In claiming that "even a dog distinguishes between being stumbled over and being kicked"¹ Justice Holmes demonstrated his limited knowledge of the canine world. But even if Holmes was wrong about dogs, he was right about the law, within which the distinction between what an agent intends and what actually occurs has spawned major lines of legal doctrine. In constitutional law, in torts, in contracts, and in criminal law, to name just the obvious examples, understanding law's resolution of the gap between the intended and the occurrent represents a large step toward understanding the most important doctrinal and theoretical problems.

This distinction between what someone intends and what in fact occurs is an important feature of law generally, but it also occupies a prominent position within those particular legal areas, most of which have nothing to do with the First Amendment, in which words are the instruments of operative legal consequences. The parol evidence rule gives pride of place to the "actual" (about which much more will be said presently) meaning of contract terms to the exclusion of what might have been intended by one

or even both of the contracting parties. The debate between objective and subjective theories of contract is similar, again posing the issue whether the conventional meaning of contractual language, as opposed to the mental states of the parties, is (or is not) what defines the core of the contractual understanding. Long before there was a New York Times Co. v Sullivan, indeed, long before there was even a New York Times, the common law of libel wrestled with the question whether the ordinary meaning of allegedly defamatory language could produce liability even when the user of that language had no defamatory intent. And for almost as long as there have been statutes and constitutions, questions of statutory and constitutional interpretation have focused on the question whether the plain meaning of statutory or constitutional language is superior or inferior to evidence of the outcomes actually intended by the legislators or drafters who wrote the words.

The distinction between the intended meaning and conventional meaning has occasionally been an issue under the First Amendment, for it should come as no surprise that the distinction between what a word might mean to a particular speaker and what it might mean to the larger linguistic community sometimes tracks the distinction between what is and is not protected by the Constitution. Under the standard reading of Brandenburg v Ohio, for example, speech advocating the use of force or unlawful activity may be punished only, inter alia, when the speech itself directly, or literally, urges violent or otherwise unlawful activity. And even post-Sullivan defamation often makes liability turn on the distinction between what a speaker may have intended (or what a listener

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2 Joseph M. Perillo, 1 Corbin on Contracts § 4.12 (West, rev ed 1993).
4 See Restatement (Second) of Torts § 563 (1977); Rodney A. Smolla, Law of Defamation § 4.2 at 4-6.1 (2d ed 2001).
6 See Masses Publishing Co. v Patten, 244 Fed 535 (SDNY 1917) (L Hand, J).
or reader may have understood) and what the conventional meaning of the words actually is.⁹

Interestingly, the most direct manifestations of the distinction between a speaker’s intentions and society’s conventions of meaning arise when the speech is not linguistic, but rather, as it is said in the domains of the First Amendment, “symbolic.”¹⁰ And this should come as little surprise, because when people communicate their messages by means other than words the likelihood that the conventional meaning of the communication will be contested increases. This issue was precisely at the center of the various opinions in the Supreme Court’s 2002 Term cross-burning decision, Virginia v Black,¹¹ for at the heart of the disagreement among the Justices was a deeper contest about the legal consequences that are to ensue under circumstances in which the message a communicator intends to send diverges from the message that a recipient of that message understands. It is not surprising that the Justices were confused on this issue, for questions about the relevance of speaker’s intent, although pervasively important in free speech analysis, have rarely surfaced explicitly in either the case law or the literature.¹² Virginia v Black thus provides an excellent opportunity to examine more closely the question of speaker’s intent and the resultant First Amendment significance of the potential divergence between what a speaker intended to communicate and what was in fact communicated by the conventional meaning of the words the speaker employed. Indeed, as we shall see, it may be that the widely accepted view that speaker’s intent is an important component of First Amendment analysis is mistaken, and that First Amendment protection typically hinges on what a speaker says and not on what he or she intends to do with the speech. Moreover, because the First Amendment import of the divergence between

⁹ See, for example, Moldea v New York Times Co., 15 F3d 1137 (2d Cir 1993); White v Fraternal Order of Police, 909 F2d 512, 518 (DC Cir 1990); Bertsch v Duemeland, 639 NW2d 455, 461 (ND 2002); Kelly v Arrington, 624 So2d 546 (Ala 1993).


¹¹ 123 S Ct 1536 (2003).

meaning and intent appears to be different to a majority of the Black Court when the message is nonlinguistic than when it is linguistic, the case also reveals something enduring but arguably mistaken about the Court's approach to the First Amendment dimensions of nonlinguistic communication.

I. Two Cases and Two Problems

Unlike most symbolic speech cases going back to United States v O'Brien, Virginia v Black presented no issue about whether either the legislation in general or the particular prosecution under it was aimed at the communicative impact of the targeted activity. There may in 1968 have been a (scarcely) plausible argument that the prosecution of David O'Brien for burning his draft card was not based on the communicative impact of his act, and there was a much more plausible argument in 1984 that the prohibition on camping overnight in Lafayette Park in Clark v Community for Creative Non-Violence was aimed not at the communicative impact of ideological sleeping but rather as much at those whose unlawful sleeping was a consequence of fatigue as it was at those who slept in order to send a message. Indeed, even


15 That the argument was scarcely plausible did not keep the Supreme Court from accepting it. Supported largely by a presumption against looking at actual legislative motive, a presumption that is much weaker now than it was in 1968, see Church of the Lukumi Babalu Aye v City of Hialeah, 508 US 520, 534 (1993); Washington v Seattle School Dist. No. 1, 458 US 457, 471 (1982); Wallace v Jaffree, 472 US 38 (1985); Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Supreme Court Review 1 (1994), the Court in O'Brien analyzed the case under the plausible but actually untrue assumption that Congress prohibited the destruction of one's draft card in order to facilitate registration and immediate call-up and not to punish a particular form of dissent. Had the Court looked at the underlying legislative debates as closely in O'Brien as it came to do more frequently in later years, it would have had little trouble concluding that the actual motivations of Congress had little to do with registration efficiency and much to do with punishing anti-Vietnam protesters. See Dean Alfange, Jr., Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 Supreme Court Review 1, 15-16.

some of the arguments in favor of the First Amendment permissibility of prohibitions on the desecration of the American flag
maintained, ultimately without success, that preserving the physical integrity of a national symbol was to be distinguished from prohibiting communication with a particular content from being transmitted.

In the case of Virginia's prohibition on cross-burning, however, there was no dispute about the Commonwealth's aim. Virginia prohibited cross-burning precisely to prevent people from sending a message of a certain sort, and thus the case turned not on whether Virginia had targeted the communicative impact of cross-burning, for of course it had, but instead on whether this was one of the communicative impacts whose delivery the First Amendment did not protect. If the First Amendment allows prohibitions on genuine threats precisely because of their communicative impact, which it surely does, then the question is transformed into the question of what it is that makes a communication a genuine threat, and it was on this question that the Court's focus on meaning and intention was centered.

*Virginia v Black* was in fact two cases and not one, and the difference between the two highlights the issue before the Court. Both of the cases arose under a Virginia statute that made it unlawful "for any person or persons, with the intent of intimidating any person or persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."
The statute then went on to say that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

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21 Id.
In one of the two cases, the defendant Barry Black had been the
leader of a Ku Klux Klan rally, on private property, which included
a cross-burning that was visible to those on nearby property who
were not part of the rally. There is no indication that intimidating
such spectators or adjacent property occupiers was part of the
rally’s intent, or part of the leader’s intent, but Black was neverthe-
less convicted under the statute largely because the statutory
presumption—the “prima facie” component of the statute—allowed
the jury to find an intent to intimidate from no evidence other than
the evidence of the cross-burning itself. So although there appeared
to be no intent to intimidate the particular people who were or
might be observing the rally (which is not the same as saying there
might not have been an intent to intimidate those nonviewing mem-
bers of the community, especially African-Americans, who would
become aware of the cross-burning and of the rally), the statutory
presumption was sufficient to produce the conclusion that Black had
the requisite statutory intent to intimidate.

