

1991 DAVIS MOOT COURT COMPETITION

FACTS

This case arose out of what began as a fraternity prank by a freshman fraternity pledge. Plaintiff Blake W. Blackwell is a 19-year-old white male. At the time of the underlying incident, Blackwell was an 18-year-old freshman at William and Lee State University in Traveler, Lewis Hall. William and Lee State is fully funded by the state of Lewis Hall. Blackwell had recently been given a "bid" at the fraternity house of Delta Gamma on the William and Lee campus and was in the process of pledging that fraternity when the incident occurred.

On October 31, 1990, Halloween night, Blackwell was instructed by several older members of the brotherhood at the Delta Gamma fraternity to report to the fraternity house at 8:00 p.m. Blackwell followed instructions and was met at the door by several "brothers" of the Delta Gamma fraternity. All of the individuals except for Blackwell were in Halloween masks and hats. Blackwell was handed a Ku Klux Klan uniform to wear as his "costume" which he put on and wore throughout the evening.

Blackwell and the other fraternity members were drinking alcohol for most of the night. At one point, one of the Delta Gamma's dared Blackwell to go to the Black Student Alliance (BSA) house and "give them a Halloween scare." Blackwell at first

refused, but after more drinking he eventually acquiesced and left the Delta Gamma house stating that he was on his way to the BSA house.

At about 11:30 p.m. of that same evening, Ken Mitchell was inside the BSA house which is also located on the William and Lee campus. Mitchell is a 22-year-old black male who was a senior at William and Lee at the time of the incident, and president of the Black Student Alliance. Mitchell reported that at about 11:30 p.m. he looked out the front window of the BSA house and saw Blackwell dressed as what he first thought was a ghost, and upon closer inspection realized was a Ku Klux Klansman.

Mitchell was momentarily shocked and watched silently as Blackwell began to light a gasoline-soaked cross he had planted in the front yard of the house. After lighting the cross, Blackwell stepped away from the cross and shouted, "All blacks back to Africa!" while shaking his fist at the BSA house. Mitchell was extremely angered by both the burning of the cross and the racist remark shouted by Blackwell.

Reacting quickly, Mitchell ran out of the house and tackled Blackwell, then pulled the Ku Klux Klan hood off of Blackwell to reveal his identity. Mitchell shouted for someone within the BSA house to call campus police, and he kept Blackwell pinned to the ground until the campus police arrived to take Blackwell into custody. No other members of the Delta Gamma fraternity were found in the area and no charges have been brought against that fraternity or its members by the University.

Blackwell, however, was expelled two days later by the University due to his violation of the William and Lee Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy). The Policy had been established in 1988 to curb what was viewed as the rising tide of racial intolerance and harassment on campus. Some examples of incidents leading to the enactment of the Policy included: anti-Hispanic jokes being aired on the campus radio station; a flier being distributed by unknown individuals upon which a swastika was printed with "White Aryans Unite!" across the top; a counselor finding "Death Nigger" scratched on the door of her office; and rumors of an underground White Student Union being formed.

The Policy was viewed by the administration as a way to provide the University with recourse against those individuals engaging in racist behavior. Additionally, the University wished to provide all of its students with an atmosphere that was conducive to learning and not intimidating to particular individuals because of their race, ethnicity, etc.

The Policy states:

(a) No student at William and Lee State University shall by any means willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize any other person while at William and Lee because of the other person's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status or handicap.

(b) No student at William and Lee State University shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or stigmatizing that other person because of the race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, or handicap of the other person.

(c) Any person found to have violated (a) or (b) shall be punished by immediate expulsion with no opportunity for readmission at William and Lee State University.

Blackwell brought suit against the University in the federal district court of Lewis Hall under 42 United States Code section 1983 due to what he perceived as unconstitutional behavior by a state actor. Blackwell claims that his expulsion under the Policy as a result of his yelling of a racial epithet and as a result of the cross burning and wearing of the Ku Klux Klan uniform is violative of the first amendment.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF LEWIS HALL

BLAKE W. BLACKWELL

v.

