

1. Whether the District Court and Appellate Court erred in holding that Blackwell's expulsion from William and Lee State University was not violative of the First Amendment?

IN THE
SUPREME COURT OF THE UNITED STATES
SITTING IN LEWIS
October Term, 1991

NO. LH91-537591

Blake W. Blackwell,

Petitioner,

v.

William and Lee State University,

Respondent.

ON APPEAL FROM THE FIFTEENTH CIRCUIT
COURT OF APPEALS- LEWIS HALL

BRIEF FOR PETITIONER

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QUESTION PRESENTED

- I. Whether the District Court and Appellate Court erred in holding that Blackwell's expulsion from William and Lee State University was not violative of the First Amendment?

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BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Plaintiff Blake W. Blackwell was an 18-year-old freshman at William and Lee State University (W&L) in Traveler, Lewis Hall. W&L is fully funded by the state of Lewis Hall.

On October 31, 1990, Blackwell dressed in a Ku Klux Klan uniform and went to the Black Student Alliance (BSA) house to "give them a Halloween scare."

At about 11:30 p.m., Ken Mitchell was inside the BSA house located on the W&L campus. Mitchell is a 22-year-old black male who was a senior at W&L at the time of the incident. Mitchell reported that he saw Blackwell dressed in a Ku Klux Klan uniform.

Mitchell, after some momentary shock, continued to watch Blackwell light a gasoline-soaked cross that Blackwell had planted in the front yard of the house. Blackwell then stepped away from the cross and shouted "All Blacks back to Africa!" while shaking his fist.

Angered by Blackwell's actions, Mitchell ran out of the fraternity house, tackled and held Blackwell until the campus police arrived. None of the other BSA members responded to Blackwell's actions.

As a result of his actions, Blackwell was expelled due to his violation of the W&L Policy on Discrimination and Discriminatory Harassment of students in the University Environment (the Policy). The Policy was established to curb 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 about an underground White Student Union being formed.

The Policy was viewed by the faculty 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 W&L Policy reads in pertinent part:

(a) no student...shall by any means willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize any other person at William and Lee because of the other person's race, ethnicity....

(c) any person found to have violated (a)...shall be punished by immediate expulsion....

On January 18, 1991, Blackwell brought suit against W&L in the federal district court of Lewis Hall under 42 U.S.C. section 1983 "Civil Action for Deprivation of Rights." Blackwell claimed that his expulsion under the Policy as a result of his actions was violative of the First Amendment. The District Court decided that Blackwell's expulsion was not violative of his First Amendment rights. Blackwell appealed and the Appellate Court affirmed. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The District Court and Appellate Court erred in holding that Blackwell's expulsion was not violative of the First Amendment. W&L's Policy is content-based or related to the suppression of free expression and subject to the most exacting scrutiny. Therefore, for the W&L Policy to withstand constitutional scrutiny, W&L must articulate a compelling interest in the preservation of its Policy that justifies Blackwell's expulsion, and must have chosen the least restrictive means to achieve the ends of its Policy.

W&L's interest in curbing the rising tide of racial harassment on campus is an insufficient interest in preserving its Policy that would justify Blackwell's expulsion.

If the Court finds that W&L has a sufficient interest in the preservation its Policy, the words "any means" in the Policy are overbroad. Thus, W&L still has not chosen the least restrictive means to achieve the ends of its Policy.

Additionally, the Appellate Court's reliance on the "fighting words" doctrine is misplaced. Although Blackwell's conduct would anger most people, it did not rise to the level of "fighting words" as understood by the average addressee.

Furthermore, the W&L Policy is overbroad and vague. The Policy encompasses a substantial amount of constitutionally protected speech, and men of common intelligence must guess at its meaning. Therefore, the Policy is unconstitutional.

ARGUMENT

I. THE DISTRICT COURT AND THE APPELLATE COURT ERRED IN HOLDING THAT BLACKWELL'S EXPULSION FROM WILLIAM AND LEE STATE UNIVERSITY WAS NOT VIOLATIVE OF THE FIRST AMENDMENT.

