

Binding a Future of Violence: A Semiotic Reading of Race in Supreme Court Cases

Abstract:

The 2003 SCOTUS ruling in *Virginia v. Black* determined that no state or municipality may post a law stating that the act of burning a cross is, in and of itself, inherently an act of racial discrimination or threat of physical violence, and as such is illegal. The court ruled such laws unconstitutional on the basis that, while burning a cross for the purpose of racial discrimination or threat of physical violence may be outlawed, it is possible that a cross might be burned towards other purposes, and that such instances must be understood as expressions of views or opinions, and protected under the first amendment. The oral argumentation in this case roots itself deeply in the semiotics of cross burning: what is signified by the sign of the burning cross? Are there multiple possible signifieds, and if so, what are their differences, and by what characteristics and circumstances can they be distinguished from one another? I argue that in order to understand this case, the court's decision, and the phenomenon writ large, we need to understand the concept I propose of *historical semiotic mass*, and distinguish between three distinct understandings of "symbolic violence": that of Bourdieu, that of Girard, and a third, performative, meaning that I argue is absent from the first two conceptions.

Introduction

In the 2002 SCOTUS ruling term, the court heard oral argumentation in *Virginia v. Black*, which combined two cases that had previously been heard before the Virginia Supreme Court. In the first case, Respondent Black led a Ku Klux Klan rally at which a 30-foot cross was burned on private property, which was unobstructedly visible from the nearby state highway, with the permission of the property owner. The fact pattern of the case included that Mr. Black, who lived in a different county, had heard that in the county where the rally took place, blacks and whites had been holding hands on the sidewalk, inspiring his intention to hold the rally and burn the cross. Further, during the rally, both before and during the burning of the cross, Mr. Black and others present were heard speaking loudly about "taking a .30/.30 and randomly shooting blacks" (*Virginia v. Black* 6). In the second, respondents O'Mara and

Elliot burned a cross on the private lawn of their next-door neighbors, who are African American, after a dispute in which the neighbors called the police to file a noise complaint regarding O'Mara's usage of his backyard as a shooting range. All three respondents were found guilty under Virginia statute § 18.2-42, which mandates 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 six felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

These convictions were contested, first in the Virginia Supreme Court, and then in front of SCOTUS, on the basis that a) the prima facie clause is unconstitutional in that it restricts the burning of a cross as a means of expressing a viewpoint rather than for the purpose of intimidating a person or groups of persons, b) the jury in the original Black trial was instructed that the burning of the cross at all could be considered sufficient evidence of the required "intent to intimidate," and c) that the Virginia statute was indistinguishable from the ordinance found to be unconstitutional in *R.A.V. v. St. Paul* (in which an ordinance prohibiting cross burning was overruled on that basis that it unduly singled out cross burning for the purpose of intimidating racial minorities as the unsavory message to be prohibited, distinct from any number of other intimidating acts). Ultimately, the court held that the Virginia statute was unconstitutional, on a 7-2 majority, with the majority opinion penned by Justice O'Connor (Scalia and Thomas dissenting, in part and in full, respectively).

It is now broadly understood that ours is a society rife with systemic racism encoded into the many institutions that structure our social lives, and that the State, made up of many such institutions, is a racial state—that is, it was built out of, relies on, and reinforces systemic racism in a variety of ways. Scholars analyzing the racial state have often focused in on the Criminal Justice System as one of the arms of the State most clearly obvious in creating and enforcing racial hierarchy. The stark statistical difference in the conviction and imprisonment of black men and women at significantly higher rates than whites has been cited as central to a continued racial order, punctuated by the lingering ramifications of

such inequality on voting rights, employment opportunities, and other measures of full citizenship (Alexander 2012). Further, the increasing news coverage of the prevalence of police brutality and even fatal violence against black men and women has been a spotlight onto a racial state maintained by physical force. Insofar as theories of State power have examined the courts as a site of systemic racism, it has largely been in these two contexts: the court as the bureaucratic location of the production of disenfranchised felons (Van Cleve 2017; Alexander 2012), and the court as the frequent acquitter of police officers who target, brutalize, and even murder black bodies (Van Cleve 2017; Harris 1999; Balbus 1973).

I am proposing a new approach to understanding the court as a site of State power and the production and perpetuation of a racial order—namely, a semiotic theory of the state. I am engaging with many of the scholars who have analyzed the State as being involved in various forms of meaning making, and suggest that one crucial role of the courts towards this project of the State is the interpretation, legitimation, and production of signs. Through court cases, especially those in the highest levels of the justice system—the state supreme courts, and the Supreme Court of the United States—the State, via judges and justices, defines and interprets violence, and thus, makes decisions that influence what kinds of violence are likely to continue in the future, and what kinds of violence may be thwarted (or attempted to be thwarted) by the State.

In a previous paper (Moore and Reed 2019) I turned to court cases involving police violence against black men and made a temporal argument about State power: in acquitting officers accused of racial violence and murder, the court participates in the production of a future where such violence will continue, not so much because it is releasing such officers back into their departments, where many of them become repeat offenders of similar conduct (McElvain and Kposowa 2008; Sherman 2018), but because court decisions create a present reality in which officers can be confident that their actions will be legitimated by the courts in the future. That is, I argue that a pattern of many acquittals within the courts establishes a predictable precedent that officers and civilians alike can reasonably draw upon to make accurate predictions about how the court might rule on their actions in the future.

