A STUDY OF *STATE V. MYLETT*: NORTH CAROLINA'S JUROR HARASSMENT STATUTE VIOLATES THE FIRST AMENDMENT RIGHT TO FREE SPEECH

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I. INTRODUCTION

After the trial and conviction of his twin brother, Patrick Mylett, a college student living in North Carolina, was arrested.[1] Patrick was upset after his brother's conviction, and spoke against the conviction to several of the jurors in the courthouse lobby.[2] Patrick did not touch any of the jurors, nor did he issue any threats of violence.[3] However, Patrick was arrested and charged with violation of the North Carolina juror harassment statute, N.C.G.S. § 14-225.2(a)(2),[4] for addressing the jurors as they left the courthouse.[5] Though the North Carolina Supreme Court ultimately overturned his conviction on other grounds, Patrick raised a strong argument that the statute is unconstitutional because it unduly restricts free speech.[6]

This Note will analyze the argument that individuals have a right to protest decisions made by jurors, and therefore, that the North Carolina juror harassment statute is unconstitutional under the First Amendment. To that end, this Note will proceed in four Parts. Part I outlines *State v. Mylett* and provides the legislative history and background of the statute. Parts II and III analyze the speech implications of the statute. Part II argues that the statute violates the First Amendment as a content-based restriction on speech. Part III discusses procedural protections under the First Amendment and argues that the statute is vague and overbroad. Part IV addresses counterarguments, outlines policy reasons for finding the law unconstitutional, and recommends how the judiciary should address this issue.

II. CASE STUDY AND LAW BACKGROUND

A. State v. Mylett

Dan and Patrick Mylett were students at Appalachian State University.[7] The two brothers were attending a party near

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[1] State v. Mylett, 374 N.C. 376, 377 (2020).

[2] State v. Mylett, 822 S.E.2d 518, 552 (N.C. Ct. App. 2018).

[3] *Mylett*, 374 N.C. at 377.

[4] N.C. GEN. STAT. § 14-225.2(a)(2) (2021).

[5] *Mylett,* 374 N.C. at 377.

[6] *Id.* at 378.

[7] *Mylett*, 822 S.E.2d at 552.

campus when things turned violent.[8] Dan was involved in an altercation with a fellow student in which he was severely beaten, to the point of being hospitalized.[9] When police arrived to control the situation, Dan supposedly spat blood from his mouth, and it accidentally hit a police officer.[10] Dan was arrested and charged with intoxicated and disruptive behavior and assault on a government official.[11] Dan was tried before a jury at the district court level and received a guilty verdict regarding the assault on a government officer.[12] Dan was sentenced to 60 days in jail suspended for 12 months' probation.[13] At his new trial after appeal, Dan was sentenced to 10 days of active jail time and was ordered to pay around $1,600 in fees and costs.[14]

Standing in the lobby of the courthouse after his brother's trial, Patrick was troubled.[15] He felt strongly that his brother was innocent and was justifiably disturbed about the severe consequences the conviction would have on his brother's life.[16] While still experiencing the intense emotions stemming from the conviction, Patrick saw several of the jurors leaving the courthouse in front of him.[17] Overcome with grief, Patrick approached the jurors to protest their decision to convict his twin.[18] The jurors testified that Patrick said that "he hoped that [the jurors] could live with [themselves] because [they] had convicted an innocent man," that the jurors "got it wrong, that [they] made a mistake," and told them, "[C]ongratulations, [they] just ruined [his brother's] life."[19]

Court officials arrested Patrick and charged him with six violations of N.C.G.S. § 14-225.2(a)(2), a statute that is intended to guard against juror harassment.[20] Patrick was also charged with conspiracy to commit harassment of a juror under the same statute.[21] The portion of the statute under which Patrick was

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[8] *Id.*
[9] *Mylett,* 374 N.C. at 377.
[10] Brief for Defendant-Appellant at 3, State v. Mylett, 882 S.E.2d 518 (2018) (No. COA17-480).
[11] *Mylett*, 822 S.E.2d at 552.
[12] *Id.*
[13] *Id.*
[14] State v. Mylett, 799 S.E.2d 419, 423 (N.C. Ct. App. 2017).
[15] *Mylett,* 374 N.C. at 377.
[16] *Id.* at 377, 383.
[17] *Id.* at 377.
[18] *Id.*
[19] *Id.* at 381–82.
[20] *Id.* at 377.
[21] *Id.*

charged reads: "[a] person is guilty of harassment of a juror if he: . . . [a]s a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse."[22] Under the statute, a person who is convicted under subsection (a)(2), as Patrick was, is guilty of a Class H felony.[23]

