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KLAN COSTUMES AND BLACK FACE CAN ANYONE PUNISH?

Hateful, offensive, sophomoric, stupid, absolutely insensitive and wrong. Their actions were all of these. At Halloween parties at the University of Louisville, Ole Miss and Auburn, fraternity members disgraced themselves and their organizations by dressing in Ku Klux Klan costumes or in black face.

At Auburn, some brothers of Beta Theta Pi and Delta Sigma Phi dressed in Klan hoods, and at least one as a Confederate soldier pictured in front of a Confederate battle flag, his shotgun crossed with that of a hooded Klansman in front of a black-faced individual with his neck in a noose. The story and photos were splashed across the country when a local photography company hired to memorialize the party put the photos on their web site. At the University of Louisville, the Tau Kappa Epsilon Fraternity chapter was suspended pending an investigation after some members of its chapter dressed in black face at an off-campus Halloween party. At the University of Mississippi, one Alpha Tau Omega member dressed as a local sheriff posed with a gun to the head of another member wearing black face who was kneeling on the ground picking cotton.

Academic and fraternity leaders should not stand idly by without reacting to such distasteful action. The question is how far can each go in reacting to or punishing the individuals who wore the KKK garb.

When word got out, the reaction was swift and predictable -- loud condemnations, quick apologies from the chapters involved and then efforts at punishment. The fallout was widespread. At December's annual meeting of the Association of Fraternity Advisors and the National Interfraternity Conference, representatives of the National Pan-Hellenic Council's fraternities and sororities walked out of the final banquet in protest over NIC's failure to take a stronger stand against what happened at Auburn. On the Internet, over 18,000 people "signed" a petition calling for Auburn to remove Beta Theta Pi and Delta Sigma Phi from its campus.

No doubt, the individuals involved and the chapters who permitted it deserve public censure. The Ku Klux Klan stands for the worst in the history of race relations in this country and given the KKK's history of brutality, terrorism and indeed lynching. There is no humor in KKK garb.

The court drew a sharp distinction between action against which the University could impose sanctions, and pure speech, with respect to which the University's ability to constitutionally regulate was much more limited.

Academic and fraternity leaders should not stand idly by without reacting to such distasteful action. The question is how far can each go in reacting to or punishing the individuals who wore the KKK garb. Ironically, it is the fraternities which have a far greater ability to punish those involved than do officials at any of the public universities involved.

The President of the University of Louisville responded with a swift apology to those "who had been harmed by the offensive actions of a few of our students." Louisville promptly conducted an investigation, held a hearing conducted by three faculty members and on November 29th, the University Provost issued a final non-appealable decision suspending Tau Kappa Epsilon's privileges through the end of spring semester 2002 and banned the chapter from participating in spring rush and other activities. The Provost's decision prohibited TKE from allowing non-resident members or non-member students on TKE premises for any purposes. The chapter was also required to conduct attendance-mandatory educational sessions.

At Auburn, the University's response came even more swiftly. The Atlanta Journal-Constitution reported that the interim president of the University said "These images are shocking and outrageous, and they are unacceptable. On

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behalf of the faculty, staff and students, I apologize deeply for the hurt that has been caused for so many by the insensitive acts of a few students." The Auburn Code of Student Discipline permits the president to remove students "where the action of a student or a group of students poses an immediate threat to the well-being of the University or there is substantial evidence that the continued presence of the student(s) on the campus shall disrupt the university...." Acting under that provision, Interim President William F. Walker indefinitely suspended the 15 students who wore black face or Klan attire to the fraternity Halloween parties. According to published reports, the two national fraternities involved pulled the charters of their chapter at Auburn and the University acted to withdraw their recognition.

With equal predictability, the decision by Auburn to suspend the students and close the fraternity was met with a lawsuit. And within days, a local Lee County Circuit Court judge issued a decision lifting the suspension of the students. That doesn't resolve the controversy at all. The court refused to prohibit the University from taking further disciplinary action. The court also did not address the actions of the international fraternity in closing its chapter.