In this paper, I turn to the concept of *symbolic violence*, and its legal status, as a continuation of my semiotic analysis of the court as a site of racialized meaning making. There are a number of reasons that the particular case of cross burning is ideal for examining why forms of symbolic violence are so legally ambiguous as to regularly make for complex and relatively divided SCOTUS cases. First, cross burning is of course a physical act rather than a verbal speech act, which differentiates it from standard “intent to intimidate” or “fighting words” cases, where the nature of language narrows the possible reasonable interpretations of the statement made. Similar complications have been found in cases involving the burning of American flags (*Texas v. Johnson*) and the burning of draft cards (*United States v. O'Brien*), instances of which were cited in the oral argumentation of *Black*.

Second, the specifics of this physical act, ie. the burning of a cross, are such that there is debate regarding the nature of the symbols at hand. It is at once true that the burning cross has historically been used by the KKK for the express purpose of threatening, foreshadowing, or invoking the beating, maiming, and lynching of African Americans (and, less commonly, other groups, such as Northern “carpetbaggers” and whites sympathetic to the plight of African Americans) and also that the cross as a symbol certainly extends far beyond its usage by the KKK, and has been burned in a variety settings that seem distinct from the purposes of the KKK (Newton 2014).

Third, the first two points make possible the disagreement regarding the *prima facie* clause under dispute in the Virginia statute. Since the case involves a symbolic act rather than a verbal speech act, and the symbol in question is one both with deep historic connotations as well as some variety in its (at least theoretical) potential uses, there is thus great disclarity regarding which meanings of the symbol are occasional and which are permanent; which characteristics are possible, and which are necessary. As a result of these three unique facets of the case, the court engages in a lengthy and involved debate regarding the signifieds attached to the sign of a burning cross. Though *Virginia v. Black* is so instructive precisely because of its peculiarities, what it reveals about how the United States Justice System reads signs, defines violence, interprets speech acts (verbal and non-verbal), and approaches race-specific perception can help us understand and explain the way the court functions in a wide variety of cases

involving racial violence (broadly defined)-- from police brutality and murder, the removal or protection of confederate monuments and statues, to the rights of different kinds of protestors to assemble and bear arms.

In the remainder of this paper, I will discuss in some depth the primary arguments made during the *Virginia v. Black* hearing, and analyze the semiotic implications of each step in the counsel and court's logics. The similarities of the two counsels' arguments center around the concept of *historical semiotic mass*, and I will argue that this case serves as an invaluable bookmark for the court's acknowledgement and understanding of historical semiotic mass, and that this process and its recognition are hugely important for tracing the codification of racialized and violent scripts into all levels of the Justice System over the past 100 years (or more).

In "Violence and Its Interpretations: A Semiotic Theory of the State" (Moore and Reed, 2019), my coauthor and I used the term *historical semiotic mass* to describe the process by which a police officer conducting an investigatory traffic stop draws, unconsciously or semi-consciously, on generations of previous semiotic interpretation as he or she assigns to the sign of black skin the signified of "aggressive" or "dangerous." We argued that the police officer's offensive (rather than defensive) actions are thus more readily interpreted by the courts as justified or appropriate, because the courts also draw upon on the same historical semiotic mass that has made the relationship between the sign of black skin and the signified of "threat" durable over time. In chapter one of this dissertation I have explained in more detail what I mean by this term, and why I feel it is a necessary concept as distinct from previously theorized terms such as the "weight of memory" or "historical memory" (Hall 1980).¹

¹ As detailed in Moore and Reed 2019, I am drawing upon Risto Heiskala's (2004) concept of how "semiotic mass" accrues within a conversation, as certain signs and their interpretants become validated and repeated such that some signs are less prone to resignification (that is, to being interpreted in different or new ways at a later point in the conversation) than others. In chapter one of this dissertation I explained more thoroughly how I am using this concept of meaning accrual and the variable durability of signs and their interpretants on a historical scale, to describe how, over time, certain signs become entrenched with specific meanings, implications, and inferences so much so that it is incredibly difficult, and in many cases nearly impossible, for those signs to take on new meanings and new interpretants.

In *Virginia v. Black*, the two opposing counsels both give an argument deeply rooted in the idea of signs accruing deeply embedded meaning throughout the passage of time, and the development of a history of interpretation for those signs. Given this crucial similarity in their discussions, I argue that the real difference between their positions, and thus the ultimate determining factor of the court's decision, lies in differing understandings of the term "symbolic violence." As a result, I will discuss, in the context of the case, the concepts of symbolic violence put forth by Bourdieu and Girard, and then will argue that there is a third, heretofore undertheorized category of symbolic violence at play in the case, which I am calling "the performative." The argument that I am making about symbolic violence is largely a temporal one: each approach contains a different explanation about the relationship between past actions, present interpretation, and future actions and interpretations. Finally, I will argue that a clear theoretical framework capable of distinguishing between these categories of symbolic violence is necessary for understanding how the US Justice System determines what is legitimate violence and what is illegitimate violence, and how race function semiotically to influence those determinations. Such an understanding is crucial because, I argue, the decisions the court makes in the present, via its interpretations of the past, *bind the future* by making predictable certain future interpretations of future acts.²

