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Rally 'Round the Burning Cross, Boys: A Legal and Rhetorical Analysis of *Virginia v. Black*

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In this paper, I present a traditional legal analysis and a rhetorical analysis of the U.S. Supreme Court's recent ruling, Virginia v. Black. In Black, a State of Virginia statute which made it a felony to burn crosses with an intent to intimidate was found to be an unconstitutional abridgment of the First Amendment's right of free expression.

The legal analysis discusses the legal precedents and other justifications for the Court's ruling. The rhetorical analysis identifies central terms of meaning and value, the reasoning held out as valid, and examines the new legal culture thereby created.

Introduction

. . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. Justice Oliver Wendell Holmes[1]

If language is accepted as a creator and shaper of knowledge, and not simply as a neutral or imperfect vehicle for the transmission of reality, then language becomes an important artifact to examine. The study of language can reveal, among other things, how knowledge manifests itself in the creation of various institutions and other social phenomena that define a culture or subculture. One situation that allows examination of the role of language as a creator or shaper of knowledge is the study of the language of appellate opinions. In this paper, I examine the oral argument before the United States Supreme Court and then the plurality opinion in *Virginia v. Black* ("*Black*"),[2] using a method drawn from the writings of Professor James Boyd White. Specifically, I examine the key words and phrases in the oral argument and the opinion itself in order to develop a picture of the legal environment that emerges as a result. In *Black* the Court examined the State of Virginia's convictions of three different defendants arrested for burning crosses as a form of hate speech.

Related Research

A number of legal commentators have written about hate speech, and *Virginia v. Black* in particular. An illustrative sample includes Anne B. Ryan's *Punishing Thought: A Narrative Deconstructing the Interpretive Dance of Hate Crime Legislation;*[3] Alexander Tsesis' *Hate in Cyberspace: Regulating Hate Speech on the Internet*[4] and *Prohibiting Incitement on the*

Internet;[5] Victor C. Romero's *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*[6]; Debbieann Erickson's *Trampling on Equality—Hate Messages in Public Parades*[7]*;* Melanie Bradford's *Constitutional Law--Freedom of Speech--State Statutes May Prohibit Cross Burning Performed with the Intent to Intimidate Without Violating the First Amendment*[8]; Maribeth G. Berlin's *The Shortcomings of the Supreme Court's Viewpoint Discrimination Analysis in* Virginia v. Black[9]; and W. Wat Hopkins' *Cross Burning Revisited: What the Supreme Court Should Have Done in* Virginia v. Black *and Why It Didn't.*[10] However, none of these commentators have looked at this topic from a rhetorical or linguistic perspective.

There are those who do examine the connection between language and the law. The connection between language and law presents a field of study ominously large and unamenable to easy organization. Richard Posner notes these difficulties in his work, Law and Literature:

> The study of law and literature seeks to use legal insights to enhance the understanding of literature, not just literary insights to enhance under-standing of law. The field envisages a general confrontation or comparison, for purposes of mutual illumination, of two vast bodies of texts, and of the techniques for analyzing each body. The result is a rich but confusing array of potential links between law and literature.[11]

In order to avoid confusion, I divide the study of the connection between language and law into the three fields of argumentation, literary criticism, and rhetorical criticism.

For some, the study of the connection between law and language means an examination of the process of argumentation. For example, this connection led philosophers Chaim Perelman and Stephen Toulmin to create new models or systems of argument. Moving away from a system of argument based on first premises accepted as true, Perelman advances a system that is audience centered: "The aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to theses that are presented for their consent."[12] Argumentation, to Perelman, is the crucial vehicle for a "thorough investigation of proof in law, of its variations and evolution, [and] can, more than any other study, acquaint us with the relations existing between thought and action."[13]

Like Perelman, Toulmin's investigations of the connection between language and law led him to focus on the area of argumentation. "Logic," according to Toulmin, "is generalized jurisprudence. Arguments can be compared with lawsuits, and the claims we make and argue for

in extra-legal contexts with claims made in the courts, while the case we present in making good each kind of claim can be compared with each other."[14] So, both Perelman and Toulmin's investigations of the connection between language and law led them to a characterization of the process of argument in a juridical setting.

Those researchers examining this connection from a literary point of view study two types of texts—literary texts which address, in some way, the law, and legal texts, that is, legislative, constitutional and common law (judicial opinions) texts.

A large number of literary texts that discuss, to some extent, the law have been analyzed by scholars interested in the connection between language and law. An illustrative sample includes Earl F. Briden's "Idiots First, Then Juries: Legal Metaphors in Mark Twain's Pudd'nhead Wilson,"[15] Alice N. Benston's "Portia, the Law, and the Tripartite Structure of The Merchant of Venice,"[16] Martha S. Robinson's "The Law of the State in Kafka's The Trial,"[17] Allen Boyer's "Crime, Cannibalism and Joseph Conrad: The Influence of *Regina v. Dudley and Stephens* on Lord Jim,"[18] and G.H. Treitel's "Jane Austen and the Law."[19] Other scholars have examined legal texts in their study of the connection between language and law. An illustrative sample of studies examining legal texts includes Kenneth S. Abraham's "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair,"[20] Robert A. Ferguson's "'We Do Ordain and Establish': The Constitution as Literary Text,"[21] Richard H. Weisberg's "Law, Literature and Cardozo's Judicial Poetics,"[22] and James Boyd White's critiques of *McCulloch v. Maryland*,[23] *Olmstead v. United States*,[24] and the Declaration of Independence.[25]

However, little research delves into legal texts to determine how legal meaning is created by key legal phrases. In particular, no study has undertaken to examine the oral argument and then the resulting opinion in *Virginia v. Black.*

James Boyd White is one contemporary scholar who examines legal texts focusing on how legal meaning is created by key legal phrases. White has devoted considerable effort to the examination of the relationship between rhetoric and law. White presents his method of literary and cultural criticism in his book, When Words Lose Their Meaning,[26] and uses his method of literary criticism to examine texts that range from Homer's Iliad[27] to the U.S. Constitution.[28] The underlying tenant of White's method is that language creates and shapes culture:

> The language, after all, is the repository of the kinds of meaning and relation that make a culture what it is . . . . In a sense we literally are the language that we speak, for the particular

> culture that makes us a "we"—that defines and connects us, that differentiates us from others—is enacted and embedded in our language.[29]

This intimate link between culture and language justifies White's method of defining a culture by examining its texts.