Auburn is not the first university to have difficulty sustaining in the courts disciplinary action for similar activity. State universities have encountered great difficulty in attempting to define and promote politically correct speech while prohibiting that which the university thought was incorrect. In an effort to control uncivil speech, the University of Michigan adopted a policy that prohibited individuals from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status. The policy was adopted following incidents of particularly inappropriate conduct, which included a flier declaring an open season on blacks using terms like "jigaboos" and "porch monkeys," the display of a Ku Klux Klan uniform from a dormitory window and racist jokes being broadcast on a campus radio station.

While recognizing the desire of the University to maintain a campus atmosphere that was conducive to equal opportunity to all, the court, reviewing the challenge to the regulation, was nonetheless extremely critical of it. The court drew a sharp distinction between action against which the University could impose sanctions, and pure speech, with respect to which the University's ability to constitutionally regulate was much more limited. (Wearing costumes and makeup is generally regarded as speech, at least symbolic speech, as opposed to conduct.) The court recognized that:

> The University may subject all speech and conduct to reasonable and non-discriminatory time, place and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication.... What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with the ideas or messages sought to be conveyed. *Doe v. University of Michigan* (1989).[1]

Noting that on a university campus, "free and unfettered interplay of competing views is essential to the institution's educational mission," the court made it clear that a public university cannot limit speech simply because the speech being sanctioned was found to be offensive, even gravely so, by large numbers of people." *Doe v. University of Michigan.*

Other campuses have encountered the same difficulties in attempting to enforce speech conduct codes. The Iota Xi Chapter of the Sigma Chi Fraternity at George Mason University conducted an "Ugly Woman Contest" in which members of the fraternity dressed as caricatures of different types of women. One dressed as an offensive caricature of a black woman. In the court case that followed the effort by George Mason University to enforce its speech conduct code against the fraternity, the court described one individual so dressed as follows: "He was painted black and wore stringy, black hair decorated with curlers and his outfit was stuffed with pillows to exaggerate a woman's breasts and buttocks. He spoke in slang to parody African-Americans." (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University* (1993).[2]

Subsequently, the University's Dean for Student Services, and others, came to the conclusion that Sigma Chi's behavior had created a hostile learning environment for women and blacks, incompatible with the University's mission. The University then suspended the fraternity from all activities for the rest of that semester and placed a two-year prohibition on all social activity by the fraternity chapter. Sigma Chi brought suit under the Federal Civil Rights Act (42 U.S.C. §1983).

The court noted that:

> From the mature advantage of looking back, it is obvious that the performance, apart from its charitable fund-raising features, was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the fraternity recognized as much. The answer to the question of whether the First Amendment protects the fraternity's crude attempt at entertainment, however, is all the more difficult because of its obvious sophomoric nature. (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University.*)

While the University argued that the fraternity's actions were "devoid of any artistic expression," the court made it plain that the "low quality" of the entertainment offered by the

fraternity did not necessarily make it exempt from First Amendment protections. The court ultimately ruled that:

> We feel that the First Amendment protects the fraternity's skit because it is inherently expressive entertainment. Even if this were not true, however, the skit, in our view, qualifies as expressive conduct. (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University.*)

Elsewhere, the University of Wisconsin, through its Board of Regents, adopted a "Design for Diversity" plan to increase minority representation, multi-cultural understanding and greater diversity throughout the University of Wisconsin system, and adopted a rule which permitted the University to impose discipline in non-academic matters in a variety of situations, including making comments which might demean or create an intimidating, hostile or demeaning environment based on race, sex, religion, creed, disability, sexual orientation, national origin, ancestry or age. The University of Wisconsin newspaper brought suit challenging the rule. In reviewing the claims of the newspaper, the reviewing court ultimately found that the University of Wisconsin's rules were both overbroad, that is, applied to many more instances than were necessary to regulate against the conduct it desired to prohibit, and was vague, that is, not capable of being understood because those "of common intelligence must necessarily guess at its meaning." *UMW Post v. Board of Regents of the University of Wisconsin System*,[3] quoting with approval *Broadrick v. Oklahoma*.[4]

In the end, while recognizing the good intentions of the University, the court stated:

> The founding fathers of this nation produced a remarkable document in the Constitution, but it was ratified only with the promise of the Bill of Rights. The First Amendment is central to our concept of freedom. The God-given 'unalienable rights' that the infant nation rallied to in the Declaration of Independence can be preserved only if their application is rigorously analyzed.
>
> The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions, such as those that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands.