In the companion case, however, there was little doubt about
the existence of an intent to intimidate particular individuals. In
that case, Richard Elliott, Jonathan O’Mara, and an unnamed third
person attempted to burn a cross on the yard of Elliott’s neighbor,
James Jubilee. Although Jubilee was an African-American (unlike
even the spectators and adjacent property owners in the Black
case\(^2\)), and although there appears little doubt that cross-burning,
rather than some other technique of intimidation, was used pre-
cisely because of Jubilee’s race, there is some indication that the
original motivation to intimidate was not (or not entirely) racially
based. Rather, the motivation behind the cross-burning involved,
at least in part, Elliott’s alcohol-assisted desire to retaliate against
Jubilee for complaining to the authorities about the noise coming
from shots fired in Elliott’s back yard, the shots themselves appar-
ently the result solely of Elliott’s target-shooting hobby. Perhaps
because of ample other evidence of an attempt to intimidate, there-
fore, the statutory presumption, unlike in Black’s case, played no
role in the convictions of Elliott and O’Mara.

The convictions of Black and of Elliott and O’Mara were re-
versed by the Supreme Court of Virginia, that court concluding,

\(^2\) See Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 3.10.50 at 3-23 n 11 (Matthew Bender, 2003).
substantially on the authority of *R.A.V. v City of St Paul,*\(^{23}\) that the statutory prohibition on cross-burning, even apart from the presumption, was a constitutionally fatal exemplar of content-based and viewpoint-based discrimination against certain messages precisely because of the point of view the messages espoused. Because the Virginia court thus struck down the statute in its entirety on account of its alleged lack of viewpoint neutrality, the existence of the presumption played no essential role in the decision. Although the court concluded in dicta that the presumption was fatally overbroad, the statute's own focus on cross-burning and not on other forms of intimidation was what rendered it violative of the First Amendment, the Supreme Court of Virginia concluded, and its conclusions about the presumption were relegated to a comparatively minor role.

In the Supreme Court of the United States, however, the presumption loomed much larger. Writing for herself, Chief Justice Rehnquist, and Justices Stevens, Scalia, and Breyer, and reaching a result to which Justice Thomas also subscribed, Justice O'Connor upheld the core of the statute, rejecting the Virginia court's view that the case was controlled by *R.A.V.* Justice O'Connor followed the analytic structure of *R.A.V.* in allowing content-based distinctions within an area of nonprotection so long as the content distinction reflected the distinction and rationale for the initial nonprotection. The linchpin of the analysis for Justice O'Connor, therefore, was that cross-burning was simply a particularly virulent form of intimidation. Because intimidation remains unprotected by the First Amendment, she reasoned, it was permissible for Virginia to single out for special treatment those acts which lay along the same axis that produced First Amendment nonprotection in the first place. Thus, to use one of the examples from *R.A.V.*, if obscenity is unprotected in part because of its sexual explicitness and patent offensiveness, then it is not an impermissible form of content or viewpoint discrimination to single out especially explicit or

especially offensive obscenity for special treatment, even though it would violate the First Amendment to single out obscenity espousing a certain point of view for special treatment. And because Justice O'Connor saw the Virginia statute as singling out not intimidation with a certain point of view but intimidation with special intimidating power, she concluded, over the dissent on this point of Justice Souter, joined by Justices Kennedy and Ginsburg, that the statute itself was a constitutionally permissible prohibition on unprotected intimidation.

Not so, however, with the presumption. When the question turned from the validity of the cross-burning anti-intimidation statute itself to the validity of the presumption of an intent to intimidate from the act of cross-burning, a different majority emerged, and on this issue Justice O'Connor wrote for herself and a plurality, but over the dissents only of Justices Scalia and Thomas, in holding that the First Amendment was violated by the statutory presumption and by the inference, even if rebuttable, that any act of cross-burning manifested an underlying intent to intimidate. Because some acts of cross-burning were not intended to intimidate but were rather intended to communicate in less harmful and more First Amendment–worthy ways, Justice O'Connor reasoned, the presumption effectively imposed a penalty on protected speech that could not be permitted to stand.

II. Does R.A.V. Survive?

My goal here is to deal primarily with the issues of threats, intent, and nonlinguistic communication, and much less with the well-rehearsed issue of content-based and viewpoint-based distinc-

24 After R.A.V., therefore, an obscenity law restricted to that subset of legally obscene materials (see Miller v California, 413 US 15 (1973)) that endorsed or promoted sexual violence would not survive constitutional scrutiny, because the viewpoint-based distinction between endorsing and condemning sexual violence (see American Booksellers Ass'n, Inc. v Hudnut, 771 F2d 323 (7th Cir 1985)) was not simply an extension of the reason why obscenity is not covered by the First Amendment. See Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv J L & Pub Pol 461 (1986). For a pre-R.A.V. argument for narrowing obscenity law in just this way, see Frederick Schauer, Causation Theory and the Causes of Sexual Violence, 1987 Am Bar Found Res J 737.

25 In a brief concurring opinion, Justice Stevens reiterated the substance of his opinion in R.A.V., and emphasized that a state may prohibit cross-burning with an intent to intimidate even if it does not prohibit other forms of threatening conduct. 123 S Ct at 1552 (Stevens concurring).
tions, but any comprehensive analysis of Virginia v Black must at least acknowledge its treatment of R.A.V. and the question whether restrictions on cross-burning but not on other forms of intimidation are necessarily viewpoint-based.

In crucial respects, the Court’s distinction, first set out in R.A.V. and then applied in Black, between what we might call cross-cutting and non-cross-cutting content-based distinctions is a sound and important one. We can start with the assumption that any distinction between speech covered by the First Amendment and speech not covered by the First Amendment is in some sense content-based. The distinction between covered economic advocacy and uncovered price-fixing is content-based, as is the distinction between covered commercial advertising and uncovered advertising of securities, and as is the distinction between covered sexually explicit material and uncovered obscenity. But behind each of these distinctions is a rationale, and it is the insight of the Court’s approach in R.A.V. and then in Black that distinctions drawn in pursuit of those rationales are best characterized as “more of the same,” consequently not creating new or independent First Amendment problems. So if, to take another example, the distinction between covered foul language, like that protected in Cohen v California, and uncovered fighting words is a matter of a confluence of lack of ideational content, harm to a targeted recipient, and likelihood of ensuing physical violence (and that is what Chaplinsky v New Hampshire applied)


27 “In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech.” R.A.V., 505 US at 420 (Stevens concurring in the judgment). See also Young v American Mini Theatres, 427 US 50, 66-70 (1976) (Stevens for a plurality).


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It appears to suggest, then it would be permissible to draw a distinction (differential penalties, say, or prosecution of acts lying on one side of the distinction but not the other) that picked out for special legal attention a subclass of the class of fighting words based on particular lack of ideational content, particular likelihood of harm to a targeted recipient, and particular likelihood of causing physical violence, for these factors run with and not against the grain of the initial distinction between the covered and the uncovered speech.30

In contrast to such “more of the same” distinctions, other distinctions cut across rather than with the grain of the initial distinction between the covered and the uncovered. So, to take an extreme hypothetical example, if a statute were to prohibit Republican but not Democratic utterances of fighting words it would plainly fail, and, to take a real and not fanciful example, under R.A.V. it appears to be constitutionally impermissible to treat obscenity in the way the Supreme Court of Canada treated it,31 by singling out within the class of obscenity only that obscenity that endorses or causes violence against women.32 Because the distinction between endorsing and condemning violence against women is not part of the rationale for excluding obscenity from the coverage of the First Amendment,33 this distinction cuts across rather

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30 I employ the language of “covered” and “uncovered” speech to distinguish those categories lying outside the scope of the First Amendment (fighting words (Chaplinsky), obscenity (Paris Adult Theatre I v Slaton, 413 US 49 (1973)), formerly defamation (Beaubarnais v Illinois, 343 US 250 (1952)), formerly commercial advertising (Valentine v Chrestensen, 316 US 52 (1942)), and countless others that are so plainly outside the First Amendment as to have not even generated serious litigation) from the decision that certain instances of speech lying inside the First Amendment may wind up not being “protected” because their regulation on some occasion satisfies all the elements of a First-Amendment-inspired test. Thus, the regulation of verbal price-fixing is not covered by the First Amendment, but acts of explicit incitement to imminent political violence are unprotected by virtue of the operation of the Brandenburg test. For my own extensive elaboration of this distinction, see Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv L Rev (forthcoming 2004); Frederick Schauer, Codifying the First Amendment: New York v Ferber, 1982 Supreme Court Review 285; Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand L Rev 265 (1981).