The First Amendment forbids the abridgement of "speech." Blackwell's statement "All blacks back to Africa!" is clearly pure speech.

The Supreme Court has also acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). In order for the conduct to possess sufficient communicative elements to be considered speech within the meaning of the First Amendment, the Court must decide whether "[a]n intent to convey a particularized message was present...and [whether] the likelihood was great that the message would be understood by those who viewed it." Id. at 410-411.

In Texas v. Johnson, 491 U.S. 397 (1989), the Court held that the burning of a flag as a means of political protest in opposition to the renomination of Ronald Reagan as President was sufficiently imbued with elements of communication to implicate the First Amendment. Id.

Similarly, in the present case, Blackwell's burning of a cross while wearing a Ku Klux Klan uniform demonstrated an intent to convey a particularized message. The burning of a cross while wearing a Ku Klux Klan uniform has been for many years the symbol of the White Aryan Race of racial and ethnic hatred. Thus there

is no question of the message intended to be conveyed by this conduct, and any reasonable person who viewed the conduct would have understood its message. Therefore, Blackwell's conduct was sufficiently imbued with elements of communication to implicate the First Amendment.

A. THE WILLIAM AND LEE STATE UNIVERSITY
POLICY IS CONTENT-BASED OR RELATED TO THE SUPPRESSION
OF FREE EXPRESSION AND SUBJECT TO THE MOST EXACTING
SCRUTINY.

Although Blackwell's words and conduct are considered "speech" within the meaning of the First Amendment, both are not necessarily protected under the First Amendment. United States v. O'Brien, 391 U.S. 367, 371 (1968). In making this determination, the Supreme Court of the United States has articulated two standards of review. If the governmental interest in regulation is related to the suppression of free expression then a more demanding standard of review is required. Texas v. Johnson, 491 U.S. 397, 403 (1989). If the governmental interest in regulation is unrelated to the suppression of free expression then the less stringent standard of review in O'Brien is applied. Id.

In Boos v. Barry, 485 U.S. 312 (1988), the Court considered the constitutionality of a law prohibiting the "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" Id. at 315.

In holding that the law was content-based or related to the suppression of free expression, the Court stressed that the government, in justifying its law, did not aim at the "secondary

effects" of picket signs in front of embassies. Id. at 321. That is, the government did not point to congestion or to the need to protect the security of embassies. Id. Rather, the government focused only on the need to protect the "dignity" of foreign diplomatic personnel by insulating them from speech that was critical of their governments. Id.

The Court reasoned further that because "the emotive impact of speech on its audience is not a 'secondary effect' but a potential 'primary effect,'" the regulation of the speech was content-based or directly related to the suppression of free expression. Id.

Similarly, W&L's regulation of speech in its Policy is content-based. W&L asserts, as a justification for its Policy, as a result of growing racial intolerance and harassment on campus, an interest in providing the university with recourse against those individuals engaging in racist behavior.

In justifying its Policy, however, W&L does not point to the fear that such behavior will "materially and substantially" interfere with school activities, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), or that such behavior will cause a breach of the peace, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), or that such behavior will cause responsive violence. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978). Rather, W&L focuses only on the direct impact--the dignitary impact--of speech on minority students on campus.

The W&L Policy has a "willful and intentional"¹ element. That is, the Policy is intentionally designed to punish only those students who seriously offend others. Texas, 491 U.S. at 411. Thus whether Blackwell's speech and conduct violated the Policy "depended on the likely communicative impact of his [speech and] expressive conduct." Id. W&L articulates no other reason for the implementation of its Policy except to curb the rising tide of racial harassment on campus. The term "harassment" suggests an attack on one's dignity, which is emotive as defined by Boos. Thus, the W&L Policy is content-based and subject to the most exacting scrutiny. Boos, 485 U.S. at 321.

B. W&L HAS NOT SHOWN THAT ITS POLICY IS NECESSARY TO SERVE A COMPELLING STATE INTEREST THAT WOULD JUSTIFY BLACKWELL'S EXPULSION; THEREFORE, NO FURTHER ANALYSIS IS NECESSARY. THE POLICY IS UNCONSTITUTIONAL.

