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010) (upholding the constitutionality of a statute that criminalizes the knowing supply of material support to foreign terrorist organizations); Virginia v. Black, 538 U.S. 343, 363 (2003) (upholding state cross burning statute because of the symbol's link to the Ku Klux Klan).

4. Snyder v. Phelps, 131 S. Ct. 1207, 1218–19 (2011).

compelling state reason to label violent video games in order to prevent their distribution to minors.[5] In both cases, the Court found that the Constitution protects provocative and insensitive speech, even when it causes others grief and anger.[6] These holdings were in keeping with the Court's traditional doctrine that speech cannot be criminalized solely because of its offensive content.[7]

The nearly categorical proscription against interfering with expressions that elicit negative emotional responses stands in sharp contrast to the deference the Court has shown to states' policies prohibiting organizations or individuals from spreading messages meant to incite others to commit harmful actions. Contrary to accepted lore in much academic literature, the Supreme Court has on several occasions recognized that some public safety concerns warrant state regulations on threatening expressions, even when they pose no imminent threat of harm.[8] The modern judicial trend is to defer to public policies that curb incitement, group defamation, and material support to organizations whose stated purposes are violent.[9]

This bifurcation between offensive and threatening speech more accurately explains the Court's contextual approach than the accepted belief among many prominent First Amendment scholars, such as Professors Steven Gey and Daniel Farber, that absent a showing of immediate harm courts must find content regulations against incitement to be facially unconstitutional.[10] Judicially recognized limits on cross burning and the funding of terrorist organizations also run counter to Dean Robert Post's assertion that the First Amendment bars the en-

5. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

6. *Id.* at 2733; *Snyder*, 131 S. Ct. at 1215.

7. *See* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

8. *Humanitarian Law Project*, 130 S. Ct. at 2731; *Black*, 538 U.S. at 363.

9. *See*, *e.g.*, *Humanitarian Law Project*, 130 S. Ct. at 2731; *Black*, 538 U.S. at 363.

10. *See*, *e.g.*, Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 925 (2009) ("[I]t can hardly be viewed as a surprise that the government is entitled to prevent individuals from threatening an individual or the public with immediate violence."); Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1294 (2005) [hereinafter Gey, *Questions About Cross Burning*] ("The . . . First Amendment issue involves the bedrock principle that political advocacy is protected from government regulation unless the advocacy takes the form of incitement, the advocacy occurs in a context where an immediate concrete harm follows from the speech in question, and the speaker intends his or her speech to instigate the immediate harm.").

actment of statutes that differentiate between "harmful" and "beneficial ideas."[11] To the contrary, states can prohibit speech that threatens public peace precisely because of its content.[12] First Amendment jurisprudence contains a clear demarcation between restraints on statements tending to offend and those intrinsically dangerous to public safety.[13] Without first examining evidence about what the speaker meant to convey, a court cannot make that distinction. In upholding restrictions on intimidating speech, the Supreme Court resorts to neither the imminent threat of harm nor the strict scrutiny tests. Instead, its constitutional assessment is more comprehensive, delving into whether the stated reasons for regulations implicate substantial interests in public security and safety.[14]

Some journalists disapproved of regulations on speech that posed no imminent threat of harm. Several popular media outlets expressed visceral opposition to *Holder v. Humanitarian Law Project* (*HLP*), which upheld a federal ban against giving material support to designated foreign terrorist organizations.[15] An anonymous editorial in the *Washington Post* asserted that the holding would give the federal government sweeping power to criminalize the contacting of terrorist organizations even if the aim of the communication were to help negotiate a cessation of violence.[16] A *Los Angeles Times* editorial took a decidedly textualist approach to the First Amendment, asserting that the majority in *HLP* had "[d]isregard[ed] the dictionary as well as

11. *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011) (asserting that the political presumption of equal, individual autonomy "underwrites the First Amendment doctrine's refusal to distinguish between good and bad ideas, true or false ideas, or harmful or beneficial ideas").

12. *See Black*, 538 U.S. at 363 ("[J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

13. *Compare* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("Such speech cannot be restricted simply because it is upsetting or arouses contempt."), *with Humanitarian Law Project*, 130 S. Ct. at 2728 (holding that the statute does not violate the First Amendment "[g]iven the sensitive interests in national security and foreign affairs at stake").

14. *See*, *e.g.*, *Humanitarian Law Project*, 130 S. Ct. at 2727 (asserting that the "evaluation of the facts by the Executive . . . is entitled to deference [because t]his litigation implicates sensitive and weighty interests of national security and foreign affairs").

15. *See id.* at 2731.

16. Editorial, *Material Error: The Court Goes Too Far in the Name of Fighting Terrorism*, WASH. POST, June 22, 2010, at A18.

the Constitution."[17] On the constitutional side, these editorials did not distinguish between protected speech that some listeners find to be outrageous and unprotected speech that facilitates the commission of violent crimes; a distinction on which this Article focuses. On the political side, these editorials ignored an organization's ability to be taken off the designated list by desisting from terror.[18] On the material side, the criticisms discounted the fungibility of funds contributed for non-violent activities, freeing up a terrorist group's ability to exploit other resources to commit acts of violence.[19]

This is the first article to clearly describe the constitutional distinctions between the Supreme Court's divergent approach to affective and intimidating communications. Although the liberty interest of non-violent groups is protected by the First Amendment even when it crosses into indecency, state and federal governments can regulate speech that threatens the safety of others. Hurt feelings are not legally cognizable harms. On the other hand, speech that poses a threat is beyond the ambit of free speech protections.

Part I of the Article surveys the Supreme Court's recent guidance on the constitutional value of offensive, emotionally charged speech. In this area, the Court has opted to protect speakers' expressive interests. Part II distinguishes offensive expressions from those that threaten others' well-being, dignity, or security. After describing the evolution of jurisprudence dealing with the regulation of inflammatory speech, I take up the special case of digital communications, which are disseminated in a realm where the imminent threat of harm and fighting words tests have little relevance. When reviewing regulations against purposeful threats, the Court has recognized several categories of content regulations that have historically withstood judicial scrutiny.[20] Part III argues against the view of those First Amendment scholars who believe restrictions on

17. Editorial, *Terror and Free Speech*, L.A. TIMES, June 22, 2010, at A12.

18. Federal statute requires the State Department to periodically review whether a group should continue to be designated a foreign terrorist organization. *See* 8 U.S.C. § 1189(a)(4)(B)(ii) (2006).

19. *See Humanitarian Law Project*, 130 S. Ct. at 2727 ("The State Department informs us that '[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]' Congress's finding that all contributions to foreign terrorist organizations further their terrorism.").

20. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

group defamation, hate symbols, and material support of terrorists violate the First Amendment.[21]

I. EMOTIVE AND OFFENSIVE EXPRESSIONS

A. OFFENSIVE SPEECH

The judiciary has played a central role in safeguarding the rights of speakers to make statements even when the content offends audiences.[22] This doctrinal tradition is not derived from the literal wording of the First Amendment, which explicitly only prohibits Congress from abridging free speech.[23] The Court regards obnoxious and degrading speech to be presumptively protected from content-based restrictions that can infringe First Amendment rights.

Snyder v. Phelps, the first of three recent cases on constitutionally protected offensive speech, arose from a funeral protest by the pastor and parishioners of the Westboro Baptist Church.[24] Participants displayed signs with messages, such as "God Hates the USA/Thank God for 9/11" and "God Hates Fags," in protest of the United States' tolerance of homosexu-

21. In a recent article Professor Jeremy Waldron explained how and why group defamation statutes further the legitimate public interest in maintaining a "well-ordered society." Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1626–30 (2010) ("[W]hen people call for the sort of assurance to which hate speech laws might make a contribution, it is not on the controversial *details* of justice. Instead, it is on some of the most elementary fundamentals—that all are equally human and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, and subordination."). The Canadian Supreme Court has made a similar point in an opinion upholding a restriction on hate propaganda:

> [Hate propaganda] undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

Taylor v. Canadian Human Rights Comm'n, [1990] 3 S.C.R. 892, 894 (Can.).

22. In the landmark *Hustler Magazine v. Falwell* decision, the Court unanimously held that proof of malice was needed to prove a tort of intentional infliction of severe emotional distress about a matter of public concern. 485 U.S. 46, 56 (1988).

23. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). The Court signaled in 1938 that free speech would be one of the categories it would give "more exacting judicial scrutiny" against state abuse. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

24. Snyder v. Phelps, 131 S. Ct. 1207, 1213–14 (2011).

als.[25] After Westboro picketed a deceased soldier's funeral, his father, Albert Snyder, filed a lawsuit in which he claimed their antics caused him to suffer "severe and lasting emotional injury."[26] The protesters confined themselves to public land, in keeping with police orders for staging the demonstration.[27] Protestors did not enter the cemetery, used no violence, and did not yell or use any profanity.[28]

The district court, nevertheless, found them liable for intentional infliction of emotional distress, intrusion into seclusion, and civil conspiracy.[29] The court of appeals reversed on First Amendment grounds.[30] The Supreme Court, then, upheld the appellate court's decision, finding that the distress occasioned by the picketing "turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."[31]

The Court made clear that the liberty to express a political viewpoint was not actionable solely "because it is upsetting or arouses contempt."[32] The First Amendment shields speech even when it is made under circumstances that some people might find to be hurtful or misguided.[33] The decision was in keeping with the established distinction between narrowly tailored regulations that further compelling government purposes, like deterring violence, and overbroad prohibitions that are meant to safeguard emotional sensitivities by restraining speakers from uttering unpleasant or even uncivil statements. Government is prohibited from showing favoritism to the viewpoint of one individual over another, even when the expressed message has an unpleasant impact on the audience.[34]

Had the plaintiff in *Snyder* been a captive audience to the protest, unable to avoid it, some government regulation would

25. *Id.* at 1213.
26. *Id*. at 1222 (Alito, J., dissenting).
27. *Id.* at 1213 (majority opinion).
28. *Id.*
29. *Id.* at 1214.
30. Snyder v. Phelps, 580 F.3d 206, 226 (4th Cir. 2009).
31. *Snyder*, 131 S. Ct. at 1219.
32. *Id.*
33. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").
34. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) (stating that government cannot restrict speech in order to raise the profile of more favored points of view).

have been warranted.[35] But at the time of the funeral the Westboro protesters were 1000 feet away, and the plaintiff could not read their signs nor make out what they were saying.[36] He only later found out details through a news report about the event.[37]

The physical distance between them was only one important contextual fact. The protesters meant to shock the conscience but not to intimidate Snyder's entourage.[38] Without any contemporaneous awareness of the message, Snyder was unable to prove the picketers were intentionally threatening him.[39] Whether the Court's decision is regarded from Dean Robert Post's democratic value of free speech[40] or Professor Edwin Baker's autonomy perspective,[41] the Westboro community's right to publically present their views on a controversial subject was intrinsic to the speech values of the First Amendment. The protestors did not threaten the democratic order; to the contrary, they were exercising their rights to political speech and self-expression.

There is nothing novel about the conclusion that outrageous, non-menacing speech is protected by the First Amendment. The *Snyder* majority's dismissiveness that statements made at a distance can be threatening is, however, suspect. The key question, as I will show in Part III, is whether the speaker means to intimidate, defame, or advance criminal conduct.

35. The court sparingly applies the captive audience doctrine. *Snyder*, 131 S. Ct. at 1220; Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975) (describing circumstances in which the government can selectively censor offensive expression because "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

36. *Snyder*, 131 S. Ct. at 1213–14.

37. *Id.*

38. One indicator that church members did not intimidate mourners was that Westboro notified the authorities of their intent to picket and then followed police orders throughout the demonstration. *Id.* at 1213. Bringing police into event planning reduced the risk of physical altercation.

39. *See* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1463 (2011) (describing a context-specific analysis for evaluating whether outrageous, humiliating, and intrusive speech can be said to result in the intentional infliction of emotional distress).

40. *See* Post, *supra* note 11, at 482–83 (explaining why free speech protections are best understood to be democracy enhancing rather than autonomy oriented).

41. C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 522, 526 (2011) (asserting that the key feature of free speech is autonomy, within the context of political speech and outside of it).

Those offenses may be committed even where speaker and target are not in close proximity. For instance, when threats are posted on the Internet, a billboard, or school blackboard, the object of the message might come across the message later, or not at all, but the forewarning of harm may be no less real. In *Snyder*, no such threat was involved, but where the intent is to intimidate another, even at some future time, the potential for harm is elevated. Professor Kenneth L. Karst has pointed out that even when death threats are made from afar they can result in long-term anxieties and traumas.[42] If members of the Westboro Church had gone beyond obnoxious and callous statements to intentional threats against the funeral procession, they might have been held criminally liable.[43] The precedential value of *Snyder*, then, should be limited to circumstances when picketers do not mean to threaten a public audience.

B. DEPICTIONS OF CRUELTY

Snyder falls into a line of precedents that protect "disagreeable"[44] or "scurrilous"[45] speech, even when such communication "stirs people to anger."[46] Neither a community's sense of morality nor individual sensibilities can gainsay the liberty interest of an individual to make a statement, even one that many would deem to be inappropriate and disgusting. A closely related category protects repulsive audio-visual depictions.

In a 2010 case, *United States v. Stevens*, the Court struck down a federal statute prohibiting the creation, sale, and possession of videos depicting animal cruelty, finding that the law was impermissibly overbroad.[47] In its brief, the United States

42. *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1342 (2006).

43. *See infra* text accompanying notes 74–76.

44. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

45. Cohen v. California, 403 U.S. 15, 22 (1971) (explaining a First Amendment challenge to a state law against "offensive conduct" in public discourse).

46. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (overturning a conviction under a disorderly conduct law).