32 See note 15.

33 Nor, in fact, and unlike Chaplinsky, is the noncoverage of obscenity a function of the harm it might be thought to produce, for the best understanding of the Roth-Paris approach is premised on the nonpossession of Miller-defined obscenity of First Amendment value, independent of any other value it might possess, and independent of the degree of harm it might be thought to be capable of producing. See Frederick Schauer, Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language, 67 Georgetown L J 899 (1979).
than with the grain of the rationale for noncoverage and would consequently be impermissible. Indeed, and contrary to how the Court understood the issue in *R.A.V.*, it is sounder to think of the distinctions in light of a First Amendment not that protects speech, but instead that prohibits certain reasons for restricting it.\(^4\) From this perspective what is wrong with the cross-cutting distinctions is not so much that they are cross-cutting as that they are based on reasons and distinctions—between viewpoints, most notably—that the First Amendment simply cannot countenance, and that the distinctions that are not cross-cutting are acceptable because, by being based on distinctions that support the doctrinal structure itself, they reflect reasons the First Amendment does not deem impermissible.

As so recast, this understanding of why it can violate the First Amendment to restrict speech that the First Amendment does not value can be an important analytic tool, but its application in *Virginia v Black* rests on shakier foundations. For the majority, *R.A.V.* is explainable by the way in which the cross-burning prohibition there reflected the impermissible state motive to distinguish between, say, racial harmony and racial animosity, but the prohibition in *Black* rested on the constitutionally benign legislative judgment that cross-burning represented nothing more than a particularly virulent form of intimidation. And because excluding intimidating speech from the First Amendment rests on a permissible reason, the Court concludes, Virginia’s motivations in targeting especially intimidating speech are constitutionally permissible.

A closer look at the dynamics of what causes cross-burning to be especially intimidating, however, makes the Court’s distinction between *Black* and *R.A.V.* difficult to accept. What makes cross-burning more intimidating than, say, flag-burning or leaf-burning, or more intimidating than cross-bearing, is precisely the way in

\(^{34}\) Although not usually expressed as it is in the text, the focus not on the protection of speech but on the exclusion of certain reasons for restricting it is consistent with the perspective of a large literature identifying the core of the free speech idea as preventing certain improper government motivations. See Larry A. Alexander, *Low Value Speech*, 83 Nw U L Rev 549 (1989); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U Chi L Rev 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stan L Rev 767 (2001); Frederick Schauer, *The Aim and the Target in First Amendment Methodology*, 83 Nw U L Rev 562 (1989); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm & Mary L Rev 779 (1985).
which cross-burning’s intimidating potential is a function of the racist but constitutionally protected point of view it embodies. Thus, Virginia’s belief that burning a cross is especially intimidating is based solely on the viewpoint-based judgment that symbols with one point of view have effects that symbols with another point of view do not have. Cross-burning is indeed more intimidating than many other forms of intimidation, but the very fact that it is so much more intimidating to African-Americans than to others, as Justice Thomas’s opinion makes so clear,\(^3\) both explains its special horror and renders it difficult to reformulate its harm in viewpoint-neutral terms.

That the Court persuaded itself that cross-burning is simply a more virulent form of intimidation and not an example of crosscutting viewpoint discrimination, however, is not surprising, for the Court’s rationale here sounds in very much the same register as the frequently-discredited-by-everyone-except-the-Court secondary-effects doctrine.\(^3\) In its secondary-effects cases, the Court has concluded that the First Amendment allows content-based restrictions on speech, so long as the restrictions are justified by harmful effects that are merely correlated with speech of a certain content and not caused by the message that the speech is communicating (neighborhoods whose theaters focus exclusively on Walt Disney movies are far less likely to be dangerous and to be the home to non-speech-related crimes than neighborhoods whose theaters feature “adult” fare). Similarly, the Court appears to believe that “intimidation,” like crime in the vicinity of adult theaters, justifies drawing a distinction based on the fact that public displays of some content (flag-burnings) are less likely to be intimidating than public displays of some different content (cross-burnings). Under this rationale, however, even such First Amendment bedrocks as Brandenburg \textit{v} Ohio\(^3\) are open to challenge, because with not much reformulation we might define the harm at issue in

\(^{13}\) 123 S Ct at 1552 (Thomas dissenting).


Brandenburg not as the prevention of syndicalism, as in the actual Ohio statute, but rather as the prevention of physical harm. If Clarence Brandenburg's call to "revengeance" against African-Americans had been understood by Ohio as creating a risk of physical violence, and had Brandenburg been prosecuted under a law aimed at decreasing the incidence of the "secondary effect" of physical violence, would the result have been different? And if not, as is almost certainly the case, then the use of the secondary-effects doctrine, whether in the adult theater cases or under different language in Virginia v Black, cannot do the work the Court expects of it.

That the Court's distinction between Black and R.A.V. is unsuccessful does not by itself answer the question whether Black is wrong and R.A.V. right, or vice versa. But the analytic failure of the Court's attempt to distinguish the two cases means that, hardly for the first time in American constitutional law, there exist two mutually exclusive precedents with no clear indication that the latter supersedes the former. And under these circumstances, it remains for future cases to make the decision between them, and thus to determine whether it will be some version of the secondary effects doctrine that survives despite its analytical flaws, or whether instead the Black outcome will in the future be reformulated to make it clear that, R.A.V. and many other cases notwithstanding, the aversion to viewpoint-based regulation, at least in the area of racial intimidation, is not as unqualified as had previously been thought.

Everyone has his favorite example, but a good example from First Amendment doctrine is the inconsistency between Amalgamated Food Employees Union v Logan Valley Plaza, Inc., 391 US 308 (1968), and Lloyd Corp. v Tanner, 407 US 551 (1972), an inconsistency not resolved until Hudgens v NLRB, 424 US 507 (1976).

That racial intimidation is to the Court and to the Commonwealth of Virginia different from other forms of intimidation becomes more apparent when we focus carefully on the identity of the targets of the intimidation. As explored in the following section, the traditional understanding of the exclusion of threats, verbal harassment, and verbal intimidation from the coverage of the First Amendment is based largely on the face-to-face or otherwise individually targeted nature of the prototypical threat. Other forms of threats and intimidation are aimed at larger communities, however, and there is little doubt that the typical cross-burning is an attempt to intimidate an entire segment of the population. That cross-burning often has this aim and effect, however, does not resolve the First Amendment question, for this characterization seems to apply as well to Brandenburg's threats of "revengeance" against Blacks and Jews, and perhaps as well to Frank Collin's selection of Skokie as the planned locus for the march of the American Nazi Party. Collin v Smith, 578 F2d 1197 (7th Cir 1978), cert denied, 439 US 916 (1978). Perhaps an attempt to intimidate an entire community (even a local community) based on that community's race, religion,
III. Threats and the First Amendment

The distinction, if any, between R.A.V. and Black becomes an issue, however, only because of a logically prior one—the presumed exclusion of threats from the coverage of the First Amendment. In both cases the Court’s analytic framework is premised on a venerable understanding that state and federal laws that are aimed at threats or intimidation may as a general proposition survive First Amendment attack. The question, then, is whether that venerable understanding is sound, and, if so, whether the acts at issue in cases like R.A.V. and Black are the kinds of acts that count as threats or intimidation for First Amendment purposes.

