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Rodney A. Smolla

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TERRORISM AND THE BILL OF RIGHTS

Rodney A. Smolla*

This year is the Tenth Anniversary of the William & Mary Bill of Rights Journal, and the Journal is very fortunate and honored to have Professor Rodney Smolla publish an article in this year's volume. Professor Smolla played an integral role in the founding and organizing of not only the Journal, but also the Institute of Bill of Rights Law at William & Mary Law School. The Journal extends its most appreciative thanks to Professor Smolla for all his help.

In this Article, Professor Smolla examines the right to free speech in the context of Black v. Commonwealth, a case which dealt with a Virginia law that banned cross-burning. While the legal doctrines argued in the Black case were certainly important then, they took on a whole new importance in light of the attacks on September 11, 2001. Professor Smolla discusses whether the terrorists attacks should affect the freedoms of speech and expression in America, concluding that, while horrific and life-changing, the attack on America should not alter our First Amendment rights.

It is Monday morning, September 10, 2001. I am standing at the advocate's podium in the elegant courtroom of the Supreme Court of Virginia. Hanging on the stately walls of the courtroom are the portraits of many of America's greatest jurists — giants of history who shaped and defined the American Bill of Rights. Behind me the courtroom, seats are more crowded than usual, filled with civil rights and civil liberties lawyers, and with students from the University of Richmond and the University of Virginia. In front of me are seven justices of the Virginia Supreme Court.

The case presents a classic Bill of Rights conflict, indeed a classic American conflict, placing in tension such fundamental values as freedom of speech, religious tolerance, racial equality, and, the primal value that undergirds the very notion of the social contract that constitutes a civil society, freedom from physical attack and threats of violence — freedom, if you will, from fear itself. Seen through the eyes of the highest law enforcement officials of the Commonwealth of Virginia, the defendants on trial are terrorists. Seen from the eyes of the lawyers defending them, the defendants on trial are being persecuted for exercising their freedom of expression.

* George E. Allen Professor of Law, University of Richmond, T.C. Williams School of Law. Prior to joining the law faculty at the University of Richmond, Professor Smolla was on the law faculty at the College of William & Mary, Marshall-Wythe School of Law, where he served as Director of the Institute of Bill of Rights Law. Professor Smolla worked with students at William & Mary to found the Student Division of the Institute of Bill of Rights Law, as well as the *William & Mary Bill of Rights Journal*. He was invited by the *Journal* to submit this article in honor of the ten-year anniversary of the *Journal*.

I was a defense lawyer in *Black v. Commonwealth*,¹ acting as a cooperating attorney for the American Civil Liberties Union of Virginia, and I was presenting the oral argument on behalf of the defendant, Barry Elton Black. Black was a leader of the Ku Klux Klan convicted of violating a Virginia statute that makes it a felony to burn a cross with the intent to intimidate any person.² In the course of my argument, I argued vociferously that Black was not a terrorist, that he had not engaged in any actual conspiracy to commit violence, had not communicated any genuine threat of violence against anyone, and had not intimidated any person in any palpable or real sense. Black's expression, the burning of a cross, was hateful and racist and offensive to most Americans of good will, I admitted, but it was not, in and of itself, a terrorist act. When pointedly asked by one of the justices whether the Commonwealth of Virginia was helpless to defend its citizens against the criminal violence of groups such as the Ku Klux Klan, I responded that the commonwealth was not helpless at all: ordinary criminal laws were available to police true threats, and in addition, laws directed to punishment of bias-motivated crimes could be enacted.³ There is a distinction, I maintained, between hate crime and hate speech, and the distinction is of constitutional dimension. The First Amendment embodies no right to engage in hate crime. It does embody a right to engage in hate speech. This distinction, I maintained, is fundamental to the American way of life.

* * *

A jump forward in time. We are months past the disaster. Imagine an American citizen. We will call him Alexander. Expressing anger and outrage at Osama bin Laden, Alexander creates an effigy of bin Laden in his front yard, hanging from a noose affixed to a tree limb, with a sign beneath the effigy stating: "WANTED: DEAD OR ALIVE." People who stroll or drive through the residential neighborhood have different reactions. Some honk their car horns in approval, or yell affirmations like "Right On!" or "God Bless America!" Others do not evidence any outward reaction at all, and we may only guess at their thoughts. A few shake their heads or frown with disapproval. Perhaps they are offended by the crudity of the display, or do not believe in the death penalty, or feel that the image is inappropriate for children who regularly pass through the neighborhood. One resident, however, is quite passionately angered by the presentation.

Imagine a second American citizen. We will call him Amhad. Born in Boston

¹ 553 S.E.2d 738 (Va. 2001), *petition for cert. filed*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1107).

² VA. CODE ANN. § 18.2-423 (Michie 1996). *See infra* notes 29-36 and accompanying text.

³ *See infra* notes 29-36 and accompanying text.

where his mother kept house while his father, now a physician, attended Harvard, Amhad is a devout Moslem fundamentalist. His parents were born in Saudi Arabia, and live there now. But Amhad, exercising the privileges of citizenship granted by the Fourteenth Amendment,⁴ has spent his adult life in the United States, writing, speaking, and raising money for various Islamic organizations and charities. Amhad believes that the Saudi government is corrupt, that Israel is evil, and that America acts in concert with Israel to oppress the Palestinians and subjugate the world of Islam. Most disturbingly, he actually sees Osama bin Laden as a prophet and hero. And so he erects a counter-display on his front yard. It is a flattering effigy of Osama bin Laden, standing proud and defiant. Under the likeness appear the words: "OSAMA BIN LADEN: PROPHET AND HERO."

Amhad's display evokes far more furious responses than Alexander's. Eggs and bottles are tossed in Amhad's front yard. Trespassers enter the property and set the likeness of bin Laden afire. Amhad receives threatening phone calls, and is stalked as he drives to and from his home. Undaunted, he erects another version of the same display, holds a press conference on his front lawn to profess his faith in Osama bin Laden and denounce America, his country by birthright and choice, as "the Great Satan." Amhad declares that under the First Amendment to the United States Constitution he has as much right to erect his pro-bin Laden effigy as his neighbor had to erect his anti-bin Laden effigy, and demands that the police protect his property (including his bin Laden tribute) and his person against vigilante violence.

Amidst great furor, the city council meets. Some say that the city should force both citizens to remove their bin Laden displays. Others say that Alexander's can stay, but Amhad's must go. There are some with more extreme positions; they call for Amhad's immediate arrest and prosecution, or at the least, his deportation. He should be charged with sedition, or incitement to riot, his most shrill detractors declaim. Some even say he is an "accessory after the fact" to the terrorism of September 11, or a traitor to his country, guilty of providing aid and comfort to the enemy.

The local ACLU defends Amhad, however, saying that he has committed no crime, and urging restraint by everyone. "It's a free country," says the head of the ACLU.

"No it isn't," replies a vitriolic critic. "We are at war now, and we're not so free anymore."

* * *

⁴ The first sentence of the Fourteenth Amendment unequivocally declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." U.S. CONST. amend. XIV, cl. 1.

It is Monday, September 10 again, back within the majestic and civil confines of the Supreme Court of Virginia. Yet within the civility of the setting, the legal and policy issues in contest are intense. I suspect that about half the spectators in the courtroom agree with the positions I am taking, and about half agree with the Commonwealth. From the questions posed to the advocates during oral argument, I guess that the members of the Court might also be divided, and that the final outcome of the appeal is very much in doubt.

If the outcome was in doubt that day, however, in my advocate's self-righteousness I had no doubt about what the outcome ought to be. The First Amendment's guarantee of freedom of speech was, in my constitutional constellation, the true lodestar. I felt great certitude on this. To the extent that others in the courtroom might not have agreed, they were entitled to their opinions, but I was certain they were wrong.

None of us in that courtroom that day could have known that within twenty-four hours all our lives would be profoundly changed. And none of us in that courtroom could have known that the events of the next day would hit the American consciousness with enough force to rattle the foundations of all certitudes. Like so many Americans, on September 11 I felt deep shock, grief, anger, and dismay, and I did what I could to provide assistance and comfort to those most directly affected by the terrorist violence. And like so many, as the immediate shock and sorrow gave way to participation in the national analysis, discussion, and debate over our society's proper responses to the events, I found myself, with others, beginning to re-examine many of the basic habits and premises of our national life.

