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Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten

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Summary

Almost half of the states outlaw cross burning with the intent to threaten as such. A few of these statutes cover the display of hangman's nooses and other symbols of intimidation as well. Moreover, the same misconduct also frequently falls under more general state prohibitions on coercion, terroristic threats, harassment, or hate crimes. Some of these laws feature a hate crime element without which conviction is not possible; others do not. In either case, there are obvious first amendment implications.

The Supreme Court has explained that not all speech, particular expressive conduct, is protected by the First Amendment. However, in *R.A.V. v. St. Paul*, it held cross burning with the intent to annoy was protected and did not come within the "fighting words" category of unprotected speech. Shortly thereafter, in *Black v. Virginia*, the Court held that cross burning with the intent to convey a true threat was not protected. Some of the Justices noted another difference between the two cases: the ordinance in *R.A.V.* had a hate crime element — the offense had to be motivated by racial or some other discriminatory animus; the statute in *Black* had no such element.

In years since *Black* was announced, the lower courts have continued to recognize true threats as unprotected, but have also continued to analyze challenges to threat statutes under the First Amendment's overbreadth doctrine and the vagueness doctrine of the Fifth and Fourteenth Amendments' due process clauses. These laws have generally survived such challenges, although an imprecisely worded statute has fallen victim to a vagueness attack upon occasion.

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Introduction

Burning crosses, exhibitions of hangman's nooses and similar displays are the subjects of criminal statutes in virtually every state in the Union. The coverage of those statutes varies a great deal. The Supreme Court's decision in *Black v. Virginia*[1] serves as a reminder that efforts to enlarge their scope raise serious, but not insurmountable, First Amendment implications.

Cross Burning

Legislatures in almost half of the states have enacted statutes that explicitly outlaw cross burning in one form or another.[2] The most common variety simply states, "It shall be unlawful for any person, with the intent of intimidating any person or group of persons to burn, or cause to be burned, a cross on the property of another, a highway, or other public place."[3] In other places, a specific cross burning

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[1] 538 U.S. 343 (2003).

[2] ALA.CODE §13A-6-28; ARIZ.REV.STAT.ANN. §13-1707; CAL. PENAL CODE §11411; CONN.GEN.STAT.ANN. §46a-58; DEL.CODE ANN. tit.11 §805; FLA.STAT. ANN. §876.17; GA.CODE §16-11-37; IDAHO CODE §18-7902; ILL.COMP.LAWS ANN. ch.720 ¶5, §12-7.6; LA. REV.STAT.ANN. §14:40.4; MD. CODE ANN.,CRIM. LAW §10-304; MO. ANN. STAT. §565.095; MONT.CODE ANN.§45-5-221; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN. §2C:33-10; N.C.GEN.STAT. §14-12.13; OKLA.STAT.ANN. tit.21 §1174; S.C. CODE ANN. §16-7-120; S.D.COD.LAWS ANN. §22-19B-1; VT.STAT.ANN. tit.13 §1456; VA. CODE ANN. §18.2-423; WASH.REV.CODE ANN.

[3] LA.REV.STAT.ANN. §14:40.4[A.]. Given the individual complexities of state sentencing and correctional structures, a discussion of the sanctions that follow as a consequence of violation of the statutes examined here is beyond the scope of this report.

proscription has been affixed to the state's civil rights law,[4] its threat statute,[5] or its harassment provision.[6]

Without more, these proscriptions do not ordinarily reach beyond burning crosses to hangman's nooses or other such harbingers of violence. In response several jurisdictions have resorted to generic condemnation of symbols or exhibitions calculated to intimidate or threaten. One such example states briefly,

> It shall be unlawful for any person or persons to place, or cause to be placed, anywhere in the state any exhibit of any kind whatsoever with the intention of intimidating any person or persons, to prevent them from doing any act which is lawful, or to cause them to do any act which is unlawful. FLA.STAT.ANN. §876.19.[7]

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[4] *E.g.*, "(a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United Stats, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability....

"(c) Any person who places a burning cross or a simulation thereof on any public property, or on any private property without the written consent of the owner, shall be in violation of subsection (a) of this section." CONN.GEN.STAT.ANN. §46a-58. As noted below, several states include a hate crime element within their coercion, terroristic threat, or harassment statutes.

[5] *E.g.*,"(a) A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

"(b) A person commits the offense of a terroristic act when: (1) He or she uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another's household; ..." GA.CODE §16-11-37(a), (b)(1).

[6] "No person may maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry or national origin: (1) causes physical injury to another person; or (2) Deface any real or personal property of another person; or (3) Damage or destroy any real or personal property of another person; or (4) Threaten by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts prohibited in subdivision (1), (2), or (3) of this section will occur," S.D.COD. LAWS ANN. §22-19B-1.

"For purposes of this chapter, the term 'deface,' includes cross-burnings, or the placing of any word or symbol commonly associated with racial, religious, or ethnic terrorism on the property of another person without that person's permission," S.D.COD.LAWS ANN. §22-19B-2.

[7] *See also*, N.C.GEN.STAT. §14-12.13 ("It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful.");and CAL. PENAL CODE §11411; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN.

