R.A.V. REVISITED: 30 YEARS OF "HATE" & THE FIRST AMENDMENT

U.S. Supreme Court
1991 – 1992 Term

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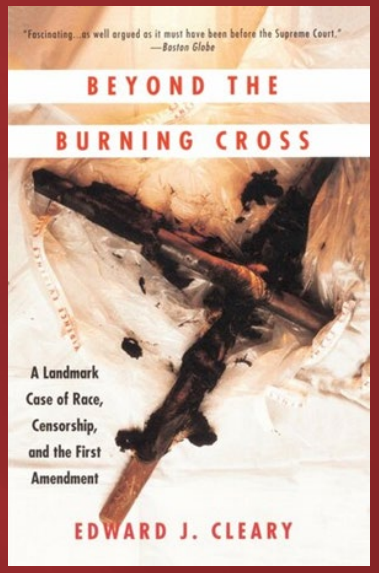


"The Burning Cross"
by Edward Cleary

Presented To: Minnesota Judicial Center
Tuesday, May 17, 2022

TABLE OF CONTENTS

JANUARY 6TH LEGACY

- "There is no First Amendment right to unlawfully threaten to harm or kill someone.
- As Justice Scalia noted, "threats

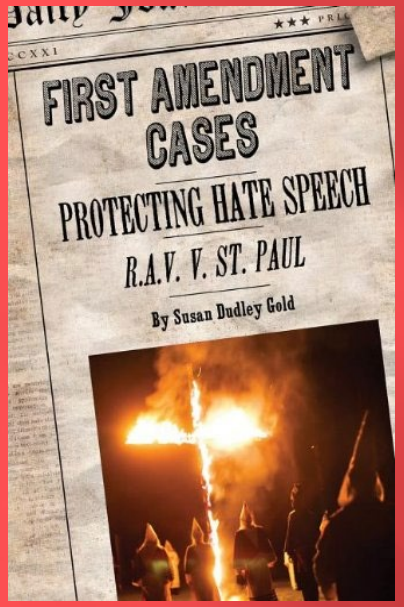
"threats of violence are outside the First Amendment."
Citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)

Storming the Capitol

Merrick Garland

THE ODIOUS ORDINANCE

- Bias-motivated Crime Ordinance, Leg. Code § 292.02
- "Who places on public or private property a symbol, object, … or graffiti including, but not limited to, a ***burning cross*** or Nazi swastika … [that] arouses anger, alarm, or resentment … on the basis of race, color, creed, religion or gender … comments disorderly conduct and shall be guilty of a misdemeanor."



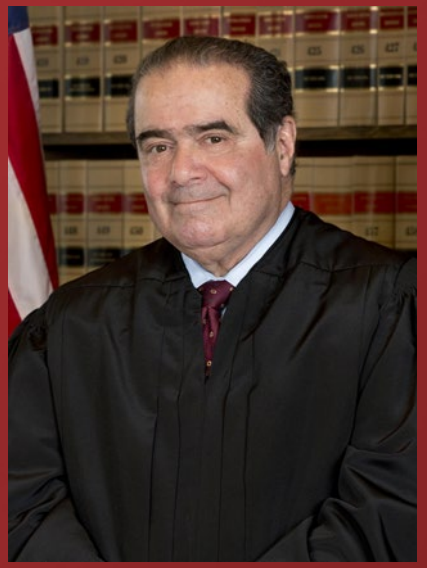
CROPS, CAPERS & CRIME

In the wee hours, between 1:00 – 3:00 a.m., on the first day of summer, June 21, 1990, a group of youths assembled crudely constructed crosses of broken chair legs which were taped together and placed burning in front yard of home of newly-residing Black family across the street from RAV's home. RAV ,a juvenile, was charged with two counts, including violation of the City's "Bias Motivated" Ordinance.