But, before I launch into the argument proposed above, I would like to note some guidelines for how I am approaching this case. I do not purport to give a legal analysis of whether this case is on solid legal ground, nor to make an argument about whether or not a statute prohibiting cross burning is indeed unconstitutional. Much has been written in legal journals to argue in each direction on this case.³ Rather, I am taking as the focus of my examination the semiotic logic that the court utilizes in order to come to its decision, as an important indicator of the "grammar of violence" that guides court interpretation in all

² For my approach to temporality I am drawing in part on Butler's concept of *iteration* (Butler 1990). Butler suggests that gender is continuously reproduced by a multitude of daily actions, conscious and subconscious, that continually re-inscribe past gender expectations and normative behaviors onto the body in the present, making them increasingly durable into the future. I am arguing that historical semiotic mass functions in a similar way, as I will explain in more detail later in the chapter.

³ See, for example, Jeannine Bell (2004) "O Say, Can You See: Free Expression by the Light of Fiery Crosses"; Leslie Kendrick (2014) "Free Speech and Guilty Minds"; Paul T. Crane (2006) "'True Threats' and the Issue of Intent"; Kenneth L. Karst (2006), "Threats and Meanings: How the Facts Govern First Amendment Doctrine"

manner of cases. That is, I am not making an argument about the legality of certain acts, nor about the constitutionality of their proscription-- instead, I am arguing that a detailed, semiotic analysis of how the court defines and interprets violence is a necessary and undertheorized aspect of state power, and thus, in a racial state, an undertheorized aspect of systemic racism.

Virginia v. Black

One of the many reasons that *Virginia v. Black* is such a particularly useful case for beginning to unpack the grammar of violence employed by the Supreme Court is that in this instance both the petitioner and the respondent spend the majority of their floor time arguing that the essential detail of the case does not exist in the fact pattern, but rather in the 100-year history of the KKK leading up to the incidents here charged. The result is that the semiotic nature of the discussion is nearly identical in the oral argumentation of each counsel, though the men come to opposing conclusions about what this semiotic inference implies about the constitutionality of the act in question. The fact that each counsel relies heavily, and in fact I think almost entirely, on an understanding of the process by which a symbol acquires a specific meaning via repeated usage over time gives us a unique opportunity to judge the court's response to the concept in ways more multiplicitous than if it had been employed only by counsel.

Following the chronology of the oral argumentation itself, I will begin with the opening remarks of a Mr. Hurd, speaking on behalf of the petitioner (that is, on behalf of the State of Virginia, to dispute the Virginia Supreme Court's finding that the statute at hand was unconstitutional). Mr. Hurd's argument has three primary components, which I will address in turn: 1. That the burning cross as a symbol is entirely unique in its function, meaning, and scope of reasonable interpretation, so that it can be only imprecisely compared to other symbols and words. 2. That the burning cross does *not* function as an expression of an opinion, opposition, or political viewpoint, but rather that it functions as a direct threat of immediate bodily harm, and as such should be considered more akin to a "fighting words" case rather than a case in which another symbol, such as the American flag, has been burned. 3. That the function of the burning cross as a direct threat of bodily harm has been inextricably tied to the symbol of the burning cross over the course of the past 100 years of history (almost to the day, since the founding of the new Ku

Klux Klan established cross burning as one of their most infamous icons).

One element of the debate over the Virginia statute is about whether or not the same problematic actions could not be just as easily banned by a broader statute proscribing threats or intimidations of all forms; that is, since banning a specific symbol raises questions of viewpoint-censorship, couldn't the First Amendment concern be resolved by a less specific statute? To this point, Mr. Hurd cedes that indeed acts of cross burning can, and have, been convicted on the basis of less-specific federal statutes against fighting words. However, he argues that in fact the burning cross is "a symbol like no other; and so this is a self-contained category" (Justice Ginsburg, questioning Mr. Hurd, 14). At this point the discussion begins to delve into the semiotic, where it remains for its entirety. The burning cross exists at an intersection of acts that are handled differently in the courts. On the one hand, it is an act: the burning cross purely as an image is not what is being discussed-- it is quite easy to see at face value that hanging on someone's lawn a paper poster on which a picture of a burning cross is printed will not elicit nearly the same effect as a wooden cross doused in kerosene and set ablaze. We will come to the importance of this differentiation in the next section. At the same time, the burning cross contains a religious icon, which, when unburned, can certainly not be constitutionally banned. This leaves the door open for all manner of useful comparison cases, as we will get to, as well as space for confusion regarding failed attempts to burn a cross. Indeed, in the O'Mara and Eliot case, the defendants are accused of attempting to burn a cross, and of partially burning a cross-- the two pieces of wood they attached in the form of a cross were apparently insufficiently coated in fuel, such that they burned only momentarily and were not consumed, and when the victim's family discovered the object, it was merely a slightly scorched makeshift cross, rather than the 30-foot fire hazard involved in the Black case. And finally, the burning cross may very well be a statement that ought to be considered in the same way that words are considered under the First Amendment. At many points throughout the discussion, both counsels as well as multiple justices remark on the fact that the Klan argues that their use of the burning cross expresses their ideology above any other purpose. Again, I will discuss this point in more detail in the next section.