General Prohibitions

Both the states that have explicit cross burning statutes, as well as those that do not, often have coercion, terroristic threat, harassment or civil rights statutes of sufficient breadth to prosecute misconduct that might otherwise be tried under a cross burning statute.

Coercion.

Coercion is a crime that dates from the Nineteenth Century Field Code (1865). It is a crime reminiscent of extortion but without the extraction of property required of that offense.[8] In those states in which it is found, it is essentially the same. It prohibits efforts to compel another through the use of threats to do or refrain from doing something the victim is legally entitled to do:

> A person commits the crime of criminal coercion if, without legal authority, he threatens to confine, restrain or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act.[9]

A few states characterize as the crime of intimidation the crime known elsewhere as coercion.[10] In either case, the proscription would apply where a cross burning or other symbolic threat is designed to discourage another from exercising or refraining from exercising a particular lawful prerogative.

Terroristic Threats.

State terroristic threat statutes are diverse. At one time, such statutes encompassed only threats to commit a serious crime against person or property. Today those elements have been replaced and augmented with an array of provisions relating to hoaxes and false alarms of catastrophic consequences.[11] In those states

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§2C:33-10; S.D.COD.LAWS ANN. §22-19B-1.

[8] Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 405 (2003) ("Eliminating the requirement that property must be obtained to constitution extortion ... would eliminate the recognized distinction between extortion and the separate crime of coercion....").

[9] ALA.CODE §13A-6-25(a); *see also,* ALASKA STAT. §11.41.530; ARK.CODE ANN. §5-13-208; CONN. GEN.STAT.ANN. §53a-192; DEL.CODE ANN. tit.11 §791; KY.REV.STAT.ANN. §509.080; NEV.REV.STAT. §207.190; NEW YORK PENAL LAW §§135.60, 135.65; N.D.CENT.CODE §12.1-17-06; OHIO REV.CODE ANN. §2905.12; ORE.REV.STAT. §163.275; PA.STAT.ANN. tit. 18 §2906; WASH.REV.CODE ANN. §9A.36.070.

[10] MONT.CODE ANN.§45-5-203; IND.CODE ANN. §35-45-2-1.

[11] *E.g.,* WYO.STAT.ANN. §6-2-505(a)("A person is guilty of a terroristic threat if he threatens to commit any violent felony with the intent to cause evacuation of a building, place of assembly or facility of public transportation, or otherwise to cause serious inconvenience, or in reckless disregard of the risk of causing such inconvenience"); NEB.REV.STAT. ("(1) A person commits terroristic threats if he or she threatens to commit

where one of the elements of the crime is either the fear of imminent serious injury or property destruction[12] or of a threat directed against the general population,[13] prosecution of intimidation by symbolic threats may be difficult if not impossible under most circumstances. On the other hand, in those states where the terroristic threats statute proscribes threats of death, serious injury or property destruction,[14] particularly where the statute has a hate crime element,[15] the circumstances surrounding a cross burning or similar display may present all the elements for a prosecution.

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any crime of violence: (a) With the intent to terrorize another; (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or (c) In reckless disregard of the risk of causing such terror or evacuation.").

[12] *E.g.*, TEX.PENAL CODE ANN. §22.07; UTAH CODE ANN. §76-5-107.

[13] *E.g.*, LA.REV.STAT.ANN. §14:40.1[A]("Terrorizing is the intentional communication of information that the commission of a crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist, with the intent of causing members of the general public to be in sustained fear for their safety; or causing evacuation of a building, a public structure, or a facility of transportation; or causing other serious disruption to the general public."); VA. CODE ANN. §18.2-46.4, 18.2-46.5.

[14] DEL.CODE ANN. tit.11 §621(a)("A person is guilty of terroristic threatening when he or she commits any of the following: (1) the person threatens to commit any crime likely to result in death or in serious injury to person or property... "); *see also*, ALA.CODE §13A-10-15; ALASKA STAT. §§11.56.807, 810; ARIZ.REV.STAT.ANN. §13-1202; ARK.CODE ANN. §§5-13-301, 5-54-203; HAWAII REV.STAT. §707-715; KY.REV. STAT. ANN. §508.080; MINN.STAT.ANN. §609.713; NEB.REV.STAT. §28-311.01; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN. §2C:12-3; NEW YORK PENAL LAW §490.20; N.D.CENT.CODE §12.1-17-04; OHIO REV.CODE ANN. §2909.23; PA.STAT. ANN. tit. 18 §2706.

[15] *E.g.*, OKLA.STAT.ANN. tit.21 §850[A]("No person shall maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, national origin or disability: 1.Assault or batter another person; 2. Damage, destroy, vandalize or deface any real or personal property of another person; or 3. Threaten by word or act, to do any act prohibited by paragraph 1 or 2 of this subsection if there is reasonable cause to believe that such act will occur."), *see also*, CONN.GEN.STAT.ANN. §53a-181k(a); MICH.COMP.LAWS ANN. §750.147b. As discussed below, the Supreme Court's decision in *Black* may cast a shadow over the true threat statutes that feature a hate crime element.

Harassment.

