No. _____

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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[IN THE SUPREME COURT OF VIRGINIA]

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v. Record No. 010123

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

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v. Record No. 010038

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE DONALD W. LEMONS
November 2, 2001

FROM THE COURT OF APPEALS OF VIRGINIA

In these appeals, we consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The case of *Black v. Commonwealth* involves a Ku Klux Klan rally on private property with the permission of the owner, where a cross was burned as a part of the ceremony. The companion cases of *O'Mara v. Commonwealth* and *Elliott v. Commonwealth* involve the attempted

* Justice Keenan did not participate in the hearing and decision of this case.

burning of a cross in the backyard of the home of James S. Jubilee ("Jubilee"), an African-American, without permission. We conclude that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad.

FACTS AND PROCEEDINGS BELOW

The prosecutions of Richard J. Elliott ("Elliott") and Jonathan O'Mara ("O'Mara") arose from a single incident in the City of Virginia Beach. On May 2, 1998, Elliott and O'Mara attended a party at the home of David Targee ("Targee"). Elliott told several people at the party that his neighbor, Jubilee, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard.

Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. While transporting the cross to the Jubilee home, Elliott referred to Jubilee with a racial epithet confirming Jubilee's race. Upon arriving at Jubilee's home, O'Mara put the cross in the ground and attempted to light it.

In addition to the epithet, the record is replete with references to Jubilee's race. In the Commonwealth's motion for joinder of defendants in the Elliott and O'Mara cases, it is stated: "Mr. James Jubilee is an African-American." A fire investigator with the City of Virginia Beach testified that Targee knew the Jubilees were black before he participated in the cross burning.

Throughout the O'Mara and Elliott prosecution, the Commonwealth referred to "burning a cross in a black family's yard." The questions of counsel and argument to the court are replete with references to race and racism.

Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross burning statute.

Elliott was also charged with attempted cross burning and conspiracy to commit cross burning. Upon his plea of not guilty, a jury found him guilty of attempted cross burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

O'Mara and Elliott appealed to the Court of Appeals, alleging that the Virginia cross burning statute violated the free speech clauses of both the United States and Virginia Constitutions. The Court of Appeals affirmed the convictions, holding that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va. App. 525, 536, 535 S.E.2d 175, 181 (2000).

In the third case reviewed, Barry Elton Black ("Black") organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County. Following speeches filled with racial, ethnic, and religious bigotry, a cross approximately 25 to 30 feet tall was ignited

Black was indicted for violating Virginia's cross burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500.

Black appealed his conviction, and the Court of Appeals affirmed the judgment of the trial court, "[f]or the reasons stated in *O'Mara v. Commonwealth*." *Black v. Commonwealth*, Rec. No. 1581-99-3, December 19, 2000, at 1.

THE CROSS BURNING STATUTE

Code § 18.2-423, the cross burning statute, provides that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black[1] contends that the cross burning statute is unconstitutional because it engages in viewpoint and

[1] Because of the similar constitutional challenges presented in these consolidated cases, our references to Black's contentions shall be inclusive of those mounted by O'Mara and Elliott.

content discrimination and it fails to incorporate the standards articulated by the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), concerning incitement to, and likelihood of, imminent lawless action. Additionally, Black contends that the provision of the statute permitting an inference of intent to intimidate from the mere act of burning a cross, which excuses the Commonwealth from its proof requirement for the establishment of a prima facie case, further aggravates viewpoint and content discrimination and violates the limitations prescribed in *Brandenburg*.

The geometric configuration of a single vertical bar traversed by a single shorter horizontal bar has no unusual inherent properties. But its symbolic meaning is powerful. For Christians, the symbol of the cross evokes remembrance of the crucifixion of Christ. Unfortunately, such powerful symbols are often subject to misappropriation. As recognized by Justice Clarence Thomas in his concurring opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the burning of a cross has acquired a specific meaning:

> 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. . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

In 1952, in direct response to Ku Klux Klan activities in Virginia,[2] including incidents of cross burning, the General Assembly enacted the predecessor statute to the law at issue in these cases.[3] The cross burning statute was amended on several occasions, including an amendment expanding the sites where cross burning may not take place, and the addition of the inference of intent to intimidate from the mere act of burning a cross for the purposes of establishing a prima facie case under the statute.[4]

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[2] *See Police Aid Requested by Teacher: Cross is Burned in Negro's Yard*, Richmond News Leader, Jan. 21, 1949, at 19; *Cross Fired Near Suffolk Stirs Probe: Burning Second in Past Week*, Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1; *Huge Cross is Burned on Hill Just South of Covington*, Richmond Times-Dispatch, Apr. 14, 1950, at 6; *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4; *Cross is Burned at Reedville Home*, Richmond News Leader, Apr. 14, 1951, at 1; *'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments*, Richmond Times-Dispatch, Feb. 6, 1952, at 7; *Bill to Curb KKK Passed by the House*, Richmond Times-Dispatch, Mar. 8, 1952, at 5; *Name Rider Approved by House: Measure Now Goes to Battle*, Richmond News Leader, Feb. 23, 1952, at 1; *Governor Backs Curb on Ku Klux Activities*, Richmond Times-Dispatch, Feb. 10, 1952, § 2, at 1.

[3] Code § 18.1-365 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.

[4] *See* 1968 Va. Acts ch. 350 at 450; 1975 Va. Acts ch. 14 at 90, ch. 15 at 174.

SELECTIVE REGULATION OF SPEECH BASED UPON CONTENT

It is well established that non-verbal, symbolic expression is "speech," and is as fully protected by the First Amendment to the United States Constitution as more traditional means of communication. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing of black arm bands by high school students as a protest against the war in Vietnam). However pernicious the expression may be, "[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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Any question about the constitutional infirmity of such selective proscription of speech was resolved by the United States Supreme Court in the case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.* *R.A.V.* involved the prosecution of a teenager who, with several other minors, allegedly assembled a crudely made cross and burned the cross inside the fenced yard of a black family. *Id.* at 379. The City of St. Paul prosecuted under its Bias-Motivated Crime Ordinance, which provided:

> 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.

St. Paul, Minn., Legis. Code § 292.02 (1990). The trial court held that the statute was unconstitutional, but the Minnesota Supreme Court reversed, construing the St. Paul ordinance as limited to conduct that amounts to "fighting words," namely, "conduct that itself inflicts injury or tends to incite immediate violence. . . . " *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn.1991). Accepting the limited construction placed upon the statute by the Minnesota Supreme Court, the United States Supreme Court held that, even if the expression reached by the ordinance was proscribable under the "fighting words" doctrine, the ordinance was "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.

Noting that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed," the Court observed that "[c]ontent-based regulations are presumptively invalid." *Id.* at 382 (citations omitted). Exceptions to the rule include: obscenity (*e.g., Roth v. United States*, 354 U.S. 476 (1957)), defamation (*e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952)), and "fighting words" (*e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). But simply because particular categories of speech may be regulated does not mean that such regulation may selectively discriminate on the basis of content. As the Court in *R.A.V.* stated:

> And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

R.A.V., 505 U.S. at 386.

The Commonwealth argues that the Virginia statute is neutral because "Code § 18.2-423 applies equally to anyone who burns a cross for the purpose of intimidating anyone." The Commonwealth further dwells upon the phrase in *R.A.V.* which states that "threats of violence are outside the First Amendment." 505 U.S. at 388. This quotation is incomplete and distorts the holding of *R.A.V.* While a statute of neutral application proscribing intimidation or threats may be permissible, a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment. *Id.*

Emphasizing the point, the Court in *R.A.V.*, noted:

> Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 384.

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be

> punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 386.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* – i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

Id. at 388.

> And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

Id.

R.A.V. makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not

discriminate based upon the content of the message.[5] In this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: "the government may not regulate use based upon hostility – or favoritism – towards the underlying message expressed." *Id.* at 386.

While not specifically stating that "race, color, creed, religion or gender" is the subject of proscription, the absence of such language in the Virginia statute does not

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[5] It is important to note that *R.A.V.* did not interpret the First Amendment to forbid "underinclusiveness." To the contrary, the Court held that:

> In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

Id. at 387. Of course, the subjects of the proscription expressly stated in the St. Paul ordinance were symbols and words, including a burning cross or a Nazi swastika, evoking "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." As the Court noted, excluded from proscription was identical behavior with a different subject, such as "political affiliation, union membership, or homosexuality." *Id.* at 391. The infirmity addressed in *R.A.V.*, as in the cases before this Court, was not "underinclusiveness;" rather, it was the selective discrimination in the ordinance based upon content.

mask the motivating purpose behind the statutory prohibition of cross burning. The United States Supreme Court dealt with a similar question in the "flag burning" cases. In *Texas v. Johnson*, Johnson was prosecuted under a statute making it unlawful to intentionally or knowingly desecrate the United States flag. "Desecrate" was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." 491 U.S. at 400 (quoting Texas Penal Code Ann. § 42.09 (1989)). After the Supreme Court declared the Texas statute unconstitutional, Congress enacted the Flag Protection Act of 1989. In subsequent litigation concerning the Act, the government maintained that the absence of language in the Act focusing upon the content of the actor's symbolic speech cured any constitutional problems. The Supreme Court disagreed in *United States v. Eichman*, 496 U.S. 310, 315 (1990) (internal quotations omitted), stating that, "[a]lthough the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression."

Similarly, considering the historical and current context of cross burning, and the statute's reliance on such context for the provision of an inference of intent to intimidate from the mere act of burning a cross, it is clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression as well.

The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and

content as symbolic speech has been universally acknowledged. For example, the Supreme Court of South Carolina declared a statute[6] with operative language similar to ours unconstitutional and observed: "a burning cross historically conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993). The Court of Appeals of Maryland also declared a statute[7] with operative language similar to ours unconstitutional and observed:

> Those who openly burn crosses do so fully cognizant of the controversial racial and religious messages which such acts impart. Historically, the Ku Klux Klan burned crosses to express

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[6] S. C. CODE ANN. § 16-7-120 (1985) provided:

It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the 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.