"Certitude is not the test of certainty[.]" admonished Oliver Wendell Holmes, "[w]e have been cock-sure of many things that were not so."⁵ I do not know that I could have been more cocksure in my abiding belief in the importance of our Bill of Rights, particularly the freedoms of speech, religion, and press guaranteed in the First Amendment. And indeed, I took great comfort in the fact that in the immediate hours and days following the attacks, our political leadership did *not* call for scraping our core constitutional freedoms, but for vigilant adherence to them. President Bush admirably set the tone for all of our nation's leadership in his insistence that if we abandon our liberty out of fear of terrorism, we will have given terrorism the very victory it craves, for we would have then surrendered to the terrorist's objective of displacing our freedom with fear.⁶ Our leaders thus did not

⁵ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

⁶ See President's Address Before a Joint Session of the Congress of the United States in Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1350 (Sept. 20, 2001):

I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat. I ask you to uphold the values of America and remember why so many have come here. We are in a fight for our

call for wholesale suspensions of freedom of speech or press, did not call for the end of due process of law, did not seek to erase the presumption of innocence, did not announce the abandonment of individual privacy, or freedom from unreasonable searches and seizures.

If the rhetoric of freedom remained resonant, however, I had my doubts that the reality of freedom would go undiminished. As we got down to the actual task of enacting laws responsive to the attacks of September 11,⁷ I observed significant slippage in our commitment to the Bill of Rights. Through a combination of congressional enactments and administrative policy pronouncements, it became clear that there was no longer any such thing as business as usual.

This is not shocking or unexpected. It is the normal societal response to sudden catastrophe, as it is often the normal individual response. Nor is it unprecedented. Throughout American history, we have compromised our commitment to certain Bill of Rights freedoms when exigent emergency appeared to require it.⁸ A constitutional right does not seem of much value if the Constitution itself is imperiled, and the Constitution does not seem much more than script on ancient parchment when suicidal terrorists threaten to bring down the nation. What is the point of saving an abstraction like "a constitutional right" when skyscrapers fall from the sky crushing thousands? What is the point of blind faith in a document called the "Bill of Rights" when a heinous biological agent in the hands of the next ingenious terrorist might murder millions? As Abraham Lincoln asked, "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"⁹

We might well ponder Lincoln's question with regard to any constitutional right that has been placed in play by the attacks of September 11. Pick yours: the definition of "treason,"¹⁰ the right to trial by jury,¹¹ the protection against unreasonable search and seizure,¹² the requirement of probable cause,¹³ the right to

principles, and our first responsibility is to live by them. . . . As long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world.

Id.

⁷ *E.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

⁸ John Conyers, Jr., Editorial, *Liberty at Risk*, WASH. POST, Sept. 19, 2001, at A33.

⁹ Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

¹⁰ U.S. CONST. art. III, § 3, cl. 1.

¹¹ U.S. CONST. amend. VI, VII.

¹² U.S. CONST. amend. IV.

¹³ *Id.*

the assistance of counsel,¹⁴ or any number of other established constitutional norms arguably placed in jeopardy by laws and policies proposed in response to the traumatic September events.

In this Article, I seek to explore Lincoln's question in the context of one Bill of Rights liberty, freedom of speech, as a vehicle for considering the larger questions of whether and how a nation subjected to a sudden terrifying violent attack may maintain a high degree of fidelity to its fundamental commitments to individual freedom. Although the free speech question is by no means the only constitutional conflict posed by the terrorism attacks, it is certainly an important one. We are said to be in a war against terrorism.¹⁵ The impact of war on freedom of speech is an old and vexing question. In *Schenck v. United States*,¹⁶ it was argued that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."¹⁷

The cross-burning case that I argued on September 10 is but one small dispute, one relatively petty and obscure conflict, in the long American history of free speech litigation. Yet it provides a superb window from which to view the entire American struggle to reconcile our constitutional traditions prior to September 11 with our altered realities since that day. As I waited for the Virginia Supreme Court to render its decision in *Black v. Commonwealth*,¹⁸ the litigation took on a bellwether quality. I wondered what impact the terrorist attack of September 11 would have on a case submitted to a court on September 10. I did not contemplate this in any vain or crass sense. I did not ask whether I would win *my* case or lose *my* case. Instead I contemplated the problem in the broader sense of one who cares, one who has spent a good part of his professional life engaged in these questions, one deeply affected — with the rest of the nation — by the dastardly September attacks. I asked, in short, both whether the outcome *would* be changed by the events of September 11, and more importantly, whether the outcome *should* be changed.

There was genuine soul-searching here, personal and communal. In discussions with students, discussions conducted at symposia and teach-ins and town meetings, the impact of the September 11 attacks was a constant topic, and I learned much from the insights and observations of others. At the end, I came away with at least a provisional answer on the "should" question, though I had little confidence in my

¹⁴ U.S. CONST. amend VI.

¹⁵ President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301, 1302 (Sept. 11, 2001) ("America and our friends and allies . . . stand together to win the war against terrorism.").

¹⁶ 249 U.S. 47 (1919).

¹⁷ *Id.* at 52. As discussed later, Holmes' position on this issue appeared to evolve in certain cases after *Schenck*. See *infra* note 90 and accompanying text.

¹⁸ 553 S.E.2d 738 (Va. 2001), *petition for cert. filed*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1107).

ability to predict the “would.”

My answer, for what it is worth, is that our First Amendment principles should *not* bend in the aftermath of September 11, despite all we have been through.

* * *

At the heart of the argument I pressed before the Virginia Supreme Court on September 10 was the supposition that violent speech is not the same as violent action. Under this view, which was, prior to September 11, established constitutional doctrine,¹⁹ the government may not punish the mere *abstract advocacy* of violence, even the abstract advocacy of the violent overthrow of the government, of murder, of terrorism.²⁰ Concomitantly, the government may not punish *mere membership* in a group that has as its firmly adopted agenda the violent overthrow of government, murder, or terrorism.²¹ If this view is accepted, a Ku

¹⁹ See *infra* notes 95-97 and accompanying text.

²⁰ See *infra* notes 76-88 and accompanying text.

²¹ See *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937):

[P]eaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

Id.; *Yates v. United States*, 354 U.S. 298, 329-30 (1957):

The second observation is that both the record and the Government's brief in this Court make it clear that the Government's thesis was that the Communist Party, or at least the Communist Party of California, constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party's affairs and thus inferentially parties to its tenets. . . . But when it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years

Klux Klan leader may not be put in jail merely for expressing publicly the view, *as an abstraction*, that it is desirable to murder Blacks, Jews, or Catholics, or for expressing the view, *as an abstraction*, that society would be better off if somebody murdered the president.²² Nor may any person be put in jail merely for being a *member* of the Ku Klux Klan, even if it is proven that the Klan is committed to such a terrorist agenda.²³

This is not to say that a Klan leader would be immune from punishment for using speech actually to *plan* a violent attack.²⁴ Nor is it to say that a Klan leader would be immune from punishment for *inciting* a violent attack, if it could be proven that the reigning constitutional standard, articulated in *Brandenburg v.*

before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged. We need scarcely say that however much one may abhor even the abstract preaching of forcible overthrow of government, or believe that forcible overthrow is the ultimate purpose to which the Communist Party is dedicated, it is upon the evidence in the record that the petitioners must be judged in this case.

Id.

²² See *infra* note 88.

²³ See *Noto v. United States*, 367 U.S. 290, 297-98 (1961):

[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

Id.

²⁴ See *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (dissenting in a case in which a majority affirmed the convictions of communist party leaders for espousing the overthrow of the United States, but adding that he would have affirmed the convictions if actual planning of terrorist activity had been involved):

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale

Id.

Ohio,²⁵ was satisfied.

Under the *Brandenburg* test:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.²⁶

Violent rhetoric and graphic hate-filled demonstrations standing alone, however, do not satisfy this standard. To deconstruct this proposition, it is useful to look at the facts of the Virginia cross-burning cases, and the legal arguments presented in them, more closely.

* * *

Richmond, Virginia's capital city, was the capital of the Confederacy. Following the Civil War and well into the twentieth century, much of Virginia life remained highly racist and segregated,²⁷ and like people in many states where Jim Crow laws were well-entrenched, many Virginians resisted the mandate of *Brown v. Board of Education*.²⁸ Yet despite the stubborn persistence of racism in Virginia, and the commonwealth's official endorsement of racial separation, the commonwealth did move against the excesses of the Ku Klux Klan, even before the Supreme Court's decision in *Brown*.