Throughout his trial and appeals, Patrick argued that the statute was unconstitutional. At the trial court level, Patrick filed a pre-trial motion to dismiss the charges, arguing that the statute violates the First Amendment since it punishes people for exercising their right to free speech.[24] To cure the constitutional violation, Patrick requested that the trial court instruct the jury to read the statute as requiring either a true threat or intent to intimidate.[25] The court denied that request and the motion generally.[26] Subsequently, Patrick was found guilty of conspiracy to commit harassment of a juror.[27]

On appeal, Patrick again argued that the statute violates the First Amendment. The North Carolina Court of Appeals disagreed, upholding Patrick's conviction and ruling that the statute applied to "non-expressive conduct" and therefore did not implicate the First Amendment.[28] The court further reasoned that even assuming that the First Amendment was implicated, the statute would survive intermediate scrutiny as a content-neutral restriction, because it was not vague, and the trial court did not err in denying Patrick's request for an instruction on true threat or intent.[29] The North Carolina Supreme Court reversed Patrick's conviction on evidentiary grounds without deciding the constitutional issue.[30]

B. Statutory Background

The North Carolina juror harassment statute was originally passed in 1977 and has been amended six times.[31] The content of the statute implies that the legislative intent was to

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[22] N.C. GEN. STAT. § 14-225.2(a)(2) (2021).
[23] § 14-225.2(c).
[24] *Mylett,* 374 N.C. at 378.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] State v. Mylett, 822 S.E.2d 518, 524 (N.C. Ct. App. 2018).
[29] *Id.* at 544–46.
[30] *Mylett,* 374 N.C. at 379.
[31] N.C. GEN. STAT. § 14-225.2 (2021).

protect jurors from interference and harm.[32] In fact, another case that involved this statute illustrates that intent clearly. In *Burgess v. Busby*,[33] a doctor convicted of malpractice released a list of the jurors who had found him guilty to other physicians in the area.[34] The doctor's intent was to retaliate against the jurors for finding him liable by dissuading other physicians in the area from treating those jurors as patients, making it overwhelmingly difficult for the jurors to obtain healthcare in that area.[35] The North Carolina Court of Appeals reversed and remanded the dismissal of the plaintiff's case against the physician as to his violation of the juror harassment statute.[36] The doctor's actions were both intimidating and threatening under the court's reading of the statute.[37] Specifically, the North Carolina Court of Appeals held that "a citizen who undertakes this public duty should be free from a personalized published harassment" like the one enacted by the physician and that the physician's "communication [was] not protected speech."[38]

III. N.C.G.S. § 14-225.2(A)(2) IS A CONTENT-BASED LAW THAT REGULATES BOTH SPEECH AND EXPRESSIVE CONDUCT, THEREBY MAKING IT PRESUMPTIVELY UNCONSTITUTIONAL.

Within First Amendment jurisprudence, one must first determine whether the law governs protected speech and/or expressive conduct or if it governs non-expressive conduct, which is unprotected by the First Amendment.[39] Second, assuming that the law regulates speech or expressive conduct, the court must determine whether the restriction on speech is content-based or content-neutral.[40] Content-based laws are "presumptively unconstitutional" and automatically trigger strict scrutiny, making it very difficult for the law to pass constitutional muster.[41]

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[32] *Id.*
[33] 544 S.E.2d 4 (N.C. Ct. App. 2001).
[34] *Id.* at 6–7.
[35] *Id.* at 6.
[36] *Id.* at 13–14.
[37] *Id.*
[38] *Id.*
[39] Katrina Hoch, *Expressive Conduct*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/952/expressive-conduct.
[40] David L. Hudson, Jr., *Content Based*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/935/content-based.
[41] *Id.*

This Part first analyzes whether the North Carolina statute unconstitutionally prohibits protected speech and/or expression. Then, this Part determines whether the statute proscribes certain speech based on its content. Finally, this section analyzes the statute under strict scrutiny and ultimately concludes that the statute is unconstitutional.

A. The North Carolina Statute Regulates Speech and Expressive Conduct, Thereby Subjecting the Law to Strict Scrutiny.

The First Amendment prevents the government from restricting speech, but speech has come to be understood as more than just the spoken or written word—it can also include *conduct* that is inherently expressive in nature.[42] The Supreme Court has delineated categories of activity that amount to speech based on the strength of their relation to communication.[43] The Court has also assigned tests to each of those categories by which laws restricting such activity are scrutinized.[44] The category with the highest level of scrutiny is pure speech, which includes not only actual words spoken or written, but also expressive conduct like burning a flag or burning a cross.[45] Notably, the conduct encompassed by this category must be inherently communicative; it must convey a message that is likely to be understood by its audience.[46] In other words, "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First [ ] Amendment . . . .'"[47] In contrast, the First Amendment does not protect conduct that is purely non-expressive, such as purchasing bananas at the grocery store, which is highly unlikely to be considered communicative of any message.[48]