In other words, one way we can define a culture is by examining its relationships with its language. We are born into a pre-existing language system that controls meaning quite apart from our individual machinations: "The ways we have of claiming, establishing, and modifying meaning are furnished for us by our culture, and we cannot simply remake to suit ourselves the sets of significance that constitute our world."[30] Because the use of language is shaped by the culture in which it is used, language can be used as a vehicle for the examination of a culture:

> The resources that establish the possibilities of expression in a particular world thus constitute a discrete intellectual and social entity, and this can be analyzed and criticized. What world of shared meanings do these resources create, and what limits do they impose? What can be done by one who speaks the language, and what cannot? What stage of civilization does this discourse establish? When we ask such questions, the study of language becomes the study of an aspect of culture, and we become its critics.[31]

This method of criticism suggests some interesting avenues of investigation. In particular, his method of examining how a culture is affected by the forces emanating from the creation of a text presents a fruitful area of inquiry in rhetorical criticism. White shows his reader a unique way to gauge the impact of a text on a culture: an examination of the relationships created as a result of the existence of a text. In agreement with the general thrust of post-modern rhetorical theory, an examination of the relationships formed as a result of the existence of a text can reveal the power of language to create or, at a minimum, shape our legal reality. I use White's method of cultural criticism because I view appellate decisions, really, the law *in toto*, as an ongoing conversation, a conversation that started close to the inception of our country and one that will continue on into the foreseeable future. It is, as Kenneth Burke states, an unending conversation:

> Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while until you decide that you have caught the tenor of the

> argument; then you put in your oar. Someone answers; you answer him; another comes to your defense; another aligns himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally's assistance. However, the discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.[32]

This conversation carried on by the United States Supreme Court and those who argue before it is of fundamental importance to all of us—it is the material of democracy, the essence that defines our society and our very place within this society. White's method of cultural criticism allows us to examine the impact of a text on this ongoing conversation by examining a text as a cultural phenomenon.

Virginia v. Black: Factual and Procedural Scenario

In *Virginia v. Black*, three men were convicted of violating a Virginia statute which made it a felony "for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place."[33]

Respondent Barry Black led a Ku Klux Klan rally on private property, with twenty-five to thirty people in attendance.[34] This property was "an open field just off Brushy Fork Road (State Highway 690) in Cona, Virginia."[35] One witness to the rally stated that she heard Klan members talk about their identity and beliefs.[36] The Court selected the following as an example of some of what this witness heard:

> The speakers "talked real bad about the blacks and the Mexicans." One speaker told the assembled gathering that "he would love to take a .30/.30 and just randomly shoot the blacks." The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to . . . the black people." [This witness] testified that this language made her "very . . . scared."[37]

To conclude the rally, the crowd "circled around a 25- to 30-foot cross," erected some 350 yards from the highway, which was set aflame, while the song "Amazing Grace" was played over loudspeakers.[38] Black was found guilty by a jury and was fined $2,500.00.

In a separate incident, Respondents Richard Elliott and Jonathan O'Mara burned a cross on the yard of Elliott's next-door neighbor in Virginia Beach, Virginia, African-American James Jubilee.[39] Apparently, one motive for the incident was retribution for Jubilee's earlier inquiry regarding shots being fired in the Elliott's backyard (the explanation given was that Elliott's son

used the backyard as a firing range).[40] Seeing the partially burned cross made Jubilee "'very nervous' because he 'didn't know what would be the next phase,' and because 'a cross burned in your yard . . . tells you that it's just the first round.'"[41] Respondent O'Mara pled guilty to the original charges of attempted cross burning and conspiracy to commit cross burning; a jury found Elliott guilty of attempted cross burning, but acquitted him of conspiracy to commit cross burning. O'Mara was sentenced to 90 days in jail, with 45 days of the sentence suspended, and assessed a $1,500.00 fine; Elliott was sentenced to 90 days in jail and assessed a $2,500.00 fine.[42]

After the Court of Appeals of Virginia affirmed the convictions of Black, O'Mara and Elliott, the Respondents appealed to the Supreme Court of Virginia.[43] The Supreme Court of Virginia found the statute unconstitutional on its face, finding it an unconstitutional content-based restriction because it "selectively chooses only cross burning because of its distinctive message."[44] Moreover, the court found the provision of the statute allowing any cross burning as prima facie evidence of an intent to intimidate overbroad because the "enhanced probability of persecution under the statute chills the expression of protected speech."[45] Three justices dissented, finding the statute constitutionally firm because it prohibited only conduct that posed a true threat.[46] The dissenters also disagreed with the majority conclusion that the prima facie provision was unconstitutionally overbroad, finding the provision still placed the burden of proof on the Commonwealth to prove an intent to discriminate.[47] The Commonwealth of Virginia's Writ of Certiorari was granted by the United States Supreme Court.[48]

Analysis of the Oral Argument

The first step in an analysis of an oral argument before the Supreme Court is explaining how these arguments function in context. Except in some rare circumstances, the Supreme Court operates as an appellate court—a court that hears appeals from lower state and federal courts. As such, disputes from lower courts are brought to them. When the Court agrees to hear a case, the attorneys write legal briefs that present the facts of the case, the legal procedure, the issues to be addressed, and then arguments on behalf of their clients. After the briefs are submitted to the Court, the attorneys present oral arguments to the Court. Then, the work of the attorneys is done. At this point, the Justices meet, discuss the merits of the case, an opinion is drafted and circulated among the Justices for discussion and editing, and eventually a final opinion is delivered by the Court.

