

IN THE  
SUPREME COURT OF THE UNITED STATES  
SITTING IN LEWIS HALL

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Supreme Court No. LH91-537591

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BLAKE W. BLACKWELL,  
Petitioner,

v.

WILLIAM AND LEE STATE UNIVERSITY,  
Respondent.

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On Appeal from the Fifteenth Circuit Court  
of Appeals - Lewis Hall

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the trial and appellate courts err 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 RESPONDENT

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## STATEMENT OF THE CASE

During petitioner Blake W. Blackwell's freshman year at state-funded William and Lee State University in Traveler, Lewis Hall, he was pledging the Delta Gamma fraternity. On Halloween night, 1990, several brothers instructed Blackwell to wear a Ku Klux Klan costume for the night. During the night, one of Blackwell's fraternity brothers dared him to go to the Black Student Alliance (BSA) house and "give them a Halloween scare." After initially refusing, Blackwell eventually headed toward the BSA house.

Inside the BSA house, Ken Mitchell witnessed Blackwell light a gasoline-soaked cross in the front yard, shake his fist and shout "All blacks back to Africa." Angered by Blackwell's actions and his remark, Mitchell ran out of the house, tackled Blackwell and pulled off the Klan hood. Mitchell then shouted for someone inside the BSA house to call the campus police.

On November 2, 1990, Blackwell was expelled pursuant to the University Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy). The pertinent parts 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 with immediate expulsion with no opportunity for readmission at William and Lee.

Blackwell sued the University under 42 U.S.C. §1983 claiming his expulsion was in violation of his First Amendment rights. He also claimed that the Policy was both overbroad and vague. Neither the District Court nor the Court of Appeals agreed that Blackwell's expulsion violated his First Amendment rights or that the Policy was either vague or overbroad.

#### SUMMARY OF ARGUMENT

The trial and appellate courts did not err in holding that William and Lee's Policy could be applied to Blackwell's wearing a Ku Klux Klan costume, burning a cross and yelling a racial epithet without violating his First Amendment rights. In addition, both courts correctly held that the Policy was neither vague nor overbroad.

Conduct does not fall under the protection of the First Amendment unless it is symbolic conduct. Even if Blackwell's conduct can be considered symbolic speech, freedom of speech has never been unabridged. Both speech which creates a clear and present danger of substantive evil and speech classified as "fighting words" have always been excluded from First Amendment protection. Even protected forms of speech may be restricted to appropriate times, places and manners.



Undoubtedly, Blackwell's actions fall into of these categories. Given the history of Ku Klux Klan cross burning and lynching, the average person, particularly the average African American, would consider those symbolic acts as creating a clear and present danger of injury and would react by fighting. Additionally, Blackwell chose to conduct these activities not in a public forum but on the lawn of the Black Student Alliance house.

Even though the words fall under the categories of unprotected speech, the court still must determine if the government regulation is sufficiently justified. Because the Policy did not regulate mere conduct but actions which were intentionally injurious, the government's interest was unrelated to the suppression of free expression. Thus, the regulation is justified if it is within the Constitutional power of the University and furthers an important University interest while restricting only those First Amendment freedoms that are essential for the furtherance of that interest. Because the University had within its police powers the right to ensure a safe academic atmosphere and the Policy furthered that objective by punishing students who willfully disrupted that atmosphere by intentionally injuring other students, the university was justified in enacting the Policy. Even if the court holds that the Policy is related to the suppression of free expression because it only limits conduct that communicates some message, the University has a compelling interest in protecting its students from negative influences during a crucially formative period in

their lives. Therefore, the Policy is justified even under a strict scrutiny test.

Finally, the Policy imposed punishment only for acts intentionally with the purpose of injuring, intimidating, oppressing, threatening, victimizing or stigmatizing. Thus, the Policy was not vague because it provided adequate notice to both students who had to obey the Policy and administrators who had to enforce the Policy. Moreover, because the Policy punished only willfully and intentionally intimidating speech, it did not include a substantial amount of protected speech along with speech it could legitimately regulate. Therefore, the Policy was not overbroad.