Most states have a harassment statute. In various configurations, they cover repetitious annoyances;[16] threats specifically conveyed, orally, electronically, or by telephone or mail;[17] and conduct likely to stimulate an immediate violent response.[18] Most are unlikely to reach symbolic threats and intimidation such as cross burning, hangman's nooses or their ilk. A few, however, may qualify, especially those that resemble terroristic threat statutes. The Nevada statute, for example, states in relevant part:

> A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (1) To cause bodily injury in the future to the person threatened or to any other person ... and (b) The person by words or conduct places the person receiving the threat in reasonable fear that the threat will be carried out. NEV.REV.STAT. §200.571[1].[19]

Here too, constitutional anxieties aside, coverage is most apparent in those statutes that feature a hate crime element.[20]

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[16] *E.g.* , KY.REV.STAT.ANN. §525.070(1)(e)("A person is guilty of harassment when with intent to harass, annoy or alarm another person he ...(e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."); ARK.CODE ANN. §5-17-208; COLO.REV.STAT. §18-9-111; MASS. GEN.LAWS ANN. ch.265 §43A; NEB.REV.STAT. §28-311.02; N.MEX.STAT. ANN. §30-3A-2; S.C. CODE ANN. §16-3-1700.

[17] *E.g.*, ARIZ.REV.STAT.ANN. §13-2921 [A]("A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person: 1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses. 2. Continues to follow another person in or about a public place for no legitimate purpose after being asked to desist 3. Repeatedly commits an act or acts that harass another person. 4. Surveils or causes another person to surveil a person for no legitimate purpose. 5. On more than one occasion makes a false report to a law enforcement, credit or social service agency. 6. Interferes with the delivery of any public or regulated utility to a person."); CONN.GEN.STAT.ANN. §§53-182b, 53a-183; IND.CODE ANN. §35-45-2-2; IOWA CODE ANN. §708.7; 18-7903; KAN.STAT.ANN. §21-4113; MO.ANN.STAT. §565.090; N.D.CENT.CODE §12.1-17-07; OKLA.STAT.ANN. tit.21 §1172; TENN.CODE ANN. §39-17-308; TEX.PENAL CODE ANN. §42.07; UTAH CODE ANN. §76-5-106.

[18] *E.g.*, ALA.CODE §13A-11-8(a)(1) ("A person commits the crime of harassment if, with intent to harass, annoy, or alarm another person, he or she either: a. Strikes, shoves, kicks, or otherwise touches a person or subjects him or her to physical contact. b. Directs abusive or obscene language or makes an obscene gesture towards another person."); ALASKA STAT. §11.61.122; NEW YORK PENAL LAW §240.25; ORE.REV.STAT. §166.065; PA.STAT.ANN. tit. 18 §2709.

[19] *See also*, DEL.CODE ANN. tit.11 §1311, 1312; MINN.STAT.ANN. §609.749; OKLA.STAT. ANN. tit.21 §850; WASH.REV.CODE ANN. §9A.46.020; WIS.STAT.ANN. §947.013.

[20] *E.g.*, ORE.REV.STAT. §166.155(1)("A person commits the crime of intimidation in the second degree if the person:...(c) Intentionally, because of the person's perception of race, color, religion, national origin or sexual orientation of another or of a member of the other's family, subjects such other person to alarm by threatening: (A) To inflict serious physical

Civil Rights.

Most jurisdictions have hate crime sentencing statutes that enhance the penalties imposed for commission of other criminal offense when the defendant was motivated by racial, religious or some other discriminatory animus.[21] As already noted, the presence of such animus is an element in several of the cross burning, harassment and threat statutes. Apart from these, a handful of states also have statutes that criminalize the deprivation of civil rights generally:

> (B) If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony.... W.VA.CODE ANN. §61-6-21(B).[22]

First Amendment Considerations

No cross burning statute or law of similar comportment can be assessed without considerations of its First Amendment implications. Generally, these statutes will pass constitutional muster so long as they can be read only to proscribe expressive conduct that falls outside of the protection of the First Amendment. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech."[23] The Fourteenth Amendment's due process clause imposes the same restriction upon the states,[24] many of whose constitutions house a comparable limitation on state legislative action.[25]

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injury upon or to commit a felony affecting such other person, or a member of the person's family; or (B) To cause substantial damage to the property of the other person or of a member of the other person's family.").

[21] ALA.CODE §13A-5-13; ARIZ.REV.STAT.ANN. §13-702; CAL. PENAL CODE §422.75; CONN.GEN.STAT.ANN. §53a-40a; DEL.CODE ANN. tit.11 §1304; FLA.STAT.ANN. §775.085; HAWAII REV.STAT. §706-662; ILL.COMP.LAWS ANN. ch.720 ¶5, §12-7.1; IOWA CODE §729A.2; KAN.STAT.ANN. §21-4716; KY.REV.STAT.ANN. §532.031; LA.REV.STAT.ANN. §14:40.4; ME.REV.STAT.ANN. tit.17-A, §1151; MINN.STAT.ANN. §244 App.II.D.2; MO. ANN.STAT. §557.035; MONT.CODE ANN.§45-5-222; NEV.REV.STAT. §207.185; N.H.REV. STAT.ANN. §651:6; N.J.STAT.ANN. §2C:16-1; N.Y. PENAL LAW §485.05; N.C.GEN.STAT. §14-3; OHIO REV. CODE ANN. §2927.12; PA.STAT.ANN. tit.18 §2710; R.I.GEN.LAWS §12-19-38; TENN.CODE ANN. §40-35-114; TEX.PENAL CODE §12.47; UTAH CODE ANN. §76-3-203.3; VT.STAT.ANN. tit.13 §1456; W.VA. CODE §61-6-21(d); WIS.STAT.ANN. §939.645.