For a state to regulate speech in a policy that is content-based, it must show that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. (quoting Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983)) (emphasis added). If either prong of the test fails then the speech which the government seeks to regulate cannot be regulated. See Texas v. Johnson, 491 U.S. at 397.

The regulation is necessary to serve a compelling government interest if the state's interest in preserving its regulation

¹ The wording of the policy suggests that it has a specific or malicious intent element. This issue will be addressed in the vagueness section.

justifies its action. Id. at 410. Hence, in the present case, W&L's interest in preserving its Policy must justify Blackwell's expulsion to satisfy the first prong of the Boos test.

W&L is a public school. The lawn of the Black Students Alliance (BSA) is a public forum.² School facilities are public forums if school officials have "by policy or by practice" opened those facilities for use by some segment of the public, such as a student organization. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988). A fraternity is a student organization. One of the main purposes of establishing fraternities is to develop organizations whereby diverse students can exchange their life experiences with one another. One of the vehicles for accomplishing this objective is through open discourse about one's political and social viewpoints. Such discourse, for instance, in the course of pledging a fraternity, often occurs on the lawns of fraternities. Thus, as a matter of "policy" and "practice," universities have encouraged students to pledge fraternities, and have allowed open discourse on the lawns of fraternities because open discourse is important to universities' goals of educational enrichment of students. There is no reason to believe W&L encourages the pledging of fraternal organizations for a contrary reason. Because BSA is a student organization, and

² It is not clear from the facts whether the lawn of BSA house is on public property. There is no evidence establishing that the BSA house is privately owned, is rented, or is borrowed from the university, which might suggest that the lawn is on public property. In any event, the lawn is arguably a public forum.

W&L has arguably designated the lawn of BSA "by policy and by practice" as a forum for public discourse, BSA is therefore a public forum and the standard in Tinker governs. Id. at 270.

Tinker is the seminal case recognizing the free expression rights of public school students. Tinker involved the suspension of three high school students for wearing black armbands in protest to the Vietnam War. Tinker, 393 U.S. at 503. In reversing the suspension, the Court articulated that students in public schools "do not shed their constitutional rights to freedom of speech at the schoolhouse gate." Id. at 506. They cannot be punished merely for expressing their personal views on the school premises," Hazelwood, 484 U.S. at 266, unless school authorities can show that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker, 393 U.S. at 509.

W&L asserts an interest in curbing the rising tide of racial harassment on campus. In a high school or elementary school setting "the role of the school as an inculcator of civic values," Smolla, Academic Freedom, Hate Speech, And The Idea Of A University, 53 Law and Contemporary Problems 195, 223 (1990), is paramount. However, college students are adults. Id. The First Amendment guarantees wide freedom in matters of adult public discourse. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Blackwell's conduct was a manifestation of his feelings towards Blacks in America. Although most people would

find Blackwell's conduct offensive and repugnant to the core values held generally by the people of this country, it is an insufficient basis to construct and apply a policy to force persons who wish to ventilate "their dissident views" into avoiding particular forms of expression. Cohen v. California, 403 U.S. 15, 23 (1971).

Collin v. Smith, 578 F.2d at 1197 is illustrative of this point. In Collin, the National Socialist Party of America (NSPA), a Party reminiscent of the German Nazi Party during the Third Reich, announced plans to march in Skokie, Illinois. Id. at 1199. The NSPA planned to wear uniforms including swastikas and planned to carry placards with statements advocating free speech for the White man. Id. at 1200. Skokie has a large Jewish population.

The court noted that the NSPA knew that many people would find their demonstration emotionally disturbing. Id. Moreover, the court emphasized that their task was to determine whether the First Amendment protects the activity in which the NSPA intends to engage, "not to render moral judgment on their views or tactics." Id. at 1201.

In finding the ordinances unconstitutional, the court stressed that the restriction on expressive activity because of its content would undermine the fundamental principle of the First Amendment that debate on public issues should be "uninhibited, robust, and wide-open." Id. at 1202.