47. 130 S. Ct. 1577, 1584, 1592 (2010). The majority found the statute to be overbroad and did not decide whether a similar statute limited to depictions of animal cruelty would be permissible. *Id.* The dissent, on the other hand, thought the Court mischaracterized the case as dealing with speech rather

asserted that "[l]ike obscenity, the depictions [of human cruelty to animals] are of patently offensive conduct that appeals only to the basest instincts."[48] Similarly, the Humane Society's amicus brief compared crush videos to obscenity, asserting that "[l]ike depraved sexual materials banned by obscenity laws, crush and dogfighting videos are 'patently offensive,' lack serious social value, and appeal to base human instincts rather than conveying any ideas or information."[49]

The majority in *Stevens*, however, rejected the government's comparison of offensive speech to sexually prurient material.[50] The Court's differentiation between depictions of animal violence and obscenity was predicated on judicial exclusivity in the interpretation of the Constitution[51]: under its doctrinal framework, only the judiciary can identify which expressions do or do not qualify as speech for First Amendment purposes. Congress, on the other hand, is prohibited from using cost-benefit analysis or moralism for regulating speech.[52] The Court in *Stevens* also distinguished the depiction of cruelty to animals from the narrow class of communications that go beyond the aegis of the First Amendment, including the incitement to imminent lawlessness,[53] group defamation,[54] child pornography,[55] and solicitation to commit a crime.[56] Unlike criminal laws prohibiting actual cruelty to animals, the federal law that the Court struck down in *Stevens* targeted only the distribution of its depiction.[57]

than cruel acts committed to animals. *Id.* at 1592 (Alito, J., dissenting). For the dissent, the case was about conduct, not speech.

48. Brief for the United States at 9, *Stevens*, 130 S. Ct. 1577 (No. 08-769).

49. Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 21, *Stevens*, 130 S. Ct. 1577 (No. 08-769).

50. *Stevens*, 130 S. Ct. at 1584–86.

51. *See* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 731 (2009) (arguing that judicial intrusion into legislative enforcement authority violates the framing principle of self-government).

52. *See Stevens*, 130 S. Ct. at 1586 (noting that categories of free speech falling outside of First Amendment protection are not upheld on cost-benefit grounds).

53. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

54. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

55. New York v. Ferber, 458 U.S. 747, 754–63 (1982).

56. United States v. Williams, 553 U.S. 285, 298 (2008).

57. The federal statute the Court found to be unconstitutional in *Stevens* grew out of a nationwide concern. The law prohibited the creation, sale, and possession of "a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C.

While *Stevens* like *Snyder* dealt with offensive speech, there was a key, overlooked difference between the two. In *Stevens* the depiction of animal cruelty required the previous commission of a violent act that is illegal in all United States jurisdictions,[58] while *Snyder* was a pure speech case. Despite this clear distinction, which might have led to different results,[59] the unifying premise in both decisions is that offensive and outrageous speech is protected where it is made without any intent to intimidate or solicit criminal conduct. The majority's error in *Stevens* was to discount past criminality in the test for communicative legitimacy.

Self-expression with no intent to instigate criminal conduct, which was at play in *Stevens* and *Snyder*, was also central in a 2010 Supreme Court term decision. In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court rejected California's attempt to prohibit the electronic distribution of violent content to children.[60] The Court invalidated a state regulation against renting and selling violent video games to minors that are "patently offensive to prevailing standards in the community."[61] Like videos depicting cruelty to animals, the Court did not regard violent electronic games to be analogous to obscenity because no violent intent was involved in the games.[62] Like *Snyder*, the expressive conduct of renting and selling violent video games was not interwoven with criminality, as it was in *Stevens*, but the Court did not revisit the latter decision. The

§ 48(a) (2000) (reenacted as Pub. L. 111-294 § 3(c), 124 Stat. 3179 (2010)). The District of Columbia and all fifty states have statutes prohibiting the cruel treatment of animals. United States v. Stevens, 533 F.3d 218, 223 (3d Cir. 2008). Stevens was convicted in Pennsylvania but lived in Virginia. In Pennsylvania, cruelty to animals includes "wantonly or cruelly" abusing or neglecting an animal over "which he has a duty of care." 18 PA. CONS. STAT. § 5511(c) (2007). Likewise, the abandonment of an animal or deprivation of "sustenance, drink, shelter or veterinary care, or access to clean and sanitary shelter which will protect the animal against inclement weather and preserve the animal's body heat and keep it dry" are also criminally actionable. *Id.*

58. All fifty states and the District of Columbia have statutes against cruelty to animals. *See Stevens*, 533 F.3d at 223 n.4 (listing citations to state and District of Columbia animal cruelty statutes).

59. Justice Alito regarded the case to be about conduct rather than speech. United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting) ("The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of 'crush videos,' a form of depraved entertainment that has no social value.").

60. 131 S. Ct. 2729, 2742 (2011).

61. *Id.* at 2732, 2742.

62. *Id.* at 2734.

Court in *Entertainment Merchants* found that California lacked a compelling reason to enact a value laden content regulation, even when the law was based on its parens patriae power over children's welfare.[63]

The holdings in *Stevens* and *Entertainment Merchants* are closely linked to the *Snyder* decision barring regulation of disturbing and outrageous expression. All three rulings were based on the principle that offensive, detestable, and even revolting speech is protected where there is no intent to instigate violence or intimidate the public.[64] While *Stevens* misapplied the principle to expression arising from actual rather than fictional criminal conduct, the ruling accurately reflects the facial First Amendment doctrine. This fairly well settled area of law is in sharp contrast to the often heated disputes about the legitimacy of regulations that target belligerent, instigative, and hate speech. As we will see in Part II, the Court has been more deferential of content regulations on self-expression that are fashioned to maintain public safety and to protect private reputation.

II. INFLAMMATORY SPEECH

In *Snyder*, *Stevens*, and *Entertainment Merchants*, the Court relied on the well-established premise that speech is a fundamental interest, protected even when it is offensive. The constitutional right to unencumbered private speech outweighs hurt feelings and moralistic concerns. The Court distinguishes this form of communication from intentionally intimidating statements; with regulations of the latter, it is the civic interest in safety that outweighs expressive liberty. Even then, the prosecution bears a heavy burden of proof because a risk exists of government intrusion. While criminal regulation of incitement requires proof of intent, the Court recognizes the social interest in protecting civil order against public disturbances likely to instigate fist fights.[65] The extent to which states can

63. *Id.* at 2735–36.

64. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 952, 999 (2d ed. 2002). The Court has found the same protection for violent depictions of cruelty to animals and gory video games as it had earlier for displaying the emotive words "Fuck the Draft" in a courthouse, Cohen v. California, 403 U.S. 15, 26 (1971), and the burning a flag at a rally, Texas v. Johnson, 491 U.S. 397, 414 (1989).

65. The Court has explicitly rejected

> the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the

restrict individuals from displaying hate symbols, uttering racist epithets, and advising terrorists has caused a great deal of academic and judicial controversy.

A. HISTORICAL DIMENSIONS

From its earliest developments following the First World War, First Amendment jurisprudence addressed the question of whether states can prohibit incitement. Three cases that arose from prosecutions under the Espionage Act of 1917[66]—*Schenck v. United States*,[67] *Frohwerk v. United States*,[68] and *Debs v. United States*[69]—established the groundwork for contemporary doctrine. Justice Oliver Wendell Holmes, Jr. drafted all three majority opinions. *Schenck* remains the most influential of this trilogy.

Charles T. Schenck was criminally convicted under a federal statute that prohibited interference with the U.S. effort to recruit soldiers during the First World War.[70] Evidence at trial showed that Schenck had intentionally mailed pamphlets, urging young men to resist military conscription.[71] The Court upheld his conviction and, more importantly for posterity, developed the "clear and present danger" test for reviewing cases of incitement.[72] It allowed for limitations on speech when there

> undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."). Of all the Supreme Court Justices only Hugo Black held an absolutist view on free speech. *See* Hugo L. Black & Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962) ("The beginning of the First Amendment is that 'Congress shall make no law.' I understand that it is rather old-fashioned and shows a slight naïveté to say that 'no law' means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which *almost* convince me, that it is very foolish of me to think 'no law' means no law.").

66. Espionage Act of June 15, 1917, Pub L. No. 65-24, ch. 30, § 3, 40 Stat. 217, 219 (amended 1997) (punishing the expression of sentiments that undermine war efforts).

67. 249 U.S. 47, 48 (1919).

68. 249 U.S. 204, 205 (1919).

69. 249 U.S. 211, 212 (1919).

70. *Schenck*, 249 U.S. at 49.

71. *Id.* at 49–50.

72. *Id.* at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and

was a high probability it would cause grave harm.[73] Judges were thereby empowered to balance concerns for self-expression against those of public safety, leaving some room for subjective adjudication. Ambiguity of what constituted a clearly present danger required additional doctrinal development.

Just a week after deciding *Schenck*, the Court clarified that a criminal conviction for speech could not be based solely on the content of the message, but instead required the government to prove up the intent of the speaker and the context of the utterance.[74] The trial court in *Frohwerk* issued arrest warrants for printing and circulating articles opposing military service.[75] The Supreme Court held that the First Amendment did not "give immunity for every possible use of language"; for instance, criminalizing incitement to murder is not unconstitutional.[76] Jacob Frohwerk's intent to obstruct recruitment was evident from his working jointly with others, even though he lacked the means to carry out the scheme.[77] The Court did not, however, connect intent with the temporal proximity of likely harm.[78]

Frohwerk's principle that restrictions on speech must be judged on a case-by-case basis is consistent with civil procedure rules of standing and ripeness,[79] but today a court would certainly find that the First Amendment protects the expression of antiwar sentiments.[80] None of the extant history suggests that

present danger that they will bring about the substantive evils that Congress has a right to prevent.").

73. Hand's model of the clear and present danger test requires courts to "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *See, e.g.*, United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

74. Frohwerk v. United States, 249 U.S. 204, 209 (1919) (explaining that a statement's potential "to kindle a flame" should be partly judged by the community where it is circulated); *Schenck*, 249 U.S. at 52 ("If the act, (speaking or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.").

75. *Two Missouri Editors Held*, N.Y. TIMES, Jan. 27, 1918, at 7.

76. *Frohwerk*, 249 U.S. at 206.

77. *Id.* at 209.

78. *Id.*

79. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (describing how the doctrine of ripeness is aimed at avoiding premature judicial adjudication for the court to avoid entangling itself in abstract disagreements).

80. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14

Frohwerk was seeking to instigate a clear and present public danger.[81] He seemed instead to have been voicing his opinion against the war. His resistance efforts were just as outrageous to many Americans living during the Wilson administration as the statement of funeral protestors in *Snyder v. Phelps* may sound to modern sensibilities. Offensive speech, as we saw in Part I, is constitutionally protected. For the present Article, the questionable application of the Espionage Act of 1917[82] is of lesser moment than the lasting impact the clear and present danger test has had on First Amendment doctrine.

Frohwerk and *Schenck* determined that there are categories of anti-social communications that involve more than the private interest to self-expression. In both of those cases, the Court was convinced that the speakers' intent to instigate resistance to conscription posed a clear danger. The flaw of these judgments was in upholding the suppression and punishment

(1969) (holding that the First Amendment barred the suspension of students who wore antiwar armbands to express their opposition to the Vietnam War without causing any "substantial disruption of or material interference with school activities"); *see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1288 (2005) ("[U]nder modern First Amendment law, courts would overturn convictions for antiwar leafleting or speeches, and would treat the law as content-based."); James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 666 (2011) ("[A]n antiwar protest in a public forum, is afforded a much stronger presumption of protection than most other forms of expression.").

81. For contemporary accounts of Frohwerk's journalism for the *Missouri Staats Zeitung* and *Kansas Staats Zeitung* that led to his conviction, see *German Americans Sought to Stop Allies' Munitions*, EVENING INDEP. (Massillon, Ohio), Mar. 5, 1918, at 14; *Threaten Boycott Against Ellinwood Democratic Editor Because He's for Hughes but He Stands Firm and Scorns Democratic Leaders Who Make Threats Against Him*, HUTCHINSON NEWS (Hutchinson, Kan.), Oct. 28, 1916, at 16.

82. In another case arising from criticism of the Wilson administration's handling of World War I, the Court upheld the conviction of the socialist leader Eugene Debs. Debs v. United States, 249 U.S. 211 (1919); *Eugene Debs Must Serve Prison Term*, OGDEN EXAMINER (Ogden, Utah), Mar. 11, 1919, at 1; *To Begin Sentence*, HUTCHINSON NEWS (Hutchinson, Kan.), May 31, 1919, at 1. The conviction was so questionable that after taking office, President Warren Harding pardoned Debs. JOHN W. DEAN, WARREN G. HARDING 128 (2004) (discussing President Harding's commutation of Debs's sentence and their meeting at the White House); Dan M. Kahan, *Cognitively Illiberal State*, 60 STAN. L. REV. 115, 131 n.62 (2007) (comparing Debs conviction to the Court's infamous holding on discrimination against homosexuals); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1715 n.63 (2004) (stating that Debs did nothing that would currently constitute espionage).

of political statements that were not menacing, violent, or dangerous. It would take years for the Court to provide guidance that would prevent government from interfering with antiwar sentiments while recognizing the public need to protect civic tranquility against intentional threats.

B. THE MODERN TEST

In *Brandenburg v. Ohio*, the Court rejected the claim that hateful statements made without the intent to intimidate the public can be actionable.[83] The per curiam opinion extended the right of free expression to abstract statements voiced only in the presence of like-minded individuals and invited guests.[84] The case arose from a rally to which only Klan members and two guests were invited.[85] The Court found the Ohio Criminal Syndicalism Act[86] to be unconstitutional because it punished mere advocacy of unlawful actions, even in a circumstance when a speaker did not threaten or incite others to commit imminent criminality.[87]

The key events in *Brandenburg* occurred at a Ku Klux Klan rally to which Klansmen had invited a journalist and cameraman.[88] The closed nature of the event rendered it impossible for speakers to scare or intimidate the public at large.[89] As a guest, the television crew was not intimidated by the proceedings because its presence was desired by the organizers; therefore, there was no true threat to anyone at the rally.[90] The ap-

83. 395 U.S. 444, 447–49 (1969) (per curiam).