[7] MD. ANN. CODE art.27, § 10A (1957, 1992 Repl. Vol.) provided in pertinent part:

It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place.

> hostility towards blacks and other groups it disfavored, and it is that idea which contemporary cross burners aim to perpetuate.

State v. Sheldon, 629 A.2d 753, 757 (Md. 1993).

The historical context for the passage of the Virginia cross burning statute is uncontrovertible. In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech – the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.

Initially, the cross burning proscription extended only to acts on property of another without permission. In 1968, the limitation concerning situs was removed, and in 1975, the addition of language establishing prima facie evidence of intent to intimidate from the mere act of burning a cross reaffirmed the legislative context of the statute. During oral argument, the Commonwealth maintained that the portion of the statute proscribing the burning of a cross had nothing to do with the motivation of the actor. When asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning. The Commonwealth cannot have it both ways.

"SECONDARY EFFECTS"

As described above, the *R.A.V.* analysis begins with categories of speech that may be subject to regulation and

holds that such regulation may not selectively discriminate on the basis of content. However, the Court in *R.A.V.* recognized that some selective regulation of constitutionally protected speech may be permissible if it is based upon the "secondary effects" of speech rather than its content. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the ordinance under review proscribed the location of an adult motion picture theater within 1,000 feet of any residential zone, single – or multiple – family dwelling, church, park, or school. Because the ordinance did not ban adult theaters entirely, the Court held that the ordinance is "properly analyzed as a form of time, place, and manner regulation." *Id.* at 46.

The analysis used by the Court focused upon whether the regulation was directed at the content of the protected speech or at a legitimate area of government concern. Determining that the dominant motive of the ordinance was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' " the Court upheld the ordinance. *Id.* at 48. The Court held that the regulation in *Renton* was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. By contrast, the legislative history of the Virginia cross burning statute, the meaning afforded the expressive conduct, and the provision of prima facia evidence of intent to intimidate from the mere act of burning a cross, make it abundantly clear that Code § 18.2-423 is aimed at regulating content, not "secondary effects."

OVERBREADTH ANALYSIS

As discussed herein, the majority opinion in *R.A.V.* holds that certain categories of speech may be regulated, but the government may not discriminate in its proscription within these categories on the basis of content. The concurring opinions in *R.A.V.* preferred a more traditional analysis confined to the question whether the ordinance suffered from overbreadth. As Justice White noted, St. Paul's ordinance was unconstitutionally overbroad because:

> Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that – however repugnant – is shielded by the First Amendment.

Id. at 413 (J. White, concurring). The Commonwealth's cross burning statute is similarly defective.

It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). Threat of prosecution under a criminal statute "tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Self-censorship, "a harm that can be realized even without an active prosecution," inhibits free speech. *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000).

Code § 18.2-423 provides in part that "any such burning of a cross shall be prima facie evidence of an intent to

intimidate a person or group of persons." Assuming that the act is done "on the property of another, a highway or other public place,"[8] the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. Code § 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

BRANDENBURG ISSUES

R.A.V., the Court acknowledged that the narrow construction placed upon the ordinance limited its application to "fighting words," a proper category of proscription. Nonetheless, the ordinance was declared unconstitutional because of its selective application to only certain expressions of fighting words. Virginia's cross burning statute suffers from the same infirmity.

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[8] The Virginia statute prohibits cross-burning "on the property of another, a highway or other public place." Remarkably, it sweeps within its prohibition the act "on the property of another" with or without permission.

Because we hold that the statute impermissibly proscribes otherwise protected speech on the basis of content, and because the statute is overbroad, it is unnecessary to address the remaining challenges under *Brandenburg*.[9]

CONCLUSION

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.

A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment. Additionally, a statute that sweeps within its ambit both protected and unprotected speech is overbroad. Accordingly, we hold that Code § 18.2-423 violates the First

[9] Additionally, because we resolve these questions under the First Amendment to the United States Constitution, it is unnecessary to address Elliott's and O'Mara's additional argument that Article I, § 12 of the Virginia Constitution is also violated.

Amendment of the United States Constitution. The convictions in each of these appeals will be vacated and the indictments will be dismissed.

Reversed and dismissed.

JUSTICE KINSER, concurring.
JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

JUSTICE KINSER, concurring.

In the words of the dissent, I, too, "stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others." However, in contrast to the dissent, I cannot be dissuaded from that devotion, and believe that the "fair application of our jurisprudence" must include a fair and proper application of the First Amendment. Therefore, I fully agree with the majority opinion. I write separately to address certain inferences and conclusions drawn by the dissent.

Relying on the definition of the term "intimidation" set forth in *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 670 (1985) ("intimidation . . . means putting a victim in fear of bodily harm"), the dissent concludes that Code § 18.2-423 proscribes only conduct that constitutes "true threats." Expanding on that definition, the dissent then states that the purpose of Code § 18.2-423 is "to proscribe physical acts intended to inflict bodily harm

upon the victims of such acts." The dissent's attempt to equate an intent to intimidate with a "true threat" or a physical act intended to inflict bodily harm has no legal basis and misconstrues the decision in *Sutton*.

The issue in that case was whether there was sufficient evidence to prove that the defendant engaged in sexual intercourse with the victim against her will by intimidation. 228 Va. at 662, 324 S.E.2d at 669. Noting that the General Assembly had expanded the scope of the statute proscribing rape to include "a prohibition against sexual intercourse with a woman against her will by threat or intimidation," as well as by force, the Court explained that "[t]here is a difference between threat and intimidation[,]" and that "[i]ntimidation may occur without threats." *Id.* at 663, 324 S.E.2d at 669-70. Thus, our established jurisprudence does not support the proposition that Code § 18.2-423 proscribes only conduct that constitutes "true threats." An act performed with the intent to intimidate, i.e., to place an individual in fear of bodily harm, does not rise to the same level as a threat (defined in *Sutton* as "expression of an intention to do bodily harm," 228 Va. at 663, 324 S.E.2d at 670), or a physical act intended to inflict bodily harm.

For the same reason, Code § 18.2-423 does not satisfy the principle enunciated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that "the 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." Although reprehensible and offensive, the act of burning a cross with the intent to

intimidate is not necessarily speech aimed at "producing imminent lawless action." *Id.* That proposition is borne out by the fact that the cross burning for which Barry Elton Black was convicted occurred on private property with the permission of the owner.

Even if the dissent were correct that Code § 18.2-423 proscribes only conduct that constitutes "true threats," the General Assembly cannot engage in content discrimination by selectively prohibiting only those "true threats" that convey a particular message. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Unfortunately, that is what the General Assembly has done in Code § 18.2-423 by confining the proscription in that statute to the act of burning a cross. The constitutional infirmity is not, as suggested by the dissent, cured by the fact that the statute does not prohibit all acts of burning a cross. The statute's content-based discrimination still exists.

Finally, the dissent's statement that the majority has concluded that the Constitution of the United States prevents the General Assembly from enacting a statute that prohibits persons from burning a cross "in a manner that intentionally places citizens in fear of bodily harm" misinterprets the holding in the majority opinion. I believe that a more accurate characterization of the majority's conclusion is that the General Assembly may, in a statute of neutral application, proscribe expressive conduct performed with the intent to intimidate another individual, but that the General Assembly may not selectively prohibit only certain acts of intimidation based upon the content of the underlying message.

For these reasons, I respectfully concur.

JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

I dissent. The majority opinion invalidates a statute that for almost 50 years has protected our citizens from being placed in fear of bodily harm by the burning of a cross. The majority concludes that the Constitution of the United States prohibits the General Assembly from enacting this statute. I find no such prohibition in either the Constitution of Virginia or the Constitution of the United States. Without question, the framers of the First Amendment never contemplated that a court would construe that Amendment so that it would permit a person to burn a cross in a manner that intentionally places citizens in fear of bodily harm.

I am concerned about the fair application of our jurisprudence to every citizen and the proper interpretation of our Federal and State Constitutions. These same concerns for fairness and the safety of our citizens were the very basis for the General Assembly's decision to enact Code § 18.2-423 almost 50 years ago.

I stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others. However, contrary to the view adopted by the majority in these appeals, the First Amendment does not permit a person to burn a cross in a manner that intentionally places another person in fear of bodily harm.

I.

A.

Barry Elton Black was indicted by a Carroll County grand jury for the burning of a cross with the intent to intimidate in violation of Code § 18.2-423. At the conclusion of a trial, the jury found him guilty as charged in the indictment and fixed his punishment at $2,500. Black appealed the circuit court's judgment confirming the jury's verdict to the Court of Appeals, which affirmed his conviction. *Black v. Commonwealth*, Record No. 1581-99-3 (December 19, 2000).

The following evidence was presented during Black's trial. On August 22, 1998, H. Warren Manning, the Sheriff of Carroll County, received a report that members of the Ku Klux Klan intended to conduct a rally in Carroll County that evening. Later, Sheriff Manning drove his police car to the site of the rally, where three men dressed in white robes and hats approached him. Sergeant Richard C. Clark, Jr., met Sheriff Manning at the site of the rally.

Approximately 45 minutes later, after the rally started, Sheriff Manning observed the Klan members burn a cross that was approximately 25 to 30 feet tall. Sheriff Manning approached Black and inquired, "who [is] responsible for burning the cross?" Black responded that he was responsible for burning the cross, and he was placed under arrest.

The rally was conducted on property owned by Annabell Sechrist. She was present during the rally, and she had given the Ku Klux Klan permission to burn the cross on her property.

Rebecca Sechrist, a Caucasian female, lived on property adjacent to the property where the rally occurred. Sechrist observed the rally from her home. In response to the question, "[w]hat statements did you hear?", she 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."

Sechrist testified that she was "scared" as a result of the rally. She stated: "I was scared our home would get burned or something would happen to it. We've got two . . . kids and I was afraid that something would happen to them." In response to a question by defendant's counsel, Sechrist testified: "I think they were trying to scare me."

B.

Jonathan Stephen O'Mara was indicted by a grand jury in the City of Virginia Beach for attempting to burn a cross with the intent of intimidating a person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. O'Mara

entered a guilty plea that reserved his right to file an appeal challenging the constitutionality of Code § 18.2-423.