The U.S. Supreme Court affirmed a two-part inquiry to provide some structure to this expressive conduct question in *Texas v. Johnson*.[49] This inquiry determines whether conduct possesses expressive value so as to make it protected speech

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[42] Stromberg v. California, 283 U.S. 359, 369 (1931).
[43] *See The First Amendment: Categories of Speech*, CONG. RSCH. SERV., (updated January 16, 2019), https://sgp.fas.org/crs/misc/IF11072.pdf.
[44] *Id.*
[45] Texas v. Johnson, 491 U.S. 397, 400 (1989).
[46] *Id.* at 404.
[47] *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).
[48] *See id.* at 407.
[49] *Id.* at 404.

under the First Amendment.[50] First, the Court asks whether the speaker intended to convey a message through his or her conduct.[51] Second, the Court asks whether a reasonable observer would understand that the speaker intended to make that statement.[52] In *Johnson*, the Court held that by burning a flag as a sign of political protest, Mr. Johnson was communicating his disdain for Ronald Reagan's renomination for President while at the Republican National Convention, a message that the Court found would be easily understood by a reasonable observer as Mr. Johnson's intended statement.[53] The Court reasoned further that a law restricting "the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."[54]

The Supreme Court has heard several other cases dealing with expressive conduct as speech. In *Tinker v. Des Moines*,[55] the Court held that students wearing black armbands in protest of the Vietnam War was expressive conduct protected by the First Amendment.[56] The Court reasoned that wearing the armbands was akin to pure speech in that the bands implied a message clearly understood by the school officials who attempted to stop the behavior.[57] In *U.S. v. O'Brien*,[58] though the Court ultimately found that the law at issue in that case was not unconstitutional as applied, the Court held that burning a draft card was "symbolic speech" and was expressive conduct for the purposes of that inquiry.[59] In *Barnes v. Glen Theatre*,[60] the Court held that nude dancing was expressive activity and therefore raised a First Amendment question as to whether a law restricting such activity was unconstitutional.[61] Each of these cases show that

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[50] *Id.* at 407.
[51] *Id.* at 404.
[52] *Id.*
[53] *See id.* at 405–06.
[54] *Id.* at 406.
[55] 393 U.S. 503 (1969).
[56] *Id.* at 504–05.
[57] *Id.*
[58] 391 U.S. 367 (1968).
[59] *Id.* at 386.
[60] 501 U.S. 560 (1991).
[61] *Id.* at 566 ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

speech is not required to be verbal to be protected by the First Amendment.[62]

Even so, there are other factors a court uses in determining whether the conduct falls within the protection of the First Amendment. For example, the presence of an audience boosts the likelihood that the activity is speech or expressive conduct.[63] Additionally, the activity is less likely to be considered speech or expressive conduct if the message it is supposedly communicating requires explanation to be understood.[64]

In the *Mylett* case, the statute explicitly restricts both speech and expressive conduct. First, as to pure speech, since Patrick Mylett was arrested for his spoken words to the jurors, the statute clearly restricts a person's freedom of speech in the most basic manner.[65] In fact, the dissent at the North Carolina Court of Appeals said that "the only 'sustainable rationale for the conviction' was Defendant's 'speech'—his verbal communication of his opinion to the jurors that their verdict constituted an injustice to his brother."[66]

Moreover, the statute restricts expressive conduct protected by the First Amendment. The statute prohibits any threatening or intimidating behavior,[67] which encompasses both expressive actions and spoken or written words. However, this threatening or intimidating behavior must arise as a result of the prior official action of a juror; it must involve the communication of some message related to the official actions of the jurors.[68] Such communication would have to be done either by words or by communicative actions as received by the jurors, both of which are protected by the First Amendment.[69]

Intimidating or threatening actions could include behavior as seen in the *Burgess* case, in which the doctor did not necessarily speak verbally but rather attempted to blacklist jurors

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[62] *O'Brien*, 391 U.S. at 376; *Barnes*, 501 U.S. at 571.
[63] *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64 (2006) ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.").
[64] *Id.* at 66 ("[T]he point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent.").
[65] State v. Mylett, 374 N.C. 376, 377 (2020).
[66] State v. Mylett, 822 S.E.2d 518, 532 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[67] N.C. GEN. STAT. § 14-225.2(a)(2) (2021).
[68] *Id.*
[69] *See* Watts v. United States, 394 U.S. 705, 708 (1969) (explaining that political hyperbole is protected by the First Amendment).

from healthcare providers in his area by distributing their information publicly.[70] His conviction rested on his communication of his disdain for the jury's decision by distributing their information in attempt to restrict their abilities to seek healthcare.[71] Since one cannot violate the North Carolina statute without communicating a message to an audience (in this case, jurors), the first part of the test for expressive conduct, which requires the actor to use his conduct with the intent to convey a message, is satisfied.

