Virginia v. Black: Hard-core Hate Speech, Hard-core Porn and the First Amendment

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{Apologies for the early sections of this essay--they come from my casebook aimed at undergrads--if the reader wants to skip the elementary background, just move ahead to the section on the anti-porn codes.)

Since the Supreme Court's earliest exposition of First Amendment law, the Court has consistently held that not all uses of words are covered by the phrase "freedom of speech or of the press." If a particular use of words has "the effect of force" -- as in, for instance, inciting a murder-prone person to murder -- those words in those circumstances are not considered protected by the Constitution.[i] About fifty years ago, the Supreme Court added to this rule, the additional rule that certain categories of speech and press are not protected by the First Amendment. The Court explained:

> **There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "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. [They] . . . are not in any proper sense communication of information or opinion. . . [ii]**

As of 1993, the Court continues to rule (and has never ruled otherwise) that the libelous, the obscene and "fighting" words remain unprotected categories of speech or press. However, the justices have varied the definitions of these terms over the years and in that way have expanded or contracted the freedom to say things that are arguably "fighting"

words or to print the arguably libelous or obscene.

Obscenity Doctrine

While feminists were by no means unanimous on the subject, numerous feminists in the 1970s and 1980s engaged in a variety of campaigns against the multi-billion dollar pornography industry on the grounds that pornography, in depicting women as mere body parts meant for men's pleasure, debased women in the minds of the public and encouraged, both implicitly and explicitly, sexual violence against women. Since legally "obscene" books, pamphlets and movies are NOT protected by the First Amendment, and are in fact outlawed in every state, one might wonder why there is a pornography problem in the first place.

The answer to this is two-fold. Beginning in 1966, part of the problem could be blamed on a Supreme Court opinion that defined "obscenity" so narrowly that virtually nothing could be squeezed into the definition.[iii] In that case obscenity was said to be, among other things, material that was "<u>utterly</u> without redeeming social importance."[iv] Since even the most hard-core pornography has entertainment value for someone, this standard ended up opening the commercial floodgates for pornography.

Reacting to this situation, the Supreme Court in 1973 widened the definition somewhat.[v] The Court replaced the rule "utterly without importance" with a rule that said that to be judged obscene a work would have to, "taken as a whole, lack[] serious literary, artistic, political, or scientific value."[vi] In addition, two other tests have to be applied to determine obscenity. First, the judge must determine "whether the average [adult] person applying contemporary community standards would find that the work,

taken as a whole, appeals to the prurient interest [in sex].[vii] In an earlier case, the Court had referred readers to a dictionary definition of "prurient"; in part it read: "Itching; longing; uneasy with desire or longing . . . "[viii] Secondly, the judge must decide "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law."[ix] (One of several examples of "sexual conduct" that the Court listed as possibilities for inclusion in state statutes that itemize what may not be offensively depicted was "lewd exhibition of the genitals."[x]) If a work fails both these tests and also lacks "serious importance," then it is legally obscene and may be banned.

In addition to altering the legal definition of the obscene, so as to make more works proscribable, the Court in 1973 also elaborated why obscenity was punishable under the First Amendment. It was not, Chief Justice Burger explained, in any meaningful sense "communication of ideas"; rather, it was "crass commercial exploitation of sex." People who buy and sell obscenity are not engaged in the exchange of ideas (or money for the expression of ideas) but rather are simply trafficking in titillation.[xi] Moreover, there is an identifiable harm or set of harms, attributable to obscenity; it debases the public environment in our commercial centers; one can reasonably believe that it promotes antisocial behavior; and, because what people read and view affects their attitudes,, "a sensitive 123 S. Ct. [i.e., the intimate one between a man and a woman] . . . can be debased and distorted," through the prevalence of pornographic works in our society.[xii] Thus, it was punishable, despite the First Amendment.

Since it is obvious that much if not all of hard-core pornography can be easily judged obscene under the three-part test adopted in these 1973 cases, one may wonder why

so much of it is still openly marketed. While judicial leniency is useful for explaining the 1966-1973 pornography boom, it really cannot carry the explanatory burden after that point. To do that, societal attitudes have to be brought into the picture. Most communities and most prosecutors in the 1970s and 1980s were not interested in spending scarce public funds to prosecute and imprison pornographers. And many juries were simply unwilling to convict, even for showing films of the standard porn genre, such as "Deep Throat."