The principles of Collin are applicable to the facts of this case. Blackwell knew he was at the BSA house and that his conduct

would evoke in members of BSA strong emotional reactions. However, the fact that the administration also found Blackwell's conduct offensive does not give them carte blanche to expel Blackwell. Blackwell's conduct had to have "materially and substantially" interfered with work of the school or "impinged upon the rights of other students." Tinker, 393 U.S. at 509.

In Bethel School Dist. No. 403 v. Fraser, 478 U.S. at 675, the Court, applying the standard in Tinker, upheld disciplinary action against a student for giving a mildly obscene campaign speech at a high school assembly. The Court distinguished this speech from the expression in Tinker on the ground that the obscene speech "materially and substantially" interfered with schools educational goals and intruded on the rights of others. Id. at 680.

Similarly, the Court in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. at 260 upheld a school's right to exercise editorial control over a high school student newspaper. However, the Court admonished that Tinker mandates that a school tolerate particular student speech that happens to occur on school premises as opposed to speech through newspapers or plays. Id. at 271. Speech through school newspapers and school plays are more likely to bear the imprimatur of the school and thus can fairly be characterized as part of the school curriculum. Id. "Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself'... from speech that is...[also]...unsuitable for immature audiences." Id.

Both Bethel and Hazelwood are easily distinguished here by understanding that Blackwell's conduct took place in a university setting and took place in a public forum. While some of the incidents leading to the enactment of the W&L Policy, such as the statements in the newspaper and the radio jokes, can be more easily regulated by the University, it does not follow that areas designated "by policy and practice" to students as public forums can be as easily regulated. Id. at 267.

There is nothing in the record evincing that Blackwell's conduct excited or caused other students to join in his conduct. Nor is there any evidence of retaliatory violence by other students. In fact, only one BSA student responded to his action and non-violently. Thus, there does not appear to have been any "material and substantial" impairment of the educational goals of W&L. In Brandenburg v. Ohio, 395 U.S. 444 (1969), a Ku Klux Klan member at a rally used harsher language than Blackwell in referring to Blacks. In invalidating the statute the Klan member violated, the Court intimated that there was nothing in the record which indicated that the Ku Klux Klan member's conduct posed an immediate physical threat to anyone. Id. at 448-449.

The Court in Texas summarized it best: "To say that [W&L] has an interest in encouraging proper treatment of...[black students], however is not to say that it may [expel] a person for burning a [cross] as a means of political protest." Texas, 491 U.S. at 418.

W&L has not articulated a compelling interest in preserving

its Policy that justifies Blackwell's expulsion. Therefore, W&L's regulation of Blackwell's speech is unconstitutional.

C. EVEN IF THE COURT FINDS W&L HAD A COMPELLING INTEREST IN PRESERVING ITS POLICY THE REGULATION STILL DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY BECAUSE IT IS NOT NARROWLY DRAWN TO ACHIEVE THAT END.

Even if the Court finds W&L had a compelling interest in preserving its Policy, to withstand constitutional scrutiny, the regulation must be narrowly drawn to achieve that end. Boos, 485 U.S. at 321. In determining whether a government has chosen the least restrictive means to achieve the ends of its regulation, courts have looked to the intent of the drafters in creating such regulation. Id. at 324.

In the 1989 case of Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), the Court upheld the District Court's invalidation of section 223(b) of the Communications Act of 1934 which banned interstate commercial telephone messages, commonly known as "dial-a-porn." Id. In its analysis, the Court looked at the legislative intent of the statute, which sought to restrict access by minors to "dial-a-porn." The Court reasoned that in restricting access by minors to "dial-a-porn" the government also restricted access by adults. Id. at 131. Hence, the government did not choose the least restrictive means in promulgating its statute and therefore the ban did not pass constitutional scrutiny. Id.

