

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 01–1107

VIRGINIA, PETITIONER *v.* BARRY ELTON BLACK,
RICHARD J. ELLIOTT, AND JONATHAN O’MARA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VIRGINIA

[April 7, 2003]

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, 491 U. S. 397, 422–429 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation’s 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

Although I agree with the majority’s conclusion that it is constitutionally permissible to “ban . . . cross burning carried out with intent to intimidate,” see maj. op., at 17, I believe that the majority errs in imputing an expressive component to the activity in question, see maj. op., at 17 (relying on one of the exceptions to the First Amendment’s prohibition on content-based discrimination outlined in *R. A. V. v. St. Paul*, 505 U. S. 377 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct

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into the zone of expression overlooks not only the words of the statute but also reality.

A

“In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’” *Texas v. Johnson*, *supra*, at 421 (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921)).

“The world’s oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.” M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* vii (1991).

To me, the majority’s brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those its dislikes, uses the most brutal of methods.

Such methods typically include cross burning—“a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. Juan Williams, *Eyes on the Prize: America’s Civil Rights Years 1954–1965*, at 39 (1965). As the Solicitor

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tor General points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for the United States at 3-4 & n. 2.¹ Indeed, the connection between

¹*United States v. Guest*, 383 U.S. 745, 747-748 n.1 (1966) (quoting indictment charging conspiracy under 18 U.S.C. 241 to interfere with federally secured rights by, inter alia, “burning crosses at night in public view,” “shooting Negroes,” “beating Negroes,” “killing Negroes,” “damaging and destroying property of Negroes,” and “pursuing Negroes in automobiles and threatening them with guns”); *United States v. Pospisil*, 186 F.3d 1023, 1027 (CA8 1999) (defendants burned a cross in victims’ yard, slashed their tires, and fired guns), cert. denied, 529 U.S. 1089 (2000); *United States v. Stewart*, 65 F.3d 918, 922 (CA11 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied, 516 U.S. 1134 (1996); *United States v. McDermott*, 29 F.3d 404, 405 (CA8 1994) (defendants sought to discourage blacks from using public park by burning a cross in the park, as well as by “waving baseball bats, axe handles, and knives; throwing rocks and bottles veering cars towards black persons; and physically chasing black persons out of the park”); *Cox v. State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U.S. 987 (1992); Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* 847 (2002) (referring to a wave of “southern bombings, beatings, sniper fire, and cross-burnings” in late 1956 in response to efforts to desegregate schools, buses, and parks); Newton & Newton, *supra*, at 21 (observing that “Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence” by the Klan and its sympathizers); *id.* at 361-362 (describing cross burning and beatings directed at a black family that refused demands to sell the home); *id.* at 382 (describing incident of cross burning and brick throwing at home of Jewish office-holder); *id.* at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); Wyn C. Wade, *supra*, at 262-263 (describing

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cross burning and violence is well ingrained, and lower courts have so recognized:

“After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: ‘murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person.’ Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*” *United States v. Skillman*, 922 F.2d 1370, 1378 (CA9 1991) (emphasis added).

incidents of cross burning, beatings, kidnapping, and other “terrorism” directed against union organizers in the South); *id.* at 376 (cross burnings associated with shooting into cars); *id.* at 377 (cross burnings associated with assaults on blacks); 1 Richard Kluger, *Simple Justice* 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued desegregation decisions); Leonard S. Rubinowitz & Imani Perry, Crimes Without Punishment: White Neighbors' Resistance to Black Entry, 92 J. Crim. L. & Criminology 335, 354-355, 388, 408-410, 419, 420, 421, 423 (Fall 2001-Winter 2002) (noting that an “escalating campaign to eject a [minority] family” from a white neighborhood could begin with “cross burnings, window breaking, or threatening telephone calls,” and culminate with bombings; describing other incidents of cross burning accompanied by violence); *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4 (describing 1951 Virginia cross burning accompanied by gunfire).