84. *See id.*

85. *See id.* at 445–46 ("The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan 'rally' to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network. . . . No one was present other than the participants and the newsmen who made the film.").

86. The statute criminalized "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Id.* at 444–45 (quoting OHIO REV. CODE ANN. § 2923.13).

87. *See id.* at 449.

88. *See supra* note 85.

89. Other than Klansmen, only an invited reporter and cameraman attended. *Brandenburg*, U.S. 395 at 445.

90. A Klansman made a speech couched in hypothetical terms rather than

pellate record provided no examples of direct threats being made, only outrageously prejudicial statements about Jews and blacks.[91] While the facts of this case were quite different from *Snyder*, the Court's decision to protect speech in both was based on the same principle: the First Amendment generally protects statements not meant to place others in fear of their safety.

The Supreme Court, therefore, overturned Brandenburg's conviction because the prosecution did not prove his speech was likely to cause an imminent public disturbance.[92] Nor was there any proof that the Klansmen were conspiring to commit a crime. Statements made at the rally were offensive but used generalities rather than specific threats.[93] The private context in which the offensive statements were made indicated to the Court that the speaker had not attempted to instigate immediate violence.[94]

States and the federal government, on the other hand, have an interest in criminalizing true threats that, unlike the

orders to immediate action: "The Klan . . . . [is] not a revengent [sic] 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." *Id.* at 446. These derogatory statements, the Court found, did not incite those who were present to commit imminently violent acts. *See id.* at 448–49.

91. The tape of the event was electronically distorted and little could be understood from it. The Court found that:

> The significant portions that could be understood were: "How far is the nigger going to-yeah." "This is what we are going to do to the niggers." "A dirty nigger." "Send the Jews back to Israel." "Let's give them back to the dark garden." "Save America." "Let's go back to constitutional betterment." "Bury the niggers." "We intend to do our part." "Give us our state rights." "Freedom for the whites." "Nigger will have to fight for every inch he gets from now on."

Id. at 446 n.1. In another film of the rally someone asserted, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." *Id.* at 447.

92. *See id.* at 447–49.

93. *See supra* note 91 and accompanying text. The "true threat" standard, which I discuss at the text accompanying footnotes 104–109, is laid out in *Virginia v. Black*, 538 U.S. 343 (2003).

94. *See Brandenburg*, 395 U.S. at 447–49. The "imminent threat of harm" test, like its "clear and present danger" forerunner, was derived from John Stuart Mill's context-based example of criticism against corn dealers safely delivered through the press, as opposed to a speech to a starving mob gathered in front of the corn merchant's house. *See* JOHN STUART MILL, ON LIBERTY 100–01 (London, John W. Parker and Son 2d ed. 1859). Ultimately, Mill was more circumspect about legitimate speech than American legal standards. He thought that the liberty of speech extended only so far as the speaker did "not make himself a nuisance to other people." *Id.* at 101.

breast-beating statements at the *Brandenburg* rally, are meant to intimidate the public rather than simply invigorate fanatics or outrage opponents.[95] The Supreme Court has expressly differentiated the true threat standard from the *Brandenburg* imminent threat of harm test.

The seminal case on true threats, *Watts v. United States*, involved the conviction of a defendant who told a crowd gathered to protest the Vietnam War draft at the Washington Monument, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[96] The speaker was charged under a federal statute, providing criminal penalties for willfully and knowingly threatening the president.[97] This was said at a far more public forum than the private gathering in *Brandenburg*. While a jury in *Watts* found the speaker had willfully threatened the president, there was no indication that he meant to injure him.[98] The Supreme Court found in favor of the speaker, holding that he exhibited no actual intent to commit the threatened harm but nevertheless upheld the statute on its face.[99]

Given that *Watts* overturned the conviction for threatening the president but confirmed the constitutionality of a statute that criminalized intentional intimidation, the Court spawned obscurity about what constituted a true threat. The Second Circuit interpreted *Watts* to recognize only the constitutionality of true threats statutes that punished instances of "unequivocal, unconditional, immediate and specific" personal threats.[100] The Ninth Circuit, on the other hand, did not include the *Brandenburg* immediacy in its definition. A true threat according to the

95. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (deciding that a willful threat against the President of the United States is an unprotected form of expression); *In re* Steven S., 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that "malicious cross burning" on the private property of another was a "true threat").

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

97. In relevant part, the statute created a criminal cause of action against anyone who "knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect." 18 U.S.C. § 871(a) (2006) (matching the language the Court quoted in *Watts*, 394 U.S. at 705).

98. Watts moved the court to acquit him because his statement was made conditionally, in the event that he were to be drafted, during the course of political debate, and as a joke at which the crowd laughed. *Watts*, 394 U.S. at 706–07.

99. *See id.* at 708.

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

latter circuit was decided by an "objective" test of "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."[101] The two circuits diverged in their points of reference concerning the relevant standard, specifically about if a court should focus on whether the speaker reasonably foresaw that his words would affect the recipient of the statement or on whether the recipient would reasonably sense a threat.[102] From both perspectives, assessment of the context of the statement, the speaker's intent, and whether the type of audience present has a history of violence under similar circumstances are pertinent.[103]

The Court resolved the circuit split when it applied the true threats doctrine to a state cross burning statute in *Virginia v. Black*.[104] Intent turned out to be a key component of the doctrine, which recognizes that the criminalization of willful intimidation can be used to protect public safety.[105] The Court rejected both the Second and Ninth Circuits' glosses, defining "true threats" to "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."[106] Nothing in that definition requires any immediate risk of violence. The prosecution also need not prove that the speaker actually intended to carry out the threat.[107]

A trial court must evaluate whether the message contains words, symbols, or depictions that, under the circumstances, are meant to be intimidating. This requires a content rich

101. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1074 (9th Cir. 2002) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

102. Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (describing the difference between the Ninth and Second Circuits' interpretations of the true threats doctrine).

103. Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 539 (2005) (quoting United States v. Bell, 303 F.3d 1187, 1192 (9th Cir. 2002)).

104. 538 U.S. 343 (2003).

105. *Cf.* Dep't of Revenue v. Davis, 553 U.S. 328, 342 (2008) (stating that civic responsibilities include the protection of health, safety, and the advancement of citizens' welfare).

106. *Black*, 538 U.S. at 359.

107. *Id.* at 359–60 ("The speaker need not actually intend to carry out the threat.").

analysis.[108] A majority of the justices in *Black* agreed with Justice O'Connor's plurality opinion which established that intentionally threatening communications, such as cross burnings "carried out with the intent to intimidate," are not protected by the First Amendment.[109] Justice Scalia's concurrence in *Black*, agreeing with the judgment that states can regulate cross burning,[110] appeared to be a significant shift from his earlier conclusion in *R.A.V. v. City of St. Paul*, which had found content regulation of speech to be unconstitutional.[111] While neither he nor the plurality in *Black* explicitly overturned *R.A.V.*, by acknowledging that government could identify "burning a cross is a particularly virulent form of intimidation,"[112] *Black* moved away from a categorical repudiation of content-based regulations; a characterization that four justices who concurred in *R.A.V.* had found to be a deeply flawed analysis.[113]

108. *See id.* at 360–61.

109. *Id.* at 363. The majority distinguished the *Brandenburg* and *Watts* tests, thereby establishing that they represent separate lines of First Amendment precedents. *See id.* at 359 ("[T]he 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." (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam))); *id.* ("And the First Amendment also permits a State to ban a 'true threat.'" (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam))).

110. *See id.* at 368 (Scalia, J., concurring).

111. 505 U.S. 377, 395–96 (1992). In *R.A.V.* the Court struck down a St. Paul, Minnesota ordinance that prohibited the public or private display of Nazi swastikas or burning crosses that were known to "arouse[] anger, alarm or resentment on the basis of race, color, creed, religion or gender." *Id.* (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). Writing for the majority, Justice Scalia found that the ordinance was a form of content discrimination that violated the First Amendment. *See id.* at 391–96. Scalia recognized that the City had a compelling interest in protecting the "members of groups that have historically been subjected to discrimination." *Id.* at 395. He nevertheless decided that such a legislative intent could only be constitutionally exercised by a total ban on fighting words that "communicate ideas in a threatening manner," rather than only specific manifestations of certain ideas like racial or religious bigotry. *Id*. at 393–94.

112. *Black*, 538 U.S. at 363 ("Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."); *see* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 704, 724, 781 (1999) (discussing how the Ku Klux Klan uses burning crosses to intimidate and organize).

113. Justice Byron White's concurrence to *R.A.V.* drew attention to the majority's misreading of doctrine. He found that Justice Scalia's opinion protected

Justice Scalia split from the *Black* plurality on the mens rea element. Four Justices believed the prima facie element of the Virginia statute was unconstitutional, finding that the prosecution bears the burden of proving the defendant's state of mind to meet its initial burden of production beyond a reasonable doubt.[114] Justice Scalia, on the other hand, believed that the state's prima facie presumption of a culpable mind was constitutional because the law afforded offenders the right to rebut it at trial.[115]

The plurality of the Court further found that states can prohibit the intimidating use of a hate symbols with a "pernicious history" without running afoul of the First Amendment.[116] Justice Thomas, in dissent, also noted the pernicious history of the Klan's use of the burning cross.[117] He would have upheld the validity of Virginia's cross burning statute,[118] which he understood to prohibit "intimidating conduct" unprotected by the First Amendment.[119] The plurality's "brief history of the Ku Klux Klan," Justice Thomas wrote, and his own survey of the organization's past practices demonstrated that it "typically" used burning crosses to terrorize, intimidate, and harass "racial

a class of communications that had been "long held to be undeserving of First Amendment protection." *R.A.V.*, 505 U.S. at 401 (White, J., concurring). Justice White believed legislators had the latitude to limit only a subset of fighting words constituting "the social evil of hate speech." *Id.* He believed hate speech to be a particularly dangerous form of social evil meant to "provoke violence or to inflict injury" rather than to exchange ideas. *Id.*

Justice Harry Blackmun added a concurrence to protest the majority's categorical statements. He saw no First Amendment values "compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns." *Id*. at 416 (Blackmun, J., concurring). Thus, what the majority regarded as only emotive speech, Justice Blackmun regarded to be inflammatory.

In the third concurrence, Justice John Paul Stevens gave multiple examples of content regulations that the Supreme Court had earlier found to be constitutional. *See id.* at 421 (Stevens, J., concurring). Justice Stevens believed that the Court's opinion "disregard[ed] this vast body of case law" that had "created a rough hierarchy in the constitutional protection of speech." *Id.* at 422.

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

115. *Id.* at 369–70 (Scalia, J., concurring in part and dissenting in part).

116. *See id.* at 363 (plurality opinion).

117. *See id.* at 389 (Thomas, J., dissenting) ("[T]he majority's brief history of the Ku Klux Klan only reinforces th[e] common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.").

118. *See id.* at 400 ("Because I would uphold the validity of this statute, I respectfully dissent.").

119. *See id*. at 388.

minorities, Catholics, Jews, Communists, and any other groups hated by the Klan."[120] Both the plurality's and Justice Thomas's arguments require content rich analyses, to determine the potential cultural meanings of burning crosses. The plurality analogized Virginia's ability to single out symbols with menacing messages to obscenity regulations.[121] Thomas similarly asserted that cross burning was "the paradigmatic example" of "profane," unprotected speech.[122] They could have also distinguished it from offensive or obnoxious expressions. As we saw earlier, the Court rejected the obscenity comparison in *Entertainment Merchants* and *Stevens*,[123] thereby clearly distinguishing intentionally threatening words from the expression of outrageous content.

A more recent plurality decision, *United States v. Alvarez*, drafted by Justice Anthony Kennedy, acknowledged the existence of several "historic and traditional categories" of speech—including defamation and true threats—that states can regulate without violating the First Amendment.[124] The plurality, however, rejected a balancing test to determine whether a restraint on speech was constitutionally permissible.[125] In his concurrence to the case, Justice Stephen Breyer (joined by Justice Elena Kagan) explicitly refused to follow Justice Kennedy's "strict categorical analysis."[126] Justice Breyer instead balanced the "speech-related harm" against the "nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[127] Part III

120. *See id.* at 389.

121. *See id*. at 363 (plurality opinion) ("[J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

122. *See id.* at 388 (Thomas, J., dissenting).

123. *See supra* text accompanying notes 60–63.

124. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

125. *See id.* ("In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as startling and dangerous a free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." (alterations in original) (internal quotation marks omitted)).

126. *Id.* at 2551 (Breyer, J., concurring).

127. *Id*. Although in his concurrence Justice Breyer does not explicitly define this as balancing, referring to it instead as "fit between statutory *ends and means*," he recognizes the legitimacy of judicial analysis about whether the purported risk posed by the regulated speech is so great that it counter-

demonstrates that despite the *Alvarez* plurality's assertion, several precedents have in fact found certain categories of speech, like true threats, to be unprotected because of their harmful messages rather than their derivation from some undefined tradition.

III. PERMITTED REGULATIONS

The true threats doctrine is one of the few exceptions to the content neutral requirement and imminent threat of harm analysis. In this Part of the Article I examine several forms of speech to which the *Brandenburg* imminence test does not and should not apply, despite vehement academic sentiments to the contrary. I begin by demonstrating the test's insufficiency for regulating intimidation posted on the Internet. I then examine counterarguments about the constitutionality of regulations prohibiting threatening displays of symbols that have historically been associated with violence. Next, I analyze whether group defamation statutes, which First Amendment scholars often claim to be invalid, offer a constitutionally legitimate avenue of redress against reputational harms. Finally, the Article explains why criminalization of material support to designated terrorist organizations is a constitutionally justifiable means of preventing threats to the general welfare. In these cases, the public concern for safety is rightly given greater weight than the private interest in intimidation, defamation, and support for groups engaged in political violence.