The court fixed O'Mara's punishment at incarceration in the jail for a term of 90 days and imposed a fine of $2,500 on each of the charges. O'Mara appealed the judgment to the Court of Appeals, which affirmed his convictions. *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000).

O'Mara entered into a stipulation of facts with the Commonwealth, which was made a part of the record in the circuit court. The stipulation states: "On May 2, 1998, David Targee had approximately fifteen individuals, including Jonathan O'Mara and Richard Elliott, at his residence in Virginia Beach. They were all consuming alcohol. Elliott complained to Targee and O'Mara about his neighbor and about how he wanted to 'get back' at him. It was suggested (not by O'Mara) that they burn a cross in Elliott's neighbor's yard. O'Mara and Targee agreed, and they all went to Targee's garage where a cross was built. They all got in Targee's truck and drove to Munden Point Road in Virginia Beach. Targee was driving, with O'Mara in the front passenger seat and Elliott in the back seat. Once there, Elliott handed the cross to O'Mara, who also grabbed a can of lighter fluid and went outside and placed the cross in the yard of Elliott's neighbor. He then poured lighter fluid on the cross, set it on fire, and ran back to the car. Targee drove them back to his house. The next morning, Elliott's neighbor, James Jubilee, came out of his house and observed the partially burned cross in his yard. He broke the cross and placed [it] in the garage. He later called the police."

C.

A grand jury in the City of Virginia Beach indicted Richard J. Elliott for attempting to burn a cross on the property of James S. Jubilee with the intent of intimidating any person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. At the conclusion of a trial, the jury found Elliott guilty of attempted cross burning with the intent to intimidate and fixed his punishment at 90 days incarceration in jail and a fine of $2,500. Elliott appealed the circuit court's judgment to the Court of Appeals, which affirmed his conviction. *See O'Mara*, 33 Va. App. 525, 535 S.E.2d 175.

The following evidence was adduced at the trial. James Jubilee resided at 2044 Munden Point Road in Virginia Beach. One day, Mr. Jubilee told his next door neighbor, Mrs. Elliott, that he was concerned because persons were discharging firearms in her backyard. Mrs. Elliott responded that her husband maintained a firing range in the rear of her yard.

On May 2, 1998, David Targee had a party at his home where he entertained Jonathan O'Mara, Richard Elliott, and others. Richard Elliott, who had consumed alcoholic beverages, mentioned that "his neighbors were complaining about him shooting in his backyard. . . . He wanted to get back at them for doing it."

Later that evening, Targee, Elliott, and O'Mara went to Targee's parents' garage and constructed a wooden cross. After they had constructed the cross, they traveled by car to Mr. Jubilee's home where O'Mara placed the cross in the yard and ignited it. The next morning

between 8:15 and 8:30, Mr. Jubilee saw the cross, which contained "burn spots." He picked it up and broke it.

Jennifer Luning, O'Mara's former "girlfriend," testified that O'Mara admitted that he, Targee, and Richard Elliott had burned the cross. "He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting [guns] in the backyard."

Edwin Coyner, a fire investigator for the City of Virginia Beach, testified that he interviewed Targee several times. Targee informed Coyner that "Richard Elliott had complained about his neighbors because the neighbors had complained about him shooting in the backyard."

II.

A.

The First Amendment of the Constitution of the United States provides in part: "Congress shall make no law . . . abridging the freedom of speech." Article I, § 12 of the Constitution of Virginia states:

> "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press,

> nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

The Fourteenth Amendment prohibits state action in violation of the First Amendment. The freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States.

Code § 18.2-423 states:

> "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."

B.

We have held, since the birth of this Commonwealth, that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof." *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (1793). However, clearly engrained within our jurisprudence is the principle that this Court

> "can declare an act of the general assembly void *only* when such act *clearly and plainly* violates the

> [C]onstitution, and in such manner as to leave no doubt or hesitation on our minds.
>
> "This rule has been repeatedly declared by this court.
>
> . . . .
>
> The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives."

Commonwealth v. Moore, 66 Va. (25 Gratt.) 951, 953 (1875). Indeed, we have repeatedly held that "[e]very act of the legislature is presumed to be constitutional, and the courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution. If we doubt we must sustain its constitutionality." *Tobacco Growers' Co-Operative Assoc. v. Danville Warehouse Co.*, 144 Va. 456, 469, 132 S.E. 482, 486 (1926). We restated this fundamental principle in *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959):

> "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law. As we said in *Almond v. Day*, 199 Va. 1, 6, 97 S.E.2d 824[, 828 (1957)]: ' . . . It is only where an act is plainly repugnant to some constitutional provision that the courts can declare it null and void. If there be a reasonable doubt whether the

> act violates the fundamental law, that doubt must be resolved in favor of the act.' "

Accord Jefferson Green Unit Owners Assoc., Inc. v. Gwinn, 262 Va. 449, 459, 551 S.E.2d 339, 344 (2001); *Motley v. Virginia State Bar*, 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000); *Finn v. Virginia Retirement System*, 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000); *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999); *Mumpower v. Housing Authority*, 176 Va. 426, 443, 11 S.E.2d 732, 738 (1940); *Antoni v. Wright*, 63 Va. (22 Gratt.) 833, 882 (1872); *Auditor of Public Accounts v. Graham*, 5 Va. (1 Call) 475, 476 (1798). For some inexplicable reason, the majority ignores this fundamental principle.

C.

Black, O'Mara, and Elliott (the defendants), relying principally upon *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), argue that Code § 18.2-423 violates their right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States and Article I, § 12 of the Constitution of Virginia and that the Court of Appeals erred by holding that the statute comported with these constitutional provisions. I disagree with the defendants.

Initially, I observe that Code § 18.2-423, by its express terms, does not proscribe every act of burning a cross. Rather, Code § 18.2-423 only proscribes the act of burning a cross when such act is performed "with the intent of intimidating any person or group of persons" and the act is committed "on the property of another, a highway or

other public place." In the context of our criminal statutes, specifically Code § 18.2-61, we have defined intimidation as acts which put the victim "in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria." *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 669 (1985).

Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes "true threats." And, I note that the United States Supreme Court, in *Watts v. United States*, 394 U.S. 705, 707 (1969), approved the facial constitutionality of a federal criminal statute that prohibited someone from threatening the life of the President of the United States. It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Nat'l Organization for Women, Inc. v. Scheidler*, ___ F.3d ___, ___ (7th Cir. 2001); *Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001); *United States v. Rahman*, 189 F.3d 88, 115 (2nd Cir.), *cert. denied*, sub nom. *Nosair v. United States*, 528 U.S. 982 (1999); *United States v. Francis*, 164 F.3d 120, 122-23 (2nd Cir. 1999); *United States v. J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994). However, I must continue this inquiry regarding the constitutionality of Code § 18.2-423 because in *R.A.V., supra*, the Supreme Court held that the First Amendment

imposes certain limitations upon the regulation of speech and expressive conduct, including true threats.

In *R.A.V.*, the Supreme Court considered whether an ordinance was facially invalid under the First Amendment. In *R.A.V.*, the defendant, along with several other teenagers, made a wooden cross and burned it in a yard owned by a black family. The defendant was convicted of violating the following ordinance:

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

The Supreme Court held that the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the content of the speech, even though the Minnesota Supreme Court had concluded that the ordinance only prohibited unprotected "fighting words." *R.A.V.*, 505 U.S. at 379-81.

The Supreme Court observed, however, that certain "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of

proscribing *only* libel critical of the government." *Id.* at 383-84.

The Supreme Court explained:

> "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 discrimination 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. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707 (1969). . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example . . . a State may choose to regulate price advertising in one industry, but not in others, because the risk of

> fraud . . . is in its view greater there. . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

R.A.V., 505 U.S. at 388-89.

The Supreme Court also articulated a second basis which would permit some degree of content-based discrimination.

> "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). . . . A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.
>
> "These bases for distinction refute the proposition that the selectivity of the restriction is 'even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say." ' *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555 (1981). . . . There may be other

> such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. . . . Save for that limitation, the regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."

R.A.V., 505 U.S. at 389-90.

In invalidating the City of St. Paul's ordinance, the Supreme Court stated that

> "[a]lthough the phrase in the ordinance 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."

Id. at 391.

Continuing, the Supreme Court explained:

> "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and, in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.' "

Id. at 392 (citation omitted).

Contrary to the majority's opinion, Code § 18.2-423 does not suffer from the defects contained in the ordinance at issue in *R.A.V.* As previously stated, Code § 18.2-423 does not prohibit every act of burning of a cross. Rather, the statute only prohibits the burning of a cross when such act is performed with the intent to intimidate. And, consistent with our jurisprudence, the word "intimidate" means to place one in fear of bodily harm. Unlike the City of St. Paul's ordinance, which targeted cross burning on the basis of race, color, creed, religion or gender, Code § 18.2-423 does not contain those limitations. The conduct proscribed in the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate. That point is best illustrated in *O'Mara* and *Elliott* because these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus.

Additionally, the Supreme Court pointed out in *R.A.V.* that a valid basis for according differential treatment even to a content-defined subclass of proscribable speech is when the subclass happens to be associated with particular secondary effects of the speech so that the regulation is justified without reference to the content of the speech. The ordinance that the Supreme Court invalidated in *R.A.V.* targeted any cross burning that "one knows or has reasonable grounds to know arouses anger, alarm or resentment." 505 U.S. at 380.