Virginia passed its first law targeting certain expressive activities of the Klan in 1952.²⁹ The law arose against the backdrop of cross-burnings in front of businesses and residences owned and occupied by African Americans.³⁰

²⁵ 395 U.S. 444 (1969).

²⁶ *Id.* at 447.

²⁷ See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia's anti-miscegenation law, entitled "The Act to Preserve Racial Integrity.").

²⁸ 347 U.S. 483 (1954) (*Brown I*) (striking down "separate but equal" school regime); see also *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) (requiring the dismantling of dual school systems with "all deliberate speed."). Throughout Virginia the mandate of *Brown* was either resisted or followed grudgingly. In *Green v. County School Board*, 391 U.S. 430 (1968), decided well over a decade after *Brown*, the Supreme Court held that New Kent County's token "freedom of choice" plan for implementing *Brown* violated the Fourteenth Amendment, and declared that the time for immediately desegregating schools had come, and that the regime of gradual compliance under the rubric of "all deliberate speed" was over.

²⁹ Act of Apr. 2, 1952, 1952 Va. Acts ch. 483, at 777 (prohibiting the wearing of masks or the placement of a burning cross on the property of another without consent) (current version at VA. CODE ANN. §§ 18.2-422 to 423 (Michie 1996)).

³⁰ See *Cross Burned at Manakin; Third in Area*, RICH. TIMES-DISPATCH, Feb. 26, 1951,

Responding to these racist episodes, Governor Battle proposed statutory restrictions on the cross-burning activities of the Klan.³¹ The commonwealth's first anti-cross-burning statute only prohibited cross-burning on the property of another person,³² and was indisputably enacted to target the cross-burning activities of the Klan.³³ After 1952, the commonwealth's anti-cross-burning statute would be amended a number of times, with each amendment expanding its scope and potency. In 1968, for example, the commonwealth dropped the requirement that the cross-burning only take place on the property of another, and inserted a powerful evidentiary provision, under which the mere burning of a cross was treated *in itself* as prima facie evidence of intent to intimidate another.³⁴ In its present form, the law is quite sweeping:

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.³⁵

Virginia's cross-burning statute does not mention the Ku Klux Klan by name, and clearly applies to anyone who might burn a cross to intimidate any other person.

at 4; *Cross Fired Near Suffolk Stirs Probe*, RICH. TIMES-DISPATCH, Jan. 23, 1949, § 2, at 1; *Cross Is Burned at Reedville Home*, RICH. NEWS LEADER, Apr. 14, 1951, at 1; *Huge Cross Is Burned on Hill Just South of Covington*, RICH. TIMES-DISPATCH, Apr. 14, 1950, at 6; *Police Aid Requested by Teacher: Cross Is Burned in Negro's Yard*, RICH. NEWS LEADER, Jan. 21, 1949, at 19.

³¹ 'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments, RICH. TIMES-DISPATCH, Feb. 6, 1952, at 7.

³² The law stated in pertinent part:

It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the Commonwealth of Virginia a burning or a flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483, § 2, at 777.

³³ See *Bill to Curb KKK Passed by the House*, RICH. TIMES-DISPATCH, Mar. 8, 1952, at 5; *Governor Backs Curb on Ku Klux Activities*, RICH. TIMES-DISPATCH, Feb. 10, 1952, § 2, at 1; *Senate Passes Broadened Anti-Klan Bill*, RICH. NEWS LEADER, Feb. 23, 1952, at 11.

³⁴ Act of Apr. 2, 1968, 1968 Va. Acts ch. 350, at 450 (current version at VA. CODE ANN. § 18.2-423 (Michie 1996)).

³⁵ VA. CODE ANN. § 18.2-423 (Michie 1996).

Yet there is no doubt that the Klan was the group the legislature had in mind when it passed the statute.³⁶ Indeed, other contemporaneous provisions enacted with the cross-burning prohibition dealt with other aspects of Klan ritual, including the wearing of masks; as the Virginia Court of Appeals would candidly explain when it upheld the mask provisions of the law, the statutory scheme was obviously aimed at the Klan.³⁷

The Virginia Supreme Court's examination of the commonwealth's cross-burning statute in 2001 actually involved three consolidated cases, one of which arose from Klan activity and two of which did not.³⁸ The two cases that were not part of Klan activity arose from a cross-burning incident that plainly implicated illegal activity entirely distinct from the act of burning the cross. The two defendants, Richard Elliott and Jonathan O'Mara, after consuming alcohol, sought to "get back" at a neighbor, James Jubilee, by burning a crudely constructed cross in Jubilee's back yard. Jubilee was African American, and while there was some evidence in the record that racism may have been a factor in the incident, the defendants did not appear to have any large ideological agenda in their assault on Mr. Jubilee.³⁹ The convictions of these two defendants were affirmed by the Virginia Court of Appeals, which sustained the constitutionality of the cross-burning statute in *O'Mara v. Commonwealth*.⁴⁰ The key point here is that if

³⁶ See *supra* notes 30-31.

³⁷ In *Hernandez v. Commonwealth*, 406 S.E.2d 398 (Va. 1991), the Court of Appeals upheld the constitutionality of Virginia's anti-mask law, a companion provision to the cross-burning law, openly acknowledging the law's link to the Klan. *Id.* at 401 ("We acknowledge that the legislature's original motivation for enacting the anti-mask statute may have been to 'unmask the Klan.' The statute was, after all, created in the same act with statutes prohibiting cross burning and intimidation, activities historically associated with the Klan."). The court in *Hernandez* sustained the law, reasoning that it could be sustained for content-neutral reasons, such as "the prevention of violence, crime and disorder by the unmasking of potential criminals." *Id.* Interestingly, the court in *Hernandez* explicitly distinguished the prohibition on the wearing of a mask from other aspects of the Klan's "uniform," stating:

The record does not establish, as the appellant contends, that the mask is so identified with the Ku Klux Klan that it is a symbol of its identity. The robe and the hood may be such symbols, but the mask is not. The mask worn without the robe and the hood would be meaningless. The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and the hood. Without the mask, the social and political message conveyed by the uniform of the Ku Klux Klan is the same as it would be with the mask.

Id. at 400.

³⁸ *Black v. Commonwealth*, 553 S.E.2d 738, 741 & n.1 (Va. 2001), *petition for cert. filed*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1107).

³⁹ See *id.* at 748 (Hassell, J., dissenting).

⁴⁰ 535 S.E.2d 175 (Va. Ct. App. 2000). The Virginia Supreme Court granted an appeal

Virginia had never enacted its cross-burning law, the two defendants in the *O'Mara* case could still have been prosecuted under other laws. There is no constitutional right to enter another's backyard without permission and burn a cross (or anything else) there, and the defendants in *O'Mara* were obviously guilty of *some* crime, and could certainly have been prosecuted and convicted under laws of general applicability such as criminal trespass.⁴¹

The third case, *Black v. Commonwealth*,⁴² involved a Ku Klux Klan leader, Barry Elton Black. I was the lead appellate lawyer on behalf of Black, as part of team assembled by the ACLU of Virginia that included attorneys David Baugh and Sara Davis.⁴³ David Baugh, a nationally prominent defense attorney, is African American, an irony not lost on anyone, which served to underscore vividly the fact that the defense lawyers were not defending the substance of Mr. Black's racist message, but his right to say it. Unlike the trespassers in the *O'Mara* case, who were obviously guilty of some crime other than cross-burning and could have been prosecuted for those other crimes, Barry Elton Black was not guilty of any other offense, and no prosecution for any crime other than cross-burning would have been plausible.

Black organized and led a Klan rally on private property in Cana, Virginia on August 22, 1998. During the rally, which was conducted with the permission of the landowner (who was present during the rally), Klan members set fire to a cross, approximately twenty-five to thirty feet in height. Following a Klan custom, the Klan members played the sacred hymn *Amazing Grace* over a loudspeaker as they marched around the cross, shouting and chanting. Their statements included diatribes against Blacks and Mexicans, and Bill and Hillary Clinton.⁴⁴

The burning cross was visible from a nearby public highway. The County Sheriff and a Deputy Sheriff, upon learning of the rally, parked on the highway and walked up to the Klan members, letting them know they would be watching the rally from the road, keeping an eye on things. Several cars drove by the scene while the cross was lit, including one car with an African American family inside. Other than the two officers and these itinerant highway travelers, only one outsider

from this decision. The results of that appeal are revealed later in this essay. *See infra* note 126.

