

negotiating the unpopular treaty that bears his name, he was so vilified that he said that he could find his way home in the dark from the number of burning effigies that illuminated the roads. In the nineteenth century John Brown, William Lloyd Garrison, and Abraham Lincoln were hanged or burned in effigy as hated enemies of slavery. In the presidential campaign of 1860, clubs of young men called “Wide-Awakes” marched at night carrying blazing torches atop tall poles in support of their candidate Abraham Lincoln. Five years later Washington, D.C. celebrated victory in the Civil War with a “grand illumination” of the city created by thousands of torches, flares, and explosions.⁸ More recently Americans protested another war by burning draft cards⁹ and flags,¹⁰ and feminists demonstrated for equal rights by burning bras. After President Kennedy’s assassination his grave was marked by fire—an eternal flame. Americans have used fire to communicate a multitude of ideas: political support or protest, military victory, remembrance, shared ideology, dissent, patriotism, joy, inspiration—and hate. Of all the fiery symbols in American history, one stands out as the most notorious and the most feared—the burning cross.

For the past eighty-eight years, ever since the first recorded cross burning in the United States in 1915, that flaming object has been the trademark of one group—the Ku Klux Klan.¹¹ To the members of the Klan, that symbol represents an ideology of white supremacy and racial solidarity. To African Americans, the burning cross symbolizes a sinister history of toxic racism reaching back to the Civil War.¹² To this audience, a cross aflame also symbolizes danger: threats, arson, violence, robed night riders, lynchings, and murder.¹³

⁸JAMES L. SWANSON & DANIEL R. WEINBERG, *LINCOLN’S ASSASSINS: THEIR TRIAL AND EXECUTION* (2001).

⁹*United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁰See, e.g., *State v. Royal*, 113 N.H. 224 (1973); *State v. Waterman*, 190 N.W. 2d 809 (1971); *State v. Mitchell*, 32 Ohio App. 2d 16 (1972). For a flag burning to protest the murder of civil rights figure James Meredith, see *Street v. New York*, 394 U.S. 576 (1969).

¹¹American cross burning has a fictional origin. Thomas Dixon’s 1905 novel, *THE CLANSMAN: AN HISTORICAL ROMANCE*, fantasized a cross burning Ku Klux Klan. The 1915 film “*Birth of a Nation*,” which was based on the novel, depicted a fictional cross burning, and that imagery inspired the real Klan to adopt the ritual.

¹²Although the Klan did not burn its first cross until 1915, fifty years after the Civil War ended, the symbol became so powerful that it came to represent in the popular mind a reign of terror that began shortly after the end of the war.

¹³For a history of these crimes, see STETSON KENNEDY, *SOUTHERN EXPOSURE* (1946); RICHARD KLUGER, *SIMPLE JUSTICE* (1975); WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* (1988); NANCY K. MACLEAN, *BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN* (1994).

From the outset, the image of rampaging, cross burning Klansmen was considered potentially explosive. D. W. Griffith's 1915 motion picture *Birth of a Nation*, an adaptation of Thomas Dixon's 1905 novel, *The Clansman*, provoked several jurisdictions to censor the film, fearing that screenings would incite race riots.¹⁴ In time a number of states banned cross burnings, including Virginia, which passed a statute against it.¹⁵

In 2003, the Supreme Court of the United States ruled on the constitutionality of that statute. In *Virginia v. Black*,¹⁶ the Court struggled with how much one can suppress conduct without banning expression. We have a long history of protecting speech that we hate, even when that speech comes close to causing real harm. There is no question that a burning cross is a combination of speech and conduct, and that the symbol can convey ideas and intimidation. In *Virginia v. Black* the Court found burning a cross to be sufficiently different to allow restrictions that would otherwise be prohibited by the First Amendment. In so doing, the Court applied an unsatisfactory ad hoc test that might lead to the suppression of not only intimidation, but ideas. It was a hard question to balance, and the best answer might be to ban not just cross burning, but *all* intimidation. That solution will serve the interests of the First Amendment best.

Background

Virginia v. Black arose from two separate incidents that resulted in convictions under Virginia's cross burning statute, which provides

¹⁴See EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES CENSORS AND THE FIRST AMENDMENT 3–6, 180–183 (1982). Fearing that the film would be suppressed, Dixon screened the film at the White House for his old friend, President Woodrow Wilson, and members of the Cabinet. "It is like history written with lightning," said Wilson. The next day Dixon prevailed upon Chief Justice Edward Douglass White, a former Klan member, to view the film that night at the Raleigh Hotel in Washington. White, the justices, and members of Congress attended the screening.

¹⁵Brief of Amici Curiae of the States New Jersey, Arizona, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, Utah, and Vermont, *Virginia v. Black*, 123 S. Ct. 1536 (2003) (No. 01-1107).

¹⁶*Virginia v. Black*, 123 S. Ct. 1536 (2003).