That threats are not protected by the First Amendment seems so intuitively obvious that one searches in vain for a First Amendment case even raising the question whether the person who says “your money or your life” has a nonlaughable defense to a criminal prosecution. Indeed, even when there is no quid pro quo, and thus no act that might better be described as “extortion” than as a “threat,” threats have long been understood to lie outside even the coverage of the First Amendment. Numerous threats, and

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ethnicity, or national origin ought to lie outside of the First Amendment, just as it lies outside the protection of freedom of expression in much of the rest of the democratic world, but reaching that conclusion in the United States, as the parallels with Brandenburg and Skokie demonstrate, would require major upheavals in existing First Amendment understandings and doctrines. We do not know whether eventually allowing the prosecution of group intimidation is what the Court had in mind in Black, but if it did not then the implications of Black remain even more mysterious.


See Thomas M. Scanlon, A Theory of Freedom of Expression, 1 Phil & Pub Aff 203 (1971) (refusing to define “expression” to include “the communication between the average bank robber and the teller he confronts”). The statement in the text should be qualified by reference to the comprehensive discussion in State v Robertson, 649 P2d 569, 581–89 (Ore 1982).

See Shackelford v Shirley, 948 F2d 935, 938–39 (5th Cir 1991); United States v Khorrami, 895 F2d 1186, 1192 (7th Cir 1990); United States v McDermott, 822 F Supp 582, 591 (ND Iowa 1993).
not only the threats that one might make on the life of the President, and not only the threats that one might make on an airplane to pilots and flight attendants, are routinely subject to criminal sanctions without the intervention of the First Amendment. Sometimes we label this intimidation, sometimes we label it bullying, sometimes we label it harassment, and sometimes we label it a threat, but, regardless of the name, the typical case in which one person by his words makes another fear for his physical safety is one that has traditionally coexisted comfortably with even a strong First Amendment.

The major exception to this principle, and even calling it an exception is likely a misnomer, has always been the threat that would not reasonably have been taken seriously. As exemplified by the overheated political rhetoric in Watts v United States, involving a Vietnam protester who had publicly verbalized his wishes to have President Johnson “in my sights,” the permissibility of sanctions for threats has for decades been qualified to exclude those rhetorical extravagances whose minimal likelihood of being taken seriously or literally distinguishes them from what the Watts Court referred to as “true” threats.

It is one thing to say that the words in Watts did not constitute a true threat, but saying it does not tell us very much about the features that distinguish a true threat from a false one. So although Watts remains, R.A.V. and Black aside, the only Supreme Court case on threats and the First Amendment, the case provides virtually no information on just what a threat is other than that what Watts said was not one. And what makes the issue important is not only that First Amendment issues arising out of threats appear
with increasing frequency\(^1\) in the context both of hate speech and of attempts to intimidate abortion providers,\(^2\) but also that the threatening feature of a true threat has frequently been misunderstood in the literature. Indeed, and perhaps as a result of the misunderstanding in the literature and in the earlier lower court cases, what makes a threat a threat for First Amendment purposes appears to have been misunderstood, \textit{en passant}, by the Supreme Court in \textit{Black}.

When we think of the archetypal threat, we imagine a threatener who actually intends to wreak physical (or perhaps financial or reputational\(^3\)) harm on the target of the threat, and then uses words designed to convince the target that the threatener in fact has that intention. If the target is so convinced, if the target believes that the threatener intends to do him harm, then the target develops that array of unpleasant feelings that we tend to call “fear.” But when the target has no reasonable belief in the likelihood that the threatener will carry out the acts literally encompassed by the words, the target will have no (or at least much less) reason to experience fear, and it would be fair to conclude that this is not a true threat.\(^4\) Thus, when the words themselves promise harmful

\(^1\) See \textit{The Supreme Court—Leading Cases}, 117 Harv L Rev 226, 339 at pp 347–49.

\(^2\) See \textit{Planned Parenthood of the Columbia/Willamette, Inc. v American Coalition of Life Advocates}, 290 F3d 1058 (9th Cir 2002); \textit{Planned Parenthood v American Coalition of Life Advocates}, 41 F Supp 2d 1130 (D Ore 1999); Blakey and Murray, 202 BYU L Rev (cited in note 40); Gey, 78 Tex L Rev (cited in note 40).

\(^3\) Or emotional harm, which would be the best characterization of a threat to harm the target’s friends or relatives.

\(^4\) Part of what makes \textit{Watts} confusing is the obvious fact that President Johnson was unaware of Watts’s words and consequently did not have his fear level elevated by them. Where a threat is not communicated to the victim, neither fear nor intimidation are relevant. Unlike the more typical prohibition of threats, the prohibition on threats against the President and those in the line of presidential succession, 18 USC § 871 (2000), appears to rest on the view that intending to injure the President, unlike simply intending to do very much else, triggers extraordinary security measures that disrupt presidential activities solely by virtue of the existence of the threat. See \textit{United States v Hanna}, 293 F2d 1080 (9th Cir 2002); \textit{United States v Patillo}, 431 F2d 293 (4th Cir 1970); \textit{Roy v United States}, 416 F2d 874 (9th Cir 1969); \textit{United States v Adair}, 227 F Supp 2d 586 (WD Va 2002); Note, \textit{Threatening the President: Protected Dissent or Political Assassination?} 57 Georgetown L J 553 (1969); Note, \textit{Threats to Take the Life of the President}, 32 Harv L Rev 724 (1919). Had Watts been serious in his motivation, and had the likelihood of his putting the President in his sights been real, we would be better off thinking of his declared but noncommunicated (to the target) intentions not as a threat but as more akin to an attempt, or some other variety of preparatory offense, with the words constituting the overt act and the permissibility of very early intervention (we normally require that attempts be further along before official action is justified) based largely on the special circumstances of protecting the President. Nevertheless, it is the word “threat” that appears in various federal statutes, and not only
action but the likelihood of harmful action is perceived by the target as very low (as would have been the case even if Watts’s words had in fact been heard by or conveyed to President Johnson), there is little or no fear and thus no threat. And that is why common schoolyard taunts of “I’ll kill you” typically produce neither fear nor legal liability, and that is why as well that those who shout “Kill the umpire!” at a baseball stadium can ordinarily do so with legal impunity.

When the target is genuinely and reasonably afraid, however, there remains a question of why it is that placing someone in reasonable fear for his personal safety (or personal well-being in a larger sense) lies outside of the First Amendment. And perhaps the best explanation we can give might be that such an act brings together numerous reasons for nonapplication of the First Amendment, none of which by itself is a sufficient condition for nonapplication, but all of which, when combined, put the typical threat well beyond any plausible conception of the focus or rationale of the First Amendment.\footnote{The pathbreaking work here is Kent Greenawalt, \textit{Speech, Crime, and the Uses of Language} (Oxford, 1989). And see also Greenawalt’s earlier \textit{Speech and Crime}, 1980 Am Bar Found Res J 645.}