At the University of New Mexico, the university attempted to impose sanctions on the local Sigma Chi chapter for an Italian wedding skit, at which a poem was read that was variously described as "vulgar," "dirty" and "degrading and insulting to women." The lawsuit brought by the fraternity challenging university-imposed punishment was settled by an agreement under which the University withdrew its sanctions and the fraternity dismissed its lawsuit. The University also ultimately had to pay $35,000 in attorneys fees and costs to Sigma Chi's attorney. (*Fraternal Law*, September 1999, "Politically Correct in New Mexico")

> Non-specific discretionary language, when used by a public institution in a conduct or speech code may not pass a constitutional due process standard. However, an individual who joins a private social organization agrees to a social compact, the membership contract, which binds them and the organization together. Constitutional rights are not involved.

The fraternities may have a far greater ability to police such actions and to punish the perpetrators. Most fraternities have standards of conduct in their constitutions or other governing documents. Some may be quite specific; others very broad, almost the equivalent of the Uniform Code of Military Justice's "Conduct Unbecoming an Officer" – or other similar language prohibiting "conduct which brings disgrace on the fraternity." Used by a public institution, a state actor, such non-specific discretionary language may not pass a constitutional due process standard. However, an individual who joins a private social organization agrees to a social compact, the membership contract, which binds them and the organization together. Constitutional rights are not involved. The member agrees to comply with the organization's rules and the organization's disciplinary process. As long as the fraternity or sorority involved follows the disciplinary process spelled out in its governing documents, the odds of a court overturning its decision are very small.

Thus, a fraternity or sorority whose members engage in speech which falls within a broad prohibition against actions which bring discredit on the organization can be punished by the organization. That punishment can include suspension or even dismissal if that is what is permitted under the rules of the organization.

Rather than punish with suspensions or expulsions, the better role for a state university in reacting to the kind of unconscionable behavior that took place at Auburn, Ole Miss and the University of Louisville is to educate. That is what colleges do best anyway. The University, its faculty and administrators ought to stand up in public condemnation of the actions and conduct seminars. Teach-ins ought to be conducted demonstrating why the conduct engaged in by the pretend klanners was wrong.

The University can teach the history of Klan violence and lynchings. It can conduct a program on what is wrong

with black face and its historical harm to black entertainers. It can work to open the eyes of today's students to the history of the struggle for civil rights – bus boycotts, lunch counter sit-ins, church bombings, water cannons and police dogs. The University can conduct anti-hatred, pro-tolerance rallies. A candlelight program with college, religious and political leaders from the community can serve as a powerful positive message in stark contrast to the stupidity of the unthinking or deliberately racist conduct of the students in black face or hoods. College administrators ought to encourage the fraternities and sororities to support these kinds of responses.

What in all likelihood will not work is the understandable desire by the University to punish those who have engaged in the offensive speech. The First Amendment simply will not allow it. The University can no more punish students for wearing makeup and Klan costumes than Skokie, Illinois (a community with a large Jewish population and many holocaust survivors) could keep Nazis from marching in its streets[5] or Cincinnati could keep the Klan from erecting a cross on Fountain Square (the heart of its downtown) during the Christmas season.[6] The First Amendment limits what a state actor – be it a municipality or a public university – can do. Clearly, what they can not do is ignore the First Amendment.

Fraternities can and should respond aggressively to such activities. In civil society such stunts are simply unacceptable. Fraternity rules can prohibit such boorish behavior and fraternities can act against those who engage in it. Failing to do so undermines the positive purposes for which fraternal organizations exist and strengthens the argument of those who would blame the chapter and national organizations for the offensive speech of a small minority of their members.

• Timothy M. Burke

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1 *John Doe v. University of Michigan*, 721 F. Supp. 852 (1989).

2 *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (1993).

3 *UMW Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163, 1178 (1991).

4 *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

5 *National Socialist Party of America v. Village of Skokie*, 423 U.S. 93 (1977) and *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605 (1978).

6 *Ku Klux Klan v. Cincinnati*, 72 F.3d 43 (1995).