[22] *See also*, CAL. PENAL CODE §422.6; ME.REV.STAT.ANN. tit.17 §2931; MASS. GEN.LAWS ANN. ch.265 §37; S.C. CODE ANN. §16-5-10; TENN.CODE ANN. §39-17-309.

[23] U.S. Const. amend. I.

[24] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[25] *E.g.*, LA. CONST. Art. I §7; MD. DECL. RTS. Art. 40; MO. CONST. Art. I §8; N.H. CONST. Pt. I, art. 22; ORE. CONST. Art. I §8; TEX. CONST. Art. I §8.

The First Amendment protects both pure speech and expressive conduct used to convey a message or embody an ideology.[26] However, the Supreme Court has long recognized that the First Amendment does not afford all forms of expression absolute protection, and the government constitutionally may prohibit the forms of expression that fall outside of the First Amendment's protections.[27] The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[28]

The proscribable categories of speech include, but are not limited to, obscenity,[29] "fighting words,"[30] and "true threats."[31] The Supreme Court recently decided a case analyzing the constitutionality of a cross-burning statute, categorizing the prohibited conduct as a "true threat."

Virginia v. Black.

Virginia v. Black considered the constitutionality of a Virginia statute that banned cross-burning "with the intent to intimidate."[32] Men had been convicted under the statute in two separate cases, which the Supreme Court consolidated and heard together.[33] In the first case, Mr. Black burned a cross on the property of a fellow member of the Ku Klux Klan ("Klan").[34] The property was located in full view of a public highway where neighbors and passers-by could view the ceremony and the burning cross.[35] In the second case, Mr. Elliot burned a cross on the front lawn of an African American family who had moved in next door.[36]

The statute under which the men were convicted read, in pertinent part:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the

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[26] *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 513-14 (1969) (finding that a school ban on armbands to protest the Vietnam war was no less offensive to the Constitution than a ban on expressing that opinion verbally in class discussions).

[27] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942).

[28] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-83 (1992)(internal citation omitted).

[29] Roth v. United States, 354 U.S. 476, 485 (1957)(holding that obscenity is not protected by the First Amendment).

[30] *See* Chaplinsky, 315 U.S. at 573 (holding that certain words that would incite an average person to fight may be prohibited).

[31] *See* Virginia v. Black, 538 U.S. 343, 363 (2003)(finding that cross-burning is a particularly virulent form of intimidation that may be punished as a "true threat").

[32] *Id.* at 343.

[33] *Id.* at 348.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 350.

> property of another, a highway or other public place....
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate.[37]

After laying out the statute, the Court proceeded to trace the history of cross-burning, placing particular emphasis upon the use of the burning cross as a threat of future bodily harm by the Klan.[38] The Court noted that "while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed."[39]

Writing for the Court,[40] Justice O'Connor indicated that cross burning, if accomplished with the intent to intimidate a person or group, could be considered a "true threat" in light of the history of burning crosses.[41] In endorsing the constitutionality of the statutory provision banning cross burning with the "intent to intimidate," the Court defined a true threat.[42]

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, [394 U.S. 705, 708 (1969)] ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. at 588. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects 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." *Ibid. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death*.[43]

Because cross burning is often intimidating, and often done with the intent of creating pervasive fear in victims that they are a target of violence, it seems to fall squarely within the type of constitutionally proscribable speech described by the Court.[44]

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[37] *Id.* at 348.

[38] *Id.* at 352-58.

[39] *Id.* at 357.

[40] Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Stevens and Breyer, *id* at 347. Justices Souter, Kennedy and Ginsburg concurred in the judgment in part and dissented in part, *id.* at 380; as did Justice Scalia in a separate opinion, *id.* at 368; Justice Thomas dissented, although he joined portions of Justice Scalia's opinion, *id*. at 388.

[41] *Id.* at 359-60.

[42] *Id.* at 360.