#### ARGUMENT

#### **I. The Trial And Appellate Courts Correctly Held That The University's Policy Could Be Applied To Limit Blackwell's Speech And Conduct Without Violating His First Amendment Right Of Freedom Of Speech**

In determining whether Blackwell's expulsion under the Policy violated his First Amendment rights, the trial and appellate court had to consider both Blackwell's conduct, wearing a Ku Klux Klan costume and burning a cross, as well as his speech, yelling a racial epithet.

##### **A. First Amendment Protection Does Not Apply To Conduct**

Clearly, the protection of the First Amendment extends only to freedom of religion, freedom of speech, freedom of the press, freedom to assemble peaceably and freedom to petition the

government for redress of grievances. No where does the First Amendment mention freedom of conduct.

Indeed, the First Amendment specifically limits the kind of conduct in which a person can engage. While a person has the right to assemble under the First Amendment, such assembly must be peaceable. Consequently, a person has never been free to conduct himself in a way which breaches the peace. In fact, the government has always regulated the peace as part of its broad police powers. As a state-supported university, William and Lee had the broad police powers to regulate breaches of the peace such as the one that occurred in response to Blackwell's conduct. Therefore, both the trial and appellate courts should have held that the Policy did not violate Blackwell's First Amendment rights in regard to his burning a cross and wearing a Ku Klux Klan costume. Clearly, those activities were purely conduct and unquestionably do not fall within scope of the First Amendment protection.

B. Conduct Protected By The First Amendment As Symbolic Speech

Sometimes, however, the line between conduct and speech becomes blurred and the court must decide if the conduct rises to the level of symbolic speech. When determining whether conduct is protected under the First Amendment as symbolic speech, the court must first judge whether the conduct is expressive. Spence v. Washington, 418 U.S. 405, 410-11 (1974). The court must consider whether the conduct displays an intent to convey a particularized message. Id. In addition, the court must ascertain whether in the

surrounding circumstances the likelihood was great that the message would be understood by those who viewed it. Id.

In the case at hand, the trial and appellate court concluded that Blackwell's conduct rose to the level of symbolic speech. Both a Ku Klux Klan hood and a burning cross historically convey a particularized message of racial hatred and harassment. Considering the history of these symbols, Blackwell's conduct conveyed a particularized message which was likely to be understood, particularly when the conduct occurred on the lawn of the Black Student Alliance. Therefore, Blackwell's conduct contained the necessary expressive elements to be evaluated as symbolic speech. Id.

C. Speech Unprotected By The First Amendment

Freedom of speech, whether literal speech or symbolic speech, has never been absolute. Neither Congress nor the Supreme Court have ever held that a man can say any thing he chooses, any where he chooses or under any circumstances he chooses. Beginning with the Sedition Act of 1798, Congress and the Supreme Court have limited the types of speech which the First Amendment can legitimately protect. Historically, large categories of speech, literal and symbolic, have been excluded from the protection of the First Amendment.

In Schenck v. United States, 249 U.S. 47, 52 (1919), the Supreme Court held that words that are "used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has

a right to prevent" were not protected by the First Amendment. Schenck, 249 U.S. at 52. If, as the Schenck court held, a man may not yell fire in a crowded theater and cause a panic, a man certainly may not shout racial epithets and use symbolic speech which was clearly racially intimidating on the front lawn of the Black Student Alliance.

The Supreme Court has consistently held that freedom of expression, even protected forms, may be restricted to appropriate times, places and manners. University of Utah Students Against Apartheid v. Peterson, 649 F.Supp. 1200, 1208 (D. Utah, C.D. 1986). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Id., quoting Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 799-800 (1985). Unquestionably, the government cannot protect intimidating and harassing speech directed at a specific race at a state-supported university, particularly when the speech occurs on the front lawn of building where that race is known to congregate. Protecting intimidating and harassing speech under the guise of the First Amendment would make a mockery of the freedoms embodied in the Constitution.

Finally, "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

the peace" are outside the realm of First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)). In the case at bar, a member of the Black Student Alliance did take action in response to Blackwell's speech and conduct. Admirably, this member did not resort to physical violence; however, Blackwell did excite enough action for a breach of the peace. Because Blackwell's speech and expressive conduct incited precisely the reaction which Cantwell and Chaplinsky explicitly prohibit, his speech and conduct cannot be protected by the First Amendment.