A. IMMINENT THREAT OF HARM ON THE INTERNET

The imminent threat of harm test is too narrow in scope to regulate the dissemination of public threats streaming on the Internet. The audience of the World Wide Web is so diffuse, spread out throughout the world, that even intentional incitement, which the Court found to be actionable in *Black*,[128] is unlikely to immediately instigate violence.[129] It can, however, have

balances "the seriousness of the speech-related harm." *Id.* (emphasis added); *see* Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 251–52 (2005) ("[B]alancing methodology [is] manifest in the Supreme Court's familiar framework of tiered means-ends scrutiny, which allows many government restrictions on speech to survive First Amendment review.").

128. *See supra* text accompanying notes 106–12.

129. For instance, *United States v. Wilcox* held that prosecutors did not meet the *Brandenburg* test requirements because the defendant's racist expressions on the Internet did not advocate violence or overthrow of the gov-

long term negative ramifications. Statements dehumanizing hated groups often influence the commission of discriminatory conduct.[130] E-mail exchanges can have serious long-term consequences. For example, Major Nidal Hasan engaged in an e-mail discussion with Imam Anwar al-Awlaki of Yemen,[131] an al-Qaeda leader who was later killed in an American drone strike.[132] In one of his e-mails Hasan asked about the religious legitimacy of "fighting Jihad" to help "Muslims/Islam" and dying as a "shaheed[]," but he gave no indication that he had any immediate plans to carry out such an attack.[133] Seeking advice from Awlaki, who preached elsewhere that "all Americans were valid targets," was seemingly a calculated attempt to get sympathetic advice;[134] however, the e-mails between the two that the Federal Bureau of Investigations has released are not explicitly conspiratorial.[135] In another e-mail, Hasan wrote ab-

ernment such that they would be unprotected "dangerous speech" under the particular circumstances. 66 M.J. 442, 449 (C.A.A.F. 2008).

130. ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 70–74 (2002) [hereinafter TSESIS, DESTRUCTIVE MESSAGES] (discussing the long-term negative consequences of Internet hate speech).

131. *"Lessons from Fort Hood: Improving Our Ability to Connect the Dots": Hearing Before the Subcomm. on Oversight, Investigations, & Mgmt of the H. Comm. on Homeland Sec.*, 112th Cong. 1–2 (2012) (statement of Douglas E. Winter, Deputy Chair, The William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas, on November 5, 2009), *available at* http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-Winter.pdf.

132. Zaid al-Alayaa, *Yemen's Leader Signs Agreement to Cede Power*, L.A. TIMES, Nov. 24, 2011, at A10 (describing the CIA drone strike that killed al-Awlaki, Yemen's al-Qaeda recruiter).

133. *See* WILLIAM H. WEBSTER COMM'N ON THE FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM INTELLIGENCE, AND THE EVENTS AT FORT HOOD, TEX., ON NOV. 5, 2009, FINAL REPORT 41 (2012), *available at* http://www.fbi.gov/news/pressrel/press-releases/final-report-of-the-william-h.-webster-commission [hereinafter FORT HOOD FBI REPORT].

134. *Al-Awlaki Tried to Use WMDs on Westerners*, DAILY PAK BANKER (Pak.), Oct. 2, 2011 (asserting that al-Awlaki "claimed all Americans were valid targets, and directed followers to engage in armed conflict with the United States").

135. Hasan subscribed to Al-Alwaki's website and received generic "mass" e-mails from Al-Alwaki which contained religious justifications for killing. *See* FORT HOOD FBI REPORT, *supra* note 133, at 67–68. There were also personal e-mails between Hasan and Al-Alwaki. *See id.* at 46 ("Hasan sent six messages to Aulaqi . . . Aulaqi responded to Hasan twice."). However, there was "no direct connection between the personal messages and the mass-mailed ones." *Id.* at 68. In these personal e-mails, Al-Alwaki indicated that he is unable to present a prize for Hasan's proposed contest seeking essays on "Why is Anwar Al Alwaki a great activist and leader" and thanked Hasan for his offer to help fi-

stractly, with no stated immediate plan, that "I would assume that suicide bomber whose aim is to kill enemy soldiers or their helpers but also kill innocents in the process is acceptable."[136] While the *Brandenburg* imminent threat of harm test protected their communications, Hasan eventually translated al-Awlaki's ideology into the very action about which he had sought advice, carrying out a fanatically driven terrorist spree, shooting to death thirteen soldiers at Fort Hood, Texas.[137] Awlaki later bragged that Hasan was his student and defended the murder spree as "a heroic act" and "a wonderful operation."[138]

E-mails are only one form of Internet communication that speakers can adopt to incite violence. Web pages can stay up indefinitely and affect an impressionable visitor's behavior shortly after the content is posted or years afterwards, a period far exceeding immediacy.[139] Recent examples of Internet incitements that lacked any timeframe include defense of terrorism;[140] praise for pedophilia;[141] and support for murdering

nancially. *See id.* at 50–51. The combination of receiving personal e-mails may have caused Hasan to believe that the mass-emails were meant specifically for him.

136. *Id.* at 58.

137. FORT HOOD FBI REPORT, *supra* note 133, at 1.

138. Jacob Sullum, Commentary, *With Terrorists, Obama's 'Trust Me' Is Not Enough*, CHI. SUN TIMES, Oct. 5, 2011, at 34. In 2011, the United States killed Awlaki in a drone strike. *'Workplace Violence' Update*, WKLY. STANDARD, Dec. 19, 2011, at 4.

139. A 2002 case found that a website displaying the names and addresses of abortion providers with black lines through those who had been killed, in conjunction with "guilty" posters known to intimidate abortion physicians and incite violence, was a true threat not protected by the First Amendment. Planned Parenthood of The Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1080, 1088 (9th Cir. 2002) (en banc); *see also* Citron & Norton, *supra* note 39, at 1460. Along a similar line of intimidation, abortioncams.com is a website with images of women going into abortion clinics posted to intimidate and shame patients. Jonathan Zittrain, *Privacy 2.0*, 2008 U. CHI. LEGAL F. 65, 89 n.94.

140. For instance, Internet messages of al-Awlaki are readily available on websites like YouTube, extolling the use of terror. Christopher Robbins, *CIA Drone Strike Misses Intended Target, Kills Other Al Qaeda Members*, GOTHAMIST (May 7, 2011, 11:52 AM), http://gothamist.com/2011/05/07/cia_drone_strike_misses_intended_ta.php; *see also* Pippa Crerar, *'I Don't Feel Bitter but I'm not Ready to Forgive My Knife Attacker'*, EVENING STANDARD (London), Nov. 4, 2010, *available at* http://www.standard.co.uk/news/stephen-timms-i-dont-feel-bitter-but-im-not-ready-to-forgive-my-knife-attacker-6532423.html (discussing how a Muslim student became radicalized through al-Awlaki and then attempted to murder a British member of Parliament for his support of the Iraq War). Another example of ongoing Internet exchanges planning to commit terrorist acts involved Colleen LaRose, who had dubbed herself "Jihad Jane" on the Internet. *'Jihad Jane' to Testify Here in Terror*

blacks,[142] Jews,[143] homosexuals,[144] or members of other identifiable groups.

YouTube, an Internet source for international file sharing, is a platform for seven hundred al-Awlaki videos, some of them calling for violent jihad.[145] YouTube also hosts videos of Imam Abubakar Shekau, who is Imam of the Boko Haram Islamist group that recently took responsibility for killing 143 people in a terrorist attack in Kano, Nigeria.[146] Shekau's and al-Awlaki's videos typically do not call for specific or immediate violence but speak of the perceived enemies of Islam in dehumanizing terms and justify killing them whenever necessary. If the United States could obtain personal jurisdiction against those who posted these videos and could prove the intent to instigate violence, the *Black* true threats doctrine would permit their prosecution.

YouTube is an example of a platform accessible to the pub-

Trial, SUNDAY INDEP. (Ireland), Feb. 6, 2011. LaRose carried on extensive e-mail conversations that incited, supported, and planned the murder of Swedish cartoonist Lars Vilks for his depiction of Mohammed. *Id.* In 2007, the House of Representatives expressed the sentiment that owners of websites "should take action to remove jihadi propaganda." H.R. Res. 224, 110th Cong. (2007).

141. The most prominent group advocating pedophilia is North American Man-Boy Love Association. *See Who We Are*, NAMBLA, http://www.nambla.org/welcome.html (last visited Mar. 10, 2013).

142. Gary Rivlin, *Discomfort over Google Site's Hate Forums*, INT'L HERALD TRIB., Feb. 8, 2005, at 13 (describing Internet sites with a variety of hate content).

143. Kathryn Blaze Carlson, *Muslim Group Backs Charges Against Extremists*, NAT'L POST (Can.), July 10, 2010, at A5 (stating that following a five-month investigation charges had been brought against an individual who had been posting calls for the mass murder of Jews).

144. *Group Wants to Refute Against Anti-Obama Message*, ARIZ. REPUBLIC, Sept. 5, 2009, at 4 (mentioning sermons posted on the Internet advocating death to homosexuals).

145. *See Weiner Calls for Removal of More than 700 Terrorist Videos on YouTube*, FED. INFO. & NEWS DISPATCH, INC., Oct. 24, 2010, *available at* 2010 WLNR 21389375.

146. *Attacks Carried Out in Nigeria*, WASH. POST, Jan. 22, 2012, at A12 (describing the terrorist attack in Kano, the largest city in the Northern part of Nigeria). For a representative set of videos with Imam Abubakar Shekau preaching, see YOUTUBE.COM (search "Boko Haram, Imam Abubakar Shekau") (last visited Mar. 10, 2013). An English translation for one of the videos is also available. *See* Aaron Y. Zelin, *New Video Message from Boko Haram's (Jama'at Ahl al-Sunnah li Da'wah wa-l-Jihad) Amir Imam Abu Bakr Shekau: "We Are Coming to Get You Jonathan"*, JIHADOLOGY.NET (Apr. 12, 2012), http://jihadology.net/2012/04/12/new-video-message-from-boko-harams-jamaat-ahl-al-sunnah-li-dawah-wa-l-jihad-amir-imam-abu-bakr-shekau-we-are-coming-to-get-you-jonathan/.

lic at large and not just persons with passwords. It therefore differs from the private rally scenario in *Brandenburg*. Spouting destructive messages on a publicly accessible website, though it may not cause imminently dangerous outbursts, raises safety concerns that differ from those arising at a small, private rally. Even where there is no immediate incitement, the context, audience, and speaker's intent can indicate that there is a true threat to a particular group. The intent of al-Awlaki and Shekau was to incite the public at large; their messages are so effective precisely because they pose short- and long-term threats.

Professor Cass Sunstein has pointed out the difficulty with applying the *Brandenburg* standard to incitement on mass media communications because only a handful out of millions of viewers might immediately commit violence.[147] And even this small segment of the audience might only be emboldened to act days, weeks, or even years after long-term indoctrination. Yet the intentional threats can pose a real danger to the targeted group, shifting the matter into the public realm, requiring police action. Internet advocacy of future murder, maiming, and other crimes creates risks beyond those recognized in *Brandenburg* and are much closer in line with the true threats doctrine in *Black*. The question for the Court is whether the speaker meant a threat to be outrageous or intimidating. Messages purposefully posted at URLs are accessible by anyone, even users without knowledge of the individual, company, or organization that posted the message, and therefore different than the privately attended rally from which *Brandenburg* arose. Those who would have heard of the speech through the news report would have received a filtered account rather than a message intentionally directed by the source of intimidation. The World Wide Web, as its name implies, is in large part, a public forum. The imminent threat of harm standard, therefore, is inapplicable to most intentional threats made through the Internet. A more effective method of regulating Internet incitement, at least in cases where potential terrorism is involved, is to charge any site operators who intentionally mean to intimidate third persons. Purveyors of direct intimidation may be charged with material support of terrorism, discussed in Part III.D of this Article.

The true threats doctrine provides a framework for devel-

147. *See* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 370.

oping regulations capable of addressing some of the long-term dangers posted on the Web.[148] The Court's guidance in *Black*[149]

148. I've written extensively on the subject of long-term harms from hate speech in TSESIS, DESTRUCTIVE MESSAGES, *supra* note 130; *see also* Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817 (2001).

For a detailed discussion on the development of German antisemitism and its influence on Nazi politics, see JOSEPH W. BENDERSKY, A CONCISE HISTORY OF NAZI GERMANY 141 (3d ed. 2007) (describing Nazi exploitation of traditional European antisemitism); RICHARD J. EVANS, THE COMING OF THE THIRD REICH 27 (2003) (describing the interrelatedness of historical and modern antisemitism in Germany); SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933–1939, at 3–4, 110, 324 (1997) (discussing the integration of European antisemitism in Nazi propaganda and its indoctrinating effect in Germany and Austria).

The long-term effect of destructive messages is also evident from the Hutu slaughter of Tutsis in Rwanda. *See* JEAN HATZFELD, MACHETE SEASON: THE KILLERS IN RWANDA SPEAK 55 (Linda Coverdale trans., 2005) (describing radio broadcasts openly calling for Tutsi destruction prior to the 1994 genocide in Rwanda); MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 212 (2001) (quoting from the Hutu-power Kangura newspaper, which dehumanized the Tutsis and called for their destruction); JOSIAS SEMUJANGA, ORIGINS OF RWANDAN GENOCIDE 171–72 (2003) (providing an account of how racist ideology of the 1950s took root in Hutu politics and permeated the popular view of Tutsis).