⁴¹ VA. CODE ANN. § 18.2-121 (Supp. 2001).

⁴² No. 1581-99-3 (Va. Ct. App. Dec. 19, 2000) (mem.); *see supra* note 38 (addressing subsequent history).

⁴³ Robert O'Neil and Joshua Wheeler, of the Thomas Jefferson Center for the Protection of Free Expression, filed an *amicus* brief in support of Mr. Black. Mr. Elliott was represented by James O. Broccoletti; Mr. O'Mara by Kevin Martingayle. John H. McLees, Senior Assistant Attorney General, represented the Commonwealth of Virginia.

⁴⁴ *Black*, 553 S.E.2d at 748 (Hassell, J., dissenting); Rex Bowman, *Cross-Burner Convicted: Verdict Squashes Free Speech Argument*, RICH. TIMES-DISPATCH, Jun. 24, 1999, at A1.

observed the rally. She was Rebecca Sechrist.⁴⁵

I wish to dwell a bit on Mrs. Sechrist's reaction to the rally, because I find her testimony in the case quite poignant and significant. Just prior to the rally, Mrs. Sechrist and her husband had a mobile home delivered to the parcel of property adjacent to the field on which the rally took place. Mrs. Sechrist had not yet moved into the home, but was in the process of preparing it for occupancy on the date of the rally. Mrs. Sechrist, who was related to the owner of the property where the rally occurred, did not approve of the Klan or the rally, which she watched from the front of her new mobile home. Although on her own land, she was close enough to hear and see what was going on, and she testified that she heard the Klan members expressing statements that were "real bad" about Blacks and Mexicans.⁴⁶ In the most detailed explanation of what she heard, Mrs. Sechrist testified:

They . . . talked a lot about blacks — and I don't call [] the word they called it . . . it started with an N and I don't, I don't use that word, I'm sorry — but they talked real bad about the blacks and the Mexicans and they talked about how, one . . . guy got up and said that he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and . . . how their tax paying goes to keep the black people up and stuff like that.⁴⁷

During the trial, Mrs. Sechrist vividly described how the rally made her feel:

Oh, it made me feel awful. . . . [T]hey all walked around and then they would go in one circle and say things and then they would go around in another circle and say things and then they went up and all met at the bottom of the cross and lit it and played *Amazing Grace* and I tell you what, . . . it was just terrible. It was terrible to see, that, when they were talking about random shooting black people and all, the guy that said it and everything talked about killing people and then get up there and said . . . that he was a good Christian and when he died, he knowed he was going to heaven and then to burn the cross like that, I just . . . couldn't begin to put in words how I felt. . . . I sat there and I cried. I didn't know what was going to happen between everything going on. It was just terrible.⁴⁸

⁴⁵ *Black*, 553 S.E.2d at 748 (Hassell, J., dissenting); Bowman, *supra* note 44.

⁴⁶ *Black*, 553 S.E.2d at 748 (Hassell, J., dissenting).

⁴⁷ *Id.* (alterations and omissions in original).

⁴⁸ *Black v. Commonwealth*, No. 1581-99-3, slip op. app. at 178 (Va. Ct. App. Dec. 19,

Mrs. Sechrist testified that her feelings of fear and dismay lasted for a "couple months" after the rally.⁴⁹ Mrs. Sechrist, who is not African American or Hispanic, testified that "I think they were trying to scare me," but at the same time she admitted that no participant in the Klan ever did anything threatening directed to her.⁵⁰ She conceded, indeed, that she would have felt much the same reaction had she witnessed video footage of the same rally on television.⁵¹

When I say that Mrs. Sechrist's testimony is poignant and significant, I mean to say that I find that it rings true, that it is authentic, that it probably well reflects the way many people would have reacted had they been in her shoes that day watching the Klan rally. I daresay that my own reaction could have been much the same as hers.

* * *

From a First Amendment perspective, it was my view that in all three of these cross-burning cases, there was one threshold argument so powerful that it made the cases relatively easy to decide, virtual "slam-dunks." None of the convictions could stand, I thought, because the Virginia cross-burning statute itself could not stand: brazenly grounded in viewpoint-discrimination, the statute was facially unconstitutional.

The critical precedent was a 1992 United States Supreme Court decision that also involved cross-burning, *R.A.V. v. City of St. Paul*.⁵² In facts very similar to the facts of the *O'Mara* case, *R.A.V.* involved a prosecution against several young hoodlums who entered an African American family's yard at night and lit a cross.⁵³ They were clearly guilty of several routine crimes, including trespass, but they were prosecuted not under such general laws, but under a hate-speech law, which stated in pertinent part that:

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.⁵⁴

2000) (on file with author).

⁴⁹ *Id.* at 179.

⁵⁰ *Id.* at 187-89.

⁵¹ *Id.*

⁵² 505 U.S. 377 (1992).

⁵³ *Id.* at 379.

⁵⁴ *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

The United States Supreme Court struck down the statute in a far-reaching opinion by Justice Antonin Scalia, centered in the core judgment that “the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.”⁵⁵ Justice Scalia’s opinion for the five-justice majority severely condemned the message conveyed by cross burning, but insisted that the government must combat the evils of racism and violence through mechanisms that do not offend the First Amendment: “Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”⁵⁶

I argued that the Virginia cross-burning statute simply could not be distinguished from the law struck down in *R.A.V.*, and that this ended the matter. The commonwealth strenuously opposed this claim, making a number of clever points. First, the commonwealth maintained that the Virginia statute only made criminal the act of cross-burning carried out for the purpose of “intimidation.” The statute in *R.A.V.* did not contain any such “intimidation” element, but was triggered by a different standard, one which required that the perpetrator know or have reason to know that the actions would “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁵⁷

As I saw it, two differences between the statutes might thus be teased out. The term “intimidation” is more pointed and concrete than the phrase “anger, alarm, or resentment.” Intimidation, as the trial court in the Black prosecution had construed it, was akin to a classic physical threat. The jury in Black’s case could only find intimidation if it found that Black had intentionally placed someone in fear of bodily harm.⁵⁸ Secondly, it might be argued that the ordinance in *R.A.V.* was explicitly calibrated in terms of the ideological reaction of the victim — unlike the Virginia statute, which on its face dealt only with “intimidation,” an ostensibly neutral term, the *R.A.V.* statute required that the anger, alarm, or resentment be grounded in the “basis” of certain forms of identity — race, color, creed, religion, or gender.⁵⁹ To put it in simple terms, whereas the Virginia cross-burning statute seemed to make it a crime to burn a cross for the purpose of communicating a threat along the lines of “I would like to hurt you,” the ordinance in *R.A.V.* seemed to countenance throwing a person in jail for communicating a message that might not be *threatening* as such, but merely *offensive* (in the sense that messages that arise “anger, alarm or resentment” are offensive), and moreover, offensive for a relatively narrow set of reasons — offensive “on the basis of” race, color, creed, religion, or

⁵⁵ *Id.* at 391.

⁵⁶ *Id.* at 396.

⁵⁷ *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02).

⁵⁸ *Black v. Commonwealth*, No. 1581-99-3 slip op. app. at 223-25.

⁵⁹ *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02).

gender.

Bolstering these arguments, the Commonwealth advanced a related theory, emphasizing that the Virginia cross-burning statute applied to *any* person who burned a cross for *any* reason. It was not limited to prosecutions against the Klan — indeed two of the three defendants before the Virginia Supreme Court had nothing to do with the Klan — and it was not limited to persons who burned a cross to advance a classic hate-speech agenda, such as the racist or anti-Catholic or anti-Semitic hates of supremacist groups.

