

Hypo 1: The Red Rose Case

Karen F., a 56-year old Toledo woman, was repeatedly sexually abused from the age of 4 until the age of 14, when she ran away from home. After years of intensive therapy, she began writing online fiction that she claims helps her to cope with the depression and anxiety resulting from the abuse. Her stories, read online by thirty subscribers at a website called "Red Rose," graphically and explicitly depict the sexual abuse, torture, and murder of young children.

Karen herself admits that her stories leave nothing to the imagination, describing sexual organs, sexual acts, and the children's and adult's physical reactions, emotions, and expressions in gruesome detail. The stories contain some emotional exploration but consist almost exclusively of graphic sexual descriptions. The stories are not accompanied by any images.

There is no evidence that the thirty subscribers to the Red Rose website are themselves survivors of childhood sexual abuse. The website contains warnings as to the content of the stories, and Karen has taken steps to ensure that the site is not accessible to minors. Karen charges a modest subscription fee of \$3/month to subscribers.

The U.S. District for the Northern District of Ohio has indicted Karen for violating federal obscenity laws. The six-count indictment charged her with violation of 18 U.S.C. §§ 1462 ("Importation or transportation of obscene matters"). The statute provides, in relevant part, that

[w]hoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934), for carriage in interstate or foreign commerce (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .

Karen has now been convicted and sentenced to jail. The case is now on appeal to the 6th Circuit Court of Appeals, where you are working as a law clerk. Another law clerk had been assigned to this case, but she requested reassignment after becoming extremely emotionally distraught when reading the stories. Based on the caselaw we've read, what is your recommendation and why?

Hypo 2: R.A.V.

One June morning in St. Paul, Minnesota, a white teenager, R.A.V. (a minor, so his real name remains unknown), and several other of his teenage friends were bored. Looking for something to do, they took several broken chair legs and crudely fashioned a wooden cross. They then took this homemade cross across the street and entered into the fenced-in yard of an African-American family that had been living in the neighborhood some time. As the family looked on from inside their home, the teenagers burned the cross on the family's lawn.

Although this conduct could have been punished under any of a number of laws, St. Paul prosecutors chose to charge R.A.V. and his friends under the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990), part of which provides:

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

R.A.V. was convicted under this ordinance in state trial court. He appealed to the Minnesota Supreme Court, which ruled that the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words” within the meaning of *Chaplinsky v. New Hampshire*---i.e., “conduct that itself inflicts injury or tends to incite immediate violence.”

The Supreme Court has agreed to hear this case. You are working there as a law clerk to a politically moderate Justice. What is your recommendation to your judge and why?