Likewise, in the present case, W&L did not choose the least restrictive means in enacting its Policy. W&L pronounced several

incidents leading to the enactment of its Policy. Among those incidents were racial jokes aired on the campus radio station; fliers distributed advocating the unification of White Aryans; and racist remarks scratched on a counselor's office door. The Policy mandates that "[n]o student...shall by any means willfully and intentionally injure, intimidate...any other person...because of the other person's race...."

The words "any means" in the Policy are overbroad. A student could willfully and intentionally hang a confederate flag in his dorm room with the will and intent to intimidate any black person who enters. In light of the objectives of the Policy and the incidents leading to its enactment, clearly this is not the type of harassment which the Policy intended to eradicate. However, this conduct clearly falls within the meaning of the words "any means." Thus, W&L did not choose the least restrictive means in enacting its Policy and therefore the Policy still does not pass constitutional scrutiny.

D. THE APPELLATE COURT ERRED IN APPLYING THE CHAPLINSKY DOCTRINE WHEN BLACKWELL'S SPEECH WAS NOT MADE IN A FACE-TO-FACE CONFRONTATION AND HIS SPEECH WAS UNLIKELY TO CAUSE A BREACH OF THE PEACE.

Chaplinsky v. New Hampshire, 315 U.S. at 508 was the seminal case that developed the so-called "fighting words" doctrine. The doctrine made unconstitutional speech directed at an individual in a face-to-face confrontation that was likely to cause a breach of the peace. Id. at 573.

In the present case, Blackwell's speech was not directed at anyone in particular. If the speech was not directed at anyone in

particular, it cannot be said that Blackwell was advocating any sort of action. Hess v. Indiana, 414 U.S. 105, 108-109 (1973). Further, the speech was not made in a face-to-face confrontation. The BSA student was inside the fraternity. Unless the speech is made to an individual in a face-to-face confrontation, there is no likelihood of a breach of peace. Cf. Gooding v. Wilson, 405 U.S. 518, 529-530 (1972) (Burger, J., dissenting) (conceding that Chaplinsky applies only to face-to-face confrontations).

In addition, even if the Court finds that Chaplinsky is not limited to face-to-face confrontations, the speech must have been understood by men of common intelligence as conduct likely to cause an average addressee to fight. Chaplinsky, 315 U.S. at 573. College students are men and women of common intelligence. It is by this standard that Blackwell's conduct should be judged.

Here, the BSA student did not respond immediately to Blackwell's conduct. It was only after Blackwell's statement "All Blacks back to Africa!" did the BSA student respond. The BSA student's response was merely the tackling and holding of Blackwell until the campus police arrived. The BSA student sought no form of retaliatory violence. There is no evidence that any of the BSA students were violently aroused by Blackwell's conduct. Cohen v. California, 403 U.S. at 20. Although Blackwell's conduct clearly angered BSA members and would likely anger most people, it cannot be said that Blackwell's conduct was likely to cause an average addressee to fight. This is true especially if judged by the reactions of the BSA members--men of common intelligence.

Thus, the Chaplinsky doctrine is inapplicable.

E. THE DISTRICT COURT AND THE APPELLATE COURT ERRED
IN HOLDING THAT THE WILLIAM AND LEE STATE
UNIVERSITY POLICY WAS NOT OVERBROAD AND VAGUE.

The legitimate application of a statute or policy can be found unconstitutional if the statute or policy is facially overbroad or vague. Houston v. Hill, 482 U.S. 451 (1987).

1. THE DISTRICT COURT AND THE APPELLATE COURT ERRED
IN HOLDING THAT THE WILLIAM AND LEE STATE
UNIVERSITY POLICY WAS NOT OVERBROAD WHEN IT
REACHES A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY
PROTECTED CONDUCT.

In determining whether a statute or policy is facially overbroad, the court must ask whether the "enactment reaches a substantial amount of constitutionally protected conduct." Id. at 458. (quoting Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)).

In Houston, Hill was arrested under a Houston Code of Ordinances which made it "unlawful for any person to...in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty...." Id. at 455. (emphasis added). Hill challenged the ordinance as being constitutionally overbroad. In finding that the ordinance was too sweeping and constitutionally overbroad, the Court stressed that the ordinance was not limited to "fighting words," and prohibited speech that in any manner interrupts an officer. Id. at 462. The words "any manner" forbade citizens, like Hill, from criticizing and insulting police officers, although such conduct was protected. Id.