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But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and “radical[s],” to include Catholics, Jews, most immigrants, and labor unions, Newton & Newton, *supra*, at ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia that

“A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police.” Brief of Petitioner, at 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

Virginia’s experience has been no exception. In Virginia, though facing widespread opposition in 1920s, the KKK developed localized strength in the southeastern part of the State, where there were reports of scattered raids and floggings. Newton & Newton, *supra*, at 585. Although the KKK was disbanded at the national level in 1944, *id.*, a series of cross burnings in Virginia took place between 1949 and 1952. See *Black v. Virginia*, 262 Va. 764, 771 n.2 (2001) (collecting newspaper accounts of cross burnings in Virginia during that time period); see also *Cross Fired Near Suffolk Stirs Probe: Burning Second in Past Week*, Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1 (noting that the second of reported cross burning in

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1949 “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.”).

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. 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; *Cross is Burned at Reedville Home*, Richmond News Leader, Apr. 14, 1951, at 1. At least one of the cross burnings was accompanied by a shooting. *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4. The crosses burned near residences were about five to six feet tall; while a “huge cross reminiscent of the Ku Klux Klan days” burned “atop a hill” as part of the initiation ceremony of the secret organization of the Knights of Kavaliers, was twelve feet tall. *Huge Cross is Burned on Hill Just South of Covington*, Richmond Times-Dispatch, Apr. 14, 1950, at 6. These incidents were, in the words of the time, “terroristic [sic] . . . un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens.” *Police Aid Requested By Teacher, Cross is Burned on Negro's Yard*, Richmond News-Leader, Jan. 21, 1949, at 19 (emphasis added).

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, “long considered dead in Virginia, is being revitalized in Richmond,” Governor Battle announced that “Virginia ‘might well consider passing legislation’ to restrict the activities of the Ku Klux Klan.” *‘State Might Well Consider’ Restrictions on Ku*

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Klux Klan, Governor Battle Comments, Richmond Times-Dispatch, Feb. 6, 1952, at 7. As newspapers reported at the time, the bill was “to ban the burning of crosses and other similar evidences of *terrorism*.” *Name Rider Approved by House*, Richmond News Leader, Feb. 23, 1952, at 1 (emphasis added). The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. “Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*.” *Bill to Curb KKK Passed By the House, Action is Taken Without Debate*, Richmond Times Dispatch, Mar. 8, 1952, at 5 (emphasis added).

That in the early 1950s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function “as an instrument of intimidation.” W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 185, 279 (1987).

Strengthening Delegate Godwin’s explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.² And,

²See, e.g., Va. Code §18-327 (1952) (repealed 1960) (required separation of “white” and “colored” at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code §20-54 (1950) (repealed 1968) (prohibited racial intermarriage); Va. Code §22-221 (1952) (repealed 1972) (“White and colored persons shall not be taught in the same school”); Va. Code §24-120 (1952) (repealed 1970) (required separate listings for “white and colored persons” who failed to pay poll tax); Va. Code §38-281 (1950) (repealed 1952) (prohibited fraternal associations from having “both white and colored members”); Va. Code §53-42 (1950) (amended to remove “race” 1968) (required racial separa-

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just two years after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown v. Board of Education*, 347 U.S. 483 (1954). See generally, *Griffin v. County School Board*, 377 U.S. 218, 221 (1964); *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959) (describing "massive resistance" as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment

tion in prison); Va. Code §56-114 (1950) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code §56-326 (1950) (repealed 1970) (required motor carries to "separate" their "white and colored passengers," violation was misdemeanor); Va. Code §56-390 and 396 (1950) (repealed 1970) (same for railroads); Va. Code §58-880 (1950) (repealed 1970) (required separate personal property tax books for "whites" and "colored").

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tests.

