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CROSS BURNING AS HATE SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

*Wilson R. Huhn**

INTRODUCTION

Under the First Amendment of the Constitution of the United States, “hate speech” is constitutionally protected unless the circumstances of the case indicate that the speaker intended to threaten violence or provoke an immediate act of violence. While a person may be removed from a classroom or fired from employment for engaging in “hate speech,” under the First Amendment a person may be charged with a crime only if their statements constitute a threat or provocation of immediate violence.¹ Moreover, even in cases where it is clear that a person is threatening violence or that violence is imminent, the person may be criminally prosecuted only if the law in question is carefully drawn so that it applies only in appropriate cases.

“Hate speech” is not easy to define. As Justice Potter Stewart said about obscenity, “I know it when I see it.”² What’s “funny” to one person is offensive to another, and people disagree about what kinds of behavior cross the line from poking fun, to fair political commentary, to expressions of scorn and contempt, to threats or incitement to violence. But some words and symbols unequivocally express hatred of racial, ethnic, religious, or other groups.

In the United States one particularly virulent form of expression is associated with hatred and prejudice – the burning of a cross.³ Originally a traditional Scottish custom of signalling, following the American Civil War cross burning was adopted by guerrilla groups such as the Ku Klux Klan as a symbol of racial supremacy and as a means of terrorizing the newly freed slaves. The burning cross was glorified in the wicked movie *The Birth of a Nation* (1915) that depicted the Klan as heroes and saviors. Cross burnings were common at Klan rallies throughout the 1920s at a time when lynchings were commonplace and the Klan was at the height of its power. The burning cross was used as a warning and a threat to any person seeking to improve the political or economic condition of the black race.⁴

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¹ Provocations of violence may take two forms: a face-to-face confrontation in which the speaker utters “fighting words,” or a situation in which a speaker attempts to incite a crowd to riot. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (defining the “fighting words” doctrine); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (distinguishing “advocacy” from “incitement”).

² *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

³ Cross burning, like flag burning or the wearing of a black armband, is a form of symbolic speech and falls within the protection of the First Amendment. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning is constitutionally protected); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (public school student has constitutional right to wear armband protesting war).

⁴ See *Virginia v. Black*, 538 U.S. 343, 352-355 (2003) (setting forth history of cross burning).

While the Ku Klux Klan and related militant far-right organizations still exist in the United States, they exercise no political power and as a practical matter can no longer openly hold public rallies where crosses are burned – the public outcry would overwhelm their puny expressions of hatred, and it would be political suicide for any politician to be publicly identified with the Klan. However, there are still occasional incidents of cross burning, sometimes at rallies on private land, sometimes on another person’s property as an expression of hatred aimed at a specific individual or family.

In recent decades the United States Supreme Court has decided two cases involving cross burning – *R.A.V. v. City of St. Paul* (1992) and *Virginia v. Black* (2003). In each case the defendants were arrested and convicted of a crime for burning a cross, and in each case the Supreme Court reversed the defendants’ convictions. I discuss each of those cases below.

I. *R.A.V. v. City of St. Paul*

The decision of the Supreme Court reversing the defendant’s conviction in *R.A.V.* was undoubtedly correct, but the reasoning of the Court is of limited usefulness. The majority opinion was written by Justice Antonin Scalia, whose opinions are usually a model of clarity but who in this case authored an opinion that is so muddled as to be nearly incomprehensible. At least Scalia reached the right result – he is usually as wrong as a stopped clock, and for precisely the same reason.

In this case the defendant was a juvenile who lived in the City of St. Paul, Minnesota, and whose initials were R.A.V. The defendant burned a cross in the fenced yard of a black family who lived across the street from the house where he was staying. The City charged and convicted the defendant of disorderly conduct for violating the following ordinance which had been adopted by the City:

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

The defendant claimed that this ordinance was unconstitutional under the First Amendment. Under the practice of the United States, in freedom of expression cases a criminal defendant may challenge his conviction under either of two theories: (1) The defendant may contend that he or she was perfectly within her rights to engage in the particular expression. This would be attacking the law “as applied” to the particular case. (2) In addition, the defendant may concede for the sake of argument that his or her conduct was not constitutionally protected, but is allowed to argue that the law under which he or she was charged is vague or overbroad – that the law is unconstitutional “on its face.”

⁵ 505 U.S. 377 (1992).

In light of the fact that R.A.V. had gone onto a neighbor's lawn to burn this cross it would have been difficult for him to argue that he was simply making a political statement and not a threat. Accordingly, "as applied" the law would have been constitutional because the defendant was not acting within his First Amendment rights when he burned the cross on a neighbor's property.

But is the law constitutional on its face? All nine justices of the Supreme Court found that the law as written was unconstitutional, albeit for different reasons. Some of the justices (Justice Scalia among them) found the law objectionable because it singled out "cross burning" and "swastikas" for punishment. They thought that the law was "viewpoint based" because it mentioned right-wing expressions of hatred and no others. Other justices found the law to be unconstitutional because it was "overbroad" – that is, as written the law could be applied to any person who "arouses anger, alarm, or resentment" in others, regardless of whether the speaker intended to threaten or incite violence. Accordingly, all of the justices agreed that it was unconstitutional for the City of St. Paul to prosecute the defendant or anyone else under this ordinance.