[43] *Id.* at 359-60 (emphasis added)

[44] *Id.*

The Court also recognized that, historically, crosses have been burned for reasons that are protected by the First Amendment.[45] The act of burning crosses is common at traditional Klan meetings, not unlike the meeting Mr. Black held during which the cross was lit, and those gathered sang songs, including "Amazing Grace."[46] However, the majority declined to find that once a law discriminates based on this type of content, the law is unconstitutional.[47] The First Amendment does not prohibit all forms of content discrimination within a proscribable area of speech.[48]

Within the types of content discrimination that did not violate the First Amendment, the Court cited *R.A.V.*[49] for the proposition that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[50] In this case, Virginia did not single out cross-burning with the intent to intimidate for certain reasons, such as cross-burning with the intent to intimidate due to racial prejudice, but rather banned all cross burning done with the intent to intimidate regardless of the underlying animus.[51] The majority found the facts of one of the cases it was deciding illustrative.[52] It was unclear from the record whether Mr. Elliot burned a cross on his neighbor's lawn to express racial hatred or to express his lack of appreciation for complaints about guns Mr. Elliot fired in his back yard.[53] Because the Virginia statute was written to include Mr. Elliot's conduct regardless

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[45] *Id.*

[46] *Id.* at 360 (footnote 2).

[47] *Id.* at 361.

[48] *Id.*

[49] In *R.A.V.*, the Supreme Court struck down a statute which banned cross-burning similar but not identical to the statute at issue in this case. R.A.V., 505 U.S. at 379. The statute in *R.A.V.* read:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis or race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380. The Court held that the statute criminalized speech based on protected features of otherwise proscribable speech. *Id.* at 385. In that way, it singled out for opprobrium certain specific ideas and left others untouched. *Id.* Though the ordinance had been limited only to apply to "fighting words," it was clear from the statute that it only applied to fighting words in connection with hostility on the basis of "race, color, creed, religion or gender." *Id.* at 391. So, for example, conduct otherwise proscribable under the statute, like burning a cross, would not be punishable if done with animus towards a person's sexual orientation. *Id.* The Court found this to be impermissible viewpoint and content discrimination, but suggested that a statute which was not limited to certain topics would pass constitutional review. *Id.* at 396.

[50] *Id.* at 361-62 (citing R.A.V. 505 U.S. at 388).

[51] *Id.* at 362.

[52] *Id.* at 363.

[53] *Id.*

of his motivation, the statute did not discriminate against his conduct on the basis of the content of the message the cross-burning conveyed and fell within the permissible bounds of content discrimination outlined in *R.A.V.*[54]

The Court acknowledged that cross burning is a particularly virulent form of intimidation.[55] As a result, the Court held that a statute which criminalizes cross-burning "with the intent to intimidate" is fully consistent with the Court's previous holdings.[56] Likening the situation to its obscenity cases where a state may regulate only that obscenity "which is most obscene," the Court held that a state may choose to prohibit "only those forms of intimidation that are most likely to inspire fear of bodily harm."[57]

Following the "true threat" analysis, Justices O'Connor, Rehnquist, Stevens, and Breyer went on to strike down the statute, because it contained another provision that made the act of cross burning prima facie evidence of the intent to intimidate.[58] The plurality found that, though it was constitutional to ban cross burning with the intent to intimidate as a "true threat," the prima facie evidence provision could create an unacceptable danger that protected speech would be criminalized or chilled.[59] The issue in this portion of the opinion was a jury instruction delivered in Mr. Black's case.[60] The instruction stated that "the act of burning a cross, by itself, is sufficient evidence to infer the required intent."[61] This interpretation of the prima facie evidence provision rendered the statute unconstitutional, in the plurality's view.[62] "The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself."[63] In the plurality's view, the provision stripped away "the very reason why a State may ban cross burning with intent to intimidate," and created an unacceptable risk of the suppression of ideas.[64] On that basis, the plurality held that the statute was invalid on its face.[65] Recognizing that the Virginia Supreme Court had not passed on the meaning of the prima facie evidence provision, the plurality left open the possibility that Virginia's highest court

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 368 (Stevens, J. concurring) ("Cross burning with an intent to intimidate unquestionably qualifies as the kind of threat that is unprotected by the First Amendment.").

[57] *Id.* at 363.

[58] *Id.* Justice Scalia concurred in "true threat" portion of Justice O'Connor's opinion of the Court, *id.* at 368; Justices Souter, Kennedy and Ginsburg concurred with the result reached in the opinion for the Court.

[59] *Id.*

[60] *Id.* at 364.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 365.

[64] *Id.*

[65] *Id.* at 367.

could apply a constitutional interpretation to the prima facie evidence part of the statute, or sever it from the statute completely.[66]

Justices Scalia and Thomas dissented from the plurality's view that the prima facie evidence provision rendered the statute facially unconstitutional.[67] Justice Scalia, joined by Justice Thomas, argued that prima facie evidence, as interpreted by Virginia courts in the past, "cut[] off no defense nor interpose[d] any obstacle to a contest of the facts."[68] In Scalia's view, prima facie evidence "is evidence that suffices, on its own, to establish a particular fact," but that is true only to the extent that presumption remains unrebutted.[69] The act of burning a cross is sufficient only to create an issue for the trier-of-fact with respect to the intent element of the offense, not to establish an irrebuttable presumption of intent to intimidate.[70]