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.¹⁷

In the first incident, on the night of May 2, 1998, Richard Elliott, Jonathan O'Mara and David Targee attempted to burn a small, hastily constructed cross in the front yard of Elliott's neighbor, James Jubilee, an African American. Elliott wanted to "get back" at Jubilee for complaining to Elliott's mother about gunshots being fired in the Elliott backyard target range. The cross burning trio entered Jubilee's property, erected the cross, splashed it with lighter fluid and set it ablaze. Jubilee did not witness the burning cross, but the next morning he noticed a partially burned cross about 20 feet from his house. Jubilee seized the cross, secured it in his garage, and summoned the police. Elliott and O'Mara were arrested and charged with cross burning and conspiracy to commit cross burning. Although they were not connected to the Ku Klux Klan, Elliott and O'Mara did, prior to the cross burning, refer to Jubilee's race. O'Mara pleaded guilty to both counts but reserved the right to challenge the constitutionality of the statute. He was sentenced to 90 days in jail (of which 45 were suspended) and fined \$2,500.00 (which was reduced to \$1,500.00). Elliott was tried, convicted and sentenced to 90 days in jail and a \$2,500.00 fine. The Court of Appeals of Virginia affirmed both convictions.¹⁸

In the second incident, which occurred on August 22, 1998, the fact pattern was quite different than in the first. Barry Black led a Ku Klux Klan rally not in a targeted victim's yard, but on private property with the permission—indeed the participation—of the owner. That property was a semi-secluded open field near a state highway, with eight to ten houses in the area. Twenty-five to thirty people participated in the rally, which included Klan members speaking to each other about their beliefs, about their dislike of

¹⁷*Id.* at 1541, 1542 (O'Connor, J.).

¹⁸*Id.* at 1543.

blacks and Mexicans, about Bill and Hillary Clinton, and about how their tax money goes to black people.¹⁹

At the rally's climax the Klan members formed a circle around a 25-to 30-foot-tall cross, set it on fire, and played a recording of *Amazing Grace*. At that point the local sheriff, who had observed the cross burning from the state highway 300 to 350 yards away, entered the property. Black was charged under the Virginia statute with burning a cross to intimidate a person or group of persons. At trial the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or group of people in bodily fear of harm," and also that "the burning of a cross by itself" is sufficient evidence to infer the required intent.²⁰ Black was found guilty, fined \$2,500.00, and his conviction was confirmed by the state Court of Appeals.

On appeal the Supreme Court of Virginia consolidated the cases and held that the cross burning statute was "facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad."²¹ The Virginia Supreme Court reasoned that the statute was "analytically indistinguishable" from the ordinance that the Supreme Court of the United States found unconstitutional several years earlier in another cross burning case, *R.A.V. v. St. Paul*²²; that the statute engaged in improper content-and-viewpoint based discrimination because it "selectively chooses only cross burning because of its distinctive message"²³; and because the statute's prima facie evidence provision condemns it as overbroad because "the enhanced probability of prosecution under the statute chills the expression of protected speech."²⁴

The U.S. Supreme Court granted certiorari and heard oral argument on December 11, 2002.

Oral Argument

As soon as the U.S. Supreme Court granted certiorari, *Virginia v. Black* became one of the most eagerly anticipated cases of October

¹⁹*Id.* at 1542.

²⁰*Id.*

²¹*Black v. Commonwealth*, 262 Va. 764, 768 (2001) (Lemons, J.).

²²*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²³*Virginia v. Black*, 123 S. Ct. at 1543 (citations omitted).

²⁴*Id.* (citations omitted).

Term 2002.²⁵ Although the Court hears several First Amendment cases each term, seldom does the subject matter of any case command as much widespread public attention as *Virginia v. Black*.²⁶ Court watchers expected a classic duel pitting the right to engage in unpopular speech against the desire to suppress it, and many assumed the Court would extend the principles of *Texas v. Johnson*²⁷ and *R.A.V. v. St. Paul*²⁸ and hold that the Virginia cross burning statute, like the regulations in the aforementioned cases, was impermissible, content-based discrimination against unpopular speech, and unconstitutional.

In one of the most unusual oral arguments of the term (for both what was said and how the press reported it) the justices surprised Court watchers by telegraphing that *Virginia v. Black* might not be an easy win for the First Amendment.²⁹ Given the recent precedents of *Texas v. Johnson* and *R.A.V. v. St. Paul*, plus a core collection of historic free speech cases, it was assumed by many that the Court would simply affirm the principle that the First Amendment requires us to tolerate even the speech that we hate, in order to safeguard

²⁵See, e.g., Linda Greenhouse, *Supreme Court Roundup: Free Speech or Hate Speech? Court Weighs Cross Burning*, N.Y. TIMES, May 29, 2002, at A18.

²⁶It is easier for the public to grasp the idea of a burning cross than the more abstract ideas of library internet filtering in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), or the political speech of non-profit organizations in *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), two other significant First Amendment cases in October Term 2002.

²⁷*Texas v. Johnson*, 491 U.S. 397 (1989).

²⁸*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²⁹See e.g., Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross Burning*, N.Y. TIMES, December 12, 2002, at A1; Charles Lane, *High Court Hears Thomas on KKK Rite: Justice Weighs in on Virginia Cross-Burning Ban*, WASH. POST, December 12, 2002; Joan Biskupic, *Cross-Burning Case Agitates Thomas*, USA TODAY, December 12, 2002, at 3A; Jan Crawford Greenburg, *Emotional Court Weighs Cross Burning: Thomas Speaks Against "Terror,"* CHICAGO TRIBUNE, December 12, 2002, at 10; David G. Savage, *Thomas Assails Cross Burning as Terror Tactic*, L.A. TIMES, December 12, 2002, at 41; Lyle Denniston, *Thomas Breaks Silence to Denounce Klan: Court Weighs Cross Burning*, BOSTON GLOBE, December 12, 2002, at A2; Dahlia Lithwick, *Personal Truths and Legal Fictions*, N.Y. TIMES, December 17, 2002, at A35. The fact that Justice Thomas spoke during oral argument so transfixed some commentators that they lost sight of the case. In a bizarre, and false, account Dahlia Lithwick asserted that in a "stunning" episode of "emotional outburst," Justice Thomas indulged in a "personal narrative" that she claimed might be "unforgivable." In fact there was no outburst. Instead Justice Thomas spoke quietly and courteously. Furthermore he related no personal narrative or experience.