Accordingly, oral argument before the Court is only one step in the process. In fact, although it is difficult to know exactly how important the oral argument stage is in the process, attorneys and judges admit that often the oral arguments are not ultimately very influential. For example, appellate attorney Ronald L. Marmer of the Chicago law firm of Jenner & Block, L.L.P., and Judge G. Joseph Pierron of the Kansas Court of Appeals both admit that oral arguments play a significant role only in a small percentage of cases—usually the briefs submitted play a much larger role.[49] One goal I have for this paper is to begin, in my own small way, an assessment of the role of oral argument in appellate advocacy.

1. Phrases of Central Meaning and Value

The choice of language used by attorneys and judges plays an important role in the creation of legal texts and, ultimately, our legal reality. This is particularly true when phrases of central meaning and value are used. Each central term of meaning and value has the potential to steer the outcome of a case in a different direction. Further, these central terms of meaning and value derive their power from meaning that becomes rich and complex as they are repeatedly presented, examined, and reconstituted over time in different cases. These terms derive their power from meaning, a meaning that becomes sufficiently rich and complex and defies simple translation. Imbued as they are with rich and complex meaning, these phrases bring with them a power to create or alter reality, a power or force often enhanced by repeated use.

A. "Inference of an Intent to Intimidate"

The right of free expression is found in the language of the First Amendment and is defined further by language expressed in subsequent legal opinions. Despite language that makes this right appear absolute—"Congress shall make no law . . . abridging the freedom of speech"[50]—it is clear the right to free expression has limits. Justice Holmes, in *Schenck v. U.S.*, illustrated this limitation with his oft-repeated example of falsely crying "Fire!" in a crowded theater.[51] Other categories of speech not traditionally protected by the First Amendment include obscenity,[52] fraudulent misrepresentation,[53] advocacy of imminent lawless behavior,[54] defamation of a private citizen,[55] "fighting words,"[56] and "true threats."[57]

In order for this statute to pass constitutional muster, the drafters of this bill couldn't simply ban the symbolic expression—however distasteful—of a burning cross. Instead, they had to connect it to one of the recognized exceptions to our general right of free expression. In this

case, they chose "intimidation." Thus, the statute provides that cross burning is illegal when it is done "with the *intent of intimidating* any person or group."[58]

At this point, however, the drafters of this legislation performed a neat little trick with regards to this intent: They provided an inference[59] of an intent to intimidate when a person burns a cross. Accordingly, a person can be convicted under this statute "based solely on the fact of cross burning itself."[60] This prima facie element of the statute was obviously a significant issue for the Court—the very first question by the Court, by Justice O'Connor, by-passed any factual concerns and the general prohibition presented by the statute, and focused, instead, immediately upon this section of the statute:

> QUESTION: Mr. Hurd [counsel for Commonwealth of Virginia], I—there's one part of the statute that may be troublesome, and that is the prima facie evidence provision. I suppose you could have a cross-burning, for instance, in a play, in a theater, something like that, which in theory shouldn't violate the statute, but here's the prima facie evidence provision. Would you like to comment about that, and in the process, would you tell me if you think it's severable, or what's the story on that—[61]

This signal of importance—by being the very first question asked—appears to be an accurate signal: The ultimate holding by the Court was that the prima facie provision was "unconstitutional on its face" (but whether or not the statute could stand after this provision was severed from it was left open).[62] Justice O'Connor also seems to signal her take on this provision when she asks whether or not it is "severable." One way to save an otherwise constitutionally firm statute is to "sever" from the statute that portion of it that is constitutionally offensive. The question becomes, then, can the statute still function appropriately without that portion that was cut out?[63]

B. "Multiplicity" or "Melange" of Messages

Perhaps the most important key phrase employed by counsel for Respondents was a "multiplicity of messages"[64] or a "mélange of messanges."[65] One notion in constitutional law is that of "overbreadth." The idea is that a law implemented to criminalize a certain type of unwanted act also—inadvertently—includes within its sweep actions that are constitutional.[66] In other words, a law over-reaches its intended targeted conduct and criminalizes otherwise constitutional acts. In this case, the Respondents argued that the Virginia cross burning statute reached beyond its intended target, speech intended to intimidate, and included within its ambit

speech that is constitutionally protected. However, it would be persuasively counterproductive, if not foolhardy, to not acknowledge that burning crosses *have* been used historically to intimidate. So, counsel avoids that confrontation by noting other *concomitant messages*. In responding to Justice Souter's question which posited the assumption that a burning cross has acquired the violent "potency"[67] of a brandished gun, counsel responded that the cross could represent that kind of threat, but also carries other potential meanings:

> Justice Souter, I think that our argument is that in fact it works the reverse way, that what the cross and the burning cross have acquired as a kind of secondary meaning . . . are a multiplicity of messages.[68]

This same message was reiterated again by counsel in response to Justice Ginsburg's comment that flag burning represents a constitutionally protected speech act against the government, but burning crosses are symbols which represent threats against people.[69]

> Justice Ginsburg, I only partially accept that—that dichotomy. In fact, when the Klan engages in cross-burning, as it did in Brandenburg versus Ohio, and as it did here, it is—it is a mélange of messages. Yes, to some degree it is a horizontal message of hate speech, the Klan members attacking Jews and Catholics and African-Americans and all of the various people that have been the—the point of its hatred over the years.
>
> But it's also engaged in dissent and in a political message. If you remember in Brandenburg versus Ohio, Brandenburg says if the Congress doesn't change things, some revenges[sic] will have to be taken. In this case, President Clinton was talked about by the Klan members. Hillary Clinton was talked about by the Klan members. Racial preferences and the idea that the—where they're using taxes to support minority groups. There is a jumble of political anger . . . .[70]

Again, the important point for counsel to reiterate here is that there are a number of concomitant messages potentially sent by a burning cross and that some of those messages should receive constitutional protection.