Another problem with the ordinance adopted by the City of St. Paul is that it punished expression that the speaker "knows" may arouse alarm or resentment. Under standard First Amendment analysis, a defendant may be found guilty only if he or she "intends" to utter a threat or incite violence. The level of culpability is set fairly high in most First Amendment cases so that people are not punished for the unintended consequences of their words.

Notice the consequence of invoking the principle that a law may be challenged "on its face." Here we have a defendant who is concededly operating outside his constitutional rights and invading the rights of others. But even so, under the First Amendment the government must charge and prosecute the defendant under a law that is constitutional in the abstract, on its own terms. The reason that we insist that laws be narrowly drawn to apply only to "unprotected speech" is so that free speech and political discourse is not unnecessarily discouraged. As Justice William Brennan wrote in *New York Times v. Sullivan* (1964):⁶

"[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"⁷

R.A.V. was set free so that other citizens of St. Paul would not be discouraged from engaging in free debate by a law that was overbroad.

II. *Virginia v. Black*⁸

This case actually arose from two separate occurrences. Barry Black, a leader of the Ku Klux Klan in Virginia, burned a cross at a rally for the Klan near a highway in a field on private

⁶ 376 U.S. 254 (1964) (ruling that it was unconstitutional for the police to sue a newspaper for running a advertisement for a civil rights organization describing police activity during a civil rights demonstration).

⁷ *Idem* at 271-272, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

⁸ 538 U.S. 343 (2003).

property belonging to a person who was sympathetic to the views of the Klan and who attended the rally. In an unrelated incident, Richard Elliott and Jonathan O'Mara, who were not members of the Klan, burned a cross on a black neighbor's property because the neighbor had complained to Elliott's mother about the men shooting guns for target practice in their back yard.

All three men were charged under the following statute of the State of Virginia:

“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 property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

“Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

Black, Elliott, and O'Mara were all convicted under this statute, and they each appealed their convictions to the United States Supreme Court. Black was arguably within his rights to burn a cross as a political statement, so long as he was not trying to threaten or intimidate any specific person, and therefore the law might be held unconstitutional “as applied” to him. Elliott and O'Mara had a tougher argument – like *R.A.V.*, they were obviously communicating a threat, and their only hope was to challenge the law on its face.

As in *R.A.V.*, there are a confusing welter of majority, concurring, and dissenting opinions, but there is one point on which most of the justices clearly agreed. Unlike *R.A.V.* a majority of the justices of the Supreme Court in *Black* upheld the principal portion of the statute making it a crime to burn a cross with the intent to intimidate another person. The Virginia statute, in contrast to the St. Paul ordinance, prohibits more serious conduct (“intimidation” as opposed to arousing “anger, alarm, or resentment”) and it requires a higher degree of mental culpability on the part of the defendant (“intent” as opposed to “knowledge”). However, a majority of the justices in *Black* disapproved of the “*prima facie*” evidence provision of the Virginia law. In her opinion for the Court, Justice Sandra Day O'Connor stated:

The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. ... [T]he provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute - and potentially convict - somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

The government may not take a “short cut” to conviction by telling the jury that it may presume that the act of burning a cross is always intended as a threat. Instead, the government must prove this element of the offense with independent evidence bearing upon

the defendant's state of mind. That evidence was present in the case of Elliott and O'Mara – it was absent in Black's case. Accordingly, the case against Black was dismissed.

What about Elliott and O'Mara? Could they lawfully be charged under this statute? If the words “*prima facie* evidence” were interpreted to mean that the jury is entitled to draw an inference that the act of burning a cross constitutes a threat – if that provision of the law is simply saying that the defendant's conduct is “some evidence” tending to prove what the defendant was thinking – then it would be constitutional. If, on the other hand, the statute means that if the government proves that the defendant burned a cross then it has also automatically proven that the defendant intended to intimidate people, then the statute would be unconstitutional. The Supreme Court remanded the case against Elliott and O'Mara back to the courts of the State of Virginia so that the state courts could decide what the proper interpretation of the law was. If the state courts were to interpret the “*prima facie*” provision of the statute as merely creating a “permissible inference” of intent then the law would probably be upheld. If, on the other hand, the state courts were to find that the statute treats proof that the defendant burned a cross as constituting “sufficient” evidence of intent to intimidate, or as raising a “presumption” that the defendant intended to intimidate, then the law would be unconstitutional. In *Black* the United States Supreme Court gave the state courts the opportunity to retry Elliott and O'Mara and to get it right.

CONCLUSION

Cross burning is a much more serious form of hate speech than the relatively mild cartoons that have riled Europe in recent years. There is no chance whatsoever that American courts would countenance criminal charges against Geert Wilders or the Arab European League for the drawings that they published. False and malicious they may be, but the cartoons are not threats nor are they incitements to violence except in the sense that all political or religious discourse is upsetting to those who disagree. I close this essay with the words of Justice Robert Jackson (who served as Chief Prosecutor for the United States at Nuremburg) from his opinion in the case of *West Virginia Board of Education v. Barnette* (1943):⁹

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁰

⁹ 319 U.S. 624 (1943) (ruling that children could not be suspended or expelled from public school for refusing to salute the American flag).

¹⁰ *Idem* at 642.