WILLIAM AND LEE STATE UNIVERSITY

Civil Case No. 90-3225

January 18, 1991

Howard F. Lawson, District Judge:

This matter is brought before this federal court under Title 42, United States Code, Section 1983 "Civil Action for Deprivation of Rights." Title 28, United States Code, Section 1343 grants this district court original jurisdiction over such actions.

FACTS

At the time this matter arose, Blake Blackwell was a student at William and Lee State University. The University is fully funded by the state of Lewis Hall.

On October 31, 1990, Halloween night, Blackwell attended a party at the Delta Gamma fraternity house. Upon his arrival at the house, he was met by "brothers" of the fraternity dressed in Halloween costumes. Blackwell was given a Ku Klux Klan uniform as his "costume" which he wore throughout the evening. After consuming several alcoholic beverages, one of the Delta Gammas dared Blackwell to go to the Black Student Alliance (BSA) house and "give them a Halloween scare." Blackwell, who was also

drinking, refused at first but then acquiesced.

At about 11:30 p.m., a black student, Ken Mitchell, looked out the front window of the BSA house and saw Blackwell dressed as a Ku Klux Klansman. Mitchell watched Blackwell light a gasoline soaked cross he had planted in the front yard of the house. After lighting the cross, Blackwell shook his fist at the BSA house and shouted "All blacks back to Africa!" Mitchell, angered by both the burning of the cross and the racist remark, ran out of the house and tackled Blackwell. Mitchell pulled off the Ku Klux Klan hood to reveal Blackwell's true identity and pinned him to the ground until the campus police arrived.

On November 2, 1990, the University expelled Blackwell due to his violation of the William and Lee Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy). The applicable portions of the Policy state:

(a) No student at William and Lee State University shall by any means willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize any other person while at William and Lee because of the other person's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status or handicap.

(c) Any person found to have violated (a) . . . shall be punished by immediate expulsion with no opportunity for readmission at William and Lee State University.

Pursuant to 42 U.S.C. §1983, Blackwell claims that his

expulsion under the Policy for yelling an epithet, burning a cross, and wearing a Ku Klux Klan uniform is violative of his First Amendment rights. He also claims that the Policy itself is both overbroad and vague.

DISCUSSION

I. First Amendment

While the phrase shouted by Blackwell after lighting the cross on fire is literal "speech" implicating the First Amendment, we must determine whether his action of burning the cross constitutes conduct possessing sufficient elements of communication to also implicate the First Amendment. Without such elements, Blackwell's conduct is not considered "speech," and we need not perform an analysis with regard to such conduct.

For Blackwell's conduct (cross burning) to contain sufficient elements of communication, we must find that an "intent to convey a particularized message was present," and that in the "surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 410-411 (1974). A burning cross has been the symbol of the Ku Klux Klan for many years and conveys a message of racial hatred particularly against people of the African American race. This symbol is widely recognized for its "particularized message," and in all likelihood, anyone who viewed the burning cross would understand its message. Given its history, the symbol of a burning cross satisfies Spence and

contains sufficient elements of communication. Since Blackwell's statement and his expressive conduct of burning the cross are "speech" implicating the First Amendment, this Court will analyze both.

While Blackwell's words and conduct are considered "speech" with regard to the First Amendment, it does not necessarily follow that both are protected First Amendment activities. United States v. O'Brien, 391 U.S. 367, 376 (1968). In order to make this determination, we must first ask whether the governmental interest in regulation is related to the suppression of free expression. Texas v. Johnson, 491 U.S. 397, 403 (1989). This inquiry will determine the correct standard of review which the Court should apply. If the interest is related to the suppression of expression, we must apply a more demanding standard of review. Id. Whereas, if the interest is unrelated to the suppression of expression, we must apply the less stringent standard of O'Brien. Id.