By contrast, from its clear and unambiguous language, the purpose of the Virginia statute, Code § 18.2-423, is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts. Simply stated, the Virginia statute proscribes acts of intimidation, but it does not prohibit persons from expressing their views, irrespective of how repugnant or offensive those views may be to others. The Virginia statute does not prohibit the burning of a cross so long as that act is committed without an intent to place a person in fear of bodily harm. *See also In re Steven S.*, 31 Cal. Rptr. 2d 644, 646, 647-48 (Cal. Ct. App. 1994) (statute proscribing the act of "burn[ing] a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk" is not impermissible content-based prohibition on speech within the meaning of the First Amendment); *State v. Talley*, 858 P.2d 217, 220, 225-27 (Wash. 1993) (statute proscribing cross burning that places another person in reasonable fear of harm to his person or property does not violate the First Amendment)

I recognize that the Supreme Court of South Carolina, in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), invalidated a statute that prohibited the burning of a cross on the basis that it contravened the First Amendment. The South Carolina statute, however, was significantly different from the Virginia statute. The South Carolina statute stated: "It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part . . . without first obtaining written permission of the owner or occupier of the premises so to do." *Id.* at 514.

Unlike Code § 18.2-423, which proscribes the burning of a cross with the intent of intimidating and, thus, prohibits real threats, the South Carolina statute contained no similar limitation. The Supreme Court of South Carolina concluded that its statute was enacted "in order to protect individuals and society as a whole from the reprehensible messages often sought to be symbolicly [sic] expressed by a burning cross." *Ramsey*, 430 S.E.2d at 514. As I have already explained, Virginia's statute does not suffer from this constitutional defect. Thus, the differences between the Virginia statute and the South Carolina statute are real and significant. Yet, the majority ignores the differences between Code § 18.2-423 and the South Carolina statute.

I also observe that the Maryland Court of Appeals, in *State v. Sheldon*, 629 A.2d 753, 755 (Md. 1993), held that a Maryland statute violated the First Amendment because it required those who wished to burn crosses or religious symbols to "secure the permission of the property owner

where the burning is to occur and [to] notify the local fire department before engaging in the burning." That statute stated in part:

> "It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place."

Id. at 755. Unlike the Virginia statute, the Maryland statute did not proscribe burning a cross with the intent of intimidating, but rather, is content-based regulation of expression. The Maryland Supreme Court found "no way to justify the cross burning statute without referring to the substance of speech it regulates, because the statute does not protect property owners or the community from unwanted fires any more than the law already protected those groups before the statute's enactment." *Id.* at 755. Yet, the majority ignores these significant distinctions.

IV.

Defendant Black argues that Code § 18.2-423 "does not incorporate the requirements that the speech at issue be directed to the incitement of imminent lawless action, and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*, and the *Brandenburg* standard was not satisfied here." I disagree with the defendant. The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) simply has no application here.

The Supreme Court considered the following facts in *Brandenburg*. Brandenburg, "a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' " *Id.* at 444-45 (alteration in original).

Brandenburg placed a telephone call to a reporter on the staff of a television station and invited the reporter to attend a Ku Klux Klan rally that would be held at a certain farm. "[T]he reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network." *Id.* at 445. The prosecutor relied upon the films and testimony identifying the defendant as the person who communicated with the reporter and who spoke at the rally. The prosecutor "also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films." The only persons present at the rally other than the participants were the newsmen who made the film. *Id.* at 445-46.

The Supreme Court pointed out that "the 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." *Id.* at 447. Continuing, the U.S. Supreme Court stated that

> "the mere abstract 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. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control."

Id. at 448.

The Supreme Court invalidated the Ohio Criminal Syndicalism Act because neither the indictment nor the trial court's instructions to the jury "refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is Code § 18.2-423, a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm. And, I note that the jury at defendant Black's trial was specifically instructed that

> "[i]ntimidate, as used in the term 'with the intent to intimidate' means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of

> the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria."

I have already observed, in response to defendant's counsel's questions at trial, Rebecca Sechrist testified that she was afraid that her "home would get burned or something would happen to it." Moreover, defendant Black has never challenged the sufficiency of the evidence to support the jury's finding beyond a reasonable doubt that his acts placed Sechrist in fear of bodily harm.

IV.

Defendant Black argues that "[t]he provision of Code § 18.2-423 providing that the burning of a cross shall be *prima facie* evidence of an intent to intimidate permits a jury to find intimidation from the mere act of cross-burning alone, in contravention of the First Amendment." I disagree.

Code § 18.2-423 creates a statutory inference, and we have stated that an "inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Martin v. Phillips*, 235 Va. 523, 526 n.1, 369 S.E.2d 397, 399 n.1 (1988). Additionally, "inferences are never allowed to stand against ascertained and established facts." *Ragland v. Rutledge*, 234 Va. 216, 219, 361 S.E.2d 133, 135 (1987) (citing *Southern Ry. v. Mays*, 192 Va. 68, 76, 63 S.E.2d 720, 725, *cert. denied*, 342 U.S. 836 (1951)).

This statutory inference is a factor that the jury may accept or reject in determining whether a defendant

burned a cross with the intent to intimidate a victim. This inference alone, however, is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate. And, this statutory inference does not, and cannot, absolve the Commonwealth of its burden to prove each element of Code § 18.2-423 beyond a reasonable doubt.

Moreover, the jury in Black's trial was specifically instructed as follows:

> "INSTRUCTION NO. 6
>
> "THE COURT INSTRUCTS THE JURY THAT:
>
> "The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the defendant's guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty."

. . . .

"INSTRUCTION NO. 8

"THE COURT INSTRUCTS THE JURY THAT:

"The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

"(1) That the defendant burned or caused to be burned a cross in a public place; and

"(2) That he did so with the intent to intimidate any person or group of persons.

"If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

"If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty."

As these jury instructions indicate, the Commonwealth was required to prove each and every element of its case, including the requirement of intimidation, beyond a reasonable doubt.

V.

For the foregoing reasons, I would affirm the judgments of the Court of Appeals.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 19th *day of* December, 2000.

Barry Elton Black, Appellant,

against Record No. 1581-99-3
Circuit Court No. CR 98-461

Commonwealth of Virginia, Appellee.

From the Circuit Court of Carroll County

Before Chief Judge Fitzpatrick,
Judges Coleman and Frank

For the reasons stated in *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000), we affirm the judgment of the trial court.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk
By: /s/ Marty V. P. Ring
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Bray and Bumgardner
Argued at Chesapeake, Virginia

JONATHAN STEPHEN O'MARA

v. Record No. 0992-99-1

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 0997-99-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RICHARD S. BRAY
OCTOBER 3, 2000

FROM THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH
Frederick B. Lowe, Judge

Kevin E. Martingayle (Stallings & Richardson, P.C., on briefs), for Jonathan Stephen O'Mara.

James O. Broccoletti (Zoby & Broccoletti, on brief), for Richard J. Elliott.

H. Elizabeth Shaffer, Assistant Attorney General; John H. McLees, Jr., Senior Assistant Attorney General (Mark L. Earley, Attorney General, on briefs), for appellee.

Pursuant to the terms of a plea agreement, Jonathan O'Mara pled guilty to "Attempted Cross Burning" and "Conspiracy to Commit a Felony," violations of Code §§ 18.2-423 and 18.2-22, respectively, expressly reserving the right to appeal a prior order of the trial court which denied his challenge to the constitutionality of Code

§ 18.2-423. In a separate proceeding, Richard J. Elliott, codefendant with O'Mara, was convicted by a jury for attempted cross burning, after joining with defendant O'Mara in the unsuccessful challenge to the constitutionality of Code § 18.2-423 before the trial court.[1]

Accordingly, both O'Mara and Elliott (defendants) maintain on appeal "that the code section is unconstitutional as violative of the free speech and expression protections" guaranteed by both the United States and Virginia Constitutions. Joining the two appeals for resolution by this Court, we affirm the respective convictions.

I.

The substantive facts are uncontroverted. On the evening of May 2, 1998, defendants, together with "approximately fifteen individuals," were "consuming alcohol" at the Virginia Beach home of David Targee. When defendant Elliott expressed unspecified "complaint[s] . . . about his neighbor," James Jubilee, and his desire to " 'get back' at him," someone "suggested that they burn a cross in [Jubilee's] yard." In response, Targee and defendants immediately constructed a crude cross in Tragee's garage and proceeded in Targee's truck to the Jubilee home. Elliott "handed the cross" to defendant O'Mara, who erected and ignited it on Jubilee's property, and the

[1] Although Judge Lowe presided at the trials of both O'Mara and Elliott, defendants' constitutional challenges were decided by Judge Alan E. Rosenblatt, following an extensive hearing and related argument and memoranda of law.

three returned to Targee's residence. The respective records do not clearly specify Jubilee's race.

Jubilee later discovered the "partially burned cross" and notified police, resulting in the subject prosecutions for violations of code § 18.2-423 and the attendant conspiracy.

II.

Code § 18.2-423 provides:

> 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.

Defendants contend that the statute impermissibly infringes upon expressive conduct, speech protected by the First and Fourteenth Amendments to the Constitution of the United States and Article I, § 12 of the Virginia Constitution, and, therefore, is "plainly unconstitutional."[2]

[2] "[L]itigants may challenge a statute on first amendment grounds even when their own speech is protected." *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

" 'In assessing the constitutionality of a statute . . . [t]he burden is on the challenger to prove the alleged constitutional defect.' " *Woolfolk v. Commonwealth*, 18 Va. App. 840, 848, 447 S.E.2d 530, 534 (1994) (quoting *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)).

> "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99, 498 S.E.2d 451, 454 (1998).

The First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment prohibits state action in violation of the First Amendment.

Similarly, Article I, § 12 of the Virginia Constitution establishes:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40, 467 S.E.2d 306, 311 (1996).

Although "[t]he First Amendment literally forbids the abridgement only of 'speech,' " the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In identifying expressive conduct, the Court must determine "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410-11). If so, a proscription of such activity by government "because of disapproval of the ideas expressed" is "content based" suppression of free speech, offensive to the First Amendment and "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

However, "our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Id.* at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, First Amendment protection "does not include a freedom to disregard these traditional limitations," thereby allowing government to regulate obscenity, defamation, "fighting words," *id.* at 383 (citing *Chaplinsky*, 315 U.S. at 572), and threats of violence. *See id.* at 383, 388 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)); *see also In re: Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that threats and fighting words are "remove[d] . . . from the scope of the First Amendment"); *Florida v. T.B.D.*, 656 So. 2d 479, 480-81 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) (concluding that threats of violence and fighting words are proscribable because government has "valid interest" in protecting citizens both from fear of violence and violence).