Although clever, I found these arguments unpersuasive when I first heard them, and I find them no more persuasive now, despite the terrorist attacks of September 11. The commonwealth, in my view, was not reading *R.A.V.* for all it was worth. In my judgment, the essential point of *R.A.V.* was that a law banning fighting words is permissible, but not a law banning “racist fighting words.”⁶⁰ Thus, a law banning intimidation may be permissible if the concept of “intimidation” is sufficiently confined, but not a law banning “intimidation-through-cross-burning.” It was simply irrelevant that the statute included as an element the requirement of an intent to intimidate, for even with this element included, the law was infected with viewpoint-discrimination. The Virginia cross-burning statute was thus not a genuine law of general applicability, a law that prohibited only conduct that threatened physical harm, the type of law that would not raise a viewpoint-bias problem.⁶¹

In my estimation *no* cross-burning law, no matter what extra elements of intent or harm are added, will ever escape the viewpoint-discrimination problem, or ever be constitutional, simply and completely because it *is* a cross-burning law.⁶² The simple and sufficient proof of this point is that the Supreme Court in *R.A.V.* found unavailing the effort by the Minnesota Supreme Court to save the statute at issue

⁶⁰ *Id.* at 391-92 (“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).

⁶¹ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (sustaining a “hate crime” law — not a “hate speech” law — that raised the applicable criminal penalties for crimes committed with biased intent).

⁶² See *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (applying *R.A.V.* to strike down cross-burning law):

The State urges us to construe [this statute] as proscribing “fighting words.” We discern that we cannot cure the unconstitutionality of [this statute] by such a construction. Like the Minnesota statute, [this statute] does not completely prohibit the use of fighting words; rather, it prevents only the use of those fighting words symbolically [sic] conveyed by cross burning. The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance.

Id. (footnote omitted).

with a narrowing construction that would have rendered it otherwise constitutional, because the construction did not cure the viewpoint-discrimination defect.⁶³

Precisely the same problem exists with flag desecration statutes. Consider how important the American flag has become to our culture since September 11. I had two flying from my house and one from each car. Like many Americans, in the days immediately following the attacks, it was difficult for me to see the flag or hear the National Anthem or *God Bless America* without tearing or swelling with intense emotion. Yet under established First Amendment doctrine it is impossible to devise a constitutional anti-flag-desecration law, because one cannot imagine such a law that is not grounded in some positive view of the flag as a symbol of our national unity and identity, which does not also fundamentally serve the purpose of discouraging expression corrosive of that unity and identity.⁶⁴

The killer argument against the government for both cross-burning or flag-burning laws (or for any other laws identifying some specific symbol, such as the Confederate Flag or a Swastika or an effigy of Osama bin Laden) is that the government will never have a credible answer to the question of why it must pass such a law, rather than rely on statutes of general applicability — such as laws against murder, arson, assault, battery, trespass, or threats. Even when such neutral laws incidentally implicate the exercise of expression, they are at most subject to mere “intermediate scrutiny” review, the standard applicable to content-neutral laws, and are commonly upheld.⁶⁵ When the government eschews these readily available tools to single out expression involving a particular symbol such as the flag or a cross, the underlying reason is obvious: the government’s enactment has nothing to do with the *physical* characteristics of the symbol, but with its meaning. A cross is an object or symbol of a particular shape: a vertical bar traversed by a horizontal bar. Nothing in this geometric configuration of the vertical and horizontal carries any peculiarly dangerous potency. It is not the fire that burns

⁶³ In *R.A.V.* the Minnesota Supreme Court attempted to save the hate speech law at issue through a narrowing construction that purported to limit application of the law to situations in which the speech was directed to the incitement of imminent lawless action and likely to do so — the incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev’d*, 505 U.S. 377 (1992). The Supreme Court of the United States nonetheless ruled that even if the statute were otherwise a valid incitement or a fighting words law, it would remain unconstitutional, because it would still be tainted with viewpoint discrimination. *R.A.V.*, 505 U.S. at 391-96.

⁶⁴ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down a state flag desecration law, stating 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.”); see also *United States v. Eichman*, 496 U.S. 310 (1990) (striking down federal flag desecration law passed in response to *Texas v. Johnson*).

⁶⁵ See *United States v. O’Brien*, 391 U.S. 367 (1968) (sustaining prohibition on draft-card desecration, which could be defended on the content-neutral grounds of protecting the orderly administration of the draft).

hotter when flaming sticks are crossed, but the passions that the fire inflames.

The only response that the government can ever have to this line of argument is to invoke its own prior experiences with regard to the symbol. This response is at least intellectually honest.

For many Christians, who comprise a substantial percentage of American society,⁶⁶ the cross is a sacred symbol imbued with powerful religious meaning, connoting the crucifixion of Christ. To many Christians the desecration of the symbol as part of a ritual of violence and hate is inherently offensive. That the cross-burning ritual often includes the juxtaposition of hateful messages with the playing or singing of a sacred hymn such as *Amazing Grace* or *The Old Rugged Cross* only compounds the offense. More pointedly, any American with even a passing sense of our national history knows that cross burning is a ritual strongly associated with bigotry and violence.⁶⁷ Cross-burning laws exist because cross-

⁶⁶ BARRY A. KOSMIN ET AL., GRADUATE CTR. OF THE CITY UNIV. OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY, 2001, at 12 ex. 1 (2001) (finding that 76.5 percent of U.S. adults identify themselves as Christian), available at <http://www.gc.cuny.edu/studies/aris.pdf>.

⁶⁷ Justice Clarence Thomas has told the story as eloquently as any:

There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning. Cross burning was entirely unknown to the early Ku Klux Klan, which emerged in some Southern States during Reconstruction. The practice appears to have been the product of Thomas Dixon, whose book *The Clansman* formed the story for the movie, *The Birth of a Nation*. In the book, cross burning is borrowed from an "old Scottish rite" (Dixon apparently believed that the members of the Reconstruction Ku Klux Klan were the "reincarnated souls of the Clansmen of Old Scotland") that the Klan uses to celebrate the execution of a former slave. Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function as an instrument of intimidation. To be sure, the cross appears to serve as a religious symbol of Christianity for some Klan members. The hymn "The Old Rugged Cross" is sometimes played during cross burnings. But to the extent that the Klan had a message to communicate in Capitol Square, it was primarily a political one. During his testimony before the District Court, the leader of the local Klan testified that the cross was seen "as a symbol of freedom, as a symbol of trying to unite our people." The Klan chapter wished to erect the cross because it was also "a symbol of freedom from tyranny," and because it "was also incorporated in the confederate battle flag." Of course, the cross also had some religious connotation; the Klan leader linked the cross to what he claimed was one of the central purposes of the Klan: "to

burning, the stock ritual of the Klan, has often in the past proven to be an especially potent device for intimidation. It is also a ritual that may on occasion stir up the hateful passions of Klan members and provoke them to become an out-of-control mob that sets out from the cross-burning rally to engage in acts of terror or violence. In short, there is nothing at base *irrational* about society's fear and loathing for cross-burning.

This is a powerful argument, but an unconstitutional one. It concedes the very motive that the First Amendment prohibits, for the argument contains the intrinsic admission that it is indeed the *meaning* that the ritual of cross-burning has taken on as a symbol of hate that forms the basis for the legislative judgment to prohibit cross burning. The government cannot have it both ways — it cannot claim on the one hand that the cross-burning law is neutral, and then seek to justify its statute on the grounds that in our common experience, cross burning is typically a ritual of intimidation and prejudice.⁶⁸

It matters not that persons other than the Klan may commandeer the ritual, or that the law reaches anyone who burns a cross no matter what that person's specific ideological program. In *Texas v. Johnson*,⁶⁹ the United States Supreme Court rejected this very argument, rebuffing an attempt to save the Texas flag desecration law on the supposition that the law applied evenhandedly to any person or group who desecrated the flag, from whatever political perspective.⁷⁰

establish a Christian government in America." But surely this message was both political and religious in nature.

Although the Klan might have sought to convey a message with some religious component, I think that the Klan had a primarily nonreligious purpose in erecting the cross. The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring) (citations omitted).

⁶⁸ See *R.A.V.*, 505 U.S. at 392-93:

This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.

Id.

⁶⁹ 491 U.S. 397 (1989).