Anti-Pornography Ordinances: American Booksellers Association v. Hudnut (1985)[xiii] and Hudnut v. American Booksellers Association (1986)[xiv]

Faced with this dilemma -- a profoundly held belief that the widespread availability and viewing of pornography really does hurt women, and the apparent evidence that much of the American public is not eager to apply the machinery of the criminal justice system to censor pornography -- feminist authors Catharine MacKinnon and Andrea Dworkin developed a specifically anti-pornography strategy that defined "pornography" somewhat differently from the Court's definition of "obscenity" and that argued for making such pornography actionable in civil suits brought by individual women who felt they were being harmed or had been harmed by pornography. The civil suits could pursue both "cease and desist" court orders and compensatory damages. Thus, Catharine MacKinnon argued, women, rather than government as such, would be empowered. And something that does harm to women could be checked.

Moreover, in the model ordinance that they proposed, MacKinnon and Dworkin described pornography as illegal on the grounds that it was sex discrimination. This legal strategy, taking a species of speech with some linkage to sexual violence and defining it in

law as forbidden sex discrimination, had proved strikingly effective for Catharine MacKinnon with regard to sexual harassment. She had advocated precisely that approach in a 1979 book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*,[xv] and the U.S. Supreme Court embraced the idea as the law of the land by 1986 (as described in Chapter 5 above). When applied to pornography, however, this strategy, was not to prove so successful with the judiciary.

MacKinnon and Dworkin did succeed, after extensive lobbying in conjunction with a variegated coalition of interest groups (some feminist, some church-related, some extremely traditional conservative), in persuading the city of Indianapolis to adopt an anti-pornography ordinance along the lines described above.

The phenomenon of "pornography" as defined in the Indianapolis ordinance differed from the judicial definition of "obscenity" in a number of respects. I return to a comparison of the two below, after the description of the Indianapolis statute.

The Indianapolis law defined "pornography" as "the graphic sexually explicit subordination of women [emphasis added], whether in pictures or words, that also includes one or more of the following:

> **(1) Women are presented sexual objects who enjoy pain or humiliation; or**
> **(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or**
> **(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or**
> **(4) Women are presented as being penetrated by objects or animals; or**
> **(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or**
> **(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or**

submission or display."[xvi]

The statute added that the "use of men, children, or transsexuals in the place of women" in these six paragraphs also would constitute pornography.

The ordinance then prohibited four acts with regard to pornography as so defined. The first was "trafficking," defined as "production, sale, exhibition [except in special displays in libraries], or distribution of pornography [of the types described in categories 1-5 above].[xvii] The second was "coercion into pornographic performance," defined as "coercing, intimidating, or fraudulently inducing someone into performing for pornography."[xviii] Third was "forcing pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place."[xix] Finally, the production or sale of any piece of pornography that "directly causes" an "assault, physical attack, or injury," of anyone renders the producer or seller of that pornography liable to the injured person for damages.[xx]

This concept of pornography that is employed in this statute differs from judicially defined obscenity in three ways. First, where obscenity speaks of the [mysterious and paradoxical] combination of <u>appeal</u> to prurient interest in sex, with patent <u>offensiveness</u> in degree of explicitness about sex, the pornography definition speaks simply of being "graphic [and] sexually explicit" (avoiding the seemingly contradictory rule that a thing be appealing and repellent at the same time). However, while the phraseology differs, up to this point there does not seem to be a difference of principle between the two terms. In other words, they describe essentially the same material. The second difference, however, is one of substance. The Supreme Court takes the general category of material that is

offensively explicit about sex in a way that arouses a longing for sex -- i.e., that is erotically explicit -- and divides it into two parts: that which is obscene -- the part that lacks serious artistic or other importance-- and that which is non-obscene -- those works of serious literary, artistic, political or scientific importance that happen to be erotically explicit. The Indianapolis ordinance did not make this division; <u>all</u> erotically explicit work was eligible for the pornography label if it had the additional trait of displaying the subordination of women through this graphic sexual portrayal. This latter trait made for the third difference between the two concepts; some material that was legally obscene (because it was erotically explicit and lacked artistic or other serious value) -- in other words, that was constitutionally punishable -- would not be punished by the Indianapolis ordinance because it had an egalitarian message. Only if it somehow endorsed the subjugation of women through sex was it actionable as pornography. On the other hand some material that was not constitutionally punishable -- that the First Amendment protected BECAUSE it was the serious exchange of ideas, despite its sexually explicit medium -- would be punishable under the Indianapolis ordinance (because it was sexually explicit and downgraded women). Because of this last fact, it was predictable that federal courts would throw out the law. This prediction would not surprise the authors of the statute; their hope was that they could persuade the federal courts to alter existing First Amendment doctrine on the grounds that pornography causes great harm. While they did not succeed, the anti-pornography campaign perhaps not yet over. The *American Booksellers* case may turn out to be merely the first major battle in a long-term war on pornography may yet continue, encouraged somewhat by the Court=s most recent sally into the realm of hate-speech, with

the 2003 decision *Virginia v. Black*, 538 U.S. 343 (2003).

