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CRUDE RACIST SKIT TESTS FIRST AMENDMENT

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"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - - not free thought for those who agree with us but freedom for the thought that we hate." Justice Oliver Wendell Holmes, Jr., *United States v. Schwimmer*, 279 U.S. 644 (1929).

In February 2019, there was widespread condemnation and calls for the immediate resignation of the governor and attorney general of Virginia after both men admitted to engaging in racist "blackface" conduct and caricatures in their youth decades earlier. Compare the political commentary and judgments about government officials in the court of public opinion which surrounded this recent controversy to the 1993 federal appeals court opinion described herein. This 1993 federal appeals court opinion may provide a thought provoking perspective on the First Amendment in the current age of social media, political punditry and a 24/7 news cycle.

In the case of *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 38661 USLW 2702, 83 Ed. Law Rep. 43 (4th Cir. 5/10/1993), the United States Court of Appeals for the Fourth Circuit (one step below the Supreme Court of the United States) considered the scope and applicability of the First Amendment to University sanctions imposed on a fraternity and its members following public outcry about an "ugly woman contest" with racist and sexist overtones.

FACTS OF THE CASE

For two years, Sigma Chi (the Fraternity) had held an annual "Derby Days" event, planned and conducted both as entertainment and as a source of funds for donations to charity. The "ugly woman contest," held on April 4, 1991, was one of the "Derby Days" events. The Fraternity staged the contest in the cafeteria of the student union. As part of the contest, eighteen Fraternity members were assigned to one of six sorority teams cooperating in the events. The involved Fraternity members appeared in the contest dressed as caricatures of different types of women, including one member dressed as an offensive caricature of a black woman. 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.

There was no direct evidence concerning the subjective intent of the Fraternity members who conducted the contest. The Fraternity later apologized to University officials for the presentation and conceded the contest was sophomoric and offensive.

Following the contest, a number of students protested to the University that the skit had been objectionably sexist and racist. Two hundred forty-seven students, many of them members of the foreign or minority student body, executed a petition, which stated: "We are condemning the racist and sexist implications of this event in which male members dressed as women. One man in particular wore a black face, portraying a negative stereotype of black women."

On April 10, 1991, the Dean for Student Services discussed the situation with representatives of the objecting students. That same day, the Dean met with student representatives of Sigma Chi, including the planners of and participants in the "ugly woman contest." He then held a meeting with members of the student government and other student leaders. In this meeting, it was agreed that Sigma Chi's behavior had created a hostile learning environment for women and blacks, incompatible with the University's mission.

The Dean met again with Fraternity representatives on April 18, and the following day advised its officers of the sanctions imposed. They included suspension from all activities for the rest of the 1991 spring semester and a two-year prohibition on all social activities except pre-approved pledging events and pre-approved philanthropic events with an educational purpose directly related to gender discrimination and cultural diversity. The University's sanctions also required Sigma Chi to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women. A few weeks later, the University made minor modifications to the sanctions, allowing Sigma Chi to engage in selected social activities with the University's advance approval.

FEDERAL CIVIL RIGHTS LAWSUIT

On June 5, 1991, Sigma Chi brought legal action under 42 U.S.C. § 1983 (Section 1983) against the University and the Dean requesting nullification of the imposed sanctions as violative of the First and Fourteenth Amendments. Under federal civil rights law, Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

In their federal civil rights claim under Section 1983, Sigma Chi claimed the University imposed sanctions effectively deprived Fraternity members of their free speech rights guaranteed by the First Amendment. (The First Amendment applies to the federal government, but it is applicable to the States through the Fourteenth Amendment.)

Sigma Chi submitted affidavits (written sworn statements) explaining the nature of the "ugly woman contest," including photographs of the Fraternity member depicting the offensive caricature of the black woman as well as photographs of the other participants as they appeared in the skits.

The University presented an affidavit from the Dean explaining his meeting with student leaders. An affidavit from the University President included the "mission statement" of the University which read, in pertinent part, as follows:

> George Mason University is committed to promoting a culturally and racially

> diverse student body. Education here is not limited to the classroom. We are committed to teaching the values of equal opportunity and equal treatment, respect for diversity, and individual dignity. Our mission also includes achieving the goals set forth in our affirmative action plan, a plan incorporating affirmative steps designed to attract and retain minorities to this campus.

An affidavit from the University Vice President characterized the behavior of the members of Sigma Chi as "completely antithetical to the University's mission, as expressed through its affirmative action statement and other pertinent University policies, to create a non-threatening, culturally diverse learning environment for students of all races and backgrounds, and of both sexes." According to the Vice President, the University's ongoing progress in in attracting and retaining minority students could not be maintained "if behavior like that of Sigma Chi is perpetuated on this campus."

The federal district court granted summary to Sigma Chi on its First Amendment claim. The University appealed.

SKIT SUFFICIENTLY EXPRESSIVE?

On appeal, the University claimed the federal district court had erred in not conducting further trial proceedings to determine whether "the Fraternity's intent in staging the contest" was sufficiently "expressive" to warrant First Amendment protection. Moreover, the University claimed it could demonstrate "the harm the contest caused to its educational mission."

The issue on appeal was, therefore, whether Sigma Chi's "ugly woman contest" was sufficiently expressive to entitle it to First Amendment protection. As characterized by the federal appeals court, the "obvious sophmoric nature" of the "ugly woman contest" was admittedly "the Fraternity's crude attempt at entertainment:"

> 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.