⁷⁰ *Id.* at 413 n.9:

If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. . . . Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is

Cross-burning laws and flag-burning laws are mirrors of the same altruism. Laws calculated to shelter the flag are passed to enhance our sense of national pride and national unity. Laws calculated to shelter the cross are passed to prevent the perverse use of the cross as a symbol of fraction and disunity. In both instances, the ends are admirable but the means unconstitutional. Hard as it sometimes is to accept, Americans have the right to fly flags or trample on them, to worship crosses or burn them.⁷¹

* * *

Returning to the imaginary Osama bin Laden effigy controversy, it seems to me clear enough that the First Amendment values forbidding viewpoint discrimination ought to remain sufficiently hale to preclude a number of possible responses the city might be tempted to employ in reaction to the two bin Laden effigies. The city surely could not, consistent with our constitutional traditions, expressly permit anti-bin Laden symbols and statements, but forbid supportive statements. Some might claim, rhetorically, that open support of bin Laden is "treason" or "sedition," but the law has long distinguished between anti-war protest and more tangible provision of aid and comfort to the enemy.⁷² And the decision in *R.A.V.* would seem to clearly bar the city from treating one side of a debate one way and the other side another.⁷³ Nor, following the Supreme Court's subsequent elaborations on what constitutes "viewpoint discrimination," could the city attempt a broader ban, on *all* symbolic expression related to Osama bin Laden, for or against him. To ban all effigies of bin Laden, whether they communicate praise or disgust for the man, is still to ban the symbol of the man (and only *one* man to boot) and as such, would violate the First Amendment.⁷⁴

This analysis means that the city, if it wishes to respond at all to the crisis, must resort to some other tactic. It must invoke some general law, not related to viewpoint, against one of the effigies or both. The types of general laws that jump to mind are such prohibitions as "breach of peace," "communication of threats," or "incitement to lawless action." These types of prosecutions are viewpoint-neutral, and as such avoid the problems posed by *R.A.V.* They instead are grounded in a

mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

Id.

⁷¹ Thus, however much we may regard the ultimate motive of the government in seeking to shelter the crosses or the flags from defilement as altruistic, the mechanism of such laws violates a core principle of the First Amendment. *See id.* at 418 ("It is not the State's ends, but its means, to which we object.").

⁷² *See infra* notes 90-97 and accompanying text.

⁷³ *See supra* notes 52-57, 59-60 and accompanying text.

⁷⁴ *See supra* notes 63-64 and accompanying text.

claimed link between speech and violence.

* * *

In the cross-burning cases, it was not strictly necessary for the Virginia Supreme Court to reach the question of whether the cross-burning law violated the First Amendment for reasons other than the viewpoint discrimination problem, for if the laws were viewpoint-based, they were unconstitutional without more.⁷⁵ Nonetheless, as a subsidiary argument, defense lawyers in the *Black* case argued that even if the viewpoint problem with the statute did not exist, the law failed to meet the elements of the incitement standard of *Brandenburg v. Ohio*.⁷⁶ In *Brandenburg* the Supreme Court struck down the conviction of a Klan leader for engaging in a cross-burning Klan ritual virtually identical to that in *Commonwealth v. Black*, holding that the defendant was guilty only of the abstract teaching of the moral propriety of racist violence, which the Court treated as different in kind from an actual purpose to incite immediate violence in circumstances likely to produce that violence. The *Brandenburg* Court held:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷⁷

⁷⁵ See *infra* note 127 and accompanying text.

⁷⁶ 395 U.S. 444 (1969). *Brandenburg* involved a Ku Klux Klan rally conducted on a farm outside Cincinnati. A local Cincinnati television station reporter had been invited to witness the rally, and he and a cameraman filmed the event, portions of which were later broadcast on the Cincinnati station and a national network. The film footage was filled with vile, incendiary racist bile. Klan members pronounced that "the nigger should be returned to Africa, the Jew returned to Israel," and "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken." *Id.* at 446-47. The state of Ohio prosecuted *Brandenburg*, the leader of the Klan group, under an Ohio "criminal syndicalism" law making it illegal to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," or to assemble "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13 (repealed 1974)). *Brandenburg* was convicted, fined \$1,000, and sentenced to one to ten years' imprisonment. The Supreme Court held the Ohio law unconstitutional. No one was present at the Klan rally except the Klan members themselves, the television reporter, and his cameraman. Nothing in the record indicated that the racist messages of the Klansman at the rally posed any immediate physical threat to anyone.

⁷⁷ *Id.* at 447.

In a sequel to *Brandenburg*, *Hess v. Indiana*,⁷⁸ the Court reinforced the standard, placing particularly emphasis on the requirement of "imminence," thus tightening the required nexus between violent speech and violent action.⁷⁹

More than wordplay is required to satisfy the *Brandenburg* standard; the government must do more than summarily label expression "threatening" or "intimidating."⁸⁰ A change in terminology is not a change in principle; it is the substance, not the label, that matters. A particularly telling application of this came in *NAACP v. Claiborne Hardware Co.*,⁸¹ an extremely interesting case in which the Court struck down a conviction against civil rights leaders, including Charles Evers, arising from a civil rights boycott of merchants in Mississippi. The tactics of the boycott organizers were found by the Mississippi Supreme Court to include threats, intimidation, and coercion,⁸² a characterization that was not entirely unfounded.⁸³

Despite the episodes of sporadic violence in the record and the vitriol of the defendants' rhetoric, however, the Supreme Court held that the actions of the boycott organizers were protected by the First Amendment.⁸⁴ The Court acknowledged that Evers' statements could be interpreted as inviting violent retaliation, "or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended."⁸⁵ But this did not matter, for "[t]o

⁷⁸ 414 U.S. 105 (1973).

⁷⁹ *Id.* at 108-09.

⁸⁰ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392-93 (1992).

⁸¹ 458 U.S. 886 (1982).

⁸² *Id.* at 894 (recounting the lower court's finding that "[i]ntimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results.").

⁸³ To "enforce" the boycott, activists wearing black hats stood outside the stores writing down the names of black patrons. After these names were read aloud at meetings and published in a newspaper, sporadic acts of violence were committed against the persons and property of those on the list. Charles Evers, one of the boycott leaders, threatened that boycott breakers would be "disciplined" and warned that the sheriff could not protect them at night. *Id.* at 902. Evers stated at a rally: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.*

⁸⁴ *Id.* at 911-12:

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition — rather than through riot or revolution — petitioners sought to change a social order that had consistently treated them as second-class citizens.

Id. (citation omitted) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

⁸⁵ *Id.* at 927.

the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers's conduct is constitutionally protected and beyond the reach of a damages award."⁸⁶ The emotionally charged rhetoric engaged in by Evers, the Court held, could not be fairly characterized as true incitement:

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however — with the possible exception of the Cox incident — the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."⁸⁷

In sum, it is not exceedingly difficult to distill the core learning of these cases. A central aim of the modern American First Amendment is to draw a line between abstract advocacy on the one hand, and the prevention of impending lawless action on the other.⁸⁸ Yet while discerning the core meaning of these landmark cases is not difficult, fidelity to them in times of extreme national stress is. It may be that the

⁸⁶ *Id.* at 926.

⁸⁷ *Id.* at 928 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1969)).

⁸⁸ The Court in *Brandenburg* articulated its test in the context of violent crowd behavior and assembly, and the concern that the law at issue would punish mere abstract advocacy. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) ("[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."); see also *Allen & Rocks, Inc. v. Dowell*, 477 S.E.2d 741 (Va. 1996) (holding that under Virginia's "insulting words" statute, VA. CODE ANN. § 8.01-45 (Michie 2000), words must "tend to violence and breach of the peace" to be actionable).

First Amendment is most important in the worst of times,⁸⁹ but it is the worst of times that our loyalty to it is most severely taxed.

One recurring temptation is to draw on our past experiences to declare by fiat that certain forms of expression are inherently incendiary, so that their mere utterance, standing alone, is sufficient to make the case against the speaker who utters them. In declaring that the burning of a cross *in itself* was sufficient to establish an intent to intimidate, the Virginia General Assembly attempted precisely this type of shortcut. It is a shortcut that the First Amendment must be understood to forbid.

One can understand the legislative temptation. One can understand why it would be quite rational to impute to the Virginia General Assembly a legislative "finding" that cross burning is an especially common, dangerous, or pernicious method of intimidation, a form of expression that might reasonably be declared *in advance* to presumptively meet the *Brandenburg* standard. More modestly, we might easily see the logic in a legislative supposition that cross burning is a particularly potent and evil tool for intimidation, and on that basis should be singled as a form of "conduct" so inherently intimidating that it renders permissible a legislative judgement that the act of cross burning is at minimum *prima facie* proof of an intent to intimidate.