As to the second part of the test, it seems equally as evident that the North Carolina statute regulates speech and/or expressive conduct that communicates a message that a reasonable person would likely understand as the intended message by the speaker.[72] The testimony given by the jury members at Patrick Mylett's trial proves that a reasonable person understood the message he was trying to communicate—a message that directly caused him to be arrested under the statute.[73] Not only *would* a reasonable person have understood Patrick's intended message of disdain for his brother's conviction, but a reasonable person at the scene at the time of the incident *did* understand his meaning behind his message. One juror recounted later that he, the juror, responded immediately to Patrick's protests by saying "There was sympathy for your brother on the jury[,] [b]ut we had to follow the law."[74] This demonstrates that Patrick's message caused the juror to respond by defending his decision—the very decision Patrick was protesting. Therefore, the second part of the inquiry, which requires that a reasonable observer understand the message, is satisfied. In sum, the North Carolina juror harassment statute implicates the First Amendment by regulating both pure speech and expressive conduct.

B. The North Carolina Statute is a Content-Based Law and is Presumptively Unconstitutional.

The next part of the overall First Amendment inquiry determines whether the law restricts speech based on its

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[70] Burgess v. Busby, 544 S.E.2d 4 (N.C. Ct. App. 2001).
[71] *Id.* at 6.
[72] *See supra* notes 55–58 and accompanying text.
[73] State v. Mylett, 374 N.C. 376, 377–78 (2020).
[74] State v. Mylett, Record on Appeal 105, Bates DA000056.

content.[75] Content-based laws are "those that target speech based on its communicative content" and are "presumptively unconstitutional."[76] A law facially discriminates based on content when the language used in the statute draws a line between some communicated subjects as acceptable and others as unacceptable.[77] Content-based restrictions are subject to strict scrutiny and therefore, to be upheld, must be found to serve a compelling government interest and be narrowly tailored to serve that interest.[78] To be narrowly tailored, a law must not be either over- or under-inclusive in the speech it restricts.[79] In other words, the law cannot either include or exclude speech that it should not—it must be the least-restrictive alternative to achieve the compelling interest.[80]

Reed v. Town of Gilbert serves as an example of a content-based law that the U.S. Supreme Court held unconstitutional.[81] In that case, the Court invalidated an Arizona law that imposed more stringent restrictions on political or ideological signs than it did on directional signs.[82] Because the only way of knowing whether a person had violated the statute was by looking at the content of their messaging, the Court deemed the law content-based and therefore presumptively unconstitutional.[83] The Court found that the law furthered no compelling government interest, and even if it did, the law was severely underinclusive in that it prohibited certain signage under the guise of preventing distraction and "clutter," but did not prohibit all signage that would have such an effect.[84] As such, the law was not narrowly tailored and therefore did not pass strict scrutiny.[85] The Court went further to state that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated

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[75] *See supra* notes 39–41 and accompanying text.
[76] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[77] *Id.* at 156.
[78] *Id.* at 157.
[79] *Id.*
[80] Scott Johnson, *Least Restrictive Means*, THE FIRST AMEND. ENCYCLOPEDIA, (updated June 2017), https://www.mtsu.edu/first-amendment/article/494/least-restrictive-means#:~:text=Least%20restrictive%20means%20test%20applies,be%20weighed%20against%20constitutional%20rights.
[81] *See Reed*, 576 U.S. at 171.
[82] *Id.* at 155.
[83] *Id.* at 164–65, 169–70.
[84] *Id.* at 172, 181.
[85] *Id.* at 171–72.

speech by its function or purpose," but clarified that "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[86]

Moreover, First Amendment jurisprudence largely protects speech even when that speech is "upsetting or arouses contempt."[87] In *Snyder v. Phelps*, the Westboro Baptist Church organized a protest at a soldier's funeral.[88] The protestors shouted at the funeral-goers, including at the soldier's family, that the soldier's death was God's punishment for the government allowing LGBTQIA+ people to serve in the military.[89] Though that speech is nearly universally regarded as heinous and disrespectful to the highest degree, the Supreme Court held that the speech was protected by the First Amendment.[90] The Court reasoned that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[91]