First, the typical threat is face-to-face and addressed to no audience larger than the immediate target. And although one-on-one or other face-to-face communications have a place in the theory and doctrine of the First Amendment,\footnote{See Greenawalt, \textit{Speech and Crime} at 676–77 (cited in note 55); Frederick Schauer, “Private” \textit{Speech and the “Private” Forum: Gibran v Western Line School District, 1979 Supreme Court Review 217; Steven Shiffrin, \textit{Defamatory Non-Media Speech and First Amendment Methodology}, 25 UCLA L Rev 915, 932 (1978).} much of importance about the First Amendment is captured in the utterance aimed at a larger and indeterminate audience. This is especially true when the subject of the speech is largely devoid, as is the typical threat, of political, ideological, or other normative content, and when the threat is delivered in order to serve the personal goals of the threatener rather than being aimed at larger social change or public good. Moreover, those threats that one reasonably may take seriously have the kind of immediate psychic effect that might fit within Greenawalt’s category of “situation altering”\footnote{Greenawalt, \textit{Speech and Crime} at 680–83 (cited in note 55).} utterances, and that
certainly come within what the Supreme Court has, in the context of one of the harms of fighting words, described as words that inflict injury by their very utterance. Finally, the harm of the direct threat, unlike even the injury done by what the Chaplinsky court was likely imagining, is not ephemeral, and typically produces persistent rather than simply passing mental distress. Presumably the Court in Chaplinsky was thinking of a harm not dissimilar to the harm of hearing fingernails on a blackboard, or seeing a particularly gruesome picture, but such harms often end shortly after the stimulus itself is removed. In the case of the fear produced by a threat, however, the fear is caused not by the words themselves, but by the proposition that serious danger is likely, and the fear produced by hearing (and believing) such a proposition is not one that disappears quickly. In many instances, therefore, the harm produced by the kind of threat that involves a serious face-to-face (or equivalently targeted) announcement to the target that the announcer intends to harm the target is clear, present, and, for the target, substantial.

The foregoing account may help to explain why serious face-to-face or otherwise targeted threats are typically beyond the First Amendment's reach, but if this account is even close to a sound one, then it is noteworthy that it excludes any reference to whether the threatener actually intends to carry out the acts represented by the threat. There are occasional suggestions in both the case-law and the literature that threats are punishable consistent with the First Amendment only if there is some likelihood both that the threatener intends to carry out the threat and also that the threatener will in fact do so. And if we take Watts as of a piece with Brandenburg v Ohio, not an unreasonable historical assump-
tion given the timing of the two cases, such an interpretation of a constitutionally punishable threat is sound. To the extent that Brandenburg is best understood as embodying both a requirement of explicit and intentional incitement and a requirement of some likelihood that the inciter’s audience will indeed act in accordance with the incited act—clear and present danger in modern clothing—then an incitement that does not make likely an ensuing unlawful act remains constitutionally protected.

Whether this account of the constitutional status of threats is sound, however, turns out to be a function of how we conceive of the harm that a threat does. If the harm of a threat is the harm of the threatened act, as the R.A.V. majority believed it, in part, to be, then the likelihood of the threatened act occurring is properly part of the calculus. Brandenburg would then provide the proper analysis, such that threats that carry little likelihood of being carried out remain protected by the First Amendment. Moreover, to the extent that we remain in the thrall of the threats-against-the-President example, and take a threat against the President as a prototypical threat rather than an exigency-produced or historically-produced unique example, we are again likely to see the core idea of a threat as located in the probability of the threat’s consummation.

The probability of a threat’s consummation, however, is a harm dramatically different from a harm located in the fear and distress of the listener and conceptualized in terms of the effect of the words on the target and not in terms of the probability of the occurrence of physical (or other) injury. If the harm of the threat is the fear and not the act, and this is consistent with seeing threats as of a piece with harassment and intimidation, then the threat of even an unlikely act would cause the requisite harm as long as the listener was unaware that the act was unlikely. When a listener has a reasonable belief that the threatened act will ensue, the fact that the reasonable belief is incorrect—the threatener had the intent but not the ability to carry out the threat, for example, or the threatener intended to scare or intimidate the listener but never

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62 505 US at 388, concluding that one of the reasons that threats are unprotected by the First Amendment is that individuals need to be protected “from the possibility that the threatened violence will occur.”

63 See Watts, 394 US at 709 (Douglas concurring).
had any intention to follow through on the threat—is irrelevant, except perhaps as evidence in the initial determination whether the belief was reasonable. Our first conclusion, therefore, ought to be that if we properly understand the harm of the threat as coming from the effect on the target of the communication itself and not from the likelihood of the threatened act, then the actual likelihood of the threatened act occurring—the clear and present danger component of the Brandenburg test—is essentially beside the point. Unfortunately, the Court in R.A.V., although recognizing that protecting the targets from fear was a primary purpose of the law of threats, also included the language about protecting against the possibility that the threatened act will in fact occur, and consequently R.A.V. itself contributes to the persistent confusion about the core of the problem of threats, and thus to the uncertainty about whether the probability of the threatened act occurring must be shown in order to support a constitutionally valid conviction.

IV. Is Intent a First Amendment Requirement?

But even if the harm of a threat comes from its effect on the listener and not from the likelihood that the threatened act will occur, and even if it would therefore be mistaken to require

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64 Part of the confusion may stem from the apparent rigidity of Brandenburg itself. Consider an individual or organization who provides the names and addresses of abortion providers to those who wish to (and have the ability to) murder or otherwise harm those providers. This is the factual background for the "threat" and "intimidation" provisions of the Freedom of Access to Clinics Entrances Act, 18 USC § 248(a)(1)(2000), and also for the widely discussed (see Gey, 78 Tex L Rev (cited in note 40)) Nuremberg Files litigation. Planned Parenthood v American Coalition of Life Activists, 945 F Supp 1355 (D Ore 1996) (denying motion to dismiss), 23 F Supp 2d 1182 (D Ore 1999) (denying motion for summary judgment), 41 F Supp 2d 1130 (D Ore 1999) (granting injunction and affirming jury award of damages). If we take Brandenburg as requiring literal words of incitement rather than vague calls to action, and as requiring genuine immediacy of action (Hess v Indiana, 414 US 105 (1973)), and as encompassing the provision of factual information as well as the making of normative argument, then cases like the Nuremberg Files present a high likelihood of grave danger while also falling outside of the Brandenburg strictures. In other words, obliquely delivered information-laden calls for less-than-immediate concrete violent action addressed to sympathetic audiences appear to be extremely dangerous, yet appear as well to be protected under the standard understanding of Brandenburg. Faced with these alternatives, Congress and some courts appear to have chosen to describe these calls to action as threats rather than attempt to change or contextualize the holding in Brandenburg, despite the fact that the danger is better understood as coming from a call to concrete violent political action than as from a threat in the more precise sense. Brandenburg remains intact, therefore, largely at the cost of creating a new category of "threats" quite different from the category of threats as it has traditionally been understood in the criminal law and in parts of the law of the First Amendment.
a showing of actual likelihood (as opposed to perceived likelihood), two questions of intent remain. The first of these relates to the threatener’s intent to carry out the threat itself, an issue that arises out of the suggestion in some lower court cases and in the literature that a threatener in order to fall outside the protection of the First Amendment must at least have intended to carry out the threat. Yet once we see that actual likelihood is itself no part of a threat’s First Amendment status (or nonstatus, if you will), it is hard to see why an intent to follow through would be necessary. Perhaps, as seems to be suggested in the literature, such an intent requirement is a purely prophylactic measure designed to ensure that threats not likely to have been taken seriously will not be subject to legal liability, but such an approach seems rather an indirect way of achieving that end given the irrelevance except in an evidentiary way of the likelihood of the threatened act actually occurring. If we are concerned with erecting a buffer zone around the concept of a threat, there are ways of achieving those ends that are much less exercises in indirection, of which the most obvious is perhaps simply to have a more precise definition of what is to count as a threat in the first place.

But even if the First Amendment does not impose a requirement of proof of intent to carry out the threat, we are not finished with intent, for it is plain that both the Commonwealth of Virginia and the Black majority (and, perhaps, the Black dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate. If there is no such First Amendment requirement, then Virginia’s statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it. To put the issue more precisely, the Virginia statute prohibits not intimidation but intent.