C. "Burning Cross"

Of course, at the heart of this fact pattern, statute at issue and case before the Supreme Court is the burning cross itself. This case revolves around how this symbol is to be interpreted. This interpretation is steered by the litigants' specific goal of prevailing in their case.

In order for the defendants to prevail, they argue that the statute at issue unconstitutionally targets particular messages or symbols to be censored: "At the heart of our argument is that when the State targets a particular symbol or a particular symbolic ritual, it engages in content and viewpoint discrimination of the type forbidden by the First Amendment."[71]

The hurdle the defendants faced is that, as discussed previously, a small number of certain kinds of onerous communication have been historically proscribed without running afoul of the First Amendment. If the burning cross is defined as a symbol of intimidation, as the Commonwealth of Virginia argues, then it wouldn't be unconstitutional to outlaw it. As Justice Scalia points out, "the symbol of brandishing an automatic weapon in . . . somebody's face" is not constitutionally protected expression.[72] The defendants countered, as discussed earlier, that a burning cross is not just a symbol of intimidation, but presents multiple concomitant messages, some of which are constitutionally protected forms of expression.

In order for the Commonwealth of Virginia to prevail, it argues that the burning cross is a symbol of intimidation:

> But in terms of—of delivering symbols and delivering threats, it really is unique. It says—it says, we're close at hand. We don't just talk. We act. And it deliberately invokes the precedent of 87 years of cross-burning as a tool of intimidation.
>
> Burn anything else. Burn the flag. Burn a sheet. The message is opposition to the thing that the symbol unburned represents. Burning a cross is not opposition to Christianity. The message is a threat of bodily harm, and it—it is unique. And it's not simply a message of bigotry. It's a message that—that whoever has it in their hands, a message of bodily harm is coming. That is the primary message—[73]

Moreover, counsel for Virginia argued, not only is any other interpretation simply not correct in light of this symbol's history, but the argument that there are legitimate "other" concomitant messages is facile. Finally, it appears counsel felt that (re)defining the burning cross as a form of intimidation was so important that he ended his main argument to the Court at this point (reserving time for a rebuttal, if any), and did so in an uncharacteristically long response.

> Similarly, we can ban cross[-]burning as a tool of intimidation even though many people who practice cross-burning may also carry with that cross-burning some message of bigotry. But the primary message—the fundamental message is a threat of bodily harm.

> And this is not something we just made up. Cross-burning has that message because for decades the Klan wanted it to have that message because they wanted that tool of intimidation. And so it rings a little hollow when the Klan comes to court and complains that our law treats that message—treats that burning cross as having exactly the message that they for decades have wanted it to have.
>
> And so, we do believe our statute is—is quite constitutional. They may have a political rally with a burning cross, but what they cannot do is use a Klan ceremony as a way to smuggle through real threats of bodily harm with a specific intent to intimidate. That is what happened in the Barry Black case, as the jury found. The sufficiency of the evidence in that case has—has not been contested.
>
> For these reasons, we would ask the Court to reverse the decision below and, Justice Stevens, I'd like to reserve the balance of my time.[74]

And, later, in his rebuttal comments, counsel for Virginia again presents an atypically lengthy response:

> [C]ross-burning . . . . is not just hate speech. It doesn't just say I don't like you because you are black. In the hands of the Klan, the message is the law cannot help you if you're black or Catholic or Jewish or foreign-born, or we just don't like you, and if you try to live your life as a free American, we are going to kill you. That is the message of cross-burning backed up by 100 years of history. That's why it is especially virulent. And that's why under R.A.V., this Court can allow us to proscribe it without having to pass any other law, or pretend it is the same as something quite different than what it is. . . .[75]

Counsel again stresses that a burning cross is a symbol of intimidation. But counsel goes much further here—he defines the burning cross as a symbol representative of a murderous intent against what is perhaps the most sacred American value, the ability to "live your life as a free American."[76] Counsel also asserted that by striking down this law, the Court threatens to strike down the very rule of law for an ordered society for potential victims of the Klan—"[i]n the hands of the Klan, the message is *the law cannot help you* if you're black or Catholic or Jewish or foreign-born."[77] Counsel then ended this lengthy response (and his argument *in toto*) by redefining freedom:

> We have not interfered with freedom of speech. We have not tried to suppress ideas. All we have tried to do is to protect freedom from fear for all of our citizens by guarding against this especially virulent form of intimidation.
>
> We ask that the decision below be reversed and the statute upheld. Thank you.[78]

By using the rhetorical device of antithesis, counsel redefines for the Court our right of freedom not as the right to spread potentially hateful and intimidating messages, but a freedom to be free of fear and intimidation.

Analysis of the Opinion

The plurality opinion[79] was authored by Justice O'Connor, joined in the result—but not the analysis leading to that conclusion—by Chief Justice Rehnquist and Justices Stevens and Breyer.

1. Phrases of Central Meaning and Value

A. "Burning Cross"

As in the oral argument presented to the Court earlier, the dominant symbol in this opinion is the burning cross itself. And, as was evoked in the oral argument, the present day symbol of a burning cross is immediately and inextricably bound up with its historical significance. In fact, in a rare extended recitation of its historical significance, encompassing nearly six pages of the opinion,[80] Justice O'Connor traced the burning cross from its origin "in the 14th century as a means for Scottish tribes to signal each other,"[81] through the Ku Klux Klan's use of a burning cross "as a tool of intimidation and a threat of impending violence."[82]

However, and importantly for its later analysis, Justice O'Connor weaves an historical tale in which the burning cross is both a symbol of violence and a "message [ ] of shared ideology."[83] The first known cross burning in the United States was a celebration of intimidation and racially motivated violence; the second known cross burning was part of a loyalty ceremony.

> The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. [Citation omitted.] This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. [Citation omitted.][84]

This intertwining of the cross as threat and ideological symbol continues on throughout this recitation of the history of the burning cross. For example, the burning cross is at once "'a

whirlwind climax to weeks of flogging,'"[85] and a "potent symbol[ ] of shared group identity and ideology."[86] However, Justice O'Connor ends this section of the opinion by concluding that this duality of message presented by a burning cross does not diminish its power as a tool of intimidation.