Because the burning cross is a symbol, not merely a spoken word, and because it is further not

just a symbol, but an act that alters or reverses the original meaning of the symbol when not acted upon, it does not clearly fall into any of the legal categories used for cases that appear to have some similarity. Certainly, cross burning is not the only case in which an action or a symbol has been brought before the Supreme Court for questions about constitutionality under the first amendment-- there is an entire category of acts termed "symbolic speech" that involve acts and symbols to be considered as speech by the court. In such cases, the normal course of action is to apply the "O'Brien Test," emanating from the 1966 *United States v. O'Brien* in which David Paul O'Brien and three others burned their draft cards on the steps of a Boston courthouse to protest the Vietnam war. The court ruled 7-1 against O'Brien, arguing that the first amendment cannot be used to protect a seemingly limitless category of acts that could potentially be labeled "symbolic speech." As a result, in future cases, symbolic speech may only be proscribed by laws that are a) constitutional, b) further a significant government interest that is both content neutral, and prohibits no more speech than is essential to further the interest being protected. In O'Brien's specific case, it was determined that his freedom of speech was not being proscribed, but rather, the government had a constitutionally protected interest in preserving the physical and administrative functionality of draft cards, which O'Brien violated by burning his to a handful of chars.

However, the O'Brien test cannot be straightforwardly employed in the case of cross burning, because the object being burned has no utility beyond its symbolism, and because the multiplicitous meanings of that symbol are such that some interpretations are constitutionally proscribable (active threat, intent to intimidate), while others are protected by the first amendment (express unity for white supremacists; hatred of racial minorities). But, these meanings are indistinguishable in the physical object itself. That is, a cross burned as a threat is visually identical to a cross burned as an expression of hate. It is this matter that is at stake in the prima facie clause of the Virginia statute. The jury in the Black case, though not in the O'Mara or Eliot cases, was instructed that the prima facie clause could be taken to mean that "the burning of the cross itself is sufficient evidence from which you may infer the required intent." Assuming there are multiple possible interpretations of the symbol of the burning cross, then the prima facie clause makes them indistinguishable.

Part two of Mr. Hurd's argument goes on to say that the multiplicity of possible meanings of a burning cross does not need to prevent the court from proscribing the activity. First, he notes that the Virginia statute as it stands does not ban all cross burning. It leaves plenty of first amendment breathing room for such occurrences as burning a cross in a play or for the sake of a film, or even burning a cross in the sanctity of one's own bedroom, as Scalia (facetiously) remarks. Instead, it bans only the burning of a cross for the purpose of intimidating a person or persons. Further, because this statute bans cross burning for the intimidation of any party, it is completely different from the case in *R.A.V.* in which SCOTUS overturned a statute on the basis that it specified that a cross could not be burned for the intimidation of *racial minorities*, thus violating the "content neutral" specification of the O'Brien test.

However, he argues, simple situational deduction is all that is necessary to determine the difference between a cross burned illustratively in a historical play, versus one burned for the purpose of intimidation. He argues very clearly that the primary purpose of the burning cross is for the purpose not just of intimidation, but as a threat of bodily harm, making it more comparable to "fighting words" cases than to other symbolic speech cases. This is our first instance of semiotic deviation from the ways that symbolic violence has been discussed in the past, both by theorists in the academy, as well as by the courts. Hurd argues that the signified of the sign of the burning cross is "we're close at hand. We don't just talk. We act." Additionally, he says that "it is the symbol that the Klan has used to threaten bodily harm. The connection, if you will, in our history is between the burning cross and ensuing violence" (15). In this moment, Hurd transforms the meaning of "symbolic speech" and thus of "symbolic violence." In this new register, "symbolic" means predicting, or, *binding the future*. Symbols are now being spoken of as warning of things immediately to come.⁴ This is not an unusual use of "symbolic." When we think of,

⁴ In some ways, part of what Mr. Hurd is suggesting is that the cross is similar to an "index" in the Peircian sense, rather than a "sign," – that the cross is an indicator of violence just as smoke is an indicator of fire (Peirce 1991). However, the term "sign" is still the most accurate for describing his argument, since he does not suggest that violence is absolutely necessary in order for the burning cross to be present, as would be the case in the smoke/fire comparison. Thus, when I say that this performative usage of "symbolic" describes a "binding of the future," I do not mean to suggest that physical violence is absolutely inevitable following the burning of a cross—the historical evidence shows that this is not the case. Rather, the symbol binds a future in which violence *is* feared, or anticipated, even if it never materializes physically.

for example, the symbol of a truck positioned over a right triangle on a yellow sign, we know that it is a warning informing us that the road is about to descend rather steeply, and that large vehicles ought to use a lower gear. It is this movement into a new semiotic register that allows Hurd to argue that the burning cross is exempt from first amendment protections on the basis that it foretells of physical violence soon to come.