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65 *United States v Watts*, 402 F2d 676, 691 (DC Cir 1968) (Wright dissenting).
67 Moreover, the importance of a separate buffer zone is itself a function of whether a buffer zone is incorporated into the substantive rule itself. When the substantive rule is itself overprotective of First Amendment values in order to prevent those values from being underprotected in a nonideal world, as is plainly the case with defamation, for example, then adding an additional buffer zone is both a form of double counting, see *Calder v Jones*, 465 US 783 (1984), and an under-the-table way of slighting whatever may be the interests competing with the free speech interests. See Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 BU L Rev 685 (1978).
tional intimidation, and the question is whether, apart from whatever mens rea requirement might be imposed by the criminal law generally, the First Amendment supplements this with a special First Amendment mens rea requirement, the import of which is that only by requiring a specific intent to intimidate could Virginia prosecute an intimidating act. That just this kind of intent was required by the First Amendment appears to have been assumed by the Virginia legislature, by the Virginia Supreme Court, and by the Supreme Court of the United States, but perhaps this assumption is unwarranted.

That the First Amendment does not impose an intent requirement may seem heretical, but let us examine the issue more closely. We start with the proposition that on frequent occasions a speech act is not protected by the First Amendment, and that this state of affairs is typically the consequence of that act being both less valuable (from a free speech perspective) and more harmful than the typical protected speech act. This is of course an egregious oversimplification of the architecture of the First Amendment, but it will do for present purposes. The question then is whether it is the character of the act itself or the nature of the speaker's intent that removes the case from First Amendment protection. And although it might be tempting to think, as both Virginia and the Court thought, that the speaker's intent is a necessary condition for nonprotection, it is hardly clear from the case law that this is so.

Consider first *Brandenburg*. Building on Learned Hand's opinion in *Masses Publishing Co. v Patten*, Brandenburg requires not only a likelihood of a dangerous act actually ensuing (clear and present danger), but also a "direct" encouragement to that act. Typically we understand "direct" to refer to the literal or explicit meaning of the words of incitement, and that is why, to take one of the old chestnuts of *Brandenburg* analysis, Marc Anthony's oration over the body of Caesar would be immune from sanction, but an explicit

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69 See Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law* 1049 (Foundation, 13th ed 1997). Understanding Marc Anthony's speech as not counting as "direct" for purposes of *Brandenburg* implies that his words were understood by his audience as vague or oblique, even if their general import was comprehended. If the audience understood his words as a literal code in which he was explicitly calling for specific action, the example collapses, and it is hard to imagine that Judge Hand in *Masses*, the Supreme Court in *Brandenburg*, or any of the subsequent commentators would exclude from the idea of a
call for immediate violent acts, assuming all of the other facets of Brandenburg were satisfied, would be subject to punishment. But although Brandenburg requires that specific words of incitement be used, and although a criminal prosecution would presumably necessitate proof that the speaker intended to use those words, nowhere does Brandenburg say anything about the speaker actually intending that what the words urge would in fact come to pass. So let us return to “Kill the umpire!” Suppose it is a moment of high drama late in a crucial baseball game between two traditional rivals, say the Yankees and the Red Sox. And suppose the Yankee left fielder, a man of Japanese origin and citizenship, having just hit the ninth inning home run that gives the Yankees the lead, returns to left field as the Red Sox are batting in the bottom of the ninth inning. When he arrives at his position, a Red Sox fan in the left field stands cries out, “Remember Pearl Harbor! Bomb the Jap with beer!” As a result of this encouragement, suppose then that a number of fans throw at the player whatever beer they have not yet consumed, some of it in full cans and plastic cups, causing the player a serious head injury. The inciting fan is prosecuted for aiding and abetting a battery, or some such crime, and his defense is that he never intended that any of the fans actually do what he explicitly urged, any more than fans typically actually desire the homicide of the umpire whose calls have so displeased them. However reckless he may have been in not realizing that his words would be taken literally and acted upon, our left field fan insists that was not his intention, and therefore his words remain shielded by the First Amendment.

"direct" incitement the use of Morse Code, semaphore signals, or code words whose specific meaning was well understood by both speaker and audience. Professor Alexander takes this to undercut the general view that literal incitement is required under Brandenburg, see Alexander, Incitement and Freedom of Speech (cited in note 12), but it seems more in the spirit of Brandenburg to maintain the literal incitement requirement, but with the qualification that one can literally incite by using language understood by the audience to refer in that context to highly specific acts of illegality, even if that language might depart from the dictionary meaning of that language.

70 It is, of course, no longer actually possible to buy a full can of beer, in a can, at a baseball or football stadium, but the reason why this is now so makes it clear that my hypothetical is based on a long history of real events of just this sort.

71 Those who are not baseball fans should feel free to substitute an example in which an angry crowd is milling around the gate agent at an airport under circumstances, again hardly fanciful, in which the flight is long delayed and the gate agent is providing either no information, or evasive information, or flat-out lies. One of the angry passengers cries out, "Get her away from that screen! We need to find out what the real story is!" whereupon another passenger throws the gate agent to the ground so he can see the computer screen. The
One possibility, of course, is that the fan's argument prevails, and that Brandenburg's incitement component includes not only a requirement that explicit words of incitement be used, but also that the user of the words have intended or desired that the incited acts actually occur. But if instead it may be right that the speaker can be prosecuted under the circumstances of our hypothetical example because he is as responsible for the ordinary meaning of his words as he is for the ordinary consequences of pulling the trigger on a gun ("I didn't know it was going to go off" is unlikely to be a good defense, even though guns sometimes misfire), then it may be that Brandenburg is best understood as saying what it said and not saying what it did not say. That is, Brandenburg may be best interpreted as not incorporating a distinct First Amendment-rooted intent requirement, although of course it will usually be the case that a person intends the ordinary meaning and natural consequences of the words he uses.

It is worthwhile noting here that the same issue appears to exist throughout the First Amendment. Although a person cannot be prosecuted for distributing obscene materials without proof that he knew the nature and character of the materials, it is not necessary for the prosecution to show that the defendant intended for the purchaser to use the materials for prurient interest, even though some purchasers might have different goals for the material. In other words, although appeal to the prurient interest is, inter alia, the rationale for the noncoverage of obscenity by the First Amendment, it is the materials in their ordinary and expected use that create the nonprotection, and not the distributor's mental state.

gate agent is injured, and the inciter is prosecuted. Assuming First Amendment coverage in the first instance (less clear than in the sports fan case), does the fact that the inciter may not have intended that his words be acted upon immunize him from prosecution?

This is the understanding that one finds in the literature. See William W. Van Alstyne, *Interpretations of the First Amendment* 107-08 n 43 (Duke, 1984); Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 10-22 (Michie, 1996); Frank Strong, *Fifty Years of Clear and Present Danger: From Schenck to Brandenburg and Beyond*, 1969 Supreme Court Review 41.


So too with defamation. Even putting aside the possibility that mere "reckless disregard" of falsity may generate liability consistent with the First Amendment, even the degree of intentional falsity that goes by the name of "actual malice" in *New York Times Co. v Sullivan* requires only that the defendant have known that the allegations were false but not that the defendant have intended that the allegations would cause harm. And although less directly relevant because of the complex First Amendment status of commercial advertising, it is instructive that the status as commercial speech, a status that produces a lower level of First Amendment protection, is again a status that is determined by the content of the advertisements and not the intentions of the speaker. That someone who advertises a product does not possess the profit-seeking motivation that partly justifies the lower level of protection does not change the approach that would be used to determine whether the material itself can be controlled, or whether the purveyor of the product may be sanctioned.

When we rehearse this litany of areas in which the First Amendment appears not to impose an intent requirement, we see that Virginia's intent requirement may have been superfluous, that the Court may have blundered by accepting it so easily, and that Justice Thomas, despite having relied on the long-discredited distinction between speech and conduct, may nevertheless have accurately identified what lies at the heart of the issue in *Black*.

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75 I put this possibility aside largely because "reckless disregard" has been interpreted to require proof of "awareness of probable falsity," such that the publisher "in fact entertained serious doubts as to the truth of his publication." *St. Amant v Thompson*, 390 US 727, 731 (1968).