> To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." [Citation omitted.] And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed.[87]

In fact, by concluding this section focusing on the burning cross as intimidation, Justice O'Connor seems to say that the *primary* message of this symbol is intimidation and hate, not group unity or shared ideology.

The next section of this opinion begins in a manner repeated in all free speech cases—a recitation of the seemingly clear and complete ban on any governmental restrictions on free speech provided for in the First Amendment to the United States Constitution: "'Congress shall make no law . . . abridging the freedom of speech.'"[88] This particular recitation of the general rule of free expression focuses on the protection of even unpopular speech, speech "the overwhelming majority of people might find distasteful or discomforting,"[89] and even speech "'a vast majority of its citizens believes to be false and fraught with evil consequences.'"[90]

This articulation of the general rule is then followed, again, as is the norm, by the assertion that our right of free expression is, in fact, "not absolute"[91]—it is clear that the right to free expression has limits. The Court then trots out its regular cast of characters that do not receive First Amendment protection—*Chaplinsky v. New Hampshire* and *Cohen v. California's* "fighting words,"[92] *Brandenburg v. Ohio's* "imminent lawlessness,"[93] and *Watts v. United States'* "true threats."[94] It is this last actor that eventually will have a starring role in this particular legal drama.

B. "True Threat"

Now that the formulaic recitation of the general right of free expression has been articulated, along with the list of communication historically not protected by the First Amendment, Justice O'Connor begins a more extended discussion of the exception to free expression that will become an important basis for the holding in this opinion.

> [A] prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." [Citation omitted.] Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[95]

And now, the Court states that cross burning specifically is, as was earlier expressed in the opinion in the rather long historical journey of the burning cross, a symbol of intimidation and fear: "Respondents do not contest that some cross burnings fit within the meaning of intimidating speech, and rightly so. As noted in part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[96]

However, now the plurality needs to deal with a recent opinion seemingly right on point—and one in which the Court struck down an ordinance forbidding, *inter alia*, cross burning as unconstitutional—*R.A.V. v. City of St. Paul*.[97] In *R.A.V.*, several teenagers (including the petitioner) allegedly assembled a cross by taping together broken chair legs, and then, during "predawn hours . . . . burned it in the fenced yard of a black family that lived across the street from the house where petitioner was staying."[98] The Court struck down the "St. Paul Bias-Motivated Crime" ordinance "which banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would 'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"[99] Justice O'Connor's initial response in this case to *R.A.V.* is that it is constitutionally permissible to ban some entire classes of speech:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[100]

Moreover, Justice O'Connor then notes, it would be constitutional to ban specific kinds of threats if the content discrimination is "'based on the very reasons why the particular class of speech at issue . . . is proscribable."[101] For example, a state could not constitutionally ban only

obscenity directed at political topics, but could "prohibit only that obscenity which is the most patently offensive *in its prurience*—that which involves the most lascivious displays of sexual activity.'"[102] The analogy to the facts of this case, then, appears to be that it would be constitutional to ban cross burning because cross burning presents a threat of violence which is the "most patently offensive" in the way it evokes intimated violence. The extended history of the cross, discussed *supra*, provides the basis for such a conclusion.

C. "Chilled" Speech

Finally, the Justices of the plurality opinion address the "prima facie" provision of the statute. Section 18.2-423 of the Virginia Code Annotated, provides that the "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." This statutory provision led, then, to the following Model Jury Instruction (used in Barry Black's case[103]): "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent."[104] The Court found this provision constitutionally infirm for two reasons.

First, this prima facie provision would allow a jury to find the required intent to intimidate required for a conviction based only on a defendant's silence. Accordingly, defendants who exercise their constitutional right to remain silent could find themselves complicit in their own convictions.

> The prima facie evidence provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. . . . The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.[105]

In fact, this provision, if allowed to stand, would negate the entire statute: "As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate."[106] With this language, the plurality stresses again that they would protect as constitutional the use of a burning cross for expression not intended to intimidate. In other words, the prima facie provision potentially allows *any* act of cross burning to be illegal, including when it is used, for example, as a symbol of shared ideology. This, the Justices will not allow.

The second reason the Court found the prima facie provision constitutionally infirm is that it could have a "chilling effect" on expression:

> It is apparent that the provision as so interpreted "would create an unacceptable risk of the suppression of ideas." . . . As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.[107]

This is a well-known metaphor in First Amendment jurisprudence. Moreover, the importance of metaphors in law is well recognized.

> Recognition of the power of metaphors is nothing new. . . . Nowhere is this more evident than in the American legal system, marked as it is by analogical reasoning and the role of precedent in judicial decisionmaking. Haig Bosmajian's study of the use of tropes in judicial opinions revealed that what is most often quoted from a court opinion to support a subsequent decision are the "tropological passages." These passages tend to persist over time as the language passes from decision to decision, often becoming a part of the judicial vocabulary. As Bosmajian observed, some metaphors in judicial opinions "appear once or twice and are never heard from again. Others, however, become institutionalized and integral to judicial reasoning and decision making."[108]

By utilizing this well-known metaphor in First Amendment jurisprudence—"chilled" expression—the Justices show they are concerned here not only with the suppression of ideas, but are concerned even with the notion of *potentially* suppressing an idea, potentially "chilling" speech. More importantly, in this specific case, they are concerned that our government might be suppressing an idea that the vast majority of people in our country would find repugnant—the burning of a cross as a symbol of shared ideology of prejudice.