The " 'true threat' " doctrine articulated by the Supreme Court in *Watts* permits punishment of actual speech or expressive conduct "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." *In re: Steven S.*, 31 Cal. Rptr. 2d at 647 (citing *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)). Similarly, the Court's "fighting words doctrine" expressed in *Chaplinsky* removes the shield of the First Amendment from "statements 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* (quoting *Chaplinsky*, 315 U.S. at 572); *see Cohen v. California*, 403

U.S. 15, 20 (1971) (describing fighting words as expressions likely to provoke a violent reaction when directed to another).

Here, the provisions of Code § 18.2-423 specifically prohibit the burning of a cross "on the property of another, a highway or other public place," "with the intent of intimidating any person or group of persons." Historically, a flaming cross is "inextricably linked . . . to sudden and precipitous violence – lynchings, shootings, whippings, mutilations, and home-burnings," a "connection . . . [with] forthcoming violence [that] is clear and direct." *T.B.D.*, 656 So. 2d at 481. Hence, "a burning cross conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1992).

Manifestly, the pernicious message of such conduct, a clear and direct expression of an intention to do one harm, constitutes a true threat envisioned by *Watts*, irrespective of racial, religious, ethnic or like characteristics peculiar to the victim. Moreover, the attendant fear and intimidation subjects the victim to an immediate and calculated injury that invites a breach of the peace, fighting words within the intendment of *Chaplinsky*. Thus, although such expressive conduct doubtless constitutes speech, the prohibition of which unavoidably implicates content, the message is beyond the protection of the First Amendment and appropriately subject to proscription by government.

Defendants' reliance upon *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to support the contention that Code

§ 18.2-423 unconstitutionally prohibits "merely intimidating someone," at once ignores the well-established symbolism of the burning cross and misapplies *Brandenburg*. *Brandenburg* addressed a challenge to the constitutionality of Ohio's "Criminal Syndicalism statute," which proscribed, *inter alia*, the " 'advocacy . . . [of] the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform.' " *Id.* at 444-45. Thus, the *Brandenburg* Court was concerned with the propriety of governmental restrictions on the "advocacy of the use of force or of law violation" in the context of a reform movement, an issue unrelated to the vile and malevolent expression contemplated by Code § 18.2-423. *Id.* at 447. Accordingly, the *Brandenburg* admonishment that states may "forbid or proscribe [such] advocacy" only if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" does not similarly delimit proscribable threats and fighting words. *Id.*

Defendants' assertion that *R.A.V. v. St. Paul* "makes it clear . . . § 18.2-423 is unconstitutional" is, likewise, without merit. *R.A.V.* examined the constitutionality of a St. Paul, Minnesota ordinance, which provided, in pertinent part,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . 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.

R.A.V., 505 U.S. at 380 (citing Minn. Legis. Code § 292.02 (1990)). Unlike code § 18.2-423, which proscribes cross burnings with the intent to intimidate anyone, the St. Paul ordinance prohibited such "speech solely on the basis of the subjects the speech addresses," race, color, creed, religion or gender. *R.A.V.*, 505 U.S. at 381.

In declaring the enactment unconstitutional, the Supreme Court accepted the "authoritative statement" by the Minnesota Supreme Court "that the ordinance reaches only those expressions that constitute 'fighting words,' "[3] *id.* at 381, and reaffirmed the doctrine that "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* – (obscenity, defamation, [threats, fighting words] etc.)." *Id.* at 383 (emphasis in original). However, the Court cautioned that such "categories of speech [are not] entirely invisible to the Constitution" and cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, when "St. Paul . . . proscribed fighting words of *whatever* manner that communicates messages of racial, gender or religious intolerance," the city impermissibly engaged in "[s]electivity [which] creates the possibility that [it] is seeking to handicap the expression of *particular* ideas." *Id.* at 394 (emphasis added); *see In re: Steven S.*, 31 Cal. Rptr. 2d at 649 ("speech and expressive conduct may be regulated [but] such regulation may not discriminate within that category on the basis of content"); *T.B.D.*, 656

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[3] In overruling defendants' constitutional challenges in the instant prosecutions, Judge Rosenblatt also determined that code § 18.2-243 regulated fighting words.

So. 2d at 4781 (such regulation may not "play [ ] favorites").

In contrast, Code § 18.2-423 regulates, without favor or exception, conduct, which, despite elements of expression and content, is unprotected by the First Amendment.[4]

Finally, defendant challenges Code § 18.2-423, first, as overbroad, regulating both protected and unprotected speech, and, secondly, as underinclusive, ignoring other modes of proscribable speech. However, overbreadth assumes constitutional dimension only when " 'there [is] a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the court.' " *Parker v. Commonwealth*, 24

[4] Post-*R.A.V.* decisions of other jurisdictions cited by defendant in support of a different result involve statutes substantially dissimilar from Code § 18.2-423. *See Pinette v. Capitol Square Review and Advisory Bd.*, 874 F.Supp. 791 (S.D. Ohio 1994) (statute established permit requirements to conduct public assembly); *State v. Skelton*, 629 A.2d 753 (Md. 1993) (statute proscribed cross burning to protect property owners from unwanted fires and safeguard community from fires generally); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (statute proscribed messages based upon race, color, creed or religion); *State v. Talley*, 858 P.2d 217 (Wash. 1993) (statute proscribed certain conduct related to the race, color, religion, ancestry, natural origin, or mental, physical or sensory handicap of another).

In contrast, jurisdictions examining the constitutionality of statutes more akin to Code § 18.2-423 are in accord with our conclusion. *See In re: Steven S.*, 31 Cal. Rptr. 2d 644 (statute proscribed cross-burning intended to terrorize owner or occupant); *T.B.D.*, 656 So. 2d 479 (statute proscribed burning of cross on property of another without permission).

Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)). The prohibition of Code § 18.2-423 is expressly limited to a person or persons burning a cross with the specific intent to intimidate another, a threat and fighting words unworthy of First Amendment guarantees. Further, underinclusiveness is condemned by *R.A.V.* only if the result is content discrimination. *See R.A.V.*, 505 U.S. at 387. Code § 18.2-423 criminalizes a long recognized, particularly virulent and incendiary mode of proscribable expressive conduct, a prohibition free of content discrimination.

We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence. The statute does not discriminate in its prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

Affirmed.

CONVICTION AND SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT
OF CARROLL COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 035

Hearing Date: June 23, 1999
Judge: DUANE E. MINK

COMMONWEALTH OF VIRGINIA

v.

BARRY ELTON BLACK, DEFENDANT

This day came the defendant, who appeared in person with his attorney, David P. Baugh. The Commonwealth was represented by Gregory G. Goad. Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the Indictment, which plea was tended by the accused in person.

After being advised by the Court of his right to trial either by jury or by the Court and, after consultation with counsel, the accused did not waive his right to trial by jury and to which the Court approved.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the evidence was presented by the Commonwealth and the defendant.

At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted.

At the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words:

Costs. The defendant shall pay costs of $4107.50. The defendant is Ordered to pay unto the Commonwealth its costs in this case pursuant to law including any Court appointed counsel fee allowed by this Court. The defendant was advised by the Court that his driver's license shall be revoked according to Virginia Code Section 46.2-395, and that he is subject to further charges as set forth in Virginia Code Section 19.2-358 for failure to pay according to the direction of the Court. The defendant shall pay according to a schedule to be filed with the Court for monthly payments which are due each month until all costs are paid in full.

And it is further Ordered that pursuant to Section 19.2-310.3 of the Code of Virginia, as amended, the defendant shall have a sample of his blood taken for analysis. The Court Orders the defendant to cooperate fully and promptly in permitting the said withdrawal of blood as required by law. The Court Orders the defendant to report to the New River Valley Regional Jail on June 24, 1999, at 9:00 a.m., for the withdrawal of the said sample of blood in accordance with law.

Thereupon, the jury was discharged.

And counsel for the defendant moved the Court to stay the execution of the fine pending the defendant's decision regarding appeal and the perfection of said appeal if so noted, and which motion is granted. The Court further Orders a stay in the payment of costs to the Commonwealth pending the perfection of an appeal if noted.

The Court certifies that at all times the defendant was personally present with his attorney who capably represented him.

June 28, 1999 (DATE) ENTER: /s/ Duane E. Nuich (JUDGE)

DEFENDANT IDENTIFICATION:

Alias: none
SSN: 159-40-8378 DOB: 1/6/48 Sex: male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: $2,500.00 fine

TOTAL SENTENCE SUSPENDED: none

TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

(LOGO)

COMMONWEALTH OF VIRGINIA

[Name And Address Omitted In Printing]

March 18, 1999

[Filed Aug. 31, 1999]

Mr. David P. Baugh
Attorney at Law
223 South Cherry Street
P. O. Box 12137
Richmond, Virginia 23241

Mr. Gregory G. Goad
Commonwealth Attorney
County of Carroll
P. O. Box 280
Hillsville, Virginia 24343

Re: Commonwealth of Virginia versus Barry E. Black
Case Number 98-8954

Dear Counselors:

Please be advised that I have reviewed all of the memorandums filed in this cause, both in the General District Court and in the Circuit Court, on behalf of each of the parties, and the Amiscus [sic] Curiae brief filed in support of the defendant's position in this matter, and I have given due consideration thereto.