Likewise the Darfur genocide has been fueled by hate speech. Local authorities have periodically paid for the writing and performance of hate songs to continue the instigation of the Janjaweed's most recent onslaught against Darfurians. *Censored Singer Tries to Reform 'Hate Singers*,' FREEMUSE (June 24, 2008), http://www.freemuse.org/sw28705.asp. According to an Amnesty International report, one song's lyrics were:

> The blood of the blacks runs like water
> we take their goods
> and we chase them from our area
> and our cattle will be in their land.
> The power of [Sudanese president Omer Hassan] al-Bashir
> belongs to the Arabs
> and we will kill you until the end, you blacks
> we have killed your God.

Id. A woman's song went:

> You are gorillas
> you are black
> and you are badly dressed

Id. Such lyrics likely soothe the conscience of murderers, rapists, and torturers as they pillage blacks, seeking control of Sudan. This material was originally published in a *Washington Post* video news segment. Stephanie McCrummen, *Songs of Hope for Sudan, When Censors Allow*, WASH. POST (June 19, 2008), http://www.washingtonpost.com/wp-dyn/content/story/2008/06/18/ST2008061802936.html?sid=ST2008061802936.

Also on the African continent Kenyan hate radio programs helped instigate violence between the Kikuyu and Luo peoples. Kwamboka Oyaro, *The*

is particularly helpful because even the most open calls for terrorist violence may not seek to instigate immediate destruction. There is a significant contrast between the true threats doctrine and the imminent threat of harm test. In this regard, the fighting words doctrine, which the Court developed in *Chaplinsky v. New Hampshire*,[150] is also virtually irrelevant to Internet communications.[151] Fighting words statutes criminalize personal attacks that are likely to incite an average person into "an immediate breach of the peace."[152] This doctrinal designation does not apply to intentionally threatening statements that are unlikely to provoke an immediate scuffle; merely angering another is not enough. As we saw in Part I, the First Amendment protects individuals who make outrageous statements, even when they severely upset observers' feelings from a distance, as was the case with *Snyder*.[153]

The fighting words and incitement doctrines, then, are of very limited relevance to the Internet. The Court created them before communications capabilities of the World Wide Web were even foreseeable. Threats on the Internet—whether they are disseminated by a terrorist, supremacist group, or an individual ethnocentrist—are unlikely to immediately instigate a

Media Is Not Innocent, INTER PRESS SERVICE, Feb. 2, 2008, http://www.ipsnews.net/africa/nota.asp? idnews=41049; Ofeibea Quist-Arcton, *Tracing the Roots of Ethnic Violence in Kenya*, NAT'L PUB. RADIO (Jan. 31, 2008), http://www.npr.org/templates/story/story.php?storyId=18582319. Police have found leaflets inciting to violence, which Inspector General of Police David Kimaiyo characterizes as intent on spreading "fear and panic," being disseminated ahead of the 2013 election. *Kenya Election: Hatred Leaflets in Kisumu and Mombasa*, BBC (Feb. 22, 2013, 10:01 AM), http://www.bbc.co.uk/news/world-africa-21544847; *Kimaiyo Claims on BBC that Hate Speech Leaflets Are Spreading in the Country*, KENYAN DAILY POST (Feb. 22, 2013, 5:59 AM), http://www.kenyan-post.com/2013/02/kimaiyo-claims-on-bbc-that-hate-speech.html; *see also* Drazen Jorgic, *Kenya Tracks Facebook, Twitter for Election "Hate Speech"*, REUTERS (Feb. 5, 2013, 12:46 PM), http://www.reuters.com/article/2013/02/05/net-us-kenya-elections-socialmedia-idUSBRE9140IS20130205.

And Turkish genocidal efforts against Armenians were also fueled by intentionally degrading threats. *See* DANIEL JONAH GOLDHAGEN, WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY 209–10 (2009) (discussing how longstanding Turkish prejudice played a central role in the instigation of slaughter against Armenians).

149. *See supra* text accompanying notes 106–21.

150. 315 U.S. 568, 571–72 (1941).

151. I say "virtually irrelevant" because I can envision the unusual situation in which someone sends a combative text message to another in the same room and instigates a fist fight.

152. *Chaplinsky*, 315 U.S. at 572.

153. *See supra* text accompanying notes 24–39.

fight. The opportunity to attack the selected target might either not be present or else be delayed for pragmatic reasons. Someone surfing the Web can encounter statements that might have led to a fight had they been uttered during the course of a proximate confrontation, but when long distances separate the speaker and intended target it is likely that any pugilistic feelings will dissipate, even if the two happen to meet at some distant point in the future.

B. TRUE THREATS

The applicability of the true threats doctrine to Internet communication has been woefully understudied. Even scholars who readily accept the doctrine's constitutionality tend to avoid it when discussing the *Brandenburg* imminent threat of harm analysis. Astute First Amendment experts like Professors David Strauss, Robert Post, and Eugene Volokh usually neglect to reflect on how the true threats doctrine qualifies the applicability of *Brandenburg*.[154]

In some cases there will be no overlap between incitement and true threats doctrines. That is, in some circumstances they will relate to distinct forms of unprotected speech. Incitement requires intent to place another in imminent fear of harm,[155] while true threats require only intent to threaten a specific and identifiable person or group.[156] I am interested here in cases where there is an overlap between the two; when an individual

154. Strauss typifies scholarly writing about the broad implications of the *Brandenburg* standard without specifying that it refers to statements made in private. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 54 (2010). In his discussion of the case, he makes no mention of the most recent case about cross burning, which found that a state cross burning statute with a mens rea component can be constitutional even without an imminent threat of harm component. *See id.* The same is true of Post's recent chapter on hate speech which, written six years after the *Black* decision, made no mention of how that holding affected his central topic. Robert Post, *Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 123 (Ivan Hare & James Weinstein eds., 2009). So too Volokh, who has questioned the constitutionality of hate speech regulation but only once in the text of an article mentioned *Black*, and that in passing. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1135–36 (2005). Other than that, Volokh has only made reference to the case in string citations to three articles. *See* Eugene Volokh, *Freedom of Speech and Intellectual Property*, 40 HOUS. L. REV. 697, 703 n.31 (2003); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 670 n.171 (2006); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 314 n.84 (2012).

155. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam).

156. Virginia v. Black, 538 U.S. 343, 359 (2003) (plurality opinion).

who threatens another is also trying to incite third parties to inflict harm on the victim. In the latter case, courts are faced with a circumstance where imminence is unnecessary to hold the speaker accountable for a true threat that is also likely to incite harmful behavior. *Black* involved a symbol, the burning cross,[157] that can be adopted to intentionally threaten another and to incite others to commit hate crimes. In some situations, such as those that gave rise to the litigation in *Black*, there can be overlap between an incitement and a threatening symbol—be it a cross, swastika, Hezbollah flag, al-Qaeda symbol, or some other statutorily defined hate symbol. *Black* was about an instance when there was an intent to threaten others through the use of symbolic speech that incited people to violence based on group defamations.[158] But the true threats doctrine can be read more broadly than this. Although *Black* dealt only with intimidating symbolism, nothing in the opinion supports Professor Rebecca Tushnet's recent claim that the Court treats images as more threatening than words.[159] The key take away point from the case is that laws prohibiting intentional threats, be they oral or symbolic communications, are not protected by the First Amendment even when they limit the content of speakers messages.

Some challenge the plurality's premise in *Black*. Professor Steven Gey takes issue with *Black* for what he calls "the Court's disturbing concession that governments may mete out overtly content-based sanctions on speech," that is classified in the "unprotected category of 'true threats.'"[160] He is concerned that the true threats doctrine erodes some of the values in *Brandenburg*.[161] Gey so strongly disagrees with content-based regulations on threats that to better make his point he dubs O'Connor's plurality opinion in *Black* as "confused and confusing."[162] This claim, however, seems to be merely vitriolic. Even

157. *See id.* at 347.

158. *See id.* at 363.

159. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 697–98 (2012) (stating that the "burning cross—a symbol—was understood to constitute essentially an explicit threat, allowing the state to ban cross-burning carried out for the purposes of intimidation. Words, however vicious, would have had difficulty carrying the same threatening power as the flaming cross").

160. Gey, *Questions About Cross Burning*, *supra* note 10, at 1324.

161. *Id.*

162. Steven G. Gey, *The* Brandenburg *Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 1006 (2010) [hereinafter Gey, *The* Brandenburg *Paradigm*].

the dissent in *Black* believed the state can regulate cross burning without violating the First Amendment but thought that the Virginia statute was overbroad because it punished more than just "particularly virulent" forms of proscribable communications.[163]

Gey is especially disturbed by the *Black* plurality's opinion because he believes it departs from the iconic *Brandenburg* standard by embracing Virginia's prohibition against a disfavored group's political message.[164] This claim is, however, unjustified because in her opinion O'Connor does not focus on the Klan as a politically disfavored group but rather its use of symbols to threaten the public.[165] While Gey calls her opinion "schizophrenic,"[166] the opinion established and applied a consistent scienter standard. Indeed, O'Connor overturned one of the convictions the Court considered in the two consolidated cases composing *Black*, remanding that matter to the state because the prosecution failed to prove the intent to intimidate.[167] *Black* is as consistent as the general protection on labor picketing that does not hold true when it involves "intimidation, and reprisal or threats thereof."[168] In both circumstances, the right to free speech is held to be sacrosanct, but not when it involves the use of intentional threats. Intimidating uses of symbols that are linked to violence, such as burning crosses, are very different from the picketing in *Snyder* or the outrageous speech in *Entertainment Merchants* and *Stevens*.[169]

Unlike Gey, I do not believe the Court's reasoning in *Black* to be inconsistent with *Brandenburg*'s; instead, it clarified the reach of the earlier opinion. Rather than adopting the *Bran-*

163. *Black*, 538 U.S. at 382 (Souter, J., concurring in the judgment in part and dissenting in part).

164. Gey, *The* Brandenburg *Paradigm*, *supra* note 162, at 1007.

165. *Black*, 538 U.S. at 352–57 (plurality opinion) (expostulating on the Klan's long history of violence).

166. Gey, *The* Brandenburg *Paradigm*, *supra* note 162, at 1007.

167. Gey misstates that the reason why the Court overturned Black's conviction was that it found his burning a cross to be "entirely political." *Id.* at 1007–08. But that was not the rational of Justice O'Connor's plurality opinion. She explained, instead, that the conviction had to be overturned because the trial judge had wrongly instructed the jury to presume Black's intent rather than deliberate on whether the prosecution had proven that state of mind beyond a reasonable doubt. *Black*, 538 U.S. at 349–50, 367.

168. NLRB v. Drivers Local Union 639, 362 U.S. 274, 290 (1960) (interpreting the National Labor Relations Act as it was amended by the Taft-Hartley Act).

169. *See* discussion of cases *supra* Part I.

denburg imminence standard, *Black* defined true threats to be "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."[170] The prohibition against true threats prevents speakers from disturbing the public peace by intentionally placing others in fear of danger.[171] Both cases involved defendants who had burned crosses, but there were material differences between them. In *Brandenburg*, police officers arrested a Klan member for burning a cross at a private gathering that was only attended by invitees.[172] *Black*, on the other hand, involved the arrest of individuals who had burned crosses in plain sight of third parties.[173] Only in *Black*, therefore, was the Court faced with a situation in which intimidation was aimed at persons uninvolved in the Klan ritual. For an intimidation statute to survive constitutional challenge, then, it must include public statement and intent components. The intimidation in *Black* was overt, while in *Brandenburg* the burning cross was a symbol of group unity.

Not only is Professor Gey critical of the holding in *Black*, he denies its gloss on *Brandenburg*'s imminent threat of harm

170. *Black*, 538 U.S. at 359.

171. *Id.* at 360 ("Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992))).

172. The defendant in *Brandenburg* called a reporter of a Cincinnati television station to come to a Klan rally. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (per curiam). The reporter arrived to the event with a cameraman who filmed the proceedings. *Id.*

173. *Black* involved convictions for violating the Virginia cross burning statute, prohibiting anyone from burning a cross to intentionally intimidate a person or group of persons. *Black*, 538 U.S. at 348. The prosecution had secured one of the felony convictions against a defendant who burned a cross on private property but in a location that was visible from a public road. Cars observed the cross burning and a few of the travelers asked a sheriff about it. *Id.* A white woman who witnessed the rally from her property, adjacent to the rally felt "very . . . scared" when she heard speakers discussing shooting blacks. *Id.*; Black v. Virginia, 553 S.E.2d 738, 749 (Va. 2001) (noting that the witness, Rebecca Sechrist "stated: 'I was scared our home would get burned or something would happen to it. We've got two . . . kids and I was afraid that something would happen to them.' In response to a question by defendant's counsel, Sechrist testified: 'I think they were trying to scare me.'"). The Supreme Court of Virginia consolidated this case with an unrelated matter regarding three individuals who tried to burn a cross in the yard of a black man to vindicate a personal vendetta. *Black*, 538 U.S. at 350–51. The victim felt "very nervous" when he came across the burned cross by his house, not knowing whether this was only the first step of an escalating situation. *Id*. at 350.

test. He writes that, even after *Black*, political advocacy continues to be protected unless it poses an immediate threat of a concrete harm "and the speaker intends his or her speech to instigate the immediate harm."[174] This is a common mistake. Professor Daniel Farber likewise elides the true threats doctrine with the imminent threat of harm criterion.[175] But Justice O'Connor's opinion said nothing of the kind. In fact, one of the prosecution's key witnesses saw the burning cross from afar, on her in-laws' lawn, and others noticed it while driving on an adjacent road.[176] This spectacle by no means caused an imminent threat of harm, but liability could nevertheless attach if it was intentionally meant to threaten observers. A majority of the Court, with Justice Scalia joining in concurrence[177] and Justice Thomas in agreement about this aspect despite dissenting on other grounds,[178] regarded intimidation to be enough for conviction irrespective of whether witnesses sensed any imminent threat of harm.