Scalia, further, cited a decision in which the Supreme Court emphasized that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* ... judged in relation to the statutes' plainly legitimate sweep."[71] Justice Scalia argued that an instance in which a person would burn a cross in public view without the intent to intimidate and then refuse to present a defense would be exceedingly rare and did not rise to a level of substantiality that would render the statute unconsitutional.[72] The class of persons the plurality was concerned could be convicted impermissibly under the prima facie evidence provision was far too insubstantial to justify striking down the statute as facially invalid.[73] Justice Scalia agreed, however, that the jury instruction in Mr. Black's case was improper and would have remanded the case for interpretation of the prima facie evidence provision, rather than hold the entire statute unconstitutional.[74]

Justice Thomas also wrote separately in dissent. Justice Thomas argued that the prima facie evidence provision created an inference as opposed to a presumption, and should not raise concern for the Court. A presumption, Justice Thomas noted, compels the fact-finder to draw a certain conclusion or a certain inference from a given set of facts.[75] On the other hand, an inference does not compel a specific conclusion, but "*merely applies to the rational potency or probative value of an evidentiary fact to which the fact-finder may attach whatever force or weight it*

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[66] *Id.*

[67] *Id.* at 374.

[68] *Id.* at 370 (Scalia, J. dissenting).

[69] *Id.*

[70] *Id.* at 374.

[71] *Id.* at 375. (internal citation omitted)

[72] *Id.*

[73] *Id.* at 374.

[74] *Id.*

[75] *Id.*

deems best."[76] Thomas observed that statutes prohibiting possession of drugs implied an intent to distribute based upon the quantity of drugs held and nothing more.[77] In Thomas's opinion, these possession with intent statutes operated in much the same way as the statute at issue in this case.[78]

Justice Thomas also dissented from the Court's constitutional analysis of the statute. Justice Thomas argued that banning cross-burning did not implicate the First Amendment because the statute banned conduct only.[79] In tracing the history of the cross-burning statute at issue, Justice Thomas noted that the law was enacted in 1952, a time when the Virginia legislature was controlled by segregationists.[80] The legislature recognized that cross-burning was terrorizing conduct and punishable for that reason.[81] It is unlikely, in Justice Thomas's view, that a state legislature that thoroughly supported segregation and the superiority of the white race would have intended to proscribe the message of white racial superiority.[82] Rather, the legislature considered burning a cross to be an act of terrorism and sought to forbid the conduct, not expression.[83] As a result, Justice Thomas saw no reason to analyze the statute under the First Amendment.[84]

Justice Souter also wrote separately joined by Justices Kennedy and Ginsburg.[85] Justice Souter would have found the statute unconstitutional.[86] He disagreed with the Court's interpretation of *R.A.V.* and the application of the "particular virulence" exception outlined in that case to cross-burnings.[87] Rather, Souter would have analyzed the Virginia statute for whether its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot."[88]

Regardless of that distinction, Justice Souter did not believe either conviction could be upheld when considering the entire statute as it was applied to the accused.[89] In Souter's view, the primary effect of the prima facie evidence clause "is to skew jury deliberations toward conviction in cases where the evidence of intent to

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[76] *Id.* at 395. (emphasis in original)

[77] *Id.* at 398.

[78] *Id.*

[79] *Id.* at 388 (Thomas, J. dissenting).

[80] *Id.* at 393-94.

[81] *Id.* at 393.

[82] *Id.* at 394.

[83] *Id.*

[84] *Id.* at 395.

[85] *Id.* at 380-81.

[86] *Id.* at 381.

[87] *Id.* at 382.

[88] *Id.* at 384. (citation omitted)

[89] *Id.* at 384-85.

intimidate is relatively weak and arguably consistent with a solely ideological reason for burning."[90] In that way, Souter viewed the statute as suppressing ideas to an unacceptable degree.[91]

On the basis of *Black*, it would appear that without offending First Amendment precepts a law may proscribe cross burning and similar exhibits intended to convey "true threats." Whether it may proscribe only those true threats that also include a hate crime element of the type found in the ordinance in *R.A.V.* is unclear at best.[92]

Overbreadth and Vagueness.

Overbreadth. Lower court cases decided after *Black* continue to address overbreadth and vagueness challenges to threat, harassment and intimidation statutes.[93] An otherwise valid governmental regulation may be deemed unconstitutional if it "sweeps so broadly as to impinge upon activity protected by the First Amendment."[94] Where a government proscribes both constitutionally protected speech and speech that is not protected by the First Amendment, the regulation may be struck down on grounds that it is overly broad.[95]

Where a statute proscribes conduct rather than "pure speech," the Supreme Court is less likely to invalidate the statute on overbreadth grounds. As the conduct a statute prohibits moves further from the realm of "pure speech" toward conduct that may fall within the scope of otherwise valid criminal laws, like harassment or terroristic threats, the protected speech that may be deterred "cannot, with confidence, justify invalidating the statute on its face."[96] As Justice Scalia pointed out in *Black*, "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial*

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[90] *Id.*

[91] *Id.* at 386.

[92] *Id.* at 362 (internal citations and quotations omitted)("Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavor topics. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's political affiliation, union membership, or homosexuality.").

[93] *E.g.*, United States v. Cassell , 408 F.3d 622, 635 (9th Cir. 2005)(rejected vagueness challenge to a statute that prohibits interference with a federal land sale by intimidation); Ward v. Utah, 398 F.3d 1239, 1247-254 (10th Cir. 2005)(rejecting overbreadth and vagueness challenges to the state intimidation crimes enhancement statute).