Historical Semiotic Mass

The final leg of Mr. Hurd's three-part argument is that the court can be sure that the burning cross is an active threat of imminent bodily violence precisely because of the historical semiotic mass that has been formed for the cross over the past century. In making his argument that the cross is a threat of physical violence, he says: "it deliberately invokes the precedent of 87 years of cross-burning as a tool of intimidation. Burn anything else-- burn the flag, burn a sheet. The message is opposition to the thing that the symbol unburned represents. Burning a cross is not opposition to Christianity. The message is a threat of bodily harm, and it, it is unique. And it's not simply a message of bigotry. It's a message that whoever has it in their hands, a message that bodily harm is coming. That is the primary message." This quote is particularly interesting because it evinces the logistical process by which a historical semiotic mass is formed, and indeed highlights the fact that the burning cross *necessarily* relies on historic semiotic mass to function as a threat at all.

Hurd correctly points out that burning a symbolic object is not a unique occurrence, and that it is an act that has been interpreted many times by the court. His incredibly succinct statement perhaps says it best: "the message is opposition to the thing that the symbol unburned represents." When one burns an American flag, the message is very clear: the American flag is a symbol of the country and its government, and burning the flag indicates opposition to the country and its government, and has been used thusly in numerous instances throughout history. Similarly, in the O'Brien case, O'Brien's draft card was a very clear symbol of the recruitment of young men into the armed forces to fight, and quite possibly die, in Vietnam, and thus burning the draft card expressed opposition to this practice.

I explain these very obvious cases here to highlight that indeed something strange is going on

with the meaning of the burning cross. On its face, the act should be able to be interpreted according to the very clear pattern established by the other examples: the cross is one of the most famous and recognizable symbols in the world, representing Christianity, and so, it seems to follow that burning it would express a clear opposition to Christianity. So given this model, it's in fact very strange that the burning cross is never taken to indicate an opposition to Christianity, but is rather a brandishing of Christianity (or some perverted form of such) towards other purposes. To highlight how strange this phenomenon really is, consider this: if one witnessed a burning Star of David, surely one's first thought would be that they were witnessing an aggressively anti-Semitic act, and that the burning of the Star of David indicated a strong opposition to, or threat to, Judaism. So, to recap, we have a very pervasive and well-recognized semiotic pattern in which a symbol, when burned, represents opposition to the thing that the symbol unburned represents. We have seen this demonstrated in a number of diverse examples ranging from government to religion. So then, why is it so absurd to imagine that the burning cross could represent opposition to Christianity? We have the answer in a witty exchange between Mr. Smolla (counsel for the respondents) and Justice Kennedy. Smolla, in the midst of his argument, asks, rhetorically, "what would be the difference between brandishing a torch and brandishing a [burning] cross?", to which Justice Kennedy responds, interrupting: "100 years, 100 years of history," to the extensive laughter of the courtroom.

As is often the case, a moment of apparent humor can help us understand what exactly is going here. Justice Kennedy's comment is met with laughter precisely because it seems so obvious. Brandishing a torch has no explicit meaning in the zeitgeist of 2003 United States (perhaps no longer the case in the post-August-2017 United States), but brandishing a burning cross has obtained a very specific meaning over the course of the past 100 years (Krause 2019). The majority opinion for *Virginia v. Black*, written by Justice O'Connor, dedicates its entire second section to recounting the history of the burning cross. Its first known use was as a signaling mechanism for Scottish tribes in the 14th century-- a use, it appears, entirely unrelated to its reincarnation in the 20th century.

The only plausible bridge between the Scottish use of the object for purely utilitarian purposes,

and the entirely symbolic function of the KKK's icon is in Sir Walter Scott's *The Lady of the Lake*, in which a burning cross appears "both as a summons and as a call to arms" (*Virginia v. Black* 6). The remaining five pages of the section are dedicated to describing numerous occurrences of a burning cross in the 20th century United States, most of them concurring with acts of heinous violence, including that "by September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings" (ibid 8). Further, the opinion notes several instances in which the Klan's speech and actions made explicit their usage of the burning cross as an immediate threat of impending violence. For example, "after one cross burning at a synagogue, a Klan member noted that if the cross burning did not 'shut the Jews up, we'll cut a few throats and see what happens'" (ibid 9). This account of the history of cross burnings in America takes up the central pages of the majority opinion for good reason: the court is arguing that it is the nature of this history that establishes the meaning of the symbol and thus determines its constitutional fate.

For Mr. Hurd's part, the case of the petitioner is that the historical semiotic mass of the burning cross utilized in conjunction with the heinous violence perpetrated by the Klan throughout the last century has written the meaning of the burning cross for the average citizen, very intentionally over time, so that the burning cross becomes a well-recognized sign of brutal violence and murder, which are its signifieds. He argues: "The fundamental message is a threat of bodily harm. And this is not something that we just made up. Cross-burning *has that message because for decades they wanted it to have that message, because they wanted that tool of intimidation.* And so it rings a little hollow when the Klan comes to court and complains that our law treats that message--treats that burning cross as *having exactly the message that they for decades have wanted it to have*" [emphasis added] (ibid 17). If we agreed earlier that in normal political symbolism, an object burned expressed opposition to that which the object unburned represents, then we must agree that the fact that the burning cross *does not in any register nor to any (American) audience* appear to symbolize opposition to Christianity, indicates that a process of in-depth,

intentional⁵ resignification took place over the course of decades of pairing physical violence with the “calling card” of the burning cross on the part of the KKK.