This first battle had four phases. In phase one, in response to a suit by the American Booksellers Association, the Association for American publishers and various other interested parties against the Mayor of Indianapolis, William Hudnut, the federal district court judge, Sara Evans Hughes, threw out the ordinance as unconstitutional.[xxi] In phase two, a three judge panel of the federal circuit court of appeals, in an opinion written by Judge Frank Easterbrook, unanimously affirmed Hughes's judgement that the statute was unconstitutional. In phase three, without even bothering to hear oral argument or to write an explanatory opinion, the U.S. Supreme Court affirmed the circuit court judgement.[xxii] This unexplained affirmance remained all there was of U.S.Supreme Court doctrine on the matter until the Court took the occasion, in my view, in the *RAV v. St. Paul* decision six year later to address important questions left unanswered by Easterbrook=s reasoning in the circuit court.

Specifically, the questions emerge from the fact that Easterbrook rejected the Indianapolis ordinance on the grounds that even though he fully agreed that pornography did cause harm by Aact[ing] at the level of the subconscious before persuad[ing] at the level of the conscious,@ and, A [erotically charged d]epictions of subordination tend to perpetuate subordination...lead[ing to affront and lower pay at work, insult and injury at home, battery and rape on the streets,@ still, pornography worked its harm as speech. He insisted that much other protected speech arguably did harm and, like pornography, used subconscious persuaders for part of its rhetorical power. Crucially, he noted that the statute Aleft out of its definition [of pornography] any reference to literary, artistic,

political, or scientific value. The ordinance applies to graphic, sexually explicit subordination in works great and small.@ The Supreme Court had earlier justified its carving out of the exceptions to Afreedom of speech@ itemized in *Chaplinsky* on the grounds that those uses of words

Aare no essential part of any exposition of ideas, and. . . . are not in any proper sense communication of information or opinion.@ As long as Aobscenity@ was defined as lacking significant ideational content (literary value, etc), this justification worked. But as long as the category Apornography@ included works of significant literary, artistic, or political value, the argument that porn did not communicate opinion made no sense. The question thus left open by the Easterbrook opinion was whether a revised anti-porn ordinance, one that hewed more closely to the Supreme Court=s obscenity definition could still be found constitutional: If Indianapolis were to repass this ordinance but to substitute the Court's obscenity definition (material dominated by offensively explicit depictions of sex, calculated to appeal to prurient interest, and which lack a serious degree of redeeming importance) for the phrase "graphic, sexually explicit," but were to keep all the other qualifiers about being degrading to women in one or another way, would the law then be constitutional? In other words, would it be constitutional to ban only some (rather than all) materials that are legally obscene -- those that eroticize violence toward women or that eroticize subjugation of women?

In 1986 it appeared that the Supreme Court had not developed a satisfactory answer to these questions, for the Court wrote no opinion at all. But six years later, in what I consider phase four of the *ABA v. Hudnut* battle, the case of *R.A.V. v. St. Paul*, 505

U.S. 377 (1992),[xxiii] the Court did reach out to address them, at least obliquely, although the case involved not hard-core pornography but hard-core hate speech, specifically a cross-burning in the yard of a black family, clearly targeting that family for intimidation.

In June of 1992, a five justice majority that included the vote of Clarence Thomas, the lone black justice on the Supreme Court, against heated and lengthy disagreement from the four justices in concurrence, handed down an implicit answer to these queries. According to the latter four, this majority answer contained "serious departures from the teaching of prior cases" and "cast[] aside long-established First Amendment doctrine."[xxiv]