IOWA CASE SETTLED

The lawsuit filed in the wake of Matt Garofalo's tragic 1995 death at the University of Iowa following a drinking bout after a Big Brother/Little Brother ceremony in the Lambda Chi Alpha House has now ended.

As reported in the November 2000 issue of *Fraternal Law*, the Iowa Supreme Court unanimously upheld the dismissal of the national fraternity from the lawsuit. A divided court, voting three to three, also upheld the dismissal of the chapter. The court, however, found that Chad Diehl, an individual defendant in the lawsuit who was Garofalo's fraternity Big Brother, could be held liable if it was proved that he paid for and furnished the alcohol to Garofalo, who was a minor at that time. A December 3, 2001 article in the *Daily Iowan* reported that the Garofalo family's suit against Diehl has now been settled. The details of the settlement were not revealed. While the fraternity escaped legal liability, its chapter was banished from the Iowa campus shortly after the death and only returned in the fall of 2001.

FRATERNITY AND HOSPITAL NAMED IN INDIANA LAWSUIT

A drinking stunt -- a handstand on a beer keg -- was but one in a series of actions that led to the death of Seth Korona. The Theta Chi rush party, which as many as 400 students were reported to have attended, was the venue for the handstand and the subsequent fall which apparently fractured Korona's skull. The treating hospital is alleged to have failed to accurately diagnose Korona's injury and thus also to have contributed to his death. Now, the fraternity and the hospital have both been sued.

Richard Hailey, who is representing the Korona family that filed the suit, is quoted in *The Indianapolis Star* as saying "Everything went wrong. Everything failed, in an almost perverse manner, to kill an otherwise healthy 19-year-old."

YALE STUDENTS LOSE CLAIM UNIVERSITY VIOLATED THEIR RELIGIOUS BELIEFS

The challenge by four Orthodox Jewish students to Yale University's policy requiring freshman and sophomores to live on campus ended in defeat recently when the United States Supreme Court declined to hear their appeal. The students had claimed that requiring them to live in co-ed dorms violated their religious beliefs. As a result, they argued that Yale's parietal rule violated their Fourth and Fourteenth Amendment rights and the United States Civil Rights Act (42 U.S.C. §1983) by forcing them to live in what they viewed to be a sexually promiscuous environment.

To enforce their Constitutional rights, the students' critical hurdle was to demonstrate that Yale University was a "state actor." They had much on which to base that argument. Yale was charted by special legislation adopted by the Connecticut legislature and that charter is confirmed in the Constitution for the State of Connecticut. Yale must submit its budget and finance report to the Connecticut legislature. The Governor and Lieutenant Governor are automatically members of the 19 members "Fellows of Yale College" Governing Board.

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The Court of Appeals decision,[1] which upheld the trial court's dismissal of the case, noted that in prior cases the Supreme Court had "set forth a three-prong standard: Only if (1) the government created the corporate entity by special law; (2) the government created the entity to further governmental objectives; and (3) the government retains 'permanent authority to appoint a majority of the directors of the corporation' will the corporation be deemed a government entity for the purpose of the state action requirement." Measured against those standards, since a majority of Yale's Board was not named by the State, the Court of Appeals refused to treat Yale as a state actor and therefore the student's constitutional claims were lost.

The Court also rejected the students' other claims, including an argument that the co-habitation requirements created a monopolistic tying arrangement creating unfair benefits to Yale as a landlord. That argument was premised on the students' perceptions that Yale's unique attributes resulted in it being "without substitute or equal as a desirable university to attend." The court, however, noted that "there are many institutions of higher learning providing superb educational opportunities." The court went on to note that if the plaintiffs "were dissatisfied with the Yale parietal rules, they could matriculate elsewhere."

The three-judge Court of Appeals panel was split on the plaintiff's claim that Yale violated the Federal Fair Housing Act. The single dissenting judge would have allowed the plaintiffs to proceed with discovery in an effort to establish that the Yale policy had a discriminatory effect on Orthodox Jews and that the Yale policy requiring mandatory on-campus co-ed living was not reasonably necessary to achieve an important business objective of Yale College. If so, could plaintiffs show that Yale unreasonably refused to adopt an alternative, feasible policy that would have provided a comparably effective means of meeting Yale's educational and financial objectives without imposing significant additional burdens on the plaintiffs.