Let me turn now to the argument presented by a Mr. Smolla, on behalf of the respondents. There is an exchange between Smolla and Justice Souter early on in the argumentation that bears quotation not quite in full, but at least at some length. To begin, Smolla states that: “a core element of our argument is that there is a fundamental First Amendment difference between brandishing a cross and brandishing a gun. The physical properties of the gun as a weapon add potency to the threat [...]. But the properties of the cross are not physical properties, and the burning element of a burning cross is not what communicates the threat” (ibid 28). This line of reasoning is immediately questioned by Justice Souter, who asked: “How does your argument account for the fact that the cross has acquired a potency which I would suppose is at least as equal to that of the gun?” (ibid 28). To which Smolla replies: “Justice Souter, I think that our argument is that in fact it works the reverse way, that what the cross and the burning cross have acquired as a kind of secondary message [...] are a multiplicity of messages.”

So, let’s break down this exchange. Mr. Smolla begins by alluding to the O’Brien test previously described, arguing that a brandished gun, while certainly having some symbolic and speech-like properties that could express certain viewpoints, is also a practical object whose physical properties threaten the interests of the state, namely the interest to prevent its citizens from being shot at the hands of other citizens (which is to say nothing, of course, of being shot at the hands of a government official, but that is another chapter of this dissertation). In contrast, he argues, a burning cross has no physical or utilitarian attributes that extend beyond its existence as a symbol. Perhaps this would be different if there were an extensive history of cases in which burning cross were swung as weapons to bludgeon people, or

⁵ Certainly, there is variation in the extent to which processes of resignification over time are intentional. In this case, I do not mean to suggest that every individual who burned a cross over the course of the past one hundred years did so with the conscious intention of binding the signification of racial violence ever more tightly to the sign of the burning cross. However, there is great evidence, much of it in the SCOTUS majority opinion itself, that the organization of the KKK, in the early twentieth century, chose the cross as their sign, and actively worked to link it to their public image of enforcing the racial laws (in a social sense, rather than in a legal sense) they felt the formal legal system was not adequately policing (*Virginia v. Black*).

if their purpose were to cause one's lawn or home to also catch fire and be consumed by flame, but these are not realistic representations of how the burning cross has been consistently used. (In fact, in my brief research, I found no example of a burning cross being used as a physical weapon to inflict bodily harm (Bell 2004, Newton 2014)). As a result, Smolla argues, the gun passes the O'Brien test and can be proscribed (at least insofar as the First Amendment is concerned), and the burning cross fails the test and cannot be constitutionally proscribed.

Justice Souter's response moves beyond the O'Brien test, whose primary concern is physicality, and back towards the symbolic-- he suggests that as a result of the historical semiotic mass that I have been describing, the burning cross is no different, semiotically, from a brandished gun, since both are attached, by long arcs of historical evidence, to immediately ensuing physical violence. And it is in Mr. Smolla's response that we come to the real distinction between his argument and that of Mr. Hurd. Smolla argues that, indeed, the current nature of the burning cross has been irreversibly written by the past 100 years of its history. But rather than being solidified as an active threat, he argues that the long history of the symbol has given it not one clear message, but a multitude of messages. For this reason, Smolla argues, any statute that bans the burning of a cross for the purpose of an active threat of bodily harm (which he concedes can indeed be constitutionally proscribed), risks having a chilling effect on the many other reasons one might burn a cross-- meanings of cross burning that, he argues, have also been woven into the historic semiotic mass of the symbolic object via the numerous examples of crosses being burned at KKK rallies where no immediate physical violence occurred, though most of them included much discussion of physical violence to be perpetrated in the near future.

Ultimately, Justice Souter is apparently quite convinced by this argument, because it is this side that the majority court takes in the end, and in his own opinion, joined by Justices Ginsburg and Kennedy, Justice Souter writes this, which is worth quoting at length:

To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning a cross with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a

further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it.

This opinion is a crucial thread in the tapestry of the Justice System's history of interpreting race and violence in the United States. What Justice Souter says here is that though the historical semiotic mass of the burning cross leans heavily towards the signified of physical violence, it also, due to its long history, has embedded the symbol with some ambiguity, small spaces where other possible interpretations could be backed by selected moments of specific historical evidence.

To put it in the clearest terms, in the instance in which white supremacists threaten violence against racial minorities, even in the face of an *undebated historical semiotic mass resulting in the threat of violence being unanimously acknowledged as the primary signified of the burning cross*, the Supreme Court in this case ruled that because the primary signified of the sign was not the *only possible* signified of the sign, the sign itself could not be proscribed, even if its usage frequently precedes, and invokes, physical violence⁶. The court creates a sweeping protection for a sign that they admit they believe often signifies physical violence, under the banner of the First Amendment. In so doing, they not only validate, in this present case, the interpretation that the sign of the burning cross signifies the protected ideology of white supremacists, over the interpretation that it signifies physical violence against racial minorities (despite accepting the historical evidence of this signification); they also *bind the future*, so that it can be accurately predicted that future signs of the burning cross (at least those in similar circumstances) will be interpreted by the court as likewise signifying the protected ideology of white supremacists, rather than physical violence.