As with most constitutional doctrine, there are exceptions to the rule of invalidating any law that discriminates based on content of the speech. The U.S. Supreme Court has found several categories of speech that are, as determined by their content, unprotected by the First Amendment and thereby open to government regulation.[92] These categories include things like obscenity, incitement, fighting words, and, pertinently, true threats.[93] The U.S. Supreme Court in *Virginia v. Black* defined true threats as:

> encompass[ing] 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 . . . . Intimidation in the

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[86] *Id.* at 163–64.
[87] Snyder v. Phelps, 562 U.S. 443, 458 (2011).
[88] *Id.* at 447.
[89] *Id.*
[90] *Id.* at 460–61.
[91] *Id.* at 458.
[92] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
[93] Kevin Francis O'Neill & David L. Hudson, Jr., *True Threats*, THE FIRST AMEND. ENCYCLOPEDIA, (updated June 2017), https://www.mtsu.edu/first-amendment/article/1025/true-threats#:~:text=In%20legal%20parlance%20a%20true,acting%20at%20the%20speaker's%20behest.

> 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.[94]

True threats are very serious, specific, and believable threats that would lead a reasonable person to fear for their life, health, or safety.[95] Moreover, *Virginia v. Black* added the requirement that the speaker must *intend* to communicate a true threat.[96]

However, this doctrine, as are many others, is nebulous as to the application of the concept to real people and real scenarios. The U.S. Supreme Court has offered little clarification since the inception of the rule regarding the precise standards comprising true threats analysis or the outer bounds of the doctrine.[97] For example, it is unclear whether a speaker must only intend to communicate a threat by speaking, or whether they must also have the subjective intent to commit the harm itself.[98]

Nonetheless, the U.S. Supreme Court offered some guidance about this complicated concept in *Watts v. U.S.*[99] In that case, a young man, Watts, attended an anti-war protest in Washington, D.C., where the crowd divided into small groups to discuss particular topics, and Watts joined a group discussing police brutality.[100] While in the group, Watts talked about his draft status, saying, "I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." and "They are not going to make me kill my [B]lack brothers."[101] Watts was arrested for his statement regarding then-President Johnson and was charged and convicted of a felony for knowingly and willingly threatening the President.[102]

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[94] Virginia v. Black, 538 U.S. 343, 360 (2003).
[95] *Id.*
[96] *Id.*
[97] *See* O'Neill & Hudson, Jr., *supra* note 93.
[98] *See Black*, 538 U.S. at 366–67 ("As the history of cross burning indicates, a burning cross is not always intended to intimidate.").
[99] Watts v. United States, 394 U.S. 705 (1969).
[100] *Id.* at 706.
[101] *Id.*
[102] *Id.*

The U.S. Supreme Court held that Watts's statement was not a true threat under the doctrine.[103] The Court reasoned that Watts's political hyperbole did not fit within the willfulness requirement, and further stated that the Court "must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and [wide-open], and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[104]

Watts, in light of *Virginia v. Black* as discussed above, demonstrates several important ideas relevant to this discussion of the North Carolina statute. These cases show that true threat, as requiring a knowing and willful state of mind, is a limited doctrine that requires a high standard of intent in order to justify its use in excluding speech from First Amendment protection.[105] As a result of this high standard, the doctrine is applied to only the most egregious instances of threatening words or conduct—a bar so high that even arguable threats against the President of the United States were held as protected speech.[106]

Here, the North Carolina juror harassment statute is a content-based restriction that should be subject to strict scrutiny—a standard it does not meet. The statute only restricts speech or conduct that is considered "intimidating" or "threatening,"—a determination which entirely turns on the content of the speech.[107] The North Carolina statute arguably restricts the speech based on particular subject-matter, as the law contains the language "[a]s a result of the prior official action of another as a juror in a grand jury proceeding or trial."[108] This language arguably governs the subject-matter that is proscribable under the statute—anything related specifically to the juror's official actions in a proceeding or trial is criminalized under the statute.[109] Therefore, the statute would need to survive strict scrutiny to pass constitutional muster.[110]

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[103] *Id.* at 708.
[104] *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[105] *See Watts*, 394 U.S. at 708; Virginia v. Black, 538 U.S. 343, 344 (2003).
[106] *Watts*, 394 U.S. at 708.
[107] N.C. GEN. STAT. §14-225.2(a)(2) (2021).
[108] *Id.*
[109] *Id.*; State v. Mylett, 822 S.E.2d 518, 524 (N.C. Ct. App. 2018)
[110] *See* Reed v. Town of Gilbert, 576 U.S. 155, 157 (2015).