This line of reasoning once convinced the United States Supreme Court. In the early part of the last century the Court routinely affirmed the convictions of anti-war protestors on the mere "tendency" of speech to make violence or crime more likely at some indefinite time in the future — a line of reasoning usually described as the "bad tendency" test.⁹⁰

The nadir of free speech protection in the Supreme Court was the corresponding apex of the bad tendency standard, reached in *Gitlow v. New York*.⁹¹ The Supreme Court in *Gitlow* embraced the argument that a legislature could classify certain utterances as so intrinsically perilous to public security and peace that they could be declared taboo and their very utterance made criminal.⁹² Piling on, the Court

⁸⁹ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 451-52 (1985).

⁹⁰ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919). Justice Oliver Wendell Holmes wrote these three opinions, sending Schenck, Debs, and Frohwerk to jail. But Holmes ultimately repudiated the "bad tendency" approach, in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting), a repudiation that was ultimately joined and reinforced by Justice Louis Brandeis. See *Whitney v. California*, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring). See generally David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1984).

⁹¹ 268 U.S. 652 (1925).

⁹² *Id.* at 669 ("Such utterances, by their very nature, involve danger to the public peace and to the security of the State.").

then went so far as to pronounce that once the legislature has determined that certain expression is by nature dangerous, the Constitution does not require proof that the expression actually posed a danger in an individual prosecution. The defendant is stripped of the defense that "my speech was no threat to society" because the legislature has determined in advance that such speech is always a threat to society.⁹³ This is a neat trick if it's legal; think of what we might do with it: declare in advance that all public support of Osama bin Laden is inherently traitorous and seditious, and be done with any proof problems.

Oliver Wendell Holmes (joined by Justice Brandeis), had migrated in his free speech thinking from his earlier opinions by the time of *Gitlow*, and was now a strong advocate of a robust First Amendment. Holmes dissented sharply in *Gitlow*, taking particular aim at the Court's willingness to defer to the legislature's discretion regarding the inherent danger of the proscribed speech, in one of his most eloquent defenses of freedom of speech.⁹⁴ The end point of this story is that the view of Holmes and Brandeis, originally expressed in ringing dissent,⁹⁵ would

⁹³ *Id.* at 670:

In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration.

Id.

⁹⁴ *Id.* at 673 (Holmes, J., dissenting):

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.

Id.

⁹⁵ As Justice Brandeis explained in *Whitney v. California*, 274 U.S. 357 (1927):

This legislative declaration . . . does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.

ultimately prevail and become established doctrine.⁹⁶ Mere "bad tendency" is no longer enough to justify the abridgment of expression, nor may a legislature "pre-certify" in advance that certain words or symbols are inherently dangerous or harmful.⁹⁷

Id. at 378-79 (Brandeis, J., concurring). The government may use general laws such as trespass to accomplish its purposes of crime-deterrence, but it may not by brute fiat render certain phrases, symbols, or associations illegal:

Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

Id. at 377-78 (Brandeis, J., concurring).

⁹⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹⁷ In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), for example, the Supreme Court struck down a conviction against a newspaper for violating confidentiality provisions applicable to Virginia's Judicial Inquiry and Review Commission, notwithstanding the legislature's express declaration that breaches of confidentiality constituted a clear and present danger to the administration of justice. *Id.* at 838. The legislature, the Court held, could not make such an advance finding, and in so doing purport to preclude independent judicial review of the question of whether, in the particular factual circumstances, such a clear and present danger existed, on a case-by-case basis. *Id.* at 843 ("This legislative declaration coupled with the stipulated fact that Landmark published the disputed article was regarded by the court as sufficient to justify imposition of criminal sanctions. Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); see also *Cohen v. California*, 403 U.S. 15, 26 (1971):

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

Id.; *Herndon v. Lowry*, 301 U.S. 242, 258 (1937):

The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined

* * *

If the legislative fiat device is plainly unconstitutional, however, there remains one last issue regarding the impact of the events of September 11 that presents a more subtle and difficult puzzle. While it may be true that the government could not "pre-certify" pro-Osama bin Laden speech as inherently destructive of public security and order, is it permissible for judges and juries to take into account the new social *context* created by the September 11 attacks in applying the existing First Amendment standard to *individual cases*?

It may be true that *Brandenburg* requires us to separate "abstract advocacy" from speech that in some palpable and immediate sense is threatening or inciting. But incendiary rhetoric that seemed abstract prior to September 11 does not seem so abstract anymore.

What we once may have been willing to dismiss as hyperbolic bluster we may now treat seriously as threat.⁹⁸ Separating graphic language and emotional exaggeration from genuine threats is an old First Amendment problem. In *Watts v. United States*,⁹⁹ the defendant Watts was convicted of willfully making a threat to take the life of the president during a public rally at the Washington Monument. In the course of expressing his opposition to the draft, Watts stated: "I have already received my draft classification as 1-A and 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."¹⁰⁰ The Supreme Court overturned Watts's conviction, reasoning that when taken in context what Watts said was protected by the First Amendment, for it was no more than "a kind of very crude offensive method of stating a political opposition to the President."¹⁰¹

Yet if context was enough in *Watts* to get the defendant off the hook, might it be enough today to put another defendant on it? Imagine that Amhad, our fictitious supporter of Osama bin Laden, were to say, "if the United States harms Osama bin

character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered.

Id.

⁹⁸ See, e.g., Chisun Lee, *New York's Anti-Terror Express*, VILLAGE VOICE, Feb. 19, 2002, at 35 ("One of the things some of us did on the first sunny day to get off school would now be a class-D felony," said attorney Russ Neufeld . . . referring to a new state statute on false bomb threats . . ."); *Officer Demoted for 'Taliban' Prank*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 13, 2001, at 5B ("A Miami-Dade police officer was demoted from lieutenant to patrolman for writing 'The Taliban' on a letter meant for his captain. . . . The letter did not contain any powder, but the county treated it as a possible anthrax threat and summoned the fire department.").

⁹⁹ 394 U.S. 705 (1969).

¹⁰⁰ *Id.* at 706.

¹⁰¹ *Id.* at 708.

Laden, I am going to get my rifle and put George W. Bush in my sights." Could Amhad be arrested for threatening the president? Would the Supreme Court affirm his conviction, reaching a different result from that in *Watts*?

There is not space here to fully and properly explore this question, but some preliminary observations are in order. First, in much the same manner that the Virginia cross-burning case seemed to bridge the events of September 11 and provide a kind of judicial bellwether on our evolving national debate, a case working its way through the federal courts on the West Coast provides a similarly illuminating window.

The litigation, which has been nicknamed The "Nuremberg Files" case, is *Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*.¹⁰² The case is actually a civil action, brought by a consortium of plaintiffs who were principally providers of abortion services or entities providing counseling regarding abortion services. The plaintiffs filed suit in an Oregon federal court against various members of a particularly violent and extreme faction of the anti-abortion movement. It was alleged that the defendants, through posters, pamphlets, and Internet postings, had accused various abortion providers of "crimes against humanity," and offered rewards to persons who could provide information leading to the revocation of the abortion providers' medical licenses or to anyone who could persuade them to cease performing abortions.¹⁰³ It was claimed, however, that the defendants went beyond these tactics, making some of their attacks more pointed and individualized. For example, in one poster, a specific abortion provider, Doctor Robert Christ, was featured by name, along with his photograph, and his work and home addresses.¹⁰⁴ The defendants had a process for assembling dossiers on various abortion providers, judges, and political leaders deemed supportive of abortion rights. These dossiers became known as the "Nuremberg Files," and a web page maintained by some of the defendants included the names and addresses of doctors who performed abortions, and invited others to contribute additional names.¹⁰⁵ In a macabre touch, the website denoted the names of those already victimized by anti-abortion violence, striking through the names of those who had been murdered and graying out the names of the wounded.¹⁰⁶

The case is made difficult by the fact that neither the posters nor the website contained any explicit threats against the doctors.¹⁰⁷ Yet one can easily empathize with the fear and foreboding that the expression of the defendants must have placed

¹⁰² 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). The panel opinion in the Ninth Circuit was written by Judge Alex Kozinski.

¹⁰³ *Id.* at 1017.

¹⁰⁴ *Id.* at 1012.

¹⁰⁵ *Id.* at 1012-13.

¹⁰⁶ *Id.* at 1013.