The public nature of a Supreme Court ruling is such that this performative binding of the future within the courts actually affects future behavior of citizens. Those who would burn a cross can now be

⁶ Of course, in cases where the burning cross did result in violence, its perpetrators could be charged under any number of other statutes. This case merely overrules proscriptions to burning the cross, but does not eliminate other means of prosecuting cross burners.

expected to know that the court can be predicted to interpret the act as favorably as they did in this case, and those who would be threatened by the burning of a cross now can be expected to know that the court can be predicted to delegitimize their feelings of threat, and insist that the cross, in most instances, does not invoke danger. In chapter five I will compare the implications of this invocation of future interpretations with those produced in cases that acquit police officers who have murdered unarmed black men (discussed in chapter two), and make the broader argument that the parameters for the court's interpretations of violence are unevenly distributed along vectors of race (and gender and class), and that this uneven interpretation is one mechanism that validates *and indeed perpetuates into the future* the uneven distribution of violence along racial lines that already exists in our society.

For the remainder of this paper, I will now turn to the concept of symbolic violence, which will help us explain the difference in conclusions between Mr. Hurd and Mr. Smolla's interpretation of the historical semiotic mass that the burning cross has accrued, to better understand how the court validates these acts of interpretation.

Symbolic Violence

One of the enduring debates in the theorization of violence has been over its definition--the question of what should be included and what excluded from the collection of actions housed under the term. The majority of the most popular definitions for violence have specified as an essential characteristic that it is bodily in nature, as a means of distinguishing it from other forms of non-bodily harm. More recently, there has been a divergence from understandings of violence as a necessarily physical act, separable into two approaches: arguments that the definition of violence ought to be broadened to include some acts that are harmful but not bodily, and arguments that dispense with the need for an explicit definition of violence altogether, insisting that one of the characteristics of violence is that it is an experience, and as such is deeply subjective. This theoretical landscape is the necessary backdrop to a discussion of *Virginia v. Black* for two reasons: first, it evinces the extent to which violence is inextricably intertwined with interpretation; this is a shared assumption of each definition. If violence is understood as a closed set of physical acts, then naming an act as such requires that the nature of the act

be interpreted to determine whether it falls within the prescribed category of acts deemed violent. If violence is understood as a subjective phenomenon without closed limits demarcating a specific set of acts, then the interpretation is even more readily built into the definition itself: violence consists of those acts which are interpreted as violence by the participants (including the role of observer as one way of participating in the act). Thus we can see already in the way that violence has heretofore been theorized that interpretation is of central importance to discussions of violence. The close examination of how interpretation functions in discussions of violence is the primary focus of this dissertation.

Second, it is necessary to understand, in broad categories, the ways that violence has been defined and understood, so as to better situate the concept of *symbolic violence* in relation to other forms of violence. Though the term is most commonly attributed to Pierre Bourdieu, for the concept as developed in *Masculine Domination*, the phrase also describes Rene Girard's theory of sacred substitution in *Violence and the Scared*. I am arguing that Bourdieu and Girard's definitions of the term hinge on different usages of the word "symbolic," and that there is (at least) a third category of action describable by the phrase, which I am calling "performative symbolic violence," which is accounted for in neither the works of Bourdieu nor Girard. The possibility of such distinct usages is facilitated by a multiplicity of meanings for the word "symbolic," and clearly distinguishing between these meanings is crucial for being able to accurately describe the way that violence is defined and interpreted in the American justice system, and thus, as I have argued in an earlier section of this chapter, to understand one way in which the state perpetuates a future of racial inequality and violence.

For Bourdieu, the nature of true domination is that it functions and reproduces itself even in the absence of the immediate threat of physical force. In a state of domination, the dominated party is an active creator of their own subordination, accepting and participating in systems of ideology that continuously structure the world around them in such a way that they are inferior to members of the dominating party, as women are dominated by men. In *Masculine Domination*, Bourdieu introduces the concept of symbolic violence as one of the primary mechanisms through which domination obtains. He writes: "symbolic force is a form of power that is exerted on bodies, directly and as if by magic, without

any physical constraint; but this magic works only on the basis of the dispositions deposited, like springs, at the deepest level of the body” (Bourdieu 38). Bourdieu specifies that symbolic violence means, for him, that violence which is performed through the use of symbols, and the framework by which those symbols are ordered in relationship to each other, that is, a kind of ideological hierarchy in which we understand male to be above female, rich to be above poor, and so forth. In this context, “symbolic” is being used to mean “pertaining to symbols, or existing through the use of symbols.”

In this understanding, symbolic violence is part of the ideological framework that constructs one’s *habitus*—one’s habits of thought and action that guide one through a given field and orient one’s life choices. Here, symbolic violence helps concretize rather durable fields and habituses. Individuals may make any number of choices throughout their day, but they do so largely within the established constraints of their habitus, according to the rules of their field, as established and reinforced through ideological symbolic violence. Much of the SCOTUS majority opinion in *Virginia v. Black* reads the burning cross as a form of Bourdieusian symbolic violence, on several levels. 1. The court determines that the cross’s primary function is an ideological expression, which serves to communicate the message that black is inferior to white. 2. The court acknowledges that this ideological expression was, in the past, enforced via physical violence such as lynchings, but rules that, at present, the ideology is being perpetuated in symbol only, rendering it entirely protected by the first amendment. 3. The court’s opinion suggests that proscribing cross burning is not only unconstitutional, but would be fruitless, because cross burning is only a symptom of inevitable and longstanding racial animus, rather than an incarnation of racism always actively on the make⁷.