[94] Dandridge v. Williams, 397 U.S. 471, 484 (1970).

[95] Virginia v. Hicks, 539 U.S. 113, 118 (2003)(citation omitted)(noting that when a law is shown to punish a substantial amount of free speech beyond the legitimate scope of the law, the statute is unconstitutional).

[96] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

... judged in relation to the statute's plainly legitimate sweep."[97] As a result, statutes that ban conduct, which may otherwise be expressive, likely must create a danger of deterring a substantial amount of protected speech in order to be declared facially overbroad.

Statutes banning expressive conduct that may be considered "true threats" are not immune, however, to a facial overbreadth challenge. Faced with the problem of potential unconstitutionality, state courts, by and large, have used the canons of statutory construction to limit the reach of statutes to proscribe only "true threats" as defined by the Court in *Black*.[98] Accepted rules of statutory construction instruct courts to, when feasible, construe the regulatory effects of statutes challenged under the First Amendment to punish only expression which falls outside the Amendment's protection.[99] Using this general principle, courts have read statutes to prohibit only those constitutionally proscribable forms of expression, taking care to avoid applying the statute to protected speech.[100] As the Supreme Court held in *Black*, statutes such as those addressed in this report, if interpreted by state courts only to prohibit conduct that amounts to intimidation or expressions meant to communicate a serious threat of harm, would likely pass constitutional muster.

Vagueness. "Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to protect against the

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[97] Black, 538 U.S. at 375 (Scalia, J. concurring in part, concurring in the judgment in part, and dissenting in part)(citing Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

[98] *See e.g.*, Washington v. Johnston, 127 P.3d 707, 709 (Wash. 2006)(finding that a Washington statute must be construed to prohibit only true threats to avoid invalidation on overbreadth grounds), Wise v. Commonwealth., 641 S.E.2d 134, 138 (Va. Ct. App. 2007)(holding that a Virginia statute that prohibited threats constitutional because it encompassed only "threats of bodily harm" and that threatening the life of an officer, even in the heat of the moment, was a "true threat").

[99] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)(noting that an overbroad statute may not be given effect unless and until "a limiting instruction or partial invalidation so limits it as to remove" the threat of deterring protected expression).

[100] *See e.g.*, Washington v. Johnston, 127 P.3d at 709, Citizen Publishing Co. v. Arizona, 115 P.3d 107, 114 (Ariz. 2005)(holding that a statute which prohibited "threatening" or "intimidating" did not apply to a letter to the editor published in a newspaper, because the letter could not be considered a "true threat"), Michigan v. Osantowski, 736 N.W.2d 289, 296-99 (Mich. Ct. App. 2007)(holding that a statute which prohibited acts of terrorism only prohibited "true threats" and that commenting repeatedly in and internet chat room about killing school classmates constituted a "true threat"), Wise v. Commonwealth of Va, 641 S.E.2d at 138 (holding a Virginia statute that prohibited threats constitutional because it encompassed only "threats of bodily harm" and that threatening the life of an officer, even in the heat of the moment, was a true "threat"), Dunham v. Roer, 708 N.W.2d 552, 566 (Minn. Ct. App. 2006)(upholding the constitutionality of a statute where the focus was to prohibit unwanted acts, words, or gestures and its application to the appellant where the appellant had repeatedly called the respondent derogatory names and used offensive gestures to communicate her anger).

arbitrary deprivation of liberty interests."[101] Yet, there is nothing inherently vague about statutes that outlaw the use, with the intent to threaten, of burning crosses or other harbingers of violence, although as with any type of statute they may be imprecisely drawn upon occasion.[102]

Fighting Words.

Cross burning and comparable exhibits may provoke anger as well as fear. Laws that condemn threats have sometimes been defended on the ground "fighting words" lie beyond the pale of the First Amendment's protection. This category of unprotected speech is of somewhat uncertain dimensions. *R.A.V.* is a "fighting words" case, yet the Court in *Black* opted for a "true threat" mode of analysis instead. On the other hand, in *Black* it elected to distinguish rather than reject or ignore *R.A.V.*

The "fighting words" doctrine begins in *Chaplinsky v. New Hampshire*, where the Court held that fighting words, by their very utterance inflict injury or tend to incite an immediate breach of the peace and may be punished consistent with the First Amendment.[103] In *Chaplinsky*, the Court upheld a statute which prohibited a person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," calling "him by any offensive or derisive name," or making "any noise or exclamation in his presence and hearing with the intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[104] The state court construed the statute as forbidding only those expressions "as have a direct tendency to cause acts of

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[101] Chicago v. Morales, 525 U.S. 41, 52 ((1999)(citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