D. Government's Interest In Regulation

Even if the expressive speech does not fall under the "fighting words" doctrine of Chaplinsky, the court must determine if the government interest sufficiently justifies the regulation. Differing standards apply depending on whether the government's interest in the regulation is unrelated or related to the suppression of free expression. Texas v. Johnson, 491 U.S. 397, 407 (1989).

In United States v. Lee, 935 F.2d 952, 953 (8th Cir. 1991), the court upheld the conviction of a man who burned a cross in a field adjacent to a racially mixed apartment complex. Lee, 935 F.2d at 953. Lee was convicted under a federal statute making illegal conspiracies "to injure, oppress, threaten or intimidate" any citizen in the free exercise of any statutory or constitutional right. Lee, 935 F.2d at 954. The statute did not prohibit conspiracies to communicate racist messages or to burn crosses.

What the statute did prohibit was conspiracies to threaten or intimidate others in the exercise of their federally guaranteed rights. Lee, F.2d at 955. The court held the statute was content neutral; therefore, the governmental regulation was not related to the suppression of free expression. Lee, F.2d at 954.

Similarly in the case at bar, the District Court properly decided that government's interest in regulation was unrelated to the suppression of free expression. Clearly, the Policy was not enacted to prohibit free expression. Blackwell had the freedom to burn crosses. However, Blackwell could not "willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize" another student through his conduct. Undoubtedly Blackwell acted willfully and intentionally when he chose to wear the Ku Klux Klan hood and to burn the cross not on the central quadrangle of the university or on the football field but on the lawn of the Black Student Alliance. Blackwell had the complete freedom to burn a cross in the university quadrangle; however, he chose not to act at a place or in a manner which was permissible. Given the historical significance Blackwell's acts, he obviously meant to intimidate the members of the Black Student Alliance. Under the Constitutionally valid policy which did not prohibit speech but conduct that willfully intimidated, Blackwell did not have the right to burn a cross at a place or in a manner which would intimidate other students.



1. Government's Interest Is Unrelated to The  
Suppression Of Free Expression

If the government's interest is unrelated to the suppression of free expression, as in the case at bar, then the court relies on the test announced in United States v. O'Brien, 391 U.S. 367, 377 (1968), to decide if the regulation is sufficiently justified. O'Brien, 391 at 377. A government regulation will be allowed to stand if:

- 1.) the regulation is within the constitutional power of the Government;
- 2.) the regulation furthers an important or substantial governmental interest; and
- 3.) 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.

a. The Policy Is Within Constitutional Power Of  
The University

First, the regulation must be within the Constitutional power of the government. O'Brien, 391 U.S. at 377. The Policy was enacted by the university as part of its police powers. Because the university is entirely supported by state funds, it acquires regulatory powers as any other governmental agency would. As a part of its broad police powers, the university can protect the health, safety, morals and general welfare of its student body. Thus, the university has within its power the ability to enforce policies



which will ensure a safe and productive academic atmosphere which is not threatening to its students because of their race.

b. The Policy Furthers A Substantial University Interest

Second, the regulation must further an important or substantial governmental interest. O'Brien, 391 U.S. at 377. According to the University, the Policy was enacted to control "the rising tide of racial intolerance and harassment on campus." Obviously, the University has a substantial interest in providing its students an educational atmosphere which is free from discriminatory harassment.

In Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986), the court held that an employee has a right to work in an environment free from discriminatory intimidation, ridicule, and insult. Meritor, 477 U.S. at 65, quoting Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 ( 5th Cir. 1971). Therefore, employers have an obligation to protect employees from a hostile working environment.