Suppose that Virginia had simply omitted the intent requirement from the statute, and had prosecuted Black for intimidation. That is, suppose, to take the clearest example, that Elliott and O'Mara had burned a cross right on the line (on their property but plainly visible from Jubilee’s) between Elliott’s house and that of his African-American neighbor, and that Elliott and O'Mara were then prosecuted for intimidating, or for threatening. At trial the only evidence is the act of cross-burning, and the jury is asked to conclude that the threatening dimensions of burning a cross are as plain as the threatening dimensions of standing on the property line and shouting the words “We will lynch you just like we lynched your ancestors.” Now if in the latter case no separate evidence of intent to intimidate or put in fear is necessary because of the natural import of the words, and there is nothing in the case law to indicate to the contrary, then it is clear that Virginia’s intent requirement is not something that would have been necessary in an ordinary case involving threatening words.

If this is so, then the Court may have been too quick to accept, en passant, the necessity of the specific intent requirement. The First Amendment does not of course prohibit Virginia from adding such a constitutionally unnecessary but not constitutionally prohibited requirement, but if the requirement was unnecessary then the presumption contained in it could not, except in a quite different kind of case, create nearly as much of a constitutional problem as seven and perhaps even eight members of the Court imagined it did. Alternatively, of course, seven to eight members of the Court may have believed that such a requirement was constitutionally necessary, but if that is what they believe, then we still await an explanation, in light of the existing case law, of why they believe it, what First Amendment purposes it will serve, and what this

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[80] Part of the issue is about the question whether the First Amendment protects speakers primarily or merely instrumentally. If the First Amendment is the kind of deep-down individual right that treats speaker protection as an end in itself, as some theorists have advanced, see, for example, Ronald Dworkin, Taking Rights Seriously 190–98 (Harvard, 1977); C. Edwin Baker, Human Liberty and Freedom of Speech (Oxford, 1989); Martin Redish, The Value of Free Speech, 130 U Pa L Rev 591 (1982), then keying free speech protection to a speaker having a certain kind of expressive or communicative intent may make some sense. But if we protect speakers not foundationally but instrumentally to, for example, seeking the truth, or correcting errors, or advancing knowledge, or preventing abuse of governmental power, then the speaker's state of mind has virtually no First Amendment import. Indeed, the fact that corporations have free speech rights, see, for example, First National...
requirement does in, say, *Brandenburg* cases in which defendants claim simply that they were joking.

This line of analysis works, however, only if the communicative act of burning a cross is equivalent in important ways to the communicative act of uttering the words “We will lynch you just like we lynched your ancestors,” and it may be on this issue that the *Black* case truly turns. In both Justice O'Connor's partly majority and partly plurality opinion, and in Justice Souter’s partial dissent and partial concurrence in the judgment, much is made of the fact that cross-burning may serve what we can call “benign” purposes, such as affirming the solidarity of members of the Ku Klux Klan. But of course various forms of language that standardly mean x may also on occasion mean something else. “We will lynch you just like we lynched your ancestors,” for example, may be intended as a joke, hyperbole, metaphor, or irony, and we can imagine cases in which those who have used those words are, as in *Watts*, not taken seriously by anyone, and cases in which those words are taken seriously by a consequently terrified target, but in which the speaker subsequently claims he did not intend that they be taken seriously. Thus, it is clear that were the words both intended to intimidate and had the effect of intimidating, the First Amendment would not protect them. And it is equally clear that when the words are neither intended to intimidate nor understood as intimidating, *Watts* prohibits prosecution. The important case is the one in which there is an understanding of intimidation but no intent to intimidate, and it is here that the Court appears to have gone astray, at least if we conclude that the Court’s conclusion and its overbreadth analysis would have been different in the case involving “We will lynch you just like we lynched your ancestors” than it was in the *Black* case itself.

It is possible that the Court focused so closely on nonstandard meanings of cross-burning as a consequence of an empirical dis-

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*Bank of Boston v Bellotti*, 435 US 765 (1978), suggests that at the heart of American free speech understandings is an instrumental and not foundational focus on the speaker, for if we were concerned primarily with the speaker's self-expression it is not nearly so clear that we would protect corporate speech.

81 There is of course nothing benign in the moral or political or sociological sense in something being used to affirm Klan solidarity, but as long as the evil of the Klan is irrelevant to the First Amendment, then using cross-burning to affirm Klan solidarity is no less benign under the First Amendment than is using flag-burning to affirm antwwar solidarity, or flag-waving to affirm pro-American solidarity.
agreement about the prevalence of the nonstandard meanings. Both the O'Connor and Souter opinions rely heavily on various secondary historical works, consistent with a recent and problematic trend on the Court to rely on secondary sources not cited by the parties to reach a conclusion about a genuinely contested factual issue that is central to the resolution of the case. Based on their reading, Justices O'Connor and Souter appear to believe that cross-burnings that have neither intimidating intent nor intimidating effect occupy a large enough part of the universe of cross-burnings that reliance on the ordinary meaning of the act would be substantially overinclusive. By contrast, Justice Thomas, first in his widely reported questions from the bench during oral argument and then in his dissenting opinion, appears to believe that cross-burning has essentially only one meaning, and that non-threatening (or nonintimidating) cross-burnings are about as frequent as nonthreatening utterances of the words “We will lynch you just like we lynched your ancestors.” For this conclusion, Justice Thomas relies in part on his own collection of not-cited-in-the-briefs secondary sources, and in much larger part on his own perceptions from his own experiences and his own life.

The central question in Black thus turns out to be really three related questions. First is the factual question whether there is a sufficiently large domain of nonstandard uses of the communicative act of cross-burning to fault Virginia for scooping up the nonstandard and thus constitutionally protected uses within the ambit of a rule reaching the right result in the standard case. Second is the question of what resources the Court will draw on in answering the first question. And third is the question of whether it matters, and if so how much, that we are here dealing with the question of nonstandard uses of a nonlinguistic communicative act rather than a linguistic one. Having touched on the first two, it is now time to say something about the third.

V. SYMBOLIC SPEECH REDUX

Although it is hard to tell for sure, one suspects that the nonlinguistic aspect of the communication loomed larger for all

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82 For a lengthy commentary on this phenomenon, see Frederick Schauer, The Dilemma of Ignorance: PGA Tour, Inc. v Casey Martin, 2001 Supreme Court Review 267.

of the Justices than might be justified. For Justice Thomas, whose First Amendment analysis was presented as an alternative to simply concluding that cross-burning is conduct and not speech, the analysis that first emerged in United States v O'Brien, that was further developed in the flag-burning cases from Spence v Washington through United States v Eichman, and that has been embellished in cases like Clark v Community for Creative Non-Violence as well as in the literature, was beside the point. We do not know whether Justice Thomas wishes to discard the O'Brien approach, or whether instead he believes it is inapplicable as a threshold matter to cases of this type, but without his providing more elaboration this aspect of his opinion seems not terribly useful. It is true, as he says, that the First Amendment is not applicable to someone who burns down a house and then claims he did it for political reasons, but it is not true that a statute prohibiting burning down houses for political reasons would be permissible. By collapsing the distinction between the communication-restricting aspects of laws of general application and the issue of laws aimed at the communicative impact of physical acts, this part of the Thomas opinion signals that the long-excoriated speech-conduct distinction may still have some life.

This aspect of Justice Thomas's opinion is important not because it signals the demise of the O'Brien approach, for Justice Thomas's potential vote on this issue is still only one out of nine. Rather, the importance lies in the way in which, although slightly more masked, the hold that a distinction between language and other forms of communication has on us pervades all of the other opinions, and pervades First Amendment thinking itself.

In focusing on the nonstandard messages sent by acts of cross-burning, Justice O'Connor and Justice Souter both appear to reach conclusions different from the conclusions they would have reached.