While *Black* involved only one type of intimidating symbol, the decision's underlying finding can readily be extended to other symbols—like the swastika, Hamas flag, Sri Lankan Tamil Tiger Emblem, and such—used by organizations adhering to violent ideologies and justifying terrorism.[179] Context is

174. Gey, *Questions About Cross Burning*, *supra* note 10, at 1294 (stating that one of the central First Amendment issues "involves the bedrock principle that political advocacy is protected from government regulation unless the advocacy takes the form of incitement, the advocacy occurs in a context where an immediate concrete harm follows from the speech in question, and the speaker intends his or her speech to instigate the immediate harm").

175. Farber, *supra* note 10, at 925 ("Although *Virginia v. Black* represents the Court's official recognition of true threats as unprotected and its first definition of the category's boundaries, it can hardly be viewed as a surprise that the government is entitled to prevent individuals from threatening an individual or the public with immediate violence.").

176. *Black*, 538 U.S. at 348.

177. Justice Scalia concurred because he, unlike the plurality, believed that the Virginia statute's prima facie presumption of intentional intimidation was constitutional. *Id.* at 368–71 (Scalia, J., concurring).

178. Justice Thomas argued in the dissent to *Black* that cross burning was intrinsically intimidating, which contradicted the plurality's view that some forms of cross burning could be expressive and implicate First Amendment coverage. *Id.* at 388–400 (Thomas, J., dissenting).

179. *Cf.* Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 666 n.295 (2010) ("The Hamas flag is just as ideologically violent as the swastika."); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 503–04 (2009) ("Destructive messages are particularly dangerous when they rely on historically established symbolism, such as burning crosses

important here because it reveals whether the message is only meant to trigger angst and outrage, in which case it would not be actionable, or intended to be a true threat.

C. GROUP DEFAMATION

Black is among those cases in which the Court determined that public interest trumped the right to express inciting statements.[180] This deliberation about social harm arising from expressive conduct belies *Alvarez*'s claim that balancing other social interests against speech is impermissible.[181] Another set of cases, dealing with group defamations, permit state limits on speech threatening public order and specifically designed to protect individuals and groups against reputational harms.[182] Like the true threats cases, defamation laws do not adhere to categorical notions of the First Amendment. Both are concerned with statements made for public consumption, while *Brandenburg* was about statements communicated during a meeting of like-minded individuals and their guests who were not intending to intimidate anyone at the gathering. The group defamation doctrine and true threats doctrines are not, however, identical. Group defamation statutes punish the written and oral communications of discriminatory stereotypes that are likely to instigate public disturbances,[183] while true threats statutes punish intentional intimidation.

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or swastikas, in order to kindle widely shared prejudices."); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 543 (2002) (discussing the cultural significance of Confederate symbols placed on state property); Richard L. Wiener & Erin Richter, *Symbolic Hate: Intention to Intimidate, Political Ideology, and Group Association*, 32 LAW & HUM. BEHAV. 463, 475 (2008) (discussing an empirical study that found that participants thought the display of symbols like swastikas, burning crosses, and skin fists to be intimidating); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2291 (2004) ("There can be little doubt that the swastika is as intimidating to some as the burning cross.").

180. Helen Norton has recently explained that government hate speech may also violate Equal Protection principles. *See* Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 163 (2012).

181. *See supra* text accompanying notes 124–27.

182. *See* Waldron, *supra* note 21, at 1605–09.

183. In *Beauharnais*, the Court found that an Illinois group defamation statute did not violate the First Amendment because it was drafted not as "a catchall" but specifically directed "at a defined evil" to punish the use of racist and antisemitic epithets that were "productive of breach of the peace or riots." Beauharnais v. Illinois, 343 U.S. 250, 251, 253 (1952).

In *Beauharnais v. Illinois*, the Court upheld a state statute criminalizing group libel that "portrays depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed or religion" and exposes those citizens to "contempt, derision, or obloquy."[184] Consistent with the holding in *Beauharnais*, group defamations can further be extended to revilement based on ethnicity, nationality, alienage, gender, or sexual orientation.

In a seminal decision, the Supreme Court limited the types of expressions that qualify to those that offend "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[185] Judicial review of group defamation statutes, then, must consider the specific statement's potential to disrupt the public peace and the public policy's connection to essential concepts of dignity and human worth. Proving group defamation, like its common law tort counterpart, does not require a showing of clear and present danger because the speech involved is not constitutionally protected.[186]

The *Beauharnais* decision has been roundly criticized by a variety of First Amendment scholars. Several of its detractors believe *Beauharnais* is no longer good law. Professor Jonathan D. Varat, for one, thinks that "[t]here is good reason to believe that today the First Amendment would bar an action for group libel, as distinct from individual libel."[187] Varat explains that the danger with punishing libel is that suppression of "lies"

184. *Id.* at 251 (quoting 38 ILL. REV. STAT. § 471 (1949)).

185. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (internal quotation marks omitted)). That standard of dignity resembles the approach that other countries extend beyond injuries to private reputation. For instance, Germany prohibits the distribution of "written materials . . . which describe cruel or otherwise inhuman acts of violence against humans . . . in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity." STRAFGESETZBUCH [StGB] [PENAL CODE], Dec. 2007, § 131(1) (Ger.), *translated in* THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION 116 (Michael Bohlander trans., 2008).

186. *See Beauharnais*, 343 U.S. at 266 ("Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'").

187. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1116 (2006).

runs the risk of silencing despised speakers.[188] He is concerned that group defamation prosecutions will infringe on self-expression.

Varat's arguments against group defamation seem plausible at first glance because protection of unpopular speakers is at the core of free speech doctrine. His point is, nevertheless, misguided because it ignores that society has determined that the dignitary harms suffered by defamed parties distinguish group stereotypes from innocuous lies,[189] such as false claims about military honors.[190] Earlier in this paper, I pointed out that the Court has determined that protecting the public from the dangers of menacing racist symbols outweighs a speaker's interest in threateningly displaying them.[191] The Court has upheld some other laws limiting speech because they are likely to mislead listeners. The element of deception is also intrinsic to the regulation of false advertisements[192] and trademark violations.[193] Here, as in cases of group defamation, the public's interest in receiving accurate information receives greater judicial consideration than the private right to make false statements.[194]

188. *Id.* at 1116–17.

189. I am drawing an analogy from Justice Sandra Day O'Connor's "concern for dignitary harms," which, as Professor Karst has pointed out in a different context, "bears a strong family resemblance to the concerns of modern equal protection doctrine as applied to discrimination against 'outsiders' in other categories of self-identity, such as race or sex or sexual orientation." Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 368.

190. *See* United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (plurality opinion) (holding the Stolen Valor Act to be unconstitutional for criminalizing falsely claiming to have received military honors); *see also* Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091 n.2 (2008) ("The State may only punish deliberate falsehoods when they cause significant harms to individuals.").

191. *See supra* text accompanying notes 105–14.

192. *See*, *e.g.*, Persaud Cos. v. IBCS Grp., Inc., 425 F. App'x 223, 227 (4th Cir. 2011) (finding that a marketing brochure satisfied "the statutory requirements of a false advertisement" because "it [was]—at a minimum—misleading or deceptive"); Telebrands Corp. v. F.T.C., 457 F.3d 354, 356 n.4 (4th Cir. 2006) (discussing the Federal Trade Commission Act's provision against deceptive acts that affect interstate commerce).

193. *See*, *e.g.*, Buetow v. A.L.S. Enter., Inc., 650 F.3d 1178, 1182 (8th Cir. 2011) (stating that "deception is material" to a false advertising claim under the Lanham Act (Trademark Act of 1946)).

194. *See* FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) (stating that there is no protection on "trade-marks which deceive the public" even if "members of the trade are not misled"); Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1172 (11th Cir. 2007) (recognizing that the public has a

Varat's definition of group defamation—as only dealing with deceptive statements[195]—is, moreover, too narrow. Group defamation is further concerned with maintaining public order and protecting vulnerable individuals from targeted harm.[196] At bottom, defamatory statements directed at a particular group, especially when they incorporate historical prejudices and biases, can be regulated because they result in reputational harms, not merely because they are hyperbolic or misleading.[197]

A different line of academic attack against *Beauharnais* presumes it has been superseded by subsequent decisions. Dean Erwin Chemerinsky takes this approach. He speculates that "*Beauharnais* almost certainly would be declared unconstitutional today based on vagueness and overbreadth grounds."[198] Professor Rodney Smolla more unequivocally asserts that, "*Beauharnais* is flatly inconsistent with modern First Amendment doctrines restraining content-based and view-point based discrimination."[199] Professor Nadine Strossen, former president of the American Civil Liberties Union, similarly states that "[t]he group defamation concept . . . has been thoroughly discredited."[200] Strossen's perspective is informed by Professor

right to be protected against false advertisement); Ford v. NYLCare Health Plans of Gulf Coast, Inc., 301 F.3d 329, 339 (5th Cir. 2002) (Benavides, J., concurring) (same); Kohler Co. v. Moen Inc., 12 F.3d 632, 637 (7th Cir. 1993) ("[T]rademark protection . . . precludes competitors only from using marks that are likely to confuse or deceive the public.").

195. *See* Varat, *supra* note 187, at 116–19 (discussing whether Holocaust deniers have First Amendment protection).

196. Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

197. In his concurrence to *Rosenblatt v. Baer*, Justice Potter Stewart explained interests protected by defamation laws:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

198. CHEMERINSKY, *supra* note 64, at 978. Professor Ronald K. L. Collins is also reticent, writing that today group libel laws "are deemed constitutionally suspect." Ronald K. L. Collins, *Free Speech, Food Libel, & the First Amendment. . . in Ohio*, 26 OHIO N.U. L. REV. 1, 28 (2000).

199. Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 351 (2009).

200. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 517.

Laurence H. Tribe's more qualified observation that:

> *New York Times v. Sullivan*[201] seemed to some to eclipse *Beauharnais*' sensitivity to . . . group defamation claims . . . because *New York Times* [*v. Sullivan*] required public officials bringing libel suits to prove that a defamatory statement was directed at the official personally, and not simply at a unit of government.[202]

Popular as these claims are, they do not hold up to precedential scrutiny. These statements are contrary to several major Supreme Court opinions that cite to *Beauharnais* for its precedential value.[203]

Academics who presume *Sullivan* obliterated the holding in *Beauharnais* often follow a Seventh Circuit mistake in *American Booksellers Ass'n v. Hudnut*.[204] In *Sullivan*, the Court ruled that for a public figure to prevail in a suit for defamation, she must prove that the offensive statement in question was made with actual malice.[205] One of *Hudnut*'s defenders mistakenly stated that the "doctrinal tides that have swept libel in general into the First Amendment ocean" in the wake of *Sullivan* "have left *Beauharnais* . . . high and dry."[206] That statement closely tracks the *Hudnut* opinion's erroneous dictum that "cases such as *New York Times v. Sullivan*," which set a high burden of proof for public officials seeking redress for defamation, "[have] so washed away the foundations of *Beauhar-*

201. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

202. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-17, at 926–27 (2d ed. 1988).

203. *See*, *e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2561 (2012) (Alito, J., dissenting) (stating that "many kinds of false factual statements have long been proscribed without raising any Constitutional problem." (internal quotations omitted)); United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (citing to *Beauharnais* as an example of one of the few exceptions to the general prohibitions against content based regulations on speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (drawing attention to cases like *Beauharnais*, dealing with "traditional limitations" that do not offend First Amendment protections on free speech); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) (stating that group libel falls outside the First Amendment "despite this Court's references to a marketplace of ideas").

204. 771 F.2d 323 (7th Cir. 1985).

205. *Sullivan*, 376 U.S. at 279–80 ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . . .").

206. Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 950 (1996).

nais that it [can no longer] be considered authoritative."[207] Just as forcefully but misleadingly, Judge Richard Posner in another Seventh Circuit decision wrote, even "though *Beauharnais v. Illinois* has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited."[208] This presumption has never been supported by the Supreme Court; to the contrary, the justices have shown every sign that the diametrically opposite is true.

To begin, the Court has repeatedly and approvingly cited to *Beauharnais* as controlling precedent on the constitutionality of defamation law. As recently as 2010, in a case discussed in Part I of this Article, the Supreme Court determined that *Beauharnais* is one of several lines of cases that permit restrictions on the content of speech without violating the First Amendment.[209] Furthermore, in 2012 three Justices in dissent reiterated that *Beauharnais* continues to be binding authority.[210] In an earlier case, the Supreme Court cited *Beauharnais* to demonstrate the proposition that libel is among the "categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend."[211]

Furthermore, at least two Supreme Court justices raised concerns with the Seventh Circuit's presumptuousness that *Beauharnais* has been overruled. Justice Harry A. Blackmun, joined by Justice Byron R. White, wrote an unusual dissent to a denial of certiorari in *Smith v. Collin*.[212] Petitioners had sought a writ of certiorari from the Court of Appeals holding unconstitutional an ordinance prohibiting the dissemination of hatred.[213] "[T]he Seventh Circuit's decision is in some tension with *Beauharnais*," Blackmun asserted; "[t]hat case has not been overruled or formally limited in any way."[214] Subsequent Supreme Court majority opinions have borne out the legitimacy of

207. *Hudnut*, 771 F.2d at 331 n.3.

208. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672 (7th Cir. 2008).

209. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010). Even *R.A.V. v. City of St. Paul*, a case that is often cited by the opponents of inflammatory speech regulation, referred to *Beauharnais* as an example of a legitimate government regulation against speech based on content. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

210. United States v. Alvarez, 132 S. Ct. 2537, 2561 (2012) (Alito, J., dissenting) (joined by Justices Scalia and Thomas).

211. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984).

212. Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting).

213. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

214. *Smith*, 439 U.S. at 919 (Blackmun, J., dissenting).

group defamation limitations on incitement.[215]

The Seventh Circuit's underlying error was to misconstrue *Sullivan* as an abandonment of *Beauharnais* rather than a qualification of it. *Sullivan*, which we saw earlier, set a high burden of proof for public officials suing for defamation, only impacted the holding of *Beauharnais* as it applies to public figures. Based on the many Supreme Court cases that continue to cite *Beauharnais* in the context of simple defamation,[216] *Sullivan*'s actual malice standard does not apply to private group defamation cases. The Supreme Court recognized this distinction between the two in *New York v. Ferber*, asserting that *Beauharnais* remains the controlling precedent on the publication of group libel except in cases "when public officials are the target[s]."[217] Even post-*Sullivan*, therefore, a state can criminalize portrayals that tend to subject "a class of citizens, of any race, color, creed, or religion" to "contempt, derision, or obloquy."[218] In such circumstances, private plaintiffs must prove that defendants negligently made a false statement that caused harm to the reputation or standing of a protected group.[219] But in cases of public group defamation, *Sullivan* qualifies *Beauharnais* to require proof of actual malice.

Despite the Supreme Court's regular reliance on *Beauhar-*

215. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) ("From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. These historic and traditional categories . . . includ[e] obscenity [and] defamation . . . ." (internal quotation marks and citations omitted)); R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations."); *Bose Corp.*, 466 U.S. at 504 ("[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend . . . . Libelous speech has been held to constitute one such category.").

216. *See supra* notes 209–11 and accompanying text.

217. New York v. Ferber, 458 U.S. 747, 763 (1982) (citing *Sullivan* and *Beauharnais* for the proposition that, "[l]eaving aside the special considerations when public officials are the target, a libelous publication is not protected by the Constitution").

218. Beauharnais v. Illinois, 343 U.S. 250, 270–71 (1952) (Black, J., dissenting) (quoting an Illinois group defamation statute).

219. *See* Gertz v. Welch, 418 U.S. 323, 347–48 (1974) (stating that states cannot impose strict liability). The Court stressed in *Gertz* that injuries in defamation cases typically involved the "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350. Defamation can lead monetary loss, but it is not a prerequisite for standing. *Id.*

nais for its precedential value, Professor Calvin R. Masey asserts that "the group libel concept has been thoroughly discredited."[220] Masey bases this claim on the four dissents to the case, even though the justices who wrote them did not convince the majority.[221] Be that as it may, three of four dissents did not dismiss group defamation out of hand as a categorical infringement on speech.[222] Only one of the dissenting Justices, Hugo Black, entirely rejected the constitutionality of group defamation statutes.[223]

The other three dissenters conceded that group defamation could be actionable under certain circumstances, but disagreed with the majority's judgment of the case.[224] In his dissent, Justice William O. Douglas acknowledged that the Nazi success of manipulating the population through antisemitic propaganda demonstrated that group defamation, particularly when it is intentional, has the potential of causing widespread harms:

> Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense.[225]

In another dissenting opinion to *Beauharnais*, Justice Robert Jackson recognized that the government had authority to enact a group libel statute but did not join the majority because he believed that Beauharnais did not receive an adequate opportunity to proffer his defense at trial.[226] Finally, Justice Stanley Reed asserted that group defamation statutes could only be constitutional if they included a culpability element to prove

220. Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 142 n.164 (1992).

221. *Id.*

222. *See Beauharnais*, 343 U.S. at 283 (Reed, J., dissenting) (assuming a state may "pass group libel laws to protect the public peace"); *id.* at 284 (Douglas, J., dissenting) (arguing that Nazi propaganda in Hitler Germany "could be made an indictable offense"); *id.* at 299 (Jackson, J., dissenting) (agreeing with the majority that a state can protect minorities under its libel laws).

223. *Id.* at 274–75 (Black, J., dissenting).

224. *Id.* at 279 (Reed, J., dissenting) ("It is when speech becomes an incitement to crime that the right freely to exhort may be abridged."); *id.* at 284–85 (Douglas, J., dissenting) ("My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present . . . ."); *id.* at 288 (Jackson, J., dissenting) (arguing that the Fourteenth Amendment did not incorporate the First Amendment).

225. *Id.* at 284 (Douglas, J., dissenting).

226. *Id.* at 299–301 (Jackson, J., dissenting).

incitement.[227] That element, for criminal cases, could be supplied by the actual malice element that I suggested earlier for public defamation or the scienter element Justice O'Connor required in *Virginia v. Black*.[228] A close assessment of the dissents, therefore, indicates that eight of nine justices agreed that Illinois had a public reason for prohibiting group defamation. Justice Douglas specifically tied reputational harms to the threat of physical harm; thereby implicitly linking restraints on group defamation and true threats.[229]

227. *See id.* at 279, 283 (Reed, J., dissenting) (stating that the right to free speech can be abridged "when speech becomes an incitement to crime," but the relevant criminal statute must "be reasonably well defined"). Justice Reed's test is close to the one that the Court later adopted in *Virginia v. Black*. *See supra* text accompanying notes 104–09.

228. *See supra* text accompanying notes 104–06.

229. This use of terminology is, of course, anachronistic. *Watts*, the initial source of the true threats doctrine, was not decided until seventeen years after *Beauharnais*. *Compare* Watts v. United States, 394 U.S. 705 (1969), *with* Beauharnais v. Illinois, 343 U.S. 250 (1952). Nevertheless, I think my point about Douglas's sense that intentional threats are linked to group defamation is analytically correct.

Sociological studies bear this point out. Renowned psychologist Gordon W. Allport described how "prolonged and intense verbal hostility always precedes a riot." GORDON W. ALLPORT, THE NATURE OF PREJUDICE 60 (1979). Preconceived animosities are intrinsic to hate crimes. Since medieval times, mobs have often accused Jews of kidnapping Christian children, crucifying them, and using their blood as an ingredient in Passover matzah. MAX I. DIMONT, JEWS, GOD AND HISTORY 240–41 (2d ed. 2004); RAPHAEL ISRAELI, POISON: MODERN MANIFESTATIONS OF A BLOOD LIBEL 21 (2002). This myth and other antisemitic propaganda were often repeated to incite nationalistic mobs. EMIL MURAD, THE QUAGMIRE 252 (1998); TADEUSZ PIOTROWSKI, POLAND'S HOLOCAUST: ETHNIC STRIFE, COLLABORATION WITH OCCUPYING FORCES AND GENOCIDE IN THE SECOND REPUBLIC, 1918–1947, at 135 (1998).

On the North American continent, aborigines were commonly reputed to be brutal savages who killed frontier people, and this pernicious stereotype was used to rationalize land misappropriation. BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 318–30 (2007). Lynch mobs in the United States were often riled up by allegations of arson, or that a black man had raped a white woman or a black man had argued with a white man. JAMES H. MADISON, A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA 67–68 (2001); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 47 (1995). These accusations were unquestioned by riotous crowds of individuals or white Southern men inside and outside the legal system. Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart"*, 60 J. S. HIST. 749, 752 (1994); James W. Vander Zanden, *The Ideology of White Supremacy*, 20 J. HIST. IDEAS 385, 401 (1959). During the Second World War Japanese Americans living on the West Coast were interned after being labeled spies who were inimical to the United States' war efforts. JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 262–65, 302 (1954); TSESIS, DESTRUCTIVE MESSAGES,

Professor Jeremy Waldron, who has recently argued that U.S. law should permit the regulation of group defamation,[230] has raised pragmatic doubt about whether the current members of the Court would uphold the conviction of Joseph Beauharnais.[231] He may well be correct, but that question is unanswerable without a litigant bringing a direct challenge. What we know is that regular citations to the case in majority opinions indicate that at least several justices continue to regard *Beauharnais* to be good law.[232] Waldron is correct that the need to regulate defamation is ultimately a question of principle, not merely doctrinal consistency. Existing doctrine, I believe, allows for the regulation of group defamation when it threatens public safety.[233]

D. MATERIAL SUPPORT OF TERRORISTS

Given this jurisprudential trajectory, it was logical for the Court in *Holder v. Humanitarian Law Project* to uphold a fed-

supra note 130, at 102. Democratic processes in states like California and Washington were hijacked by anti-Japanese groups who lobbied for the enforcement of discriminatory laws and internment. ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 116–19, 138 (1988). The democratic electoral system was also no barrier in Rwanda, where genocide followed repeated radio statements calling for the extermination of the Tutsi minority. Alison Des Forges, *Call to Genocide: Radio in Rwanda, 1994*, *in* THE MEDIA AND THE RWANDA GENOCIDE 41, 42–43 (Allan Thompson ed., 2007); Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, *in* THE MEDIA AND THE RWANDA GENOCIDE 90, 97–98 (Allan Thompson ed., 2007).

230. JEREMY WALDRON, THE HARM IN HATE SPEECH 4 (2012) (arguing that hate speech undermines the "sense of security in the space we all inhabit").

231. *See id.* at 64 (quoting Judge Posner that "no one thinks that the First Amendment would today be interpreted to allow group defamation to be prohibited" (citing Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 672 (7th Cir. 2008))).

232. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (affirming that speech can be limited in certain circumstances where that freedom is outweighed by moral considerations); Garrison v. Louisiana, 379 U.S. 64, 70 (1964) (recognizing that group vilification which could lead to public disorder may not be protected under the First Amendment).

233. Waldron emphasizes that hate speech harms the targeted person's dignitary interests. WALDRON, *supra* note 230, at 103. The scope of this Article does not allow me to expand on his thesis. Ultimately, I believe that hate speech and group defamation are actionable because they attack more than dignitary interests. Hate speech is essential to catalyzing mass discrimination and violence. In a previous article, I demonstrated this point through notorious, historical examples. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 741–59 (2000).

eral statute prohibiting anyone from providing "material support or resources" to groups the Secretary of State designated as foreign terrorist organizations.[234] The challenge was brought by U.S. nonprofit organizations that sought to provide the Kurdish Workers' Party and the Liberation Tigers of Tamil Eelam with training about international law, political participation, and international organization.[235] At face value, these activities were not outrageous and arguably involved no direct incitement. The Court found the context of transmitting information to dangerous terrorists to be determinative.[236]

The statute implicated public safety and free speech concerns. As part of its definition of material support, the law restricted an individual's expressive right to provide "expert advice or assistance" to any designated organization.[237] A factfinder inquiring into whether a defendant engaged in prohibited communication with a designated terrorist organization must evaluate the content of the communication to determine whether it falls under the material support statute.[238] What may be advice in some circumstances may be no more than mass-advertisement-gone-to-the-wrong-address in another. Think, for instance, of an individual who specifically addresses an advisory pamphlet about the art of negotiation to a terrorist group as opposed to an individual who inadvertently sends a mass mailing about negotiations to the terrorist organization along with a slew of other recipients. Under the statute, only

234. 130 S. Ct. 2705, 2730 (2010). It is a felony to knowingly provide, attempt, or conspire to provide "material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a) (2006). The statute defined "material support or resources" to include "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . ., and transportation, except medicine or religious materials[.]" § 2339A(b)(1).

235. *Humanitarian Law Project*, 130 S. Ct. at 2716.

236. *See id*. at 2724–25 (finding that there is no way to distinguish between helping terrorist groups with legitimate activities compared to illegal terrorist activities).

237. § 2339B(g)(4). Among the groups designated terrorist organizations are Al-Aqsa Martyrs Brigade, Al-Qa'ida, HAMAS, Hizballah, Jemaah Islamiya Organization, Liberation Tigers of Tamil Eelam, Palestine Liberation Front, Palestinian Islamic Jihad, and the Real IRA. U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGS., *available at* http://www.state.gov/documents/organization/45323.pdf.

238. *See Humanitarian Law Project*, 130 S. Ct. at 2720 ("Of course, the scope of the material-support statute may not be clear in every application.").

the former conduct is actionable because the content is advisory rather than commercial.

To limit the risk of wrongful convictions, Congress included a mental state component in the material support statute. No violation could occur unless the person providing the support had "knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts."[239] Anyone knowingly contributing to a terrorist group was subject to fifteen years in prison or up to life imprisonment if death resulted from such support.[240] *HLP*, then, dealt with a law entirely different than the outrage laws found unconstitutional in *Snyder* and *Entertainment Merchants*.[241]

In *HLP*, as with true threats and group defamations decisions I assessed earlier,[242] the public welfare concerns were grave enough to counterbalance the interest in self-expression. As with the other two categories, in *HLP* the Court did not rely on strict scrutiny analysis, with its demand for narrow tailoring.[243] The limits on speech in the context of all three categories, indicates that scholars like Eugene Volokh are mistaken to assert that *HLP* is the "only non-overruled majority opinion upholding a content-based speech restriction under strict scrutiny."[244] *HLP* is not alone in upholding a restriction on content based restraints against incitement tending to create public disorder and violence. *Black* was about the power of a state to punish intentional threats relying on menacing symbols like burning crosses,[245] *Beauharnais* was about the power of the state to punish the use of racist and antisemitic statements to

239. *Id.* at 2715.

240. § 2339B(a)(1).

241. *See supra* text accompanying notes 60–64.

242. *See supra* Part III.B (assessing the doctrine of true threats); Part III.C (assessing the doctrine of group defamations).

243. The dissent explicitly made this point. *Humanitarian Law Project*, 130 S. Ct. at 2734 (Breyer, J., dissenting) ("[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly'—to determine whether the prohibition is justified by a 'compelling' need that cannot be 'less restrictively' accommodated.").

244. Eugene Volokh, *Humanitarian Law Project and Strict Scrutiny*, THE VOLOKH CONSPIRACY (June 21, 2010, 1:28 PM), http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny/ [hereinafter Volokh, *HLP Post 1*] (subsequently updated in Eugene Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny*, THE VOLOKH CONSPIRACY (June 21, 2010, 5:43 PM) http://www.volokh.com/2010/06/21/speech-that-aids-foreign-terrorist-organizations-and-strict-scrutiny/ [hereinafter Volokh, *HLP Post 2*]).