¹⁰⁷ *Id.* at 1018.

in the hearts and minds of those doctors. After all, they knew that in the past similar posters prepared by others had preceded clinic bombings and murders.¹⁰⁸ Thus the doctors argued that, by publishing the names and addresses, the defendants had stripped the doctors of their privacy and anonymity and given violent anti-abortion activists the concrete information required to locate the doctors and attempt to kill them.¹⁰⁹ There was evidence that the doctors took the "Nuremberg Files" as serious threats: they began wearing bulletproof vests; drawing the curtains on the windows of their homes; and accepting the protection of United States Marshals.¹¹⁰ What the defendants had done went beyond abstract expression, they claimed, and constituted real threats against their lives. A jury agreed, and awarded the doctors \$107 million in damages.¹¹¹

The Ninth Circuit reversed, observing that:

Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.¹¹²

Nevertheless, the court insisted, our First Amendment thinking has evolved, and we no longer permit the government to penalize menacing speech merely because in some quite broad sense it makes society collectively less safe.¹¹³ This kind of "bad tendency" reasoning has given way to the more demanding requirements of cases such as *Brandenburg*, requiring concreteness and immediacy.¹¹⁴ The court

¹⁰⁸ *Planned Parenthood*, 244 F.3d at 1013.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1014.

¹¹³ *Id.* at 1014-15.

¹¹⁴ *Planned Parenthood*, 244 F.3d at 1015:

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. . . . It doesn't matter if the speech makes future violence more likely; advocating "illegal action at some indefinite future time" is protected. If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely. Unless *ACLA* threatened that its members would themselves assault the doctors, the First Amendment protects its speech.

admitted, as it had to, that the speech of the abortion activists frightened the doctors, and in a subjective sense was threatening and fearful.¹¹⁵ But this was not enough, the court insisted. The pivotal First Amendment question turned on the *source* of their fear.¹¹⁶ It was possible that the doctors understood the statements as veiled threats that the members of the activist organization would inflict bodily harm on the doctors unless they stopped performing abortions.¹¹⁷ If this were the appropriate interpretation, the defendants' statements would not be sheltered by First Amendment.¹¹⁸ (And this would be true even if it turned out that the defendants lacked the means to carry out the threats.) The problem was that it could also have been the case that the defendants' statements were not themselves veiled threats, but instead in some more vague sense "put the doctors in harm's way,"¹¹⁹ because against the backdrop of past violence against abortion providers, and the broad social context of our experience with violence regarding the abortion issue, these statements were rendered more frightening. If this more generalized sense of "threat" or "intimidation" was what supported the jury's verdict, the court reasoned, it could not stand.¹²⁰

A main conundrum in the case was that the literal statements of the defendants did not overtly or explicitly threaten. To make a threat out of it, one had to examine the larger social context, especially the history of the more violent factions of the anti-abortion movement. The court in *Planned Parenthood* thus put the question: "Can context supply the violent message that language alone leaves out? While no case answers this question, we note important theoretical objections to stretching context so far."¹²¹

Context, the court first noted, is often not the speaker's own creation; the speaker neither makes it nor controls it. There were great perils, in the court's view, in moving the notion of "threat" from a pointed face-to-face or one-on-one communication, the classic kind of "threat" known to criminal and tort law, to a more general "over the transom" threat communicated to the general public through modes of mass communication.¹²²

[W]hat may be hyperbole in a public speech may be understood (and

Id. (citations omitted) (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)); see also *supra* note 78 and accompanying text.

¹¹⁵ *Planned Parenthood*, 244 F.3d at 1015.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1017.

¹²⁰ *Id.* at 1019-20 (ruling the First Amendment "does not permit the imposition of liability on that basis").

¹²¹ *Planned Parenthood*, 244 F.3d at 1018.

¹²² *Id.* at 1019.

intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's position.¹²³

When dealing with speech on political issues such as abortion uttered through the mainstream channels of modern public media, the court argued, we must grant to the speakers the maximum levels of protection afforded by the First Amendment.¹²⁴

I find that many of the observations of the panel opinion in *Planned Parenthood* are enormously helpful. While I would not rule out — and do not read the panel opinion in *Planned Parenthood* as ruling out — the possibility that a “true threat” could exist when uttered through the mass media, it does seem that the proper application of our First Amendment traditions requires that we take this step only rarely, and only when the proof of intent and effect is solid, and not the stuff of mere circumstantial inference and innuendo.¹²⁵

* * *

If these thoughts explain how I believe the conflicts posed here should be resolved, they do not by any means correspond to how we might predict they will in fact be resolved. The cross-burning case was decided by the Virginia Supreme Court on November 2, 2001. By a vote of 4-3, the Court struck down the Virginia cross-burning law, in an opinion written by Justice Donald Lemons.¹²⁶ The Virginia Supreme Court's opinion rested on the viewpoint discrimination inherent in the law, and did not reach (as it did not need to reach) the *Brandenburg* question.¹²⁷ As of

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ This is not meant as a disparaging comment on the factual merits of the *Planned Parenthood* case; like many who have looked at the litigation I find the case excruciatingly close, and certainly sympathize with the plaintiffs' sense of threat. Despite that, however, I believe the panel opinion cogently addressed the perils of making a case out of broad “context.”

¹²⁶ *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), *rev'g* *O'Mara v. Commonwealth*, 535 S.E.2d 175 (Va. Ct. App. 2000), *petition for cert. filed*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1107). The majority opinion of Justice Lemons was joined by Justices Lacy, Kinser, and Whiting. Justice Kinser joined fully in the majority opinion, and also wrote a concurring opinion, joined by Justice Whiting. *Id.* at 747 (Kinser, J., concurring).

¹²⁷ *Id.* at 746.

this writing, the commonwealth has publicly announced its intention to seek review in the United States Supreme Court,¹²⁸ and in light of that declaration, the case remains “alive,” and as an advocate in it I feel ethically constrained to avoid additional comment on the outcome in the Virginia Supreme Court, other than to say generally that, with the other defense lawyers in the case, I was gratified that the Court accepted our interpretation of the First Amendment principles emanating from *R.A.V.*, and accepted our view that the cross-burning statute was fatally infected with viewpoint discrimination.¹²⁹ I found the Court’s conclusion especially persuasive:

Under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently worship the cross or burn it as an expression of bigotry. Neutrally expressed statutes prohibiting vandalism, assault, and trespass may have vitality for the prosecution of particularly offensive conduct. While reasonable prohibitions upon time, place, and manner of speech, and statutes of neutral application may be enforced, government may not regulate speech based on hostility — or favoritism — towards the underlying message expressed.¹³⁰

In an eloquent dissent, Justice Hassell disagreed, arguing that the First Amendment was never intended to shelter the type of racist and intimidating speech engaged in by the defendants.¹³¹ Although I disagreed with Justice Hassell’s jurisprudence, I admired the passion and courage of his dissent, and readily acknowledge that it was powerfully resonant with many of our fellow Americans, particularly after the events of September 11.

As for the *Planned Parenthood* case, the panel decision of Judge Kozinski has been vacated and reheard *en banc* by the entire United States Court of Appeals for the Ninth Circuit.¹³² As of this writing, a decision is still pending.

It would thus be fair to say that in both of these cases, the ultimate outcome remains in doubt. The Osama bin Laden effigy conflict that is described here is imaginary, but not contrived. As a society we will surely be facing the questions it poses in the coming months and years. This essay has been offered up in the hope that it may contribute to the dialogue on how those questions ought to be resolved.

¹²⁸ *Virginia v. Black*, 70 U.S.L.W. 3487 (U.S. Jan. 24, 2002) (No. 01-1107) (petition for cert.).

¹²⁹ These views, pressed in our briefs and oral arguments, are in the public domain.

¹³⁰ *Black*, 553 S.E.2d at 746.

¹³¹ *Id.* at 748 (Hassell, J., dissenting). Justice Hassell’s dissent was joined by Justice Koontz and Chief Justice Carrico.

¹³² 244 F.3d 1007 (9th Cir.), *reh’g en banc granted*, 268 F.3d 908 (9th Cir. 2001) (argued and submitted Dec. 11, 2001).

* * *

I was honored to be invited to contribute this essay on the proud occasion of the tenth anniversary of the *Bill of Rights Journal*. I hope I am invited to contribute again on its twentieth.