Symbolic Punishment

Bruce Fein argues that cross burning is a “unique evil” and, therefore, not entitled to the First Amendment protection accorded other expressive activities such as flag burning [“The unique evil of cross burning,” Commentary, Dec. 24]. Like so many before him, he claims that the expression he would suppress is sui generis, so that its suppression would not imperil other speech.

Mr. Fein convincingly argues that burning crosses have been put to hideously evil uses, but that does not make the burning cross “uniquely evil.” Many Holocaust survivors no doubt justifiably feel that the swastika is uniquely evil, since the atrocities committed under the swastika are orders of magnitude greater than those committed under the burning cross. Many who believe the burning cross is evil no doubt feel equally strongly about the wearing of white sheets and pointed hoods. Many may also feel that Confederate flags largely represent the same thing that burning crosses and white sheets symbolize. Arguments can be made that each of these symbols is sufficiently evil to justify their banning.

According to Mr. Fein’s view, history rather than logic should determine which symbols are entitled to constitutional protection, but such an approach would eviscerate the First Amendment. Because history is contestable in a way that logic is not, an “historically evil speech” exception to the First Amendment gives legislatures and courts far too much leeway in suppressing speech.

The state has a legitimate interest in protecting citizens from intimidation, but it has no constitutionally sufficient interest in selecting some symbols for special punishment.

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