The legal question directly posed in the *R.A.V.* case involved not pornography but expressive conduct conveying hatred for certain kinds of groups. "R.A.V." was a juvenile who had, along with some other teenagers, burned a cross in the yard of a black family in violation of St. Paul's law making it a misdemeanor to place on any 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."[xxv] The state supreme court of Minnesota in interpreting this law had ruled that it covered only "fighting words," which are not protected by the First Amendment. The U.S. Supreme Court had earlier defined "fighting words" as "words which by their very nature inflict injury or tend to incite an immediate breach of the peace."[xxvi] In this *R.A.V.* case, the five-justice majority on the U.S. Supreme Court ruled that even assuming that the statute banned only (unprotected) fighting words, it was unconstitutional for a government to pick and choose among different viewpoints within the unprotected speech category.[xxvii]

According to the *R.A.V.* majority, despite the Court's *Chaplinsky* statements that the categories of unprotected speech (obscenity, fighting words, libel) "are no essential part of any exposition of ideas" and do not Acommunicate opinion@ to any constitutionally significant degree[xxviii] it is nonetheless unconstitutional to ban a <u>part</u> of an unprotected category on the grounds of disapproval of the idea or viewpoint expressed in it.[xxix] The majority argued that such a ban was an attempt at governmental thought control and therefore disapproved by the First Amendment. (This divergence from the logic of C*haplinsky* angered the four justices in concurrences and received considerable attack from them).

This argument by the *R.A.V.* majority seems to indicate that even a statute that limited its ban to cover only those [in principle, constitutionally unprotected] obscene materials showing sexual violence against women or subjugation of women would be still unconstitutional (for the sorts of reasons outlined by Judge Easterbrook.) On the other hand, the *R.A.V.* majority left a loophole against this inference.

They described this loophole as follows: "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. . . . To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive <u>in its prurience</u> -- 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 <u>political</u> messages. . . ." (Emphasis in original.)[xxx] The majority, in the same vein, allowed for limiting punishment to the Afightingest@ of fighting words--i.e., those that produced the

greatest or most immediate threat of retaliatory violence-- and it is this point on which the conccurrence >s criticism zeroed in, posing the question whether St. Paul might not have reasonably concluded that fighting words attacking those categories itemized in the statute were indeed the most disruptive face-to-face insults in their community.

Virginia v. Black (2003)--Battle #2 in the Porn Wars?

The case of *Virginia v. Black, Elliott and O=Mara*, 538 U.S. 343; 123 S. Ct. 1536 (2003) took the U.S.Supreme Court into this loophole. The decision covered two different Virginia cases, one where the Klan had burned a cross for its own group solidarity, on its own property, at its own meeting. In another two people (Elliott and O=Mara), not necessarily Klan members, burned a cross outside the home of a black neighbor with whom they were angry, in an evident attempt at intimidation. All three had been convicted under a Virginia statute making it a crime to burn a cross Awith intent to intimidate,@ and with a provision making the fact of cross-burning itself Aprima facie evidence of intent to intimidate.@ The Court threw out the conviction of Black (on the grounds that the jury instructions with respect to the prima facie evidence clause had biased his trial) and remanded the cases of Elliott and O=Meara, asking the Virginia Supreme Court to un-blur the distinction, blurred by the clause in the majority=s view, between Acore political speech,@ which is protected and might include a cross-burning such as Black=s, and a Atrue threat,@ which is unprotected and is often (or even usually) conveyed by the act of cross-burning.

Parts I through III of Justice O=Connor=s opinion, which was supported by six of the justices (not Ginsburg, Souter or Kennedy), and which was all there was of a ACourt

opinion,@ dwelt at some length on the *Chaplinsky* precedent and on what I have called the loophole language of *R.A.V.(*123 S. Ct., at 1547-1550). O=Connor not only quoted the passage, but then re-quoted it, phrase by phrase, concluding that it is constitutional for a state to ban cross-burning, since a ban on cross burning is a clear example of a ban not on the politics that incites the threat but on the threatening or intimidating aspect of the expression. So now there is a clear precedent on the books permitting a narrowly drawn statute that targets not all fighting words but that singles out particular ones, what might be thought of as Ahard-core hate speech@ -- hate speech that expresses not only venom but would normally be read by the Aaverage addressee@ as a true threat.