The issue before the Court is the motion to dismiss the indictment against the defendant, Barry E. Black, upon the ground that Section 18.2-423, Code of Virginia is

unconstitutional and violates the freedom of speech violations of the First Amendment of the United States Constitution, and Article I, Section 12 of the Virginia Constitution. In support of that motion, the defendant alleges as follows:

1. Section 18.2-423 discriminates on the basis of content and viewpoint and is unconstitutional under the doctrine of *R. A. V. v. City of St Paul.*

2. Section 18.2-423 does not incorporate the requirement that the speech at issue be directed to the incitement of imminent lawless action and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio.*

3. The prima facie evidence standard of Section 18.2-423 creates an unconstitutional presumption.

4. Section 18.2-423 is unconstitutionally vague and overbroad.

Rather than discuss the issues in the chronology set forth above, the court has determined that it would be appropriate to consider them, to the extent necessary, in reverse order. I have chosen this approach since the ultimate reviewing authority, the United Sates Supreme Court, has held that in construing ordinances that Court is bound by the construction given to it by the State Court. *R. A. V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381; 112 S.Ct. 2538, 2542 (1992). First it is noted for the record that the Commonwealth in this case is represented, not only by the local Commonwealth Attorney, Gregory G. Goad, but also by John McLees, from the Office of the Attorney General of the Commonwealth of Virginia. The Court is of the

opinion that the arguments set forth in the memorandums filed on behalf of the Commonwealth represents not only the official position of the Commonwealth Attorney of Carroll County, but also the Attorney General's Office of the Commonwealth of Virginia. Throughout the lower court proceedings and in the current proceedings in the Circuit Court, the Commonwealth has maintained the gravaman [sic] of the offense is intimidation in that Code Section 18.2-423[1] criminalizes on the burning of a cross "with the specific intent to intimidate", (Comm. Brief Gen. Dist. Ct., Page 3 and Comm. Brief, Cir.Ct., Page 3). In addition, in support of its response to the allegation that the section is vague and overboard its position is that "intimidation" as used in such statutes, means putting one in fear of bodily harm and further that statutory construction would require this Court to construe the word narrowly, (Comm. Supplemental Brief, Page 10).

In responding to the defendant's allegation that the prima facie provision of the statute creates an unconstitutional presumption, the Commonwealth concedes that "the 'prima facie' provision does not preclude review by a case-by-case basis of whether the defendant did in fact intend to intimidate others by his act of cross burning. On the contrary, it *requires* such review. It merely establishes

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[1] Section 18.2-423, Code of Virginia, states: 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.

that a reasonable inference of such intent can be drawn from cross-burning. The ultimate burden of persuasion of intent to intimidate always rests upon the Commonwealth. Thus, it is always open to the defendant to contest the issue of whether that intent existed, and the burden is on the Commonwealth to prove such intent, as a matter of fact, beyond a reasonable doubt, and *without regard* to whether the defendant has presented evidence on that issue or not". (Comm. Supplement Brief, Page 9).

The Commonwealth concludes by stating "It is clear from reading the law that, notwithstanding the 'prima facie' provisions, the ultimate burden is still on the Commonwealth to prove beyond a reasonable doubt that the defendant *actually* intended to intimidate others by his actions".

This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused actually intended to intimidate others by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and Article 1, Section 12 of the Virginia Constitution. The narrow application of the provisions of the above referenced section can be adequately addressed by appropriate instructions to the jury and well defined perimeters with regard to admission of evidence to the very limited and precise criminal act defined therein.

Accordingly, the defendant's Motion to Dismiss the indictment is denied. I request that Mr. Goad contact Mr. Baugh to arrange a suitable date to proceed with the trial of this case.

I commend both of you gentlemen on the time, effort and excellent memorandums which you submitted to the Court in support of your respective positions.

With best regards.

Yours very truly,

/s/ Duane E. Mink
Duane E. Mink

DEM:nc

Commonwealth v. Black

INSTRUCTION NO. 8

THE COURT INSTRUCTS THE JURY THAT:

The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

INSTRUCTION NO. 8-1

THE COURT INSTRUCTS THE JURY THAT:

Intimidate, as used in the term "with the intent to intimidate" means a motivation to intentionally put a

person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria.

INSTRUCTION NO. 9

THE COURT INSTRUCTS THE JURY THAT:

The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.

INSTRUCTION NO. 10

THE COURT INSTRUCTS THE JURY THAT:

A "public place" is any place open to the knowledge or view of all; generally seen or known; without privacy or concealment.

VERDICT FORM

We the jury find the Defendant guilty of burning a cross in a public place with the intent to intimidate, as charged in the indictment.

/s/ Dannie Martin
FOREMAN

We the jury find the Defendant not guilty.

FOREMAN

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

SENTENCING ORDER - CASE NO.: CR98-3631

Attorney for the Commonwealth: A. Farashahi and S. Vachris
Attorney for the Defendant: J. Broccoletti
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was again present and represented by counsel.

On February 23, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate - F	5/2/98	18.2-423; 18.2-26

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the

defendant desired to advance any reason why judgment should not be pronounced.

In accordance with the jury's verdict, the Court **SENTENCES** the defendant to:

Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00.

The defendant shall pay costs of $1,393.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: FEBRUARY 23, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

OFFENSE:	OFFENSE DATE:
CONSPIRACY	MAY 2, 1998
ATTEMPTED CROSS BURNING TO INTIMIDATE	MAY 2, 1998

CRIMINAL ORDER – Case No.: CR98-3631

Attorney for the Commonwealth: S. Vachris and A. Farashahi
Attorney for the Defendant: J. Broccoletti
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was again present, in person, and represented by counsel.

This day came again a jury sworn for the trial of this case.

The jurors were again sent to the jury room to consider their verdicts. They subsequently return in open court the following verdicts:

1. We, the jury, find the defendant GUILTY of Attempted Cross Burning to Intimidate.

2. We, the jury, find the defendant **NOT GUILTY** of Conspiracy.

After the jury returned its verdicts, the defendant moved to poll the jury and all the jurors affirmed their vote as to the verdicts.

A separate proceeding limited to the ascertainment of punishment was held before the same jury. After hearing further evidence and argument of counsel, the jurors were sent to the jury room to consider punishment. They returned in open court the following verdict:

1. We, the jury, having found the defendant **GUILTY** of Attempted Cross Burning to Intimidate, fix his punishment at: confinement in jail for 90 days and a fine of $2,500.00.

After the jury returned its verdict, no motion was made to poll the jury as to its verdict.

The Court confirmed the jury's verdict finding the defendant **GUILTY** of Attempted Cross Burning to Intimidate and **NOT GUILTY** of Conspiracy, of which charge the defendant stands acquitted.

The case was continued until April 26, 1999 for sentencing. The Court ordered the Probation Office to prepare a presentence report.

The Clerk shall send a copy of this order to the Probation Office of this Court.

Bond Status: The defendant was continued on the same bond previously posted.

ENTERED: 2/25/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JANUARY 20, 1999
JUDGE: ROSENBLATT

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT

INDICTMENT FOR:
CONSPIRACY
ATTEMPTED CROSS BURNING TO INTIMIDATE

ORDER – CASE NO.: CR98-3631

Court Reporter: Ronald Graham & Associates, Inc.

This day came A. Farashahi and S. Vachris, attorneys for the Commonwealth, the defendant, in person, and J. Broccoletti, attorney for the defendant.

After receiving briefs and hearing argument of counsel, the Court denied defendant's motion to dismiss the above charges for the reasons stated on the record.

This matter is presently set for motions on February 2, 1999.

ENTERED: 1-25-99

/s/ AA
JUDGE

COMMONWEALTH OF VIRGINIA

v.

Richard J. Elliott

INSTRUCTION NO. 5

The Court instructs the jury that the defendant is charged with the crime of attempted cross burning. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

1. The the defendant intended to commit cross burning; and
2. That the defendant did a direct act toward the commission of the cross burning which amounted to the beginning of the actual commission of the cross burning; and
3. That the defendant had the intent of intimidating any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 7

The Court instructs the jury that the intent required to be proved in an attempted crime is the specific intent in the person's mind to commit the particular crime for which the attempt is charged. In determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.

[given
2/22/99
/s/ FBL]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
JONATHAN STEPHEN O'MARA, DEFENDANT
SSN: 226-35-0947
DOB: 7/15/79

SENTENCING ORDER – CASE NO.: CR98-3193

Attorney for the Commonwealth: A. Farashahi and S. Vachris
Attorney for the Defendant: K. Martingale and M. Del Duca
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was present and represented by counsel.

On February 22, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26
Conspiracy – F	5/2/98	18.2-22; 18.2-423

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the

defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00 on each of the charges of Attempted Cross Burning to Intimidate and Conspiracy. The sentences shall run concurrently with each other for a total sentence imposed of 90 days in jail and $2,500.00 fine.

The Court **SUSPENDS** 45 days of the 90-day jail sentence and $1,000.00 of the $2,500.00 fine conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for a period of 1 year.
2. **Costs.** The defendant shall pay costs of $433.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA v JONATHAN STEPHEN O'MARA, Defendant.	RECORD CR98-3193
COMMONWEALTH OF VIRGINIA v RICHARD J. ELLIOTT, Defendant.	RECORD CR98-3631

Before Hon. Alan E. Rosenblatt, Judge
Virginia Beach, Virginia
January 20, 1999

* * *

[21] THE COURT: All right. State statutes are entitled to a presumption of constitutionality. That's Horne book law. We all know that. The defendants maintain that as a content-based regulation of speech, this particular code section 18.2-423 is not entitled to such a presumption. They contend the statute violates the First and Fourteenth Amendments of the Constitution and have moved to dismiss this case. For the reasons that

follow, the court is going to overrule the defendants' motions.

I found the discussion this morning interesting. However, burning a cross in my opinion constitutes symbolic speech because it is an activity by which a person clearly intends to convey a particularized message; and there is a great likelihood that those who view the message will understand it. Therefore, it is an activity that may be protected by the First Amendment.

Further, the statute in question, 18.2-423, [22] is a regulation of conduct/speech that is content based, it is not content neutral. Clearly, in enacting the statute, the state – clearly, the state has adopted this regulation of statute because of disagreement with the message it conveys and because of its communicative impact. There can be no doubt – at least there's no doubt in my mind that Code Section 18.2-423 was enacted to censure a particular message of intimidation, which, as I said, makes – does not make it content neutral but content based; but because we're dealing with a message of this nature and because we're dealing with a particular message of intimidation, we're not dealing with a situation such as that expressed in Brandenburg. The Brandenburg analysis is not appropriate to the facts and to the statute in this particular case. What we're talking about is a content-based regulation of speech which must be analyzed by the court, and all such content-based regulations are presumptively unconstitutional. However, there are permitted exceptions in a few limited areas.