Similarly, a student has a right to learn in an environment free from discriminatory intimidation, ridicule and insult. Thus, the University has a duty to protect its students from a hostile educational environment. Without a mechanism for control such as the Policy enacted by William and Lee, the University would have no way of furthering its interest in maintaining a productive educational atmosphere free of harassment. In this case, the University's interest in the regulation was obviously substantial

as the measure was taken in reaction to an already hostile educational environment stemming from several incidents of racial harassment.

c. The Incidental Restriction On First Amendment Freedom Of Speech Is No Greater Than Is Essential To Provide An Atmosphere Free Of Violence At The University

Third, the incidental restriction on alleged First Amendment freedoms must be no greater than is essential for the furtherance of that interest. O'Brien, 391 at 377. For the restriction to be no greater than is necessary, the regulation must be narrowly drawn to address only the specific evil at hand. Broadrick v. Oklahoma, 413 U.S. 601, (1973). In the case at bar, the regulation did not punish random speech or conduct. Rather the regulation was limited to things which "willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize." To violate the Policy, a student must act with a specific intent to disturb the creative educational environment.

In addition, alternate channels of expression or communication must exist. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In this case, the National Park Service was allowed to restrict the time, place and manner in which protestors could demonstrate the plight of the homeless. Clark, 468 U.S. at 294. The National Park Service banned sleeping at night in certain areas of the park. However, the Park Service did not ban sleeping entirely or ban sleeping everywhere in the park. Clark, 468 U.S. at

295. Because the demonstrators were free to continue their day-and-night vigil and were allowed to keep their symbolic cities as a part of their expressive protest against homelessness, they had alternate channels of expression. Id.

In the case at bar, the Policy did not limit all kinds of expression but only those which intentionally threatened or intimidated. Students could use techniques other than threats and intimidation such as persuasion, picketing, open forums and demonstrations as a means of freedom of expression. In addition, students were free to express their views on the central quadrangle, on the football field or at the bookstore. Therefore, alternate channels of communication did exist.

Because the university had within its constitutional powers the right to ensure a safe educational atmosphere and the Policy furthered that important objective while restraining only those First Amendment freedoms necessary, the Policy met the O'Brien test. United States v. O'Brien, 391 U.S. 367, 377 (1968). Therefore, the university was justified in enacting the Policy.

## 2. Government's Interest Is Related To The Suppression Of Free Expression

Even if the court holds (as the Court of Appeals did), that the university's interest was related to the suppression of free expression because the regulation only limits conduct that communicates some message, the court still must conclude that the university was justified in enacting the Policy. Texas v. Johnson, 491 U.S. 397, 410 (1989). In the case where the regulation is

related to the suppression of free expression, the strict scrutiny test applies. United States v. Haggerty, 731 F. Supp. 415, 418 (W.D. Wash. 1990). Under the strict scrutiny test, the government must have a compelling interest for regulating expressive conduct. Id., quoting Boos v. Barry, 485 U.S. 312, 321 (1988).

In the case at hand, the compelling interest is the protection of its students from harassment and discrimination which stifles the creative learning process vital to higher education. If students cannot learn without fear of being harassed by virtue of their race, they will neither strive to excel nor contribute to the advancement of society after they graduate. Therefore, nothing could be more important to society as a whole than providing students with a stimulating learning atmosphere free of fear of discrimination.

Unquestionably, the college years are a particularly formative time in the lives of students. As Professor Matsuda said, "College is a time of emancipation from a pre-existing home or community, of development of identity, of dependence-independence conflict, of major decision making, and formulation of future plans.. . . A negative environmental response during this period of experimentation could mar for life an individual's ability to remain open, creative, and risk-taking." Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. (1989). Therefore, the University has a compelling interest in preventing negative influences, such as racial intolerance and harassment, in the lives of its students.

Minorities are particularly susceptible to negative influences such as harassment. Growing up in a world which has discriminated against them for decades, minorities come to expect such discrimination and, too often, react by ignoring such violations rather than protesting against them. The University has a responsibility to foster growth for minorities by making its campus an arena for the free exchange of ideas. However, a university cannot allow the free exchange of ideas to result in harassment of minority groups under the pretense of freedom of speech. "Racial insults are particularly undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim." Lawrence, When Racism Dresses in Speech's Clothing: Reconciling the First and Fourteenth Amendments (draft copy presented as paper at 1989 ACLU Biennial Conference) at 14.