[102] Lansdell v. State, ___ So.2d ___, ___, 2007 WL 2811969, (Ala.Crim.App. Sept. 28, 2007)("Finally, we note that Alabama is not alone in criminalizing conduct by which an individual terrorizes others by threatening violence or damage to property. Indeed, numerous other states have criminalized such conduct. Moreover, those statutes have withstood constitutional challenges based on overbreadth and vagueness. See *Allen v. State,* 759 P.2d 541, 545 (Ak.Ct.App.1988); *In re Ryan A.*, 202 Ariz. 19, 39 P.3d 543 (Ariz.Ct.App.2002); *People v. Maciel,* 113 Cal.App. 4th 679, 685, 6 Cal.Rptr.3d 628, 634 (2003); *State v. Crudup,* 81 Conn.App. 248, 263, 838 A.2d 1053, 1064 (2004); *Saidi v. State,* 845 So.2d 1022, 1026 (Fla.Dist.Ct.App.2003); *Reilly v. State,* 847 F.Supp. 951, 958 (M.D.Fla.1994); *Lanthrip v. State,* 235 Ga. 10, 218 S.E.2d 771 (1975); *Masson v. Slaton,* 320 F.Supp. 669, 672-73 (N.D.Ga.1970); *State v. Chung,* 75 Haw. 398, 862 P.2d 1063 (1993); *Thomas v. Commonwealth,* 574 S.W.2d 903, 909 (Ky.Ct.App.1978); *Sykes v. State,* 578 N.W.2d 807 (Minn.Ct.App.1998); *State v. Schmailzl,* 243 Neb. 734, 740-41, 502 N.W.2d 463, 467-68 (1993); *Commonwealth v. Bunting,* 284 Pa.Super. 444, 455, 426 A.2d 130, 136 (1981); *State v. Lanier,* 81 S .W.3d 776 (Tenn.Crim.App.2000)."). Examples of imprecision include, Botts v. State, 604 S.E.2d 512 (Ga. 2004)(finding unconstitutionally vague a hate crime penalty statute that enhanced the penalties for crimes motivated by "bias" and "prejudice" but failed to distinguish between invidious bias or prejudice and lawful bias or prejudice); State v. Williams, 26 P.3d 890 (Wash. 2001)(finding unconstitutionally vague a statute that outlawed threats to "mental health" without defining "mental health").

[103] Chaplinsky, 315 U.S. at 572.

[104] *Id.* at 569.

violence by the person to whom, individually, the remark [was] addressed."[105] Given the limited scope of application, the Supreme Court held that the statute at issue did not proscribe protected expression.[106]

This category of proscribable speech appears to be more difficult to define within the bounds of the Constitution and requires the threat of an immediate breach of peace in order to be punishable. In *Cohen v. California*, the Supreme Court held that words on a t-shirt that contained an expletive were not directed at a person in particular and could not be said to incite an immediate breach of the peace.[107] For that reason, profane words that are not accompanied by any evidence of violence or public disturbance are not "fighting words."[108] The Court went on to describe the value of expression in communicating emotion.[109] In the Court's view, certain words, including expletives, which could in other contexts be construed as fighting words, may be indispensable in effectively communicating emotion, a form of expression protected by the First Amendment.[110] In *Brandenburg v. Ohio*, the Supreme Court struck down an Ohio statute that criminalized advocating violent means to bring about social and economic change.[111] The Court found that the statute failed to distinguish between advocacy, which is protected by the First Amendment, and incitements to "imminent lawless action," which are not protected.[112] These cases illustrate that "fighting words" require an immediate risk of a breach of peace in order to be proscribable. What speech is proscribable, therefore, appears highly dependent upon the context in which it arises.[113] Moreover, it can hardly escape notice that *R.A.V.* involved a law that outlawed cross burning with the intent to annoy, while *Black* involved a law that outlawed cross burning with the intent to threaten. The first the Court found impermissible. The second it said offended only because an attendant provision effectively read the intent to threaten out of the proscription.

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[105] *Id.* at 572.

[106] *Id.*

[107] 403 U.S. 15, 20 (1971).

[108] *Id.*

[109] *Id.* at 26.

[110] *Id.*

[111] 395 U.S. 444, 446 (1969)(*per curiam*).

[112] *Id.* at 448.

[113] *See* Odem v. Mississippi, 881 So.2d 940, 948 (Miss. Ct. App. 2004)(finding that complaints and shouts of profanity from the defendant rose to the level of "fighting words" where the officer to whom he spoke did not initiate the conversation nor did the officer have the opportunity to walk away); *see also* Washington v. King, 145 P.3d 1224 (Wash. Ct. App. 2006)(noting that "it is context that makes a threat "true" or serious), Commonwealth v. Pike, 756 N.E.2d 1157, 1158-60 (Mass. App. Ct. 2001)(upholding the conviction of a woman for violation of her neighbor's civil rights where she posted signs in her yard accusing homosexuals of molesting young children and yelled insulting names as well as invitations to a physical fight because the words and conduct constituted "fighting words").

Conclusion.

To the extent that statutes of the types identified in this report ban expressive conduct that falls outside the protection of the First Amendment, the laws generally pass constitutional muster. When the laws can be read to encompass expressive conduct that is normally protected by the United States Constitution as well as traditionally criminal conduct, the statute likely must chill a substantial amount of protected conduct in order to be deemed facially invalid. Courts may limit their interpretations of statutes that appear to sweep too broadly on their faces to encompass only those forms of expression that are constitutionally proscribable.