As the supreme court said in Chaplinsky, It is well understood that the right of free speech is not absolute at

all times and under all circumstances. There are certain well-defined and narrowly limited [23] classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting, or, quote, fighting words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Fighting words are words which by their very utterance inflict injury and intend to incite immediate breach of the peace. Code section 18.2-243 is clearly a legislative attempt to regulate fighting words. The statute does not regulate all cross burnings; it only regulates those done with the intent of intimidating any person or group of persons. Thus, the statute falls within the fighting words exception.

The leading case concerning the regulation of fighting words is well known in R.A.V. In that case the Supreme Court held that even though fighting words fall within a constitutionally proscribable category, the state may not regulate such speech based on [24] hostility, or favoritism, towards a nonproscribable message. In effect, the court ruled that statutes that regulate even fighting words must be neutral and cannot discriminate against

certain viewpoints. It ultimately determined that the statute in R.A.V. was unconstitutional because it only prohibited fighting words that insult on the basis of race, color, creed, religion or gender.

As Justice Scalia explained, quote, The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey. Saint Paul has not singled out an especially offensive mode of expression. It has not, for example, selected for prohibition. Only those fighting words that communicate ideas in a threatening as opposed to a merely obnoxious manner. Rather it has proscribed fighting words of whatever manner that communicate messages of racial, gender or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

In the court's opinion, the Virginia statute [25] differs significantly from the Minnesota statute. First, it does not – first, it does single out an especially offensive mode of expression by prohibiting conduct that is done with the intent to intimidate. Second, the statute is not limited to messages of racial, gender or religious intolerance. There is no selectivity in 18.2-243. The statute prohibits the entire class of speech. The statute does not, for example, proscribe only cross burnings done with the intent to intimidate someone on the basis of race or on the basis of national origin. The Virginia statute prohibits all cross burnings done with the intent to intimidate, regardless of the message the perpetrator is attempting to convey and

regardless of the social or political viewpoint the cross burner was trying to express. All that matters is that he attempted to send his message, whatever it was, with the intent to intimidate someone.

Now, the defendants have argued because the Virginia statute prohibits only cross burnings, it favors the cross as a religious symbol and is, therefore, content based and unconstitutional under R.A.V. This argument, however, confuses the regulation of a manner of expression with the regulation of a message. The statute regulates the intimidating manner [26] of expression, which is entirely permissible. The mere fact that the statute does not proscribe all fighting words of all kinds that convey messages of intimidation does not mean that the state is playing favorites. This is simply a constitutionally underinclusive regulation of a larger set of clearly proscribable speech. As explained in R.A.V., the regulation of fighting words may address some offensive instances and leave other equally offensive instances alone; and, as long as those instances of fighting words are regulated are done so in a neutral manner with regard to the message conveyed, there is no constitutional violation. Burning a cross with an intent to intimidate is an extremely hazardous manner of expression. There is a tremendous possibility for terror and violence. Because the statute evenhandedly bans all cases of this particularly dangerous form of expression, it passes constitutional muster.

On the second issue, the defendants have contended that the statute states that the burning – since the statute states that the burning of a cross shall be prima facie evidence of an intent to intimidate, it unconstitutionally

shifts the burden of proof to the defendant. It is well settled that the prosecution bears the burden of proving every [27] element of a crime beyond a reasonable doubt. However, inferences and presumptions are a staple of our adversary system of factfinding; and where these presumptions are rebuttable, quote, the general rule is to give such presumptions permissive or burden-of-production-shifting effect only.

The statute in this case creates a rebuttable presumption. The jury, if there is one, will be instructed that the burning of a cross by itself is sufficient evidence from which you may infer the required intent. The jury may infer, not must infer. Indeed, the presumption could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal.

Recognizing that the statute creates only a permissive inference, it is inappropriate at this time to consider the defendants' argument. As the Supreme Court has instructed, our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the court. None suggests that a court should pass on the constitutionality of this kind of statute on its face. To rule on the defendants' argument at this time, as I think was conceded by Mr. Broccoletti, would be to rule [28] on the constitutionality of the statute on its face. Accordingly, because the party challenging the invalidity of the statute must demonstrate its invalidity as applied to him, it will be necessary to determine the facts of the case, which can only be accomplished by the defendant going to trial. For those reasons, the motions of the defendants are denied.

MR. BROCCOLETTI: If the court would note our objection and exception.

MR. MARTINGAYLE: For the record, note our exception.

Judge, just for the record, I wanted to make the record clear that while you were out and for the benefit of opposing counsel, I had your clerk convey to you that we did find a cite in R.A.V. of Brandenburg at 2553 in the Supreme Court Reporter Addition, Footnote 4; and I don't know if you were made aware of that or not, but I wanted to make sure –

THE COURT: I think you made the point; so, yes, I did see it.

MR. MARTINGAYLE: Yes, sir.

(The hearing was concluded at 11:36 a.m.)

Richmond News Leader, Jan. 21, 1949, at 19

Police Aid Requested By Teacher

Cross is Burned In Negro's Yard

A Negro school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police today after the burning of a cross in his front yard last night.

At Second District, officer said patrolmen on the beat in which the residence is situated have been instructed to pay special attention to activities in that block, particularly during the day when both the complainant and his wife are in school.

The incident happened at about 8:30 o'clock last night in the yard of 2700 Barton Ave., now owned by J. M. Sweat, a teacher at George Mason School.

TOLD BY NEIGHBOR

Sweat said he and his wife were in the upstairs rooms listening to the radio and knew nothing of what was happening until a neighbor rang their doorbell and told them.

The burning cross, about five feet high, was covered with burlap bags soaked in oil. Witnesses said it had burned about 10 minutes before Sweat extinguished the flames by pouring water on them.

The householder, aided by police, removed the cross to the rear yard.

A small crowd had gathered and was watching the burning when Sweat emerged from the house and disposed of the flaming cross.

The Sweat family had moved into the house several weeks ago, but said this was the first trouble they have had. While all the other homes in the 2700 block now are occupied by whites, several of them have been purchased by Negroes, who expect to occupy them soon.

Mrs. Sweat, a student at Virginia Union University, said today she did not "have the slightest idea" who could have been responsible for the act, and added that she was somewhat puzzled by its significance.

"I knew such things happened during the last century," she said, "but I didn't know there were any Ku Klux Klanners in Richmond now. It looks like a KKK act."

Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1

Cross Fired Near Suffolk Stirs Probe

Burning Second in Past Week

Virginia's second cross-burning episode of the week was under investigation yesterday by Nansemond County law enforcement officers.

A six-foot wooden cross was burned Friday night in front of a store at Driver, owned by Alvester Drake, a Negro.

The incident followed by less than 24 hours, the burning of a cross on the front lawn of J. M. Sweat, a Negro schoolteacher living in a predominantly white residential section of Richmond.

J. Frank Culpepper, Nansemond County sheriff said "only a few persons" apparently set up and lit the cross near Drake's store. He said none of the participants were hooded or masked, and that there was no ceremony.

Culpepper said the cross-burners arrived at the store in two automobiles and left immediately after setting the flames.

Two Different Groups

He could ascribe no reason for the incident. But he said he believed the participants were not the same group which last December 11 burned a cross on the property of County Fire Warden N. H. Bradshaw. All of the members of that group, he pointed out, were hooded and masked, and there was a ceremony attendant upon the burning.

Meantime, Richmond police continued an investigation into the burning of a five-foot cross in the Sweat front yard. Police Chief O. D. Garton said Saturday his department was sparing no effort "to apprehend the guilty parties."

If found, he said the participants could be charged with violating city fire ordinances, trespassing and disturbing the peace.

Sweat was not at home when the cross-burning occurred in the North Side community of Barton Heights.

Police extinguished the fire after the cross had been burning about 10 minutes.

Sweat said he "had no idea who was responsible."

The cross burnings at Driver and Richmond brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County.

Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents.

Some sources have expressed the opinion that the cross burnings, especially the Whaleyville affair, were Ku Klux Klan activities.

But in Atlanta, KKK Grand Dragon Samuel Green said yesterday that the Klan "played no part" in the incidents and had no member groups in Virginia.

"Un-American Act"

The latest Richmond cross burning was denounced last night by W.H. Reavis, treasurer of the Progressive party of Richmond, as "an un-American act, designed to intimidate Negroes from seeking their rights as citizens."

"The Klan elements who participated in and inspired this terroristic act fear the growing movement of the Negro people for their full constitutional rights and for an end to the un-American practices of discrimination and segregation," Reavis' statement said.

It added that "the Klan and Klan-minded groups are frightened at the increased political activity of the Negroes in Richmond, together with labor and other white progressives."

The first Richmond cross burning occurred on March 23 of last year on the lawn of the Robert Fulton School.

Onlookers in the vicinity reported seeing persons clad in sheets running back and forth behind the burning cross during the 20 minutes that it was afire early that night.

Police said school property was not damaged, and they could give no reason for the affair.

No one was on the school property when the officers arrived. Police later said they thought the cross burning was a prank.

Meanwhile, Alice Burke, State chairman of the Virginia Communist party, issued this statement here last night:

"Our city was immeasurably harmed when a cross was burned on the lawn of one of Richmond's citizens." (She referred to the most recent incident).

Richmond Times-Dispatch, Apr. 14, 1950, at 6.

Huge Cross Is Burned on Hill Just South of Covington

Special to the Times-Dispatch

COVINGTON, VA., April 13 – a huge cross reminiscent of the Ku Klux Klan days, was burned atop a hill just south of Covington late last night.

Hugh D. Little of Suffolk one of nine men questioned by Sheriff W. E. Henderson, assumed responsibility for the burning the sheriff said, and explained that the cross was a part of an initiation ceremony of the Knights of the Kavaliers, a secret organization charted by the State Corporation Commission in 1948.

Sheriff Henderson said Little exhibited the charter of the organization, showing himself, John R. Hampton, of Suffolk; Ralph E. Hampton of Suffolk; and James T. Lewis, of Norfolk, as the organizers.