However, even assuming that the statute does not restrict speech based on its particular subject-matter, the statute still defines "regulated speech by its function or purpose."[111] Just as the Court stated in *Reed*, defining speech in that way is equally egregious and unconstitutional in First Amendment jurisprudence.[112] The statute separates speech that has a purpose and/or function to threaten or intimidate jurors after they have completed their duties and punishes that speech, as opposed to speech meant for any other purpose or function.[113] Proscription of speech in that way is equally as unconstitutional.

Moreover, the North Carolina statute, by the Court of Appeals' own admission, does not restrict its application to true threats alone, thereby precluding any argument that the law governs only proscribable speech. Both the trial court and the North Carolina Court of Appeals refused to instruct the jury to interpret the statute as only applying to true threats as defined under *Virginia v. Black* and *Watts*.[114] The Court of Appeals thereby encouraged the jury to broadly interpret the terms "threatening" and "intimidating" within the statute to include any and all activity that could subjectively make the listener feel "threatened" or "intimidated."[115] This is plainly against the doctrine and the policies set out in *Virginia v. Black* and *Watts*.[116] In fact, the North Carolina statute, as interpreted by both the trial court and the Court of Appeals, explicitly restricts speech that is not comprised of "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" but rather restricts statements that are simply "caustic" or "unpleasant" in nature, which includes speech (like Mr. Mylett's) that is protected.[117] Just as the Supreme Court held in *Snyder*, the North Carolina courts and legislature cannot prohibit speech simply based on the fact that it is "disagreeable."[118] Therefore, the statute restricts speech that falls squarely outside of the true threat doctrine as articulated in

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[111] *Id.* at 163.
[112] *Id.*
[113] §14-225.2(a)(2).
[114] *Mylett*, 822 S.E.2d at 530.
[115] *See id.*
[116] *See Watts*, 394 U.S. at 708; Virginia. v. Black, 538 U.S. 343, 344 (2003).
[117] *Black*, 538 U.S. at 359.
[118] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

Virginia v. Black and *Watts* and the argument that the statute is constitutional under true threat doctrine necessarily fails.

Understanding that true threat doctrine offers no protection for the statute and that the law explicitly governs based on content, strict scrutiny must be applied to determine whether the law passes constitutional muster. I argue that the law fails strict scrutiny and is plainly and facially unconstitutional.

Under strict scrutiny, the law must be narrowly tailored to serve a compelling government interest and must employ the least-restrictive means to achieve the same end.[119] The government's interest in protecting jurors from harm and retaliation is arguably compelling. The judicial system relies on the citizens called to serve as jurors being safe to do so.[120] Further, jurors must be able to competently perform their duties within the courtroom while being free from intimidation or threat.[121] However, this statute is not simply preventing the jurors from any sort of interference or intimidation *during* their duties within the courtroom—it also sets forth a blanket ban on any communication that could possibly be perceived as threatening by the jurors even *after* their duties are complete.[122] Of course, the government must keep a strong reputation of protecting jurors generally, or future jurors may be less likely to perform competently and impartially, but the blanket ban on communication after the fact is simply not narrowly tailored enough to serve this interest. Therefore, the law does not survive strict scrutiny.

Overbreadth is one way a law can lack the narrow tailoring required by the Supreme Court in performing its strict scrutiny.[123] A law that is otherwise constitutional in its application to a certain scenario might be unconstitutional based on the fact that "a 'substantial number' of its applications are unconstitutional" as per the doctrine.[124] In other words, statutes

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[119] Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).
[120] *See How Courts Care for Jurors in High Profile Cases*, U.S. CT. NEWS, (January 24, 2020), https://www.uscourts.gov/news/2020/01/24/how-courts-care-jurors-high-profile-cases.
[121] *See id.*
[122] N.C. GEN. STAT. §14-225.2(a)(2) (2021); State v. Mylett, 822 S.E.2d 518, 539–40 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[123] *Mylett*, 822 S.E.2d at 539–40.
[124] U.S. v. Stevens, 559 U.S. 460, 461 (2010) (citations omitted).

must be written in a way so that they do not encompass protected speech within their restrictions.[125]

In *U.S. v. Stevens*, the U.S. Supreme Court addressed the overbreadth issue.[126] In the case, the Court analyzed a law purporting to criminalize animal cruelty, in which the statute outlawed portrayals of living animals being "intentionally maimed, mutilated, tortured, wounded, or killed."[127] The Court reasoned that because depictions of animals being legally killed through permitted hunting, which are legal and protected depictions, would be criminalized, the law is overbroad and therefore, unconstitutional.[128] The Court further clarified that "[t]he first step in overbreadth analysis is to construe the challenged statute" to determine how far the statute actually reaches, and then to determine whether the breadth of the law is "substantial" in its restriction of protected speech.[129]