We cannot say that the governmental interest of the University with regard to Blackwell's literal speech is unrelated to the suppression of free expression, but the phrase "All blacks back to Africa" is considered to be "fighting words" under Chaplinsky v. New Hampshire, 315 U.S. 568 (1941). Such "fighting words" are not protected by the First Amendment. Id. at 572. However, with regard to Blackwell's conduct, this Court holds that the governmental interest of William and Lee State University supporting the Policy is unrelated to the suppression

of free expression, and therefore, we should apply the O'Brien standard of review. The University has advanced compelling reasons for the Policy beyond the suppression of free expression. Racist incidents have been occurring with increasing frequency on the University campus since 1986. Examples of such incidents include the airing of anti-Hispanic jokes on the campus radio station, a counselor finding "Death Nigger" scratched on the door of her office, and a flier being distributed containing a swastika with "White Aryans Unite" printed across the top.

While a particular action may not be proscribed because it contains expressive elements, Blackwell's conduct at issue here is to be suppressed due to a particularized interest of the University in preventing threats of violence and the intimidation and victimization of the student body. This interest is not related to the suppression of protected expression, and thus we must use the less stringent O'Brien standard with regard to Blackwell's conduct.

Given this determination, the standard of review formulated in O'Brien is as follows:

A governmental regulation is sufficiently justified if:

- 1) it is within the constitutional power of the Government;
- 2) it furthers an important or substantial governmental interest; and
- 3) if the incidental restriction on alleged first amendment freedoms is no greater than is essential for the furtherance of that interest.

O'Brien, 391 U.S. at 377.

The first prong of the O'Brien standard requires that the

regulation be within the constitutional power of the Government. William and Lee's Policy meets this requirement. Through its police powers, the government (William and Lee State University in this case) has the sovereign right to promote order, safety, health, morals, and the general welfare of society, within Constitutional limits. The University designed its Policy to halt the growing trend of racial intolerance and harassment on campus and to provide all of its students with an atmosphere conducive to learning. This Policy is well within Constitutional limits and is a valid exercise of the University's police power.

In response to the second prong of the O'Brien standard, William and Lee has an important and substantial governmental interest embodied in its Policy. As said above, the University wishes to provide all of its students with an atmosphere that is conducive to learning and not intimidating or threatening to individuals because of their race, ethnicity, etc. The Policy was enacted to halt the growing trend of racial intolerance and harassment on the William and Lee campus. The Policy furthers these important and substantial interests by providing the University with a form of recourse against those individuals who choose to engage in racist behavior in violation of the rights of other students.

Finally, the University Policy meets the balancing requirement of the third prong of the O'Brien standard. The Policy's incidental restriction on alleged First Amendment freedoms is no greater than that which is essential to further

the above interests. William and Lee's Policy provides for a strict scienter requirement in that only willful and intentional misconduct will trigger the expulsion sanction found in section (c). If the potential violator does not act both willfully and intentionally then the University cannot find such person in violation of the policy, and thus the restriction on alleged First Amendment freedoms is no greater than necessary.

Therefore given that the Policy, as it applies to Blackwell's conduct, meets all three requirements of the O'Brien standard, it is sufficiently justified.

II. Overbreadth and Vagueness

In response to Blackwell's second contention, this Court finds that the University's Policy is not overbroad. Statutes which regulate First Amendment activities must be narrowly drawn to address only the specific evil at hand. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). A regulation will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. Houston v. Hill, 482 U.S. 451, 458. The University Policy is aimed at protecting William and Lee students from injury, intimidation, and victimization based on willfully and intentionally discriminatory conduct, and as such does not reach a substantial amount of constitutionally protected speech.

This Court also holds that the Policy is not vague. According to Screws v. United States, 325 U.S. 91, 102 (1945),

"where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." In order to be expelled under the Policy, one must act both willfully and intentionally, and therefore one cannot be said to lack warning that the act he/she does is in violation of the law.

CONCLUSION

The application of the University policy to Blackwell's statements and expressive conduct (cross burning) is not in violation of his First Amendment rights. The Policy itself is also neither overbroad nor vague. Therefore, the policy itself is valid and Blackwell's expulsion from William and Lee State University does not violate his First Amendment rights.