In *Violence and the Sacred*, Girard presents an alternate conception of symbolic violence. Here, “symbolic” primarily means “standing in for something else”: symbolic violence is one act or category of violence performed in place of another act or category of violence. Girard’s foremost example of symbolic violence is ritual and sacrifice, which he understands as a somewhat straightforward act of

⁷ An *iteration*, in the Butlerian sense.

substitution. Ritual and sacrifice substitute acts involving the sacred for acts of violence that would threaten the order of a community by instigating a cycle of required vengeance. For Girard, then, symbolic violence means substitutional violence: the exchange of some form of physical violence that instigates a harmful cycle of reciprocal violence, for a symbolic act that represents and expresses the same motivations of that violence, without triggering the same reciprocal and damaging cycle. Here we also have an invocation of the past: past acts of violence need to be repeated and vindicated in order to release the violent urge in all societies, without creating cycles of physical violence that could destroy that society. Thus, rituals of symbolic violence fulfil the urge necessitated by the past, without damning the society to an equally violent future.

It is worth mentioning, particularly given the specific case of symbolic violence that I am discussing in this paper, that Girard views sacrifice as only one means of halting a cycle of violent vengeance. He argues that in “our” society the justice system fulfills the need for halting this cycle by performing acts of violence as a legitimate authority unable to be faulted, challenged, or avenged by any individual or group of individuals. By invoking a broadly enforced conception of impartial “justice,” the courts can perform violence without fear of retribution. Of course, tied up in this understanding of how the justice system puts an end to cyclical violence is Bourdieu’s conception of symbolic violence: Girard’s explanation for the justice system relies on, but does not explain in detail, the general perception that the justice system is a) legitimate, b) impartial and just, and c) more or less omnipotent.

SCOTUS also recognizes Girard’s conception of symbolic violence in *Virginia v. Black*. It is this understanding of symbolic violence that allows for what seems otherwise to be an incongruity between the court’s admittance that cross burning has historically been used in conjunction with, and as an element of, acts of heinous physical violence, and the court’s determination that present acts of cross burning *cannot* be considered threats of future physical violence. The court acknowledges that the burning cross’s history is intertwined with illegal physical violence, but suggests that the act of burning a cross is now only a symbol of that violence in the Girardian sense of a replacement or stand in for that violence—thus, the court refuses to admit that such a past of physical violence indicates anything about violence

predictable in the future.

In each of these interpretations of symbolic violence, the court acknowledges the historical meanings of the burning cross, developed over time, but stops just short of affirming what I am arguing is a crucial element of *historical semiotic mass*: ie. a predictable future. Neither Bourdieu nor Girard's conception of symbolic violence, I argue, sufficiently accounts for the possibility that present acts of violence actually bind the future, and in this way, neither really embodies the most literal meaning of the two words "symbolic" and "violence." To be symbolic means to be a semiotic stand-in for something else, such that when one witnesses the symbol, it is near-universally recognized as an indicator for what is symbolized. There are many examples of this meaning of "symbolic" in our language: when one sees the symbol of a woman outside of a restroom, it invokes and signifies that physical human women can be found inside the restroom. When we consider a dove with an olive branch as a symbol of peace, we do not mean that the peace that exists is related to symbols, nor do we mean that the dove is a replacement for ceasefire. Rather, we mean the dove to signify that physical peace is imminent.

This most literal and semiotic understanding of "symbolic" is precluded by the understandings of both Bourdieu and Girard. Each maintains as crucial an element of semi-conscious separation between the symbol and the symbolized, and the ability of that connection to be forgotten, ignored, or denied is central to successful domination (Bourdieu) and sacrifice (Girard). However, Hurd, Smolla, and each of the Justices acknowledged that a rich history has tied physical violence inextricably to the sign of the burning cross, such that, throughout the past century, the cross has undeniably invoked physical violence, and indicated that physical violence is near at hand. How then, do they fail to find the third category of symbolic violence present in their ultimate ruling?

This incongruence comes down, ultimately, to the question of how the present affects the future. Both Bourdieu and Girard's usage of "symbolic" allows for a future that is *always already* bound by the past. Alternatively, the performative category of symbolic violence that I am proposing grants much more weight to the actions of the present in determining the outcomes of the future. Much as Judith Butler suggests that gender is bound by the weight of its historical meaning, *and also continuously*

iterated in the present (that is, continuously re-inscribed, called into being, and incarnated), I suggest that interpretations of violence are bound by historical semiotic mass, *and also* that historical semiotic mass is continuously being re-inscribed and iterated in the present, and as such, binding a predictable future.

Thus, when the cross is burned, as an act of performative symbolic violence, it does not just invoke a past of racial violence, but *actively performs* racial violence in the present, and makes predictable racial violence in the future.

And finally, to return to the level of the state, where we began, when the court determines that burning a cross is a legitimate and legal act of protected speech, the court does not just interpret the past act of cross burning; its present performative declaration *binds a future* in which burning a cross *will be interpreted* as a legitimate and legal act of protected speech ongoingly. Failure to recognize and identify this category of performative symbolic violence allows for the perpetuation of a great deal of race-specific violence that courses through the justice system on a daily basis, reinforcing and re-inscribing interpretations of race and violence that daily strengthen the historical semiotic mass I have described, binding a future into which it will continue.

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