2. Reasoning Held Out as Valid

In addition to the central terms of meaning and value, White suggests that an analysis of the reasoning held out as valid can help in the reconstruction of a picture of the culture or reality created by a text. White presents the following list of questions as illustrations of the type that would allow a critic to discover the forms and methods of reasoning held out as valid in a text:

> What shifts or transitions does a particular text assume will pass unquestioned, and what does it recognize the need to defend? What kinds of argument does it advance as authoritative? What is the place here, for example, of analogy, of deduction, of reasoning from general probability or from particular example? What is unanswerable, what unanswered?[109]

White also warns against a too narrow interpretation of the term reasoning: Our conception is circumscribed "by that part of our own intellectual tradition that has sought to reserve the term 'reasoning' for two forms of it: deductive reasoning, which is tautological in nature, and inductive, which is empirical."[110] Instead, White writes:

> One reasons not only with "propositions" but with metaphors, analogies, general truths, statements of feeling and attitude, particular definitions of self and audience, certain fidelities or infidelities to tradition or consistency, and the like, and one moves not only by logic but by association and analogy and image, by what seems natural and right.[111]

Perhaps the most important reasoning tool used by the Court in any opinion is analogy. In an oft-cited statement, Levi describes the analogic process used in legal reasoning:

> It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law.[112]

This opinion (like all appellate opinions) is replete with numerous and lengthy quotations and citations from other cases. Thus, the inventive process shown in the text shows the creative process is concerned to a great extent with the link between past and present. And, as time passes, each new opinion will become part of different opinions examined and reconstituted by authoring Justices as they juxtapose the past with the present. This process can properly be labeled *reconstitutive* because each case on which the Court deliberates presents unique fact patterns and questions of law, so the rationale applied in past cases will have to be adjusted or tailored or *reconstituted* to meet the demands of a present case. Therefore, the inventive process must be both retrospective and prospective; an authoring Justice must consider the mandates of the past and the possible needs of the future.

Moreover, it is this analogic movement, this willingness to be bound by past decisions ("*stare decisis*") that gives the Court its greatest source of power—its integrity. Other than a general societal respect for the law, the State has precious few resources to control its citizenry. When citizens lose respect for the system and its laws, chaos reigns—witness the destruction of the civil riots of the 1960s and 1990s. Therefore, one of the most important functions of analogy is justification. The Court cites similar cases from the past as authority for its current decision—

which authority is legitimized by adherence to past decisions (rather than on the basis of empirical certitude or other similar scientific or quasi-scientific proofs).

Because analogy serves as the major device for invention and justification, one can understand why the lion's share of an opinion is devoted to claims that similarities exist between the case at issue and past cases. In this opinion, conversely, one can understand why the authors of the lead opinion went to such considerable trouble to distinguish this case from *R.A.V.* The facts of both cases are strikingly similar—criminal charges against defendants for burning crosses, and both statutes at issue criminalized such activity. This perhaps explains why the distinctions by the *Black* Court seemed to ride so fine an edge.

Conclusion

In this paper I examined the interaction between the text of the oral arguments presented to the United States Supreme Court in *Virginia v. Black,* as well as the plurality opinion later presented, and myself as its reader, a reconstitution of a legal culture or reality according to my interpretation. Guided by White's methodology, I directed this examination, or "reading," by using White's suggestions for inquiry: What were the central terms of meaning and value used in the text? What reasoning was held out as valid? Specifically, I identified and described the central terms of meaning and value in the transcript of the oral arguments and the plurality opinion presented in this case and discussed the Court's use of analogy as an important form of reasoning.

The purpose of this examination was to uncover the way in which this opinion potentially created or altered our legal reality. More specifically, I hoped to address, to some extent, the question, "What legal reality or culture is created by the Court through the language presented?" While what is created by the text—a legal reality—is ephemeral, it is nonetheless real and important; it is a part of the social structure within which each of us operates. White explains:

> In addition, while the legal text speaks directly to its reader, as other texts do, the textual community it establishes with the individual reader is also a way of making another community, a community among its readers. In this sense, law is structurally ulterior in character, for it is always meant to affect what you say and do in relation to others. Indeed, it is literally and deliberately constitutive: it creates roles and relations, places, and occasions on which one may speak; it gives to the parties a set of things that they may say, and prohibits them from saying other things; it makes a real social world.[113]

Although difficult at times, this study was intended to be descriptive in nature and not evaluative—it addresses "what is," not "what ought to be." (I use what *ought* to be because every evaluation—"this is better than that"—carries with it the implication that one ought to choose the better over the inferior.)[114]

As the saying goes, "history is written by the winners." The Court found in favor of the defendants in this case, the convictions of all of the defendants were overturned because the Court found the prima facie provision unconstitutional (although the holding would allow for two of the defendants to be retried should the Commonwealth of Virginia choose to do so).[115] Now, in line with White's method of cultural criticism, the question remains, "What is the legal culture created, constituted or reconstituted as a result of this Supreme Court opinion?"

The oral arguments presented by counsel for the Commonwealth of Virginia present a world where our right of free expression is not absolute; it is a right that can be made to be subservient to other rights, constitutional or otherwise. In this case, the right of free expression must yield, counsel argues, to the right of others to not have to view potentially intimidating symbols. In fact, the statute goes beyond the sanctity of a person's own property. Certainly no one should have to endure any message on her own property, but the drafters of this statute also provided that we shouldn't have to see other people's expressions (in this case, in the form of a burning cross) on a public "highway" or "other public place."[116] Moreover, even though the statute was meant to protect receivers of the message from the potential harm of feeling intimidated, the statute focuses on the mindset of the expressor—it is illegal for a person to burn a cross with the "intent of intimidating,"[117] but it is irrelevant whether or not the receivers of the message actually felt intimidated.