245. Virginia v. Black, 538 U.S. 358, 360 (2003).

defame groups,[246] and *HLP* involved expert advice for empowering terrorist organizations[247]: all of these subjects are content-rich.

Volokh also reads narrow tailoring into the *HLP* majority's opinion, something that even the dissent did not do.[248] The closest the Court came to this formulation was to adopt an amorphous "more rigorous scrutiny" than the intermediate scrutiny test.[249] Even assuming that Volokh is correct and this is an alternative formulation, albeit an ambiguous one, of strict scrutiny, the majority would likely nevertheless view the public danger of legitimizing terror to be compelling. Criminal liability arises from only "a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[250] The majority found that the fungibility of money in a terrorist organization's control, with no "firewalls" preventing charitable contributions from being funneled toward violent activities,[251] rendered the complete bar of material support narrow under the circumstances. Even seemingly benign support for an organization could further its ability to wreak violent, political havoc.[252] Advice given about leverage through dialogue, which is what Humanitarian Law Project sought to provide, could therefore strengthen a terrorist organization's ability to make demands at the negotiation table. Although the specific advice the Hu-

246. Beauharnais v. Illinois, 343 U.S. 250, 252, 258–59.

247. *Humanitarian Law Project*, 130 S. Ct. at 2715, 2730 (majority opinion).

248. *See* Volokh, *HLP Post 1*, *supra* note 244 ("I'm inclined to say that this is indeed [narrowly tailored]—especially since the Court's precedents call for strict scrutiny of content-based speech restrictions—though the dissent reasonably notes that the majority is not entirely clear on this."). *But see* Volokh, *HLP Post 2* (noting that the "Court doesn't really define the test precisely" and questioning whether the speech restriction is narrowly tailored). In his dissent Justice Breyer did the opposite, at one point challenging the majority's assumption that strict scrutiny does not apply. *Humanitarian Law Project*, 130 S. Ct. at 2734 (Breyer, J., dissenting) ("[E]ven if we assume for argument's sake that 'strict scrutiny' does not apply, no one can deny that we must at the very least 'measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment.'").

249. *Humanitarian Law Project*, 130 S. Ct. at 2723–24 (majority opinion).

250. *Id.* at 2723.

251. *Id*. at 2725–26.

252. *See infra* note 267 (discussing why the fungible nature of money makes any, including ostensibly peaceful, contribution to terrorist organizations likely to increase terror activities).

manitarian Law Project sought to provide terrorists was not directly translatable into violence, the Court found ample evidence that "material support of a terrorist group's lawful activities facilitates the group's ability to attract 'funds,' 'financing,' and 'goods' that will further its terrorist acts."[253]

Viewed in concert, the holdings in *Black*, *Beauharnais*, and *HLP* indicate that the Court is deferential to the regulation of speech for a limited number of public safety purposes. The public safety policies involved in these three cases were inapplicable to the offensive speech cases reviewed in Part I of this Article. *HLP* did differ from the other two incitement cases in its reference to a "more rigorous scrutiny" while never adopting any comparable standard for proving up group defamations or true threats.[254] This distinction is logical because material support might involve discourse that is not harmful on its face, albeit increasing organizations' standing and credibility, while true threats and group defamations are by definition menacing to the public at large or some targeted segment thereof. Thus, the greater potential for error and abuse in the enforcement of material support statutes required a heightened level of scrutiny that would be unfitting for the other two categories.

Contrary to my doctrinal understanding of these cases, Professor David Cole criticizes *HLP* for being out of step with precedent.[255] Cole has a unique interest in *HLP* outside the realm of academic discourse: he argued the case on behalf of the Humanitarian Law Project before the Supreme Court.[256] Curiously, Cole and Volokh seek to distinguish the holding in *HLP* from an earlier one in *Citizens United*.[257] In *Citizens United*, the Court relied on strict scrutiny analysis to overturn a federal restriction on independent corporate expenditures within a statutorily proscribed period of time.[258] Cole inaccurately

253. *Humanitarian Law Project*, 130 S. Ct. at 2726 n.6.

254. *See id.* at 2723–24.

255. David Cole, *The Roberts Court v. Free Speech*, N.Y. REV. OF BOOKS, Aug. 19, 2010, at 80, 81.

256. *Humanitarian Law Project*, 130 S. Ct. at 2712.

257. Citizens United v. FEC, 130 S. Ct. 876, 886, 898 (2010); Cole, *supra* note 255, at 81 ("In *Citizens United*, the Court imposed a heavy burden of justification on the government, and required solid evidentiary support for all justifications that the government offered. . . . By contrast, in *Humanitarian Law Project*, the Court upheld the material support law based on justifications that were unsupported by evidence . . . .").

258. *Citizens United*, 130 S. Ct. at 886, 898. The strict scrutiny test is composed of two parts. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002) ("Under the strict-scrutiny test, respondents have the burden to

asserts that "[t]he two decisions purported to apply the same First Amendment standard."[259] Volokh also believes *HLP* is not in line with *Citizens United*'s strong protection of speech against government regulation.[260] To begin, both of these scholars read the strict scrutiny standard into *HLP*.[261] That standard is explicit in *Citizens United*,[262] but not in *HLP*. Indeed, it is the contrast between the rigorous application of the standard in the former and the total absence of it in the latter that belies the purported symmetry between the two. Both scholars also seem to overlook that content—one supporting mass murder for political gain and the other campaign speech in a nonviolent political contest—does matter in judicial analysis of public safety and free speech claims.

The problem, then, is not that the Court neglected to follow the *Citizens United* precedent, but rather that the case is inapposite to *HLP*. Cole and Volokh neglect to even mention the comparison between *HLP* and *Black*. Granted, the majority in *HLP* also made no reference to the opinion from *Black*. The link is nevertheless logical because *Black* dealt with a symbolic expression tied to a domestic terror group, the Ku Klux Klan,[263] and *HLP* was about foreign terrorist groups.[264] *Citizens United*, on the other hand, involved corporate speech in support of po-

prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."); *see also* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (asserting that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.").

259. Cole, *supra* note 255, at 80.

260. *See* Volokh, *HLP Post 1*, *supra* note 244 (noting that *Citizens United* overruled *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) which, before *Humanitarian Law Project*, was "[t]he *only* majority opinion until this one that has upheld a content-based speech restriction").

261. Cole, *supra* note 255, at 80 ("The Supreme Court found that both laws restrict speech based on its content, and therefore had to undergo the Court's most demanding standard of review, known as 'strict scrutiny.'"); Volokh, *HLP Post 1*, *supra* note 244. *But see* Volokh, *HLP Post 2*, *supra* note 248 ("[I]t seems to me that *Humanitarian Law Project* is endorsing a test for content-based speech restrictions that is less restrictive (and thus, if I'm right, more speech protective) than strict scrutiny.").

262. *Citizens United*, 130 S. Ct. at 898 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007))).

263. *See* Virginia v. Black, 538 U.S. 343, 360 (2003).

264. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713 (2010).

litical campaigns unrelated to terror.[265] While Humanitarian Law Project sought to provide purportedly benign aid to groups who espoused strategic terror, Citizens United was a nonprofit organization providing support for a political party that engaged in non-violent democratic elections. The two are incongruous. In *HLP* and *Black*, domestic and international public safety concerns, were critical to the judgments, while in *Citizens United* the Court decided to expand the liberty of speech in matters of representative politics. The mens rea requirement in the material support for terrorists statute appeared to be Congress's effort to provide the necessary criminal element Justice O'Connor had identified in her plurality opinion to *Black*.[266]

The holding in *HLP* applies to the prosecution of any statements or conduct that lends material support to known, designated terrorists. Even support of terrorist groups that is purportedly directed toward peaceful activities, such as negotiations, increases the availability of resources to perpetrate acts of political violence.[267] Contrary to the Court's emphasis on public safety, Professor Timothy Zick takes a distinctly liberty-enhancing point of view, arguing that the ban on funding harms the communicative interest of individuals wishing to assist designated foreign terrorist organizations.[268] He regards communication with overseas terror organizations to be a protected form of speech.[269] His analogy between advisory contacts

265. *See Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). I have argued elsewhere that *Citizens United* was wrongly decided on other grounds related to the representative nature of political speech. *See* Tsesis, *Self-Government*, *supra* note 1, at 739–51.

266. *Black*, 538 U.S. at 363–64 (plurality opinion).

267. *See* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 698 (7th Cir. 2008) (discussing how even relatively small contributions to a terrorist organization could aggregate to substantial support that enhances its ability to commit acts of terror); United States v. Afshari, 426 F.3d 1150, 1160 (9th Cir. 2005) (finding that aid to terror organizations is not pure speech because it can be just as readily be used for peaceful functions as for the procurement of weapons); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (finding that providing fungible funding for nonviolent activities "frees up resources that can be used for terrorist acts").

268. Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Approach,* 52 B.C. L. REV. 941, 947 (2011) [hereinafter Zick, *First Amendment in Trans-Border Perspective*] ("Decisions like *Humanitarian Law Project* affect not only the ability of citizens at home to reach across borders, but also the thousands of citizens abroad working on peace-building efforts in places like Afghanistan.").

269. Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging*

and associations with terrorist organizations, on the one hand, and constitutionally protected political speech and truth seeking, on the other,[270] overlooks the special public safety concerns raised by foreign terror groups' recruitment and planning activities in the United States.[271] Advisory support given to a designated terrorist organization is not like protected communication in the marketplace of ideas, but a form of conduct that strengthens the political hand of an organization committed to paramilitary attacks against civilian and/or military personnel. Zick is no doubt correct about the need for courts to consider the transborder implications of regulations on global speech in order to prevent constitutional violations,[272] but he is mistaken to argue that material support of terror organizations falls within the ambit of traditional speech norms like truth seeking, self-governance, and speaker autonomy.[273]

Prohibiting the funding and communicative support for organizations that have not renounced mass violence is not a restraint on constitutionally protected expression. The statute at issue in *HLP*, instead, seeks to prevent the intentional instigation of violence through back channel funding that is benign on the surface. Like true threats, helping a terrorist organization communicate more effectively before it has renounced political violence, can empower it and enhance its ability to murder, in-

Complexities of Transborder Expression, 65 VAND. L. REV. 125, 157–58 (2012) [hereinafter Zick, *Falsely Shouting Fire*] (arguing that *Humanitarian Law Project* may be a "very bad precedent" because its recognition of statutory limits on communications with transborder terror organizations "is arguably inconsistent with several fundamental First Amendment principles," such as those protecting political speech and truth seeking).

270. *Id.* at 158 (comparing the restriction on association with terrorist organizations to ideological restrictions on "disfavored persons or groups" in the early twentieth century).

271. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (2010) ("'Material support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.").

272. Zick, *Falsely Shouting Fire*, *supra* note 269, at 177.

273. *Id.* at 178 ("Granting robust protection to transborder speech, association, and information distribution would serve a number of traditional free speech values, including the facilitation of citizen self-governance, truth seeking, speaker autonomy, and checking governmental abuses of power wherever they occur."); *id.* at 183 (arguing that *Humanitarian Law Project* tends to "chill the free flow of information" because a domestic newspaper making print space available to a foreign terrorist group may be accused of providing "material support").

timidate, extort, and recruit.

The material support statute does not prevent individuals from independently advocating on behalf of those organizations, so long as they do not act in concert with them or under their direction.[274] Just as *Black* did not prohibit membership in the Klan, *HLP* does not prohibit individuals from pledging allegiance to an overseas terror organization.[275] The statute simply prevents the dissemination of funds and advice that increases terrorists' abilities to rely on alternative support for instigating and committing acts of violence. "The criminalization of peaceful and legal speech that is coordinated with foreign terrorist organizations" is not, as Zick claims, "inconsistent with both traditional and cosmopolitan free speech principles favoring open interaction and dialogue across borders."[276] To the contrary, foreign and domestic terrorist groups' organizing principles are coercive and intimidating, not discursive. Where public safety is at stake, officials need not rely exclusively on "new technologies to counter extremist speech in the global theater."[277] They can also turn to criminal laws like the material support statute.

CONCLUSION

The Supreme Court reviews regulations on outrageous speech very differently than it does the criminalization of intentionally intimidating statements. Offensive statements that merely shock the conscience or even repulse audiences are protected by the First Amendment. In *Entertainment Merchants Ass'n* and *Snyder*, the Supreme Court confirmed that the First Amendment protects offensive and outrageous speech. The Court has handled cases of public intimidation quite differently. The harms associated with intimidation are not merely emo-

274. *Humanitarian Law Project*, 130 S. Ct. at 2726 ("Independent advocacy that might be viewed as promoting the group's legitimacy is not covered [by the statute].").

275. It is the intent of those burning the cross that is legally consequential, not their affiliation. Indeed, the plurality explicitly stated that two of the defendants involved in the consolidated litigation "were not affiliated with the Klan." Virginia v. Black, 538 U.S. 358, 350 (2003) (plurality opinion); *see also Humanitarian Law Project*, 130 S. Ct. at 2726 (arguing that because "[t]he statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization," individual affiliation is not affected).

276. Zick*, First Amendment in Trans-Border Perspective*, *supra* note 268, at 1014.

277. Zick, *Falsely Shouting Fire*, *supra* note 269, at 178.

tional or repulsive. There is a difference between someone burning a cross to anger others and someone displaying it in public to terrorize them. Contrary to the view embraced by some scholars, when it comes to public intimidation even speech that is not imminently dangerous can be curtailed. When statements, emblems, badges, symbols, or other forms of expression that are historically tied to persecution and harmful stereotypes are intentionally used to put others in fear of violence, they are unprotected by the First Amendment.