The Court in Doe v. University of Michigan, 721 F.Supp. 852

(E.D. Mich. 1989), declared a narrower university policy than the W&L Policy overbroad and unconstitutional. In Doe, in response to similar racial incidents, the University of Michigan developed a harassment policy which prohibited individuals, under the penalty of sanctions, from "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity...." Id. at 856. (emphasis added). The policy continued to outline other acts and gave examples of acts which might fall within the scope of the policy. Id. at 856, 858. The Court found the policy overbroad because the policy, on its face, with the words "any behavior," prohibited a substantial amount of protected conduct. Id. at 864.

Similarly, the W&L Policy contains the words "any means." W&L has tried to broadly sanction speech and conduct directed at students, particularly minority students, by expelling any person who by "any means" injures, intimidates, etc., another student because of their race or ethnicity. Facially, the W&L Policy would prevent a white student, for example, from expressing a negative opinion about affirmative action because the opinion might be labeled as intimidating. Even if the white student intended to intimidate the black student with such speech, it is clearly protected speech under the First Amendment. Gooding v. Wilson, 405 U.S. at 518.

In response to the "in any manner" language in the Houston ordinance in Houston, the Court stressed that "if absolute insurance of tranquility is required, we may as well forget about

free speech. Under such a requirement, the only 'free' speech would consist of platitudes." Houston, 482 U.S. at 462 & n.11. Thus, the language in W&L's Policy is too sweeping and encompasses a substantial amount of constitutionally protected speech and conduct. Id. at 462.

2. THE DISTRICT COURT AND THE APPELLATE COURT
ERRED IN HOLDING THAT THE WILLIAM AND LEE STATE
UNIVERSITY POLICY WAS NOT VAGUE WHEN MEN
OF COMMON INTELLIGENCE MUST GUESS AT ITS MEANING.

A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." Broaderick v. Oklahoma, 413 U.S. 601, 607 (1973). Here, in order to violate the W&L Policy, the act must have been done "willfully and intentionally." The words "willfully and intentionally" together might require the act to have been done maliciously. Or it could plausibly require that the act to have been done intentionally. The language of the Policy gives no guidance as to how these words should be construed. For instance, W&L did not attempt to define the words in its Policy or give an interpretive guide. See Doe, 721 F.Supp. at 856, 858. Accordingly, one would constantly have to guess at the meaning of the words before making a controversial comment out of fear of violating the Policy.

Further, it is unclear what type of conduct would "victimize or stigmatize" another person. Id. at 867. The Policy lacks a causation element: If the university does not articulate "the prohibited quantum of disturbance" in its policy or it is not readily discernible from the announced purpose of the policy, then the policy is vague. Boos, 485 U.S. at 332. For example, a

black student hangs a poster of Malcom X on his wall. Malcom X is a strong advocate of a militant reaction to the oppression of Black people by White people. The poster might refer to a threat of future retaliation by the black student. Or it might refer to a threat to disrupt the white student's academic progress because the victimizing and stigmatizing conduct is so distracting. Doe, 721 F.Supp. at 867. The former, clearly, would be unprotected conduct. However, it is uncertain whether the latter would be. Id. What the words victimizing and stigmatizing means in the Policy and to what conduct the words apply is facially undiscernible and the announced purpose behind the policy is not revealing.

Similarly, in the present case, it is unclear whether Blackwell's burning of the cross and his words "All Blacks back to Africa!" would victimize or stigmatize a person. It is unclear whether the Policy was enacted to prevent breaches of the peace or whether it was enacted to prevent the disruption of school activity. The Policy does not give fair notice of its scope. Boos, 485 U.S. at 332. Therefore, the Policy is vague and unconstitutional.

CONCLUSION

For the reasons set forth above, I respectfully request this Court to reverse the rulings of the District Court and the Appellate Court.

Respectfully submitted,

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