What does this precedent tell us about the hypothetical I raised of an Indianapolis-type ordinance modified along the lines suggested to ban some but not all constitutionally-unprotected "obscenity," the obscenity that eroticizes violence toward and/or subjugation of women? The main thing it tells us is that the R.A.V. opinion on this point, quoted both in the majority opinion and the Souter (for three) dissent, is seriously confused about the constitutional rationale for permitting a ban on obscenity. At first, the Court=s explanation of why communities were allowed to ban obscenity (as distinguished from why it was an unprotected use of words)--i.e. what was the liegitimate government interest furthered by such a ban--told us precious little, *Chaplinsky* referring only to the Asocial interest in order morality.@ Not until the 1973 cases did Justice Burger flesh out what this meant in terms of identifiable harms that obscenity arguably promoted. (See above Para. 4 under AObscenity Doctrine@). Contrary to Justice Scalia=s teaching in R.A.V. (Perhaps

influenced by his ally in these cases, Justice Thomas, well-known from his confirmation hearings to be an enthusiast of pornography), and reiterated here by O=Connor, what is the evil that causes pornography to be bannable is NOT its degree of lasciviousness (the latter is only what causes it to be not Aspeech@). That is, what is bad about pornography according to what the Court wrote in 1973 (assuming discreet sales that do not openly debase the tone of our commercial centers) is that it reasonably can be viewed as encouraging antisocial acts (that harm women) and as debasing human attitudes about a Asensitive key relationship of human existence.@ In other words, sexual arousal per se, is not the social evil caused (arguably) by pornography. Rather it is what it does to attitudes about women and about sexual relationships between men and women (or between gay men or toward children put into comparably sexually subjugated roles). If the sale of titillation does not cause some sort of harm along these lines--having some undesirable impact on attitudes or behavior-- then there is no reasonable grounds to ban it or make it actionable (and such a ban or cause of action would then violate due process). If the Supreme Court were ever to pay heed to this-- its own precedent-- it would have to modify the lasciviousness section of its R.A.V. loophole precisely in the direction where it does not want to go--i.e. to admit that impact via subconscious influences through what is and is not eroticized in porn is precisely what renders that porn socially harmful or not. Such a move, of course, would produce an acknowledgment that an Indianapolis style ordinance amended to exclude as non-pornography material of Asignificant literary, artistic, political, or scientific value@ would indeed be constitutional.

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NOTES

i. Schenck v. U.S., 249 U.S. 47 (1919).

ii. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

iii. Memoirs v. Massachusetts (the Fanny Hill Case), 383 U.S. 413.

iv. Ibid.

v. Miller v. California, 413 U.S. 15 (1973) and Paris Adult Theater v. Slaton, 413 U.S. 49 (1973).

vi. Miller v. California.

vii. Ibid.

viii. Roth v. U.S., 354 U.S. 476, at n. 2 (1957).

ix. Miller v. California.

x. Ibid.

xi. Paris Adult Theater.

xii. Ibid.

xiii. 771 F. 2d 323 (7th Cir. 1985).

xiv. 475 U.S. 1001 (1986).

xv. New Haven, Connecticut: Yale University Press, 1979.

xvi. Indianapolis Code, Section 16-3(q), cited in American Booksellers Ass'n. v. Hudnut, 771 F.2d, at 324.

xvii. Section 16-3(g)(4). For the trafficking provision a work had to be considered as a whole, not by isolated sections, so selling a magazine like Playboy would not be actionable. Section 16-3(g)(4)(C). Also, for a plaintiff to recover damages, there had to be proof that the trafficker "knew or had reason to know" the material was pornographic.

xviii. Section 16-3(g)(5).

xix. Section 16-3(g)(5).

xx. Section 16-3(g)(7). In an action for damages from the "seller, exhibitor, or distributor," in such a case, there must be proof that the respondent "knew or had reason to know" the material was pornographic.

xxi. 598 F.Supp. 1316.

xxii. 475 U.S. 1001 (1986). Three justices dissented against the decision not to hear oral argument. They were Sandra Day O'Connor, William Rehnquist, and Chief Justice Warren Burger.

xxiii. 505 U.S.377; 112 S.Ct. 2538 (1992).

xxiv. Ibid., at 2551.

xxv. St. Paul, Minn. Legis. Code Section 292.02 (1990).

xxvi. Chaplinsky, 315 U. S., at 572.

xxvii. The four concurrers disagreed, insisting that if speech is unprotected a government, if it chose to, may ban whichever segment of it was most problematic. However, they also would strike down the St. Paul ordinance because they believed that a message could fall short of the true "fighting words" category and still "arouse anger or resentment." They viewed the statute as unconstitutionally overbroad rather than overly narrow.

xxviii. Chaplinsky, 315 U.S., at 572.

xxix. The contradiction in assuming that ideas were being expressed in something defined as not part of the exchange of ideas was noted by the dissenters. See 112 S.Ct., at 2553, Justice White dissenting.

xxx. R.A.V., at 388; 112 S.Ct., at 2546.