II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

A

“The threshold inquiry is ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes.” *Francis v. Franklin*, 471 U. S. 307, 314 (1985). We have categorized the presumptions as either permissive inferences or mandatory presumptions. *Id.*

To the extent we do have a construction of this statute by the Virginia Supreme Court, we know that both the majority and the dissent agreed that the presumption was “a statutorily supplied *inference*,” 262 Va., at 778 (emphasis added); *id.*, at 795 (Hassell, J., dissenting) (“Code §18.2-423 creates a statutory *inference*”) (emphasis added). Under Virginia law, the term “inference” has a well-defined meaning and is distinct from the term “presumption.” See *Martin v. Phillips*, 235 Va. 523, 526 (1988).

A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts. [FN1: In contrast, *an inference*, sometimes loosely referred to as a presumption of fact, *does not compel a specific conclusion*. *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*. 9 J. Wigmore, Evidence in Trials at Common Law §2491(1), at 304 (Chad. rev. 1981).] The primary significance of a presumption is that it operates to

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shift to the opposing party the burden of producing evidence tending to rebut the presumption. [FN2: *An inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production.*] No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast. *Id.*, at 526 (internal citations omitted; emphasis added).

Both the majority and the dissent below classified the clause in question as an “inference,” and I see no reason to disagree, particularly in light of the instructions given to the jury in Black’s case, requiring it to find guilt beyond a reasonable doubt both as to the fact that “the defendant burned or caused to burn a cross in a public place,” and that “he did so with the intent to intimidate any person or persons,” 262 Va., at 796 (Hassell, J., dissenting) (quoting jury instructions in Black’s case).

Even though under Virginia law the statutory provision at issue here is characterized as an “inference,” the Court must still inquire whether the label Virginia attaches corresponds to the categorization our cases have given such clauses. In this respect, it is crucial to observe that what Virginia law calls an “inference” is what our cases have termed “a permissive inference or presumption.” See *County Court of Ulster Cty. v. Allen*, 442 U. S. 140 (1979).³

³ As the Court explained in *Allen*, a permissive inference or presumption “allows--but does not require--the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the ‘beyond a reasonable doubt’ standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.” *Id.* at 157 (internal citations

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Given that this Court's definitions of a "permissive inference" and a "mandatory presumption" track Virginia's definitions of "inference" and "presumption," the Court should judge the Virginia statute based on the constitutional analysis applicable to "inferences:" they raise no constitutional flags unless "no rational trier could make a connection permitted by the inference." *Allen*, 442 U. S., at 157. As explained in Part I, *not* making a connection between cross burning and intimidation would be irrational.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. See, e.g., Tenn. St. §39-13-506; Or. St. §163.365; Mo. St. §566.032; Ga. St. §16-6-3. That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." *Warrick v. State*, 538 N.E.2d 952, 954 (Ind. 1989) (citing Ind. Code 35-42-4-3). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect

omitted). By contrast, "a mandatory presumption . . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Id.*

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cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. See, *e.g.*, 16 Del. Code Ann. §4753A; 94C Ma. St. §32E; S. C. §44–53–370. As with statutory rape, the presumption of intent in such statutes is irrebuttable—not only can a person be arrested for the crime of possession with intent to distribute (or “trafficking”) without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the *prima facie* clause here is an inference, not an irrebuttable presumption, there is all the more basis under our Due Process precedents to sustain this statute.

B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross-burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits “the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself.” *Maj. op.*, at 19. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a

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reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable, ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *Ferber v. New York*, 458 U.S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California*, 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors, may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This “chilling” effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality’s analysis, the determination of whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado*, 530 U. S. 703 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments “from unwanted advice” and “unwanted communication,” *id.*, at 708; *id.*, at 716; *id.*, at 717; *id.*, at 729. In so concluding, the Court placed heavy reliance on the “vulnerable physical and emotional conditions” of patients. *Id.*, at 729. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on “unwanted advice,” which, notably, can be given only from a distance of at least 8 feet from a prospective patient, justified by the countervailing interest in obtaining abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to

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burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782; see also J.A. 93–97, to extreme emotional distress, and is virtually never viewed merely as “unwanted communication,” but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality’s view, physical safety will be valued less than the right to be free from unwanted communications.

III

Because I would uphold the validity of this statute, I respectfully dissent.