In addition to the interest in protecting its students from harassment, the University also had an interest in protecting the right to privacy of its students. In Rowan v. United Post Office Department, 397 U.S. 728, 736-37 (1970), the court stated that every person has a "very basic right to be free from sights, sounds, and tangible matter which we do not want. . . Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." Rowan, 397 U.S. at 736-37. In addition, the court held that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." Rowan, 397 U.S. at 736.



In the case at hand, the members of the Black Student Alliance had the right to be free from intimidating and harassing remarks just as the family in Rowan had the right to be free from offensive mail. The right of every person to be let alone is a right protected by the courts; therefore, the government had a substantial interest in protecting that right.

## **II. The Trial and Appellate Court Properly Held That The University's Policy Was Neither Vague Nor Overbroad**

### **A. Policy Was Not Vague**

To determine that a statute is vague, the statute must fail to give adequate notice of the punishment imposed and to supply explicit standards for those who apply it as well as inhibiting freedoms protected by the First Amendment. Screws v. United States, 325 U.S. 91, 102 (1945). Under Screws v. United States, 325 U.S. 91, 102 (1945), adequate notice is given if "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits." Screws, 325 at 102.

In Doe v. University of Michigan, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989), a harassment policy which punished any behavior that "stigmatizes or victimizes" was held both overbroad and vague. Doe, 721 F. Supp. at 866-67. Under the policy, the "innocent intent of the speaker was apparently immaterial." Doe, 721 F. Supp. at 866. A complaint was filed graduate student who read a homophobic limerick during a public speaking class. Doe, 721 F. Supp. at 865. Although the matter was resolved informally, the administrator did not even question whether this speech was protected before

proceeding against the student. Id. Because the policy never specified with what intent discriminatory acts must be taken, it was vague .

Under the William and Lee Policy, a student must "willfully and intentionally injure, intimidate, oppress, threaten, victimize or stigmatize" another student. Unlike the policy in Doe v. University of Michigan, the Policy at William and Lee required a specific intent to intimidate a specific person or group. The Policy would not punish a student who merely read a homophobic limerick in class. To be punished under the William and Lee Policy, a student must intend that their actions injure or intimidate someone. Thus, if a student read a homophobic limerick while intentionally cornering a known homosexual in the locker room, the Policy would impose a sanction. Clearly, the Policy in question imposes punishment only for an act done "willfully and intentionally" with the specific purpose of injuring, intimidating, oppressing, threatening, victimizing or stigmatizing.

Because the Policy contained the specific intent element, it provided adequate notice to both the students who must abide by the Policy and the administrators who had to enforce the Policy. In addition, the Policy punished only those words which intimidated or threatened, i.e. "fighting" words which are not protected by the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

Finally, the words of the statute itself are not vague. In United States v. Lee, 935 F.2d 952, 957 (8th Cir. 1991), the court held that in evaluating the alleged vagueness of a term in a statute, the term must be considered in the context of the statute. Lee, 935 F.2d at 957. Considered in the framework of the statute, the meanings of the terms are not vague rather they connote deliberate action that is aimed at obstructing another person's freedom in the university environment.

B. Policy Was Not Overbroad

In order to be overbroad a policy must "sweep 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 (1987). Thus, a policy which punishes speech merely because it is offensive will be deemed overbroad.

In Papish v. University of Missouri, 410 U.S. 667, 670 (1973), the court held that a student who circulated a newspaper with the headline "Motherfucker acquitted" could not be expelled because "the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of conventions of decency." Papish, 410 U.S. at 670. Because the Policy in the case at bar did not prohibit mere speech or even speech which incidentally intimidated but was narrowly drawn to include only speech intentionally harmful, the Policy cannot be said to punish the mere dissemination of ideas. What the Policy punished was speech and symbolic speech that was outside the parameters of the First Amendment. The policy prohibited only



"fighting words" which tend to incite a breach of the peace by intentionally and wilfully injuring, intimidating, oppressing, threatening, victimizing or stigmatizing. Because the Policy did not sweep within its ambit a substantial amount of protected speech, the Policy was not overbroad.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Fifteenth Circuit Court of Appeals sitting in Lewis Hall should be affirmed.

Respectfully submitted,

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