MINNESOTA MATTERS

A Motion to Dismiss on First Amendment grounds granted by the Ramsey County District Court; on accelerated review, the Minnesota Supreme Court reversed, calling the behavior "deplorable." It construed the Ordinance permissibly to apply to "fighting words" under ***Chaplinksy v. New Hampshire,*** 315 U.S. 568 (1942) and progeny and reinstated the prosecution because the Ordinance was construed "narrowly tailored … [to] protect the community against bias-motivated threats to public safety and order. ***Matter of Welfare of R.A.V.,*** **464 N.W.2d 507 (Minn. 1991).**

SUPREME SOLUTIONS 505 U.S. 377 (June 22, 1992)

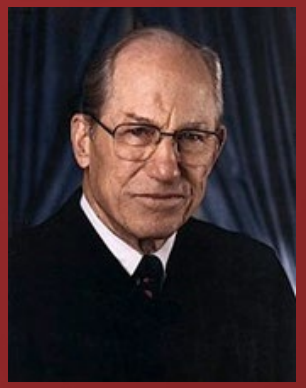


Fractured decision – unanimous majority decision written by Justice Antonin Scalia with three overlapping concurrences.

Scalia says: *Cross burning is "reprehensible,"* but the St. Paul Ordinance violates First Amendment because it is both

1) Overbroad: "Viewpoint discrimination" by prohibiting certain types of words on behavior but not other; licenses "one side to fight free style, while … the other to follow "margin of questioning rules."
2) Under-inclusive: "abusive invective … are permissible unless they are addressed to one of the specified topics of protected classes."
3) Impermissibly "content-based discrimination … "special hostility towards particular biases"

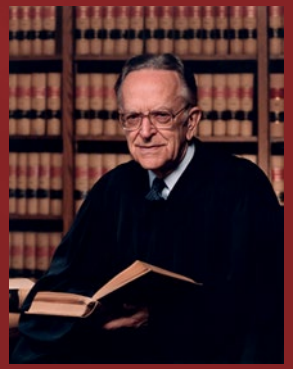
CONCURRING COMMENTS



3 Concurring Opinions

1. Justice White (Blackman, O'Connor, partially Stevens):
Case could be decided simply "within the contours of ***established*** First Amendment law … [as] ***fatally overbroad***.

2. Justice Stevens (partially Blackman and White): Unnecessary to "tinker with the first Amendment [that] … will surely ***confuse*** the lower courts."



3. Blackman: Fears decision will "serve as a precedent for future cases, or it will not. Either one" is disheartening"

APPELLATE AFTERMATH "BEYOND" BOOK

Author Edward Cleary describes the case from his perspective as appointed Public Defenders for R.A.V., *Beyond The Burning Cross,* (1995). He goes on to become head of Office of Professional Responsibility, Ramsey County Trial Judge, Judge and the Chief of Court of Appeals.

Other Local Lore: Thomas Foley, prosecutor of care; Justice Blackman, locally-based inquiry at oral argument.

CROSS CASE

- ***Virginia v. Black***, 583 U.S. 343 (2003): High Court in decision by Justice O'Connor joined by Scalia, upholds portion of Virginia statute prohibiting cross burning with "intent to intimidate." Rationale: Cross
- Burning has a long and pernicious history signal of impending violence. Justice Thomas speaks out.

HATE HEIGHTS

Hate Crime Statutes from FBI, according to reports from 15, 138 law enforcement agencies per 1990 Hate Crime Statistics At (Amended 2009) 28 U.S.C. § 534.

1992: 7,466 (6,200 reporting agencies)

2002: 7,462 (12,000 agencies)

2008: 7,783

2019: 7,103 incidents
(Race/Ethnicity: 3963)

*2020: 8,052 incidents,
involving 11,126 victims
(Race/Ethnicity: 62% (5,227)
Sexual Orientation: 20%
(Gender Identity 2.7%)
Religion: 13.3%

*Highest Level since 2008 (7785 incidents, 62% race)

SIX OF SCALIA'S GREATEST HITS

- ***Employment Division of Oregon v. Smith* (1990):** Generally applicable neutral law not specifically targeted to religious practices trump free exercise claim.
- ***Planned Parenthood v. Casey*** (1992"): O'Connor's refusal to overturn *Roe v. Wade, "cannot be taken seriously."*
- ***Citizens United v. Federal Elections America*** (2010): Concurrence emphasizes First Amendment rights of corporations to make political campaign contributions.
- ***Brown v. Entertainment Merchants*** (2011): Majority opinion bars suppression of "violent" video games for minors.
- ***Obergefell v. Hodges*** (2015): Same sex marriage dissent – "I would hide my head in a bag if author of majority opinion.