The decision in the Yale case is a blow to the arguments that Constitutional protections can be extended to students attending "private colleges." There is, however, no indication in the Court of Appeals decision that the "Sense of Congress" stated in the 1998 Amendments to the Higher Education Act was argued to the court. That section provides:

> "It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation and protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under an education program, activity, or division of the institution, directly or indirectly receiving financial assistance under the Higher Education Act of 1965." (20 U.S.C. §1011(a).)

Whether arguing this provision would have enabled plaintiffs to meet the "state actor" hurdle is speculative, but it would have been instructive if the court had dealt with that issue since, as yet, no court has.

• Timothy M. Burke

1 *Hack v. Yale College*, 237 F.3d 81 (2000).

FROLIC INTO COURT

Everyone enjoys having fun. When people are having fun, they sometimes let down their guard and make a careless mistake. When alcohol, automobiles or rowdy behavior are involved, people sometimes get hurt. When people get hurt, they sue.

Because of the foregoing realities, every fraternity has developed a program in risk management to help officers of chapters lead chapters through frolics in a safe and sane manner. Recently, there has been a rash of lawsuits where small groups of fraternity members have gone off on frolics of their own. Sometimes it involves a few members of a men's fraternity and a few members from a women's fraternity going to a watering hole close to campus.

If alcohol is consumed at the nearby watering hole and somebody is injured or dies because of an alcohol-related accident, a lawsuit is likely to follow. In the course of investigation of the lawsuit, the plaintiff's lawyer will try to identify who is responsible. If alcohol was illegally consumed, the proprietor of the watering hole may be responsible. If the injury was caused because alcohol was consumed based upon the proprietor's reliance on factitious identification cards, the supplier of the identification cards may be a target of the lawsuit. Individuals who collaborated in the frolic may be targets of the lawsuit.

There should be clearly written guidelines as to when a group of chapter members are acting on their own and when they are acting on behalf of the chapter.

Recently, when plaintiffs' lawyers have learned the three or four participants of the frolic were members of the same fraternity, they have been naming the fraternity as a defendant, claiming that the frolic was a chapter function. None of these recent cases has yet matured to the point where the determination of liability has been made. The probabilities that the fraternity is liable are very slim, because the activity is nothing more than a group of friends who happen to be members of the same fraternity chapter going off on a frolic of their own without any official connection with the fraternity. The only connection is that three or four of the participants were members of a particular fraternity.

Even if the fraternity is not held liable, the fraternity will encounter substantial expense. Many fraternities have a high deductible, such as $100,000.00. That means the fraternity pays the first $100,000.00 worth of claims. Sometimes the deductible includes the defense costs up to the exhaustion of the $100,000.00. In addition, the staff of the fraternity, the officers of the fraternity and the fraternity's general counsel need to be involved in managing the defense. It is a substantial expense, inconvenience and embarrassment to the fraternity.

Every lawsuit, even when successfully defended, affects the rates charged for liability insurance. The more claims, the higher the insurance rates.

What can fraternities do to protect against lawsuits generated by small groups of members who run off on a frolic of their own and do something foolish? There are two lines of defense:

- Fraternities should include in their ongoing educational programs, information to the members that even when they are not acting in their capacities as fraternity members at official fraternity functions, if they are identified as being affiliated with the fraternity, people will blame the fraternity for their individual conduct. The blame may be manifested through gossip, embarrassing newspaper stories or lawsuits. It is important to raise the consciousness of individual fraternity members that their conduct reflects on the fraternity and on the college. The way in which they behave will either improve or downgrade the reputation of the fraternity and the college.

- Fraternities should review their educational materials and make sure there is a clear definition of what constitutes a fraternity function. The definition should make it clear that the mere fact that three or four members of a fraternity are off on a frolic on their own, does not make their frolic a fraternity function.

Because there is a different culture in different chapters and on different campuses, this is something that should be addressed, not only nationally, but also locally. There should be clearly written guidelines as to when a group of chapter members are acting on their own and when they are acting on behalf of the chapter.

• Robert E. Manley

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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