Here, assuming that the government's interest in protecting jurors from intimidation and retaliatory behavior is compelling enough (an assumption supported by both common sense and *Burgess*), the law is still not narrowly tailored to prevent restricting a substantial amount of constitutionally protected speech. As the law stands now, a person can be (and has been) arrested and charged with a violation of the law simply by addressing jurors in a way that subjectively makes the juror *feel* intimidated or threatened.[130] The law offers no opportunity for mitigation based upon the intent of the speaker, or even the objective words or actions that were communicated.[131] The plain language of the statute, taken with the N.C. Court of Appeals' refusal to constrain the interpretation of that language, paints a clear picture that *any* communication to a juror that subjectively makes that juror feel threatened or intimidated is felonious.[132]

This leads one to conclude that even communication that is objectively unrelated to a juror's personal safety, livelihood, or even privacy, can and will be prosecuted under the statute. Patrick Mylett is the perfect example, and one can conclude that

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[125] *See id.* at 468.
[126] *Id.* at 474.
[127] *Id.*
[128] *Id.* at 482.
[129] *Id.* at 474 (citations omitted).
[130] N.C. GEN. STAT. §14-225.2(a)(2) (2021); State v. Mylett, 822 S.E.2d 518, 539–40 (N.C. Ct. App. 2018) (McGee, C.J., dissenting).
[131] *Mylett*, 822 S.E.2d. at 537 (McGee, C.J., dissenting).
[132] *See id.*

the law is overbroad, in part, because of his case's circumstances. Mr. Mylett said nothing about what he would do next—he did not threaten to harm any of the jurors, he did not attempt to overpower any of the jurors, he did not address any of the jurors in a way that could be construed as anything other than constitutionally protected protest. In truth, Patrick had a right to protest and speak and was punished for exercising that right. This behavior is contrasted with that of the physician in *Burgess*, who acted in such a way so as to harm the jurors personally.[133] He sent out their personal information as a way to retaliate as he saw fit—he attempted to enact his own version of justice.[134] Mr. Mylett did no such thing. He simply communicated his emotions and reactions to the conviction of his brother.[135]

The statute could also restrict constitutionally protected speech in scenarios that do not mirror Mr. Mylett's. It is arguable (even likely) that a disgruntled defendant who posted on Facebook that he did not agree with his jury's decision, and who tagged several of the jurors in the post, could be prosecuted under the statute. The same goes for the mother of a plaintiff whose jury acquit the defendant if she were to hand out a flyer to the jurors that communicated her disagreement with the verdict. These examples are but a few of the conceivable scenarios in which the North Carolina statute would unconstitutionally restrict protected speech.

Overall, the law offers too much discretion to the government to favor agreeable messages and to discriminate against unpopular viewpoints as expressed toward jury members in the course of their duties. It seems clear that the legislature meant to have the statute guard against true threats, retribution, or harm imparted on jurors for their actions in the course of duty. But the way the statute stands now opens the door wide for too many speakers to be prosecuted. Given the fact that the statute reaches broadly into speech that is historically and consistently protected by the constitution so as to criminalize that speech, the law is not narrowly tailored enough to survive strict scrutiny.

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[133] *See* Burgess v. Busby, 544 S.E.2d 4, 6 (N.C. Ct. App. 2001).
[134] *Id.*
[135] *Mylett*, 822 S.E.2d at 532 (McGee, C.J., dissenting).

IV. THE NORTH CAROLINA COURT OF APPEALS PUTS FORTH UNTENABLE AND INHERENTLY CONTRADICTORY REASONS FOR UPHOLDING THE LAW.

The North Carolina Court of Appeals wrote its majority opinion in *State v. Mylett* in such a way that it serves as a comprehensive set of counterarguments against this law being unconstitutional. This section will address each of these arguments in turn. First, the court believes that this law regulates non-expressive conduct, and as such, does not implicate the First Amendment in the first place.[136] The North Carolina Court of Appeals seems to confuse the concepts of laws that regulate non-expressive conduct and laws that are content-neutral by nature. The court says that the law "applies to non[-]expressive conduct and does not implicate the First Amendment" *and* that the statute's "language applies to a defendant's conduct" "irrespective of the content."[137] By definition, non-expressive conduct has no content (as the word is understood in First Amendment jurisprudence) on which to base a restrictive law.[138] In other words, non-expressive conduct does not implicate the First Amendment, given that there is no speech or expression to restrict. Significantly, non-expressive conduct is subject to a lower form of scrutiny, as that sort of conduct fails to implicate the First Amendment speech rights, while laws that are content-neutral, but are unreasonably burdensome as to speech and expression do implicate the First Amendment and are subject to strict scrutiny.[139] Further, though it is possible to have a single law that implicates both expressive and non-expressive conduct and thus divide the First Amendment analysis of the law accordingly, the N.C. Court of Appeals makes no such claim regarding the statute at issue here.[140]

By stating that the statute is both restricting non-expressive conduct and is a content-neutral law, the court conflates two separate First Amendment concepts without resolving the issue inherent in that conflation—whether the law actually implicates the First Amendment under their argument. This issue informs the rest of the court's analysis, as this question operates as the foundation for that analysis.