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84 391 US 367 (1968).
88 See authorities cited in note 14 and also Keith Werhan, The O'Briening of First Amendment Methodology, 19 Ariz St L J 635 (1987).
89 123 S Ct at 1566.
had the case been about the words, "We will lynch you just like we lynched your ancestors." Although it is true that Watts likely prevents the state from punishing all uses of those words, for some might be as benign as the alleged threat in Watts itself, and although this fact presumably makes a conclusive statutory presumption of meaning (and not of intent) still constitutionally problematic, the tenor of both the O'Connor and Souter opinions signals that the worry about prohibiting or chilling nonstandard and First Amendment-protected uses of cross-burning is a large one. And that in turn seems to be a function of the resistance of Justices O'Connor and Souter to the idea that nonlinguistic communication can have the kind of tight distribution of possible meanings that we (or at least those of us who believe in plain meaning) associate with words and language. It is undoubtedly true that Justices O'Connor and Souter would acknowledge the similarity when we are dealing with nonverbal acts that have precise linguistic translations. The extended middle finger is the most obvious of these, but there are others as well, as when a band leader's drawing of his index finger horizontally across his neck is instantly understood by the musicians to mean "stop." In these and many other instances, the nonverbal communication seems akin to using semaphore flags to send a verbal message, and I doubt that any member of the current Court would propose treating any of these cases differently for virtually any purpose than they would treat a case involving words (or pictures) alone.

When there is no exact linguistic analogue, however, when there is nothing we would call a "translation," things get trickier, and one strongly suspects that one reason that both Justice O'Connor and Justice Souter focused so much on the nonstandard uses, and thus relied heavily on overbreadth analysis, is a background belief in the inherent imprecision of nonlinguistic communication. And although it is true that nonlinguistic communication that has some communicative content may still have multiple meanings and fuzzy edges—the Frenchman's shrug, for example—much the same can be said about language. It is of course rare for a speech-restricting statute to say exactly which language is prohibited, but one still wonders whether the focus on alternative and nonstandard meanings would have been as important had we been dealing with a case in which the issue was the potential nonstandard meaning of a verbal threat. If the Virginia statute had prohibited simply intim-
idation, or had prohibited the use of intimidating words, and if the prosecutor has presented evidence of the property-line use of "We will lynch you just like we lynched your ancestors," would the Court have been as concerned about a prosecution that treated this as a sufficient prima facie case as we suspect it would have been in an otherwise identical case involving cross-burning? And if not, then Black may be more about the Court's belief that "symbolic" speech is different from "real" speech than it may at first appear.

At the heart of the Thomas opinion, and to a considerable extent the Scalia opinion as well, is thus a position whose challenge remains unanswered in either the O'Connor or the Souter opinions. This is the view that for at least one nonlinguistic communicative act there is sufficient convergence of meaning such that it no more offends the First Amendment to use this meaning as a rebuttable indicator of these regulable consequences than it does to use the standard meaning of the words "Burn Down the Draft Board Now" as a rebuttable indicator of the communicative content that even Brandenburg allows to be punished. Although he does not put it this way, Justice Thomas appears to be claiming that cross-burning has a conventional meaning as firm as the conventional meaning of many words, and that the Court's analysis is deficient in failing to recognize that although convention is a necessary condition for linguistic meaning, it is also often a sufficient condition for meanings of other kinds. To note that cross-burning may have a conventional meaning with a moderately tight distribution around its central core is not necessarily to resolve the final issue in Black. After all, Justice Thomas may be wrong, as Justice O'Connor and Justice Souter think he is, for their opinions and their focus on other communicative uses of cross-burning are but a polite way of saying to Justice Thomas that his perceptions of the meaning of cross-burning, for understandable but no less mistaken reasons, are substantially narrower than are theirs. But whether Justice Thomas or Justices O'Connor and Souter are right about the meaning of cross-burning, it is clear that the Thomas opinion properly exposes the issue as one surrounding the content and the character of the conventional meaning of cross-burning.

What makes the issue even more important is the fact that the distinction between linguistic and nonlinguistic communication, or between traditional and nontraditional forms of protest, say, has
doctrinal consequences in other parts of the First Amendment. Would the alleged balancing in Clark v Community for Creative Non-Violence\textsuperscript{91} have had more bite if the communicators had been readers or writers or speakers rather than sleepers? Would Texas v Johnson\textsuperscript{92} have been 9–0 rather than 5–4 had it involved a nationally important text (the Little Red Book in Mao's China comes to mind) rather than a nationally important symbol? Would Robinson v Jacksonville Shipyards,\textsuperscript{93} taking seriously but ultimately rejecting a First Amendment defense to a sexual harassment claim, have even looked like a First Amendment case had it not been for the First Amendment associations of Playboy magazine, associations that come less easily to mind when the vehicle of the hostile environment is less characteristic of the First Amendment's traditions even if no less communicative? We do not know the answers to these questions, but we may suspect that Virginia v Black indicates that, even if not as overtly as in the opening portions of Justice Thomas's opinion, the distinction between language and other forms of communicative conduct has a greater pull on the development of First Amendment doctrine than we may imagine.

VI. Conclusion: Freedom of Speech and the Law of Speech

As the discussion in Part IV above has, I hope, shown, we know far less about the role of speaker's intent in First Amendment analysis than we have thought, and not necessarily because it is less important. The role of regulatory intent has been pervasively and importantly analyzed, but the role of a speaker's intent has been long neglected. Perhaps that neglect was justified, and speaker's intent is at best a minor wrinkle in free speech doctrine. But the confusion about the status of threats and the First Amendment, a confusion that neither R.A.V nor Black does much to dispel, suggests that the confusions about the role of speaker's intent would be better sorted out sooner than later.

To say this, however, is not necessarily to say that speaker's intent should in fact play a larger role than it plays now. Perhaps it

\textsuperscript{91} 468 US 288 (1984).
\textsuperscript{92} 491 US 387 (1989).
\textsuperscript{93} 760 F Supp 1486 (MD Fla 1991).
should play a smaller role,94 and perhaps understanding why this is so would have kept Virginia from having gone down the wrong path in its legislation, and would have prevented the Supreme Court from following Virginia down the same false path. As it is, the Court's unsatisfactory distinction between R.A.V. and Black leaves open far more questions about hate speech and about threats than it answers.

One reason the area of intent and the First Amendment remains murky is that for too long we have treated First Amendment doctrine as entirely discontinuous from those other areas of law in which the legal system has confronted the distinction between what a speaker intends and what a speaker says. Because what it is for a speaker to mean something varies with how this distinction is negotiated, the questions that arise when there is a gap between what a speaker intends the listener to understand and what the listener in fact understands go to the heart of numerous different areas of law. The First Amendment has learned little from debates common in contract and defamation law, for example, or from debates about constitutional and statutory interpretation, but all of these areas, like the First Amendment, involve the law of speech. One need not think that the First Amendment can or should pervade very much of the law of speech to recognize nevertheless that there are lessons from the laws's centuries-old confrontations with language and meaning that could inform the First Amendment's own special form of confrontation with speech. And one need not think that the vast areas of regulation of communication now unencumbered by First Amendment thinking and doctrine should be otherwise in order to appreciate that the law of language, whether First Amendment constrained or not, could be refined for the better by understanding the role of intentions and conventions in the operation of language. For although communication is at its core conventional, and requires conventions in order to succeed, it is not a necessary truth that the things we call "words" and "speech" are the only types of conventions that make communication possible. When put this way, it seems obvious, but the obviousness of the continuity between linguistic and nonlinguistic communication remains to be fully grasped by the Supreme Court. Although Justice

94 See note 80.
Thomas’s conclusions in *Black* would require more repeal of existing First Amendment doctrine than many of us would be willing to accept, the special power of his observations about the conventional meaning of at least one item of nonlinguistic communication may nevertheless pave the way for finally giving the idea of “symbolic” speech the interment it so richly deserves.