IN THE UNITED STATES FIFTEENTH CIRCUIT
COURT OF APPEALS - LEWIS HALL

BLAKE W. BLACKWELL

v.

WILLIAM AND LEE STATE UNIVERSITY

Civil Appeal No. 91-5375

June 14, 1991

Blake W. Blackwell, a former student at William and Lee State University, brought suit against that University as a result of his expulsion for violation of the University Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy). Blackwell claims his first amendment rights were violated by his expulsion under the Policy. The suit was brought in the federal district court of Lewis Hall under 42 United States Code 1983.

In the court below it was decided that Blackwell's expulsion under the policy was not violative of his first amendment rights. We now affirm.

Lloyd J. Miller, Circuit Judge:

Within the framework of our constitutional system, fundamental rights are occasionally at odds with one another. Unfortunately, the case at bar presents just such a conflict.

Today's universities are faced with the challenge of fostering the most open and free exchange of ideas possible on the one hand, while protecting the equal rights of a diverse student body on the other. In attempting to grapple with such a challenge, William and Lee State University has enacted a policy to deal with what was perceived by the University administration as growing racial intolerance and harassment. It is that policy which we examine today with a critical eye.

FACTS

Blake W. Blackwell ("Blackwell") was a freshman student at William and Lee State University ("the University") at the time the underlying incidents in this case occurred. Blackwell decided on Halloween night of 1990 that he would go to the Black Student Alliance house on campus to burn a cross in the front yard of that house and to shout a racist remark. He did so while in a Ku Klux Klan uniform. He was stopped and restrained until campus police arrived by the president of the Black Student Alliance, Ken Mitchell, who had been in the Black Student Alliance house and had witnessed Blackwell burning the cross and shouting.

Two days later, Blackwell was summarily expelled with no chance of readmission to the University as a result of his violation of the William and Lee Policy on Discrimination and Discriminatory Harassment of Students in the University Environment. Blackwell claims that his expulsion under the

Policy was inconsistent with the first amendment, and that the Policy is on its face unconstitutionally vague and overbroad.

DISCUSSION

I.

Blackwell was expelled under the Policy for a mixture of speech and conduct. In deciding on the constitutionality of his expulsion we must first decide if the expressive element necessary to invoke the first amendment was present in Blackwell's behavior.

It is obvious that actual speech is protected by the first amendment which prohibits the abridgment of literal "speech." Conduct is a slightly more difficult question, as some conduct may not have any expressive elements at all and will not call the first amendment into play. However, the protection granted by the first amendment does not end at the literal spoken or written word. Texas v. Johnson, 491 U.S. 397, 404 (1989). Certain conduct may indeed contain sufficient "elements of communication to fall within the scope of the First. . .Amendment[]." Spence v. Washington, 418 U.S. 405, 409-11 (1974). The standard used to determine whether the requisite communicative elements were present in the conduct involved in both Johnson and Spence was whether there was "[a]n intent to convey a particularized message. . .and [whether] the likelihood was great that the message would be understood by those who viewed it."

In Johnson, the plaintiff was an individual who burned a

flag outside of the Republican National Convention in Dallas, Texas. Johnson was arrested and prosecuted under a Texas statute prohibiting desecration of a venerated object. The Johnson Court determined that burning a flag did have sufficient communicative elements to implicate the first amendment. Likewise, in Spence the defendant was convicted for hanging a flag upside down out of his window with a peace symbol taped to it. Again, the communicative connotations of such an act were recognized by the Court.

Similarly, we hold that Blackwell's conduct in this instance contained both an intent on his part to convey a message and a strong likelihood that the message would be understood. As the facts show, Blackwell affirmatively expressed an intent to send a message by burning the cross while in a Ku Klux Klan uniform and that message was understood perfectly by the only acknowledged onlooker, Ken Mitchell. Thus, not only Blackwell's speech, but also his conduct alone, would have been enough to implicate the first amendment.

II.