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[136] *Id.* at 523.
[137] *Id.*
[138] Hoch, *supra* note 39.
[139] *Id.*
[140] *Id.*

The court makes these conclusions all while attempting to contrast this case to another North Carolina case, *State v. Bishop*,[141] in which a statute "outlawed posting particular subject matter, on the Internet, with [the intent to intimidate a minor]."[142] The Court of Appeals contends that somehow this case is distinguishable from *Bishop*; the court says that posting personal information about a minor on the Internet with the intent to intimidate the minor is expressive conduct, but speaking to a juror about his or her actions in the course of being a juror in an intimidating way is somehow not expressive conduct.[143] This is simply an incongruous and nonsensical conclusion. Patrick Mylett could not have violated the statute without expressing some message either through his words or actions. He could not have been arrested and charged with a felony under the statute if he was buying bananas instead of apples at the store—he had to communicate some form of intimidation or threat (assuming that either concept had some sort of concrete meaning that only implicated proscribable speech—a premise for which there is no support) to a jury member about their actions as a juror. The only way one could violate the statute is to express a message—the Court of Appeals' conclusion that the law only covers non-expressive conduct is simply wrong.

The Court of Appeals also puts forth that the law is a content-neutral law (which again, would mean that the statute implicates the First Amendment in a way in which the court first concluded it does not) and that it is a constitutional restriction on the manner in which one may communicate with a juror.[144] Time, place, and manner restrictions are rooted in *Ward v. Rock Against Racism*,[145] in which the U.S. Supreme Court set forth a three-pronged test to determine whether a particular law operates as a constitutional time, place, or manner restriction.[146] First, the law must be content-neutral.[147] Second, the law must be narrowly tailored to serve a significant government interest (as opposed to compelling, which is a higher standard).[148] Finally, the law must

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[141] 368 N.C. 869 (2019)
[142] *Id.* at 873.
[143] State v. Mylett, 822 S.E.2d 518, 523 (N.C. Ct. App. 2018)
[144] *Id.* at 523–24.
[145] 491 U.S. 781 (1989).
[146] *Id.* at 782–83.
[147] *Id.*
[148] *Id.*

leave open ample alternative channels for communicating the speaker's message.[149]

Here, as argued above, this law is not content neutral. It allows anyone to speak to jurors about any topic they would like, except for things related to their service as jury members. But, assuming for a moment that the law is content-neutral, it still does not pass the *Ward* test. Again, as argued above, the law is not narrowly tailored, even when assuming that the government's interest in protecting jurors is significant, or compelling, for that matter. The law encompasses too much speech without regard for any sort of intent or true threat behind the communication.

Finally, the law does not leave open other channels for communicating the message. The Facebook example in the previous section operates here as well. Because of the broad terms in the statute, it is entirely conceivable that even the Internet would not be a safe haven for a disgruntled defendant or a pained plaintiff to air their grievances against their juries. They could not address the jurors in writing, or in newsprint, or in interviews, or over email. Any of those options would be conceivably felonious under the broad writing and broad interpretation of the statute by the Court of Appeals. Altogether, the Court of Appeals' counterarguments for constitutionality of this law necessarily fail at every turn.

V. CONCLUSION

The North Carolina statute prohibiting communication with jurors post-trial is a content-based restriction on speech and expressive conduct in such a way to be unconstitutional. The law, even assuming it serves a compelling government interest, is overbroad in its prohibition of constitutionally protected speech. It is not narrowly tailored to serving that compelling government interest and would fail strict scrutiny.

The statute should be held unconstitutional. Given the opportunity, either the North Carolina Supreme Court or the United States Supreme Court should hold as such but could also interpret the terms "threaten" and "intimidate" in a way that is clear, understandable, and most importantly, narrowed down to only proscribable speech.

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[149] *Id.*

Americans place a high value on the freedom of speech, and particularly speech that gets directly at the actions of government and government actors. Protesting the outcome of a governmentally composed and sanctioned jury in a particular trial seems to encompass the exact meaning and intention behind the protection of speech in this country. Patrick Mylett and others like him have a right to be heard by virtue of the United States Constitution.