The oral arguments presented by counsel for the defendants present a world in which the right of free expression is paramount. This right of free expression includes not only communication about government and governance, but apparently also nearly any form of expression, regardless of how hateful, or whether or not it is issued from the most remote fringes of our society. Counsel for defendants talked about part of his reaction to a burning cross during oral argument: "If I see a burning cross, my stomach may churn. . . . I may feel a sense of loathing, disgust."[118] However, regardless of his personal feelings towards this particular symbol, counsel for defendants argued strenuously against the constitutionality of this statute. Accordingly, counsel for defendants believes that the government's role with regard to

expression is not to censor it, but to focus instead upon creating a space where nearly any message—even the historically hateful message of a burning cross—should be brought forward as a part of our culture's "marketplace of ideas."[119]

Similarly, the Supreme Court opinion in *Virginia v. Black* presents a world in which the right of free expression is paramount . . . almost. The Court finds for the expressors . . . for the most part. These conclusions are not absolute for two reasons. First, this is a plurality opinion—the Justices could not negotiate a result and accompanying reasoning satisfactory to obtain a majority. Second, the Court's ambivalence is also shown in a holding with what appears to be a bit of a procedural anomaly. Despite finding the prima facie provision of the statute unconstitutional "on its face," the plurality then held open the possibility that a different interpretation of this statutory language by the Virginia Supreme Court could save this provision:

> Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility.[120]

The language, "invalid on its face," means that the Court doesn't have to look beyond the language of the statute to see if otherwise appropriate language is being enforced in an unconstitutional manner. In other words, this provision of the statute is patently and unambiguously unconstitutional, unconstitutional simply as written, regardless of how it is enforced. Why, then, the Justices of the plurality opinion decided at the end of their opinion—in that section of an opinion that typically reveals the very holding of the case—to provide a potential out for the Virginia law is unclear. Justice Scalia, in his opinion in which he concurs in part and dissents in part, calls this legal maneuver a "virtuoso performance":

> Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2-423 is "unconstitutional on its face," *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2-423 is possible, then facial invalidation is inappropriate. . . . Words cannot express my wonderment at this virtuoso performance.[121]

The Court's ambivalent holding in this case, however, is, at least from a societal perspective, understandable. It is natural not to want to align yourself with bigots, particularly those wishing to use a highly visible and historically reprehensible symbol of hatred.

The question becomes now, to what extent does the Court's opinion reflect the oral argument that preceded it? First, the Court did seem to signal in the oral argument which issue was going to be the most important point for consideration. In its first question at the oral argument stage, the Court, specifically, Justice O'Connor, described the prima facie provision as "troublesome."[122] Also, the Respondents' argument that a burning cross presents a "multiplicity" of messages[123] seems to have been adopted by the Court. In the opinion, the plurality found the cross to be at once a "symbol of hate" and "intimidation"[124] *and* a "potent symbol[ ] of shared group identity and ideology."[125] Finally, then, the State of Virginia's argument that a burning cross is a special symbol, one whose historical significance as a symbol of hate and intimidation justifies this particular statutory prohibition against the act of cross burning was (at least absent further action by the Virginia Supreme Court) rejected.

In the end, this case reinforces our country's right of free expression, and, more importantly, does so using an unlikely and unlikable protagonist. The Court finds in favor of the expressors, leaving the important work of countering their message of hatred and bigotry in our own hands.

Notes

[1] United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

[2] 538 U.S. 343 (2003).

[3] Note, 35 J. Marshall L. Rev. 123 (Fall 2001).

[4] 38 San Diego L. Rev. 817 (Summer 2001).

[5] 7 Va. J.L. & Tech. 5 (Summer 2002).

[6] 33 Colum. Hum. Rts. L. Rev.1 (2001).

[7] Note, 35 Gonz. L. Rev. 465 (1999/2000).

[8] Note, 34 Cumb. L. Rev. 607 (2003/2004).

[9] Note, 81 Denv. U.L. Rev. 143 (2003).

[10] 26 *Hastings Comm. & Ent*. L.J. 269 (Winter 2004).

[11] Law and Literature: A Misunderstood Relation ix (1988).

[12] The Realm of Rhetoric 9 (W. Kluback trans. 1982).

[13] The Idea of Justice and the Problem of Argumentation 108 (1963).

[14] The Uses of Argument 7 (1958).

[15] 20 Tex. Studies in Literature & Language 169 (1978).

[16] 30 Shakespeare Quarterly 367 (1979).

[17] 6 ALSA Forum 127 (1982).

[18] 20 Loy. L.A.L. Rev. 9 (1986).

[19] 100 Law Q. Rev. 549 (1984).

[20] 32 Rutger's L.Rev. (1979).

[21] 29 Wm. & Mary L. Rev. 3 (1987).

[22] 1 Cardozo L. Rev. 283 (1979).

[23] When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (University of Chicago Press 1984).

[24] *Judicial Criticism*, 20 Georgia L. Rev. 835 (1986).

[25] *Supra* at note 23, at 231-240.

[26] *Supra* at note 23.

[27] *Id.* at 24-58.

[28] *Id.* at 240-47.

[29] *Id.* at 20.

[30] *Id.* at 6.

[31] *Id.* at 7.

[32] Kenneth Burke, *The Philosophy of Literary Form: Studies in Symbolic Action*, 110–111 (1974).

[33] Virginia v. Black, 538 U.S. at 348.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 349 (citations omitted).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 350.

[41] *Id.* (citations omitted).

[42] *Id.* at 350-51.

[43] *Id.* at 351.

[44] *Id., quoting* Black v. Commonwealth, 262 Va. 764, 774, 553 S.E.2d 738, 744 (2001).

[45] *Id., quoting* Black v. Commonwealth, 262 Va. at 777, 553 S.E.2d at 746.

[46] *Id., quoting* Black v. Commonwealth, 262 Va. at 787, 553 S.E.2d at 751.

[47] *Id., quoting* Black v. Commonwealth, 262 Va. at 795, 553 S.E.2d at 756.

[48] 535 U.S. 1094 (2002).

[49] "The Importance of Oral Argument at the Appellate Level," Panel presentation, 90th Annual Conference, National Communication Association, Nov. 11, 2004.

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

[51] 249 U.S. 47 (1919).

[52] *See, for e.g.*, Miller v. California, 413 U.S. 15 (1973)(three-part definition of obscenity provided).

[53] *See, for e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979)(even speech potentially misleading may be regulated).