In the district court opinion it was asserted that the University's interest in promulgating such a policy as it was applied to conduct was not related to the suppression of free expression. Thus, the more lenient standard of United States v. O'Brien, 391 U.S. 367 (1968) was applied by the district court to analyze the constitutionality of Blackwell's expulsion. We

disagree with this reasoning and decide instead that the University has not expressed a valid interest in upholding the Policy which is unrelated to the suppression of free expression.

The University claims that its interest is in stemming what is seen as a tide of racial intolerance within the University and in providing an environment for all of its students free of harassment and more conducive to learning. These interests, though laudable, are directly related to the suppression of free expression. In order to provide such an environment for its students, the University must prohibit some forms of expression thought to be particularly odious. The University's concerns "blossom only when a person's [conduct] communicates some message, and thus are related 'to the suppression of free expression' within the meaning of O'Brien." Johnson at 410.

Thus, we are outside of the O'Brien test as we hold that the University's interest is related to suppression of expression. However, we need not apply any test, be it that of O'Brien or a stricter standard as we also hold that both the speech and conduct at issue are not of the sort meant to be protected by the first amendment.

III.

Neither the fact that the speech and conduct at issue implicate the first amendment nor the fact that the University's interest is related to the suppression of free expression necessarily means that the speech and conduct cannot be

prohibited. Various kinds of expression have been held to have so little value within the marketplace of ideas as to be devoid of protection by the first amendment.

The classic idea put forward in Schenk v. United States, 249 U.S. 47 (1919) that yelling "fire" in a crowded theatre is speech that can constitutionally be disallowed is an example of the premise that first amendment rights are not absolute. Another example is libelous speech which has remained unprotected by the first amendment and regulated by state law. See, e.g. New York Times v. Sullivan, 376 U.S. 254 (1964). More applicable to the case at hand, however, are the doctrines dealing with vulgar, offensive and shocking speech and with "fighting words."

In Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 a student at a high school assembly gave a speech to endorse a particular student government candidate and used graphically sexual metaphors and analogies throughout the speech. A Bethel High School disciplinary rule prohibited conduct which "materially and substantially interferes with the educational process. . .including the use of obscene, profane language or gestures." The student was suspended for several days as a result of his violation of the disciplinary rule.

The United States Supreme Court upheld the school policy, stating that the freedom to advocate unpopular and controversial viewpoints must be balanced against society's interest in teaching students socially appropriate behavior. The Court held that the school district acted entirely within its permissible

authority in prohibiting such vulgar speech.

As in Bethel, Washington and Lee State University also acted in a permissible fashion by punishing the vulgar and lewd language and conduct of Blackwell. Such language is not afforded protection by the first amendment. The offensiveness of the phrase Blackwell chose to shout and the offensive implications of the cross burning are far more "obscene" than any sexually explicit language could be.

Additionally, Blackwell's conduct rose to the level of "fighting words" which is also unprotected by the Constitution. Fighting words were defined in Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1941) as speech that has "a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." We find that Blackwell's remarks and conduct in this instance had a direct tendency to cause acts of violence. The individual who did see and hear Blackwell's behavior that evening, Ken Mitchell, reacted with commendable restraint in capturing and holding Blackwell until the police arrived. Mitchell's reaction was more civil than most people's reactions might have been. The historical significance of the uniform of the Ku Klux Klan and midnight cross burnings, as well as the highly insulting implications of Blackwell's racist epithet could, and perhaps should, stir strong and emotionally charged reactions.

The Court in Chaplinsky explicated the concept of certain categories of speech remaining unprotected by the first amendment

when it stated:

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 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. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.'

(quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).)

Thus, under Bethel and Chaplinsky, offensive speech and conduct such as that engaged in by Blackwell in this case may be prohibited and are not afforded protection by the first amendment.

CONCLUSION

In affirming the court below, we hold that, although the University in enacting its policy acted to suppress free expression, the kind of expression suppressed in this instance is not protected by the first amendment. Thus, as applied to Blackwell, the Policy is not unconstitutional. We also affirm the court below in holding that the policy on its face is not unconstitutionally vague or overbroad.

Affirmed.