There was no show of violence in connection with the cross-burning. Sheriff Henderson said. He added that Little gave him a signed statement in which he admitted full responsibility for the act.

Henderson said he investigated the incident on the strength of an anonymous telephone call and intercepted nine men in four cars about 500 yards from the burned cross. Little and John R. Hampton were in the first of the four cars, he said, and readily admitted their identities.

The men in the other three cars, Henderson said, were believed to be local citizens but he was unable to identify them. They would not discuss the matter, leaving Little to do the talking, he added.

After questioning the men on the road, Henderson said he went to the scene and found the charred cross lying on the ground partially covered with dirt but still burning. He extinguished the flames and took the cross to his office.

The sheriff said the cross was constructed of sawed lumber two by five inches. The cross-bar, he said, was about six fee long and the upright bar about 12 feet long.

A similar cross-burning took place near Covington July 2 of last year, but the scene of that incident was on the opposite side of town from the burning last night.

Investigation Planned

SUFFOLK, April 13, – The Nansemond Commonwealth's Attorney Paul L. Everett said today his office plans to investigate a cross burning at Driver last night to see if there had been any violation of the law. Deputy Sheriff, C. F. Mansey described the cross as 18 feet high and eight feet wide.

Richmond Times – Dispatch, Feb. 26, 1951, at 4

Cross Burned At Manakin; Third in Area

Men Flee Negro Home In Auto, Firing Pistol

MANAKIN, VA. Feb. 25 – A six-foot cross was burned in front of the home of a Negro family in the center of this small Goochland community shortly before 10 o'clock Saturday night.

It was the third such cross to be burned in this vicinity within the past week, authorities said. Two of the crosses were burned in Goochland County and the third in the western section of Henrico County.

In all three cases, the crosses were burned in front of the homes of Negro tavern owners. Law enforcement authorities were unable to give any reason for the burnings.

The latest cross was burned in front of the home of John B. Pittman, owner of a small tavern on State Route 6, about 11 miles west of Richmond and 10 miles east of Goochland Courthouse.

Five Shots Fired

Pittman said he heard a commotion in front of his home Saturday night. When he went to the front door, the cross was blazing. He said five or six white men were running away. They jumped into an automobile parked near by and drove away in the direction of Goochland Courthouse, he said.

Pittman said one of the men stuck a pistol out of a window of the automobile and fired five times.

"I can think of no reason why tehy [sic] picked out me to burn a cross," Pittman said. "I have run a business in the county for years and have no enemies as far as I know."

Deputy Sheriff John Amos said a similar cross was burned Saturday, February 17, in front of Ida Mickie's home on Maidens Road, several miles from the Pittman residence.

There had been a fight at the Mickie Tavern the night before and several persons had been arrested, Amos said. "We thought it was some of those arrested trying to get revenge on the woman but with the burning last night it puts a different light on the matter," he said.

Pranksters Suspected

Amos said no one saw the cross being placed at the Mickie place. Several shots were fired as the automobile drove away.

The crosses were about six feet high and made out of small strips of wood like bean holders; Amos said. The crosses were wrapped in burlap bagging, which had been soaked in oil.

Goochland County Sheriff Joe Powers said last night he and Amos were working on the two cases. He said it was his opinion that the crosses were the work of "bad boys" in the county and they were "acts of vandalism."

Commonwealth's Attorney J. C. Knibb was out of the county for the weekend.

White persons living in the vicinity were questioned by a reporter, but none could give any information as to why the crosses had been burned.

In the Henrico County case, the cross was burned in front of the Broadway Inn, a Negro tavern on Broad Street Road about five miles west of Richmond, also on Saturday night, February 17.

Henrico County Policeman R. H. Beck, who investigated the complaint said he thought it was the work of pranksters. He listed "vandalism" on his report.

Henrico County Police Chief Wilmer Hedrick said last night he had thought the cross burned in his county was an act of vandalism. However, he said in view of the other two burnings, he planned to confer with Goochland authorities for further investigation.

Commonwealth's Attorney H. M. Ratcliffe said last night he had not heard of the burning but that he would take action if the persons responsible were caught.

Richmond News Leader, Apr. 14, 1951, at 1

Cross Is Burned At Reedville Home

Special to The News Leader

REEDVILLE, April 14 – A cross was burned here last night in front of the home of R. L. Walker, local fish net repairman.

The family said today they suspected the cross burning was the result of the family's prosecution of five juveniles recently. The youths were punished Thursday in Juvenile Court for shooting firecrackers at the Walker's home, Walker's daughter said.

Investigation of the cross-burning is being conducted by the Northumberland County sheriff.

Richmond Times-Dispatch, Feb. 6, 1952, at 7

'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments

Governor Battle said yesterday that Virginia "might well consider passing legislation" to restrict the activities of the Ku Klux Klan.

He took his cue from the reports that the Klan, long considered dead in Virginia, is being revitalized in Richmond. A prominent Southern Ku-Kluxer has confirmed a report that attempts are being made to establish a klavern in Richmond.

[In the hooded organization, a klavern is the name given to local Ku Klux Klan clubs.]

Asked for a comment on the report that the Klan is to be revived in Virginia, the Governor said: "My reaction is not very happy."

He said that he did not know of any Virginia statutes which prohibit the wearing of masks in public and added, "If the Klan, as presently constituted, is coming to Virginia, we might very well consider passing such legislation."

By "such legislation" the Governor meant a law similar to those passed by other States where the Klan has been reactivated.

Meanwhile, Dr. J. M. Tinsley, local president of the National Association for the Advancement of Colored People, said he would call on the Federal Bureau of Investigation today to take immediate action.

Yesterday, FBI officials here said they had no word from Dr. Tinsley or other NAACP officials and declined to comment on the Klan.

"There is nothing more important than the FBI should devote its activities to at this time in Virginia than to apprehend and expose the people who are organizing and joining the Ku Klux Klan," Dr. Tinsley said.

Bill Hendrix, of Tallahassee, Fla., grand dragon of one division of the Klan, confirmed a report Monday that he was in Richmond "a couple of weeks ago" and plans a return visit "the first Saturday in March." He refused to identify his Richmond contacts and where the meeting will be held when he makes a return visit.

Foster on Guard

Richmond's safety director, Richard R. Foster, said he had heard nothing on the reactivation of the Klan, but "will keep a close watch on it." He added that he would have to wait for further developments.

In Leesville, S. C., Thomas L. Hamilton, grand dragon of the Carolinas Ku Klux Klan said yesterday he has been chosen imperial wizard of the klans in the Eastern United States.

During a telephone interview with The Times-Dispatch, Hendrix said that most of Ku Klux Klan recruiting spade work in Virginia was being done by his ally, Hamilton. Hendrix admitted that he has not been too active in the Klan's organization work of late.

Advancement "News"

Hamilton's advancement in rank, however, was "news" to an Atlanta spokesman for Klan organizations claiming to cover "the 48 States." "I hadn't heard about it," Charles H. Klein, executive secretary of the Association of Georgia Klans and the Associated Klans of America, reported.

"He must be worried," Klein added. "He must need publicity."

Hamilton and Grand Dragon Bill Hendrix, of the Florida Klan, have been working together for some time, according to the Associated Press, but both have been at outs with the Georgia Klan.

Hamilton's new post is comparable to that held by the late Sam Green, of Atlanta, after whose death the Klan split up into State and factional groups. Before the Atlantan's death, Hamilton was a constant companion to Green.

Richmond Times-Dispatch, Feb. 10, 1952, § 2 at 1

Governor Backs Curb On Ku Klux Activities

Battle Confirms Experts Working To Draw Up Bill

By James Latimer

A bill aimed at unmasking any Ku Kluxers who try to raise their sheeted heads in Virginia may be added to Governor Battle's legislative program in the next few days.

The Governor yesterday confirmed a report that he had set legislative drafting experts to work on the problem of what legislation might be devised to checkmate the Klan.

Earlier last week a Florida KKK "grand dragon," Bill Hendrix, of Tallahassee, said a "klavern" is being formed in Richmond – a "klavern" being Ku Kluxese for local chapter or unit of the hooded hoodlums.

Governor Battle's legislative researches are delving first into existing Virginia laws to see what statutes might already be on the books for use in controlling the Klan. None had been found yesterday, and it appeared a new law would be needed.

Antimasking Law

Any such legislation probably will take the form of antimasking laws which some other States have adopted.

The Governor told reporters the State couldn't ban secret organizations as such, but "we can condemn organizations in which people are ashamed to permit their faces to be shown and their membership to be known."

Apart from the Richmond klavern-forming, there have been unconfirmed reports the Kluxers are trying to organize elsewhere in the Old Dominion.

* * *

Richmond News Leader, Feb. 23, 1952, at 1

Name Rider Approved By House

* * *

2. The Senate approved and sent to the House the Stephens anti-Ku Klux Klan bill. Designed to outlaw masks worn in public, the bill was amended before passage to ban the burning of crosses and other similar evidences of terrorism.

* * *

Richmond Times-Dispatch, Mar. 8, 1952, at 5

Bill to Curb KKK Passed By the House

Action Is Taken Without Debate

The Senate bill to curb activities of the Ku Klux Klan in Virginia was passed yesterday without debate in the House of Delegates.

The bill now goes to Governor Battle. He recommended the measure offered by Senator A. E. S. Stephens, of Smithfield.

The bill would prohibit the wearing of masks and the burning of crosses on public property, and on private property without the consent of the owner or occupant.

Delegate John B. Boatwright, of Buckingham County, was the lone dissenter in the House. The bill was presented to the House by a former FBI agent, Delegate Mills E. Godwin, of Suffolk.

Recently, a KKK official predicted an effort would be made to organize klaverns in Virginia. The official said the first effort would come this Spring in the Richmond area.

"Very Salutary Effect"

Godwin said law and order in the State were impossible if organized groups could create fear by intimidation. He predicted the bill would have "a very salutary effect" by giving the police a method to control "activities that tend to incite resentment."

"This bill is distinctively in the public interest, and I urge the House to pass it," the Suffolk Delegate said.