[54] *See, for e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969)(limitation on speech allowed only if speech act is directed to inciting imminent lawless behavior and is likely to produce such action).

[55] *See, for e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964)(First Amendment requires that *public* officials can not recover damages for libel absent showing of "absent malice").

[56] *See, for e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(words whose very utterance inflict injury or tend to incite an immediate breach of the peace).

[57] *See, for e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969).

[58] Va. Code Ann. §18.2-423 (1996).

[59] In his dissenting opinion, Justice Thomas pointed out that the statute raised an "inference," not a "presumption." This technical distinction is important because an inference may be ignored by a jury, a presumption actually *shifts* the burden of proof. Virginia v. Black, 538 U.S. at 395-6.

[60] *Id.* at 365.

[61] Virginia v. Black, Transcript of Oral Argument before the United States Supreme Court on December 11, 2002, by Alderson Reporting Company, Inc. (Washington D.C.) 2. All pagination

references to the oral transcript in this paper will use the pagination provided by the LexisNexis version of the transcript.

[62] Virginia v. Black, 538 U.S. at 367.

[63] A severable statute is defined as "[a] statute if after an invalid portion of it has been stricken out, that which remains is self-sustaining and capable of separate enforcement without regard to the stricken portion, in which case that which remains should be sustained." Black's Law Dictionary 714-5 (5th ed. 1983).

[64] *Id.* at 26-7.

[65] *Id.* at 43.

[66] *See, for e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[67] Transcript, at 26.

[68] *Id.* at 26-7.

[69] *Id.* at 43.

[70] *Id.* at 43-44.

[71] *Id.* at 25.

[72] *Id.*

[73] *Id.* at 13-4.

[74] *Id.* at 15-6.

[75] *Id.* at 51-2.

[76] *Id.* at 51.

[77] *Id.* (emphasis added).

[78] *Id.* at 52.

[79] A "plurality" opinion is one in which "more justices join than in any concurring opinion (though not a majority of the court) . . . as distinguished from a majority opinion in which a larger number of the justices on the panel join than not." Black's Law Dictionary 602 (5th ed. 1983).

[80] Virginia v. Black, 538 U.S. at 352-7.

[81] *Id.* at 352.

[82] *Id.* at 354.

[83] *Id.*

[84] *Id., citing* S. Kennedy, Southern Exposure 143 (1991) and W.Wade, The Fiery Cross: The Ku Klux Klan in America 144 (1987).

[85] *Id.* at 355, *quoting* Kennedy, *supra* note 82, at 176.

[86] *Id.* at 356.

[87] *Id.* at 357 (emphasis in original).

[88] *Id.* at 358, quoting U.S. Const. amend. I.

[89] *Id., citing* Abrams v. United States, 250 U.S. 616, 630 (19191)(Holmes, J., dissenting)(First Amendment protection denied defendants violating Espionage Act by distributing literature criticizing U.S. involvement in World War I); Texas v. Johnson, 491 U.S. 397, 414 (1989)(burning of United States flag outside Republican National Convention held to be constitutionally protected speech act).

[90] *Id., quoting* Whitney v. California, 274 U.S. 357, 374 (1927)(Brandeis, J., dissenting)(Constitutional right of free speech not infringed by a statute providing punishment for one who knowingly becomes a member of association to advocate the commission of crimes or unlawful acts of force, violence, or terrorism as a means of accomplishing political changes).

[91] *Id.*

[92] *Id.* at 359, *quoting* Chaplinsky, 315 U.S. 568, 572 (1942); Cohen, 403 U.S. 15, 20 (1971).

[93] *Id., quoting* Brandenburg, 395 U.S. 444, 447 (1969)(per curiam).

[94] *Id., quoting* Watts, 394 U.S. 705, 708 (1969)(per curiam).

[95] *Id.* at 360.

[96] *Id.* at 360.

[97] 505 U.S. 377 (1992).

[98] *Id.* at 379.

[99] Virginia v. Black, 538 U.S. at 361, *quoting* Minn. Legis. Code § 292.02 (1990).

[100] *Id.* at 361-62, *quoting* R.A.V., 505 U.S. at 388.

[101] *Id.* at 362, *quoting* R.A.V., 505 U.S. at 393.

[102] *Id., quoting* R.A.V., 505 U.S. at 388 (emphasis in original).

[103] Black, 538 U.S. at 364.

[104] *Id., quoting* Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

[105] *Id.*

[106] *Id.* at 365

[107] *Id.*

[108] Stephanie Gore, *"A Rose by Any Other Name": Judicial Use of Metaphors for New Technologies*, 2003 U. Ill. J.L. Tech. & Pol'y 403, 404-05 (Fall 2003), *quoting* Haig Bosmajian, Metaphor and Reason in Judicial Opinions 13, 200, 3 (1992).

[109] White, *supra* Note 23, at 12.

[110] *Id*.

[111] *Id.*

[112] Levi, An Introduction to Legal Reasoning 1-2 (1959).

[113] White, *supra* note 23, at 12.

[114] "Impossible" may be a more apt description of the likelihood of avoiding any sort of evaluation or judgment of the legal culture created by the text. As Kenneth Burke notes, my "reflection, selection and deflection" of materials chosen or discarded certainly involves some level of evaluation and personal judgment. *See*, Burke, *Language as Symbolic Action*, in The Rhetorical Tradition: Readings from Classical Times to the Present 1035 (eds. Patricia Bizzell and Bruce Herzberg 1990) ("Even if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function as a *deflection* of reality.").

[115] Virginia v. Black, 538 U.S. at 367-8.

[116] Va. Code Ann. §18.2-423 (1996).

[117] *Id.*

[118] Transcript at 28.

[119] *See, for e.g.,* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503, 512 (1969)("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Quoting* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[120] Virginia v. Black, 538 U.S. at 367.

[121] *Id.* at 379.

[122] *Supra*, note 61.

[123] *Id*. at 26-7.

[124] Virginia v. Black, 538 U.S. at 357.

[125] *Id*. at 356.