Citing Supreme Court precedent, the federal appeals court acknowledged "First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected":

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment fall within the First Amendment guarantee. Expression devoid of "ideas" but with entertainment value may also be protected because the line between the informing and the entertaining is too elusive.

Accordingly, in this particular instance, the federal appeals court had to "determine if the skit performed by Sigma Chi comes within the constitutionally protected rubric of entertainment."

As noted by the court: "Unquestionably, some forms of entertainment are so inherently expressive as to fall within the First Amendment's ambit regardless of their quality." In addition to music and motion pictures, the court acknowledged: "Even crude street skits come within the First Amendment's reach... [A]n actor participating in even a crude performance enjoys the constitutional right to freedom of speech."

Similarly, the federal appeals court acknowledged: "nude dancing is expressive conduct entitled to First Amendment protection" without any distinction between "low and high-grade entertainment."

As noted by the court, the U.S Supreme Court had held "dance is inherently expressive entertainment, as it conveys emotions and ideas." In so doing, the Supreme Court had "refused to distinguish 'high' art from 'low' entertainment on the asserted basis that low entertainment fails to communicate a defined intellectual thought." On the contrary, the Supreme Court had concluded: "nude dancing communicated a message of eroticism and sensuality, understood by its viewers as such...notwithstanding its artistic quality." As a result, the Supreme Court had held "nude dancing was sufficiently expressive to entitle it to First Amendment protection."

> While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who wants some "entertainment" with his beer or shot of rye.

LOW-GRADE ENTERTAINMENT PROTECTED?

Accordingly, based upon Supreme Court precedent, the appeals court found "the low quality of entertainment does not necessarily weigh in the First Amendment inquiry." Similarly, in this particular instance, "even as low-grade entertainment," the federal appeals court concluded "the Fraternity's skit" was "inherently expressive and thus entitled to First Amendment protection."

On appeal, the University had argued further trial proceedings were necessary to "demonstrate that the contest does not merit characterization as a skit but only as mindless fraternity fun, devoid of any artistic expression." Specifically, the University argued: "entitlement to First Amendment protection exists only if the production was intended to convey a message likely to be understood by a particular audience." Based upon the pretrial record, the University claimed it was "impossible to discern the communicative intent necessary to imbue the Fraternity's conduct with a free speech component." The federal appeals court rejected the University's argument. In the opinion of the court, "the First Amendment protects the Fraternity's skit because it is inherently expressive entertainment."

INTENT TO CONVEY PARTICULARIZED MESSAGE?

As cited by the court, the test for determining the expressiveness of conduct requires "an intent to convey a particularized message and a great likelihood that the message would be understood by those who viewed it." Further, the court acknowledged: "the intent to convey a message can be inferred from the conduct and the circumstances surrounding it." In the opinion of the court, the

skit in this particular instance "qualifies as expressive conduct."

In reaching this conclusion, the court cited the University's pretrial sworn statements which conclusively established "the punishment was meted out to the Fraternity because its boorish message had interfered with the described University mission":

> The affidavit from the University's Vice-President... stated that the message conveyed by the Fraternity's conduct--that racial and sexual themes should be treated lightly--was completely antithetical to the University's mission of promoting diversity and providing an educational environment free from racism and sexism.
>
> [The Dean] in his affidavit stated that the University does not and cannot condone this type of on-campus behavior which perpetuated derogatory racial and sexual stereotypes, tends to isolate minority students, and creates a hostile and distracting learning environment. Such behavior is incompatible with, and destructive to, the University's mission of promoting diversity within its student body and sends a message to the student body and the community that we are not serious about hurtful and offensive behavior on campus.

According to the court, these statements conclusively established "the University officials thought the Fraternity intended to convey a message." Similarly, the court found "[t]he Fraternity members' apology and post-conduct contriteness suggest that they held the same view."

That being said, the court found no evidence suggesting "the Fraternity advocated segregation or inferior social status for women." On the contrary, the court found "the Fraternity's purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University's concerns, in the Fraternity's view, should be treated humorously." As a result, based upon the Fraternity's conduct and the circumstances surrounding it, the federal appeals court had "no difficulty in concluding that it intended to convey a message."

LIKELIHOOD VIEWERS UNDERSTOOD MESSAGE?

Having found an intent to convey a particularized message, the federal appeals court then considered the second prong of the test for determining the expressiveness of conduct, i.e, "a great likelihood that the message would be understood by those who viewed it." Under the circumstances of this case, the court found "there was a great likelihood that at least some of the audience viewing the skit would understand the Fraternity's message of satire and humor." While the Fraternity "did not anticipate was the reaction to their crude humor by other students on campus and University officials who opposed the racist and sexist implications of the Fraternity's skit," the court noted: "Some students paid to attend the performance and were entertained."

The federal appeals court, therefore, concluded the Fraternity's "ugly woman contest" satisfied the First Amendment test for expressive conduct. In so doing, the federal appeals court cited Supreme Court precedent which had held the First Amendment does not permit the imposition of

"special prohibitions on those speakers who express views on disfavored subjects." As noted by the court: "The First Amendment generally prevents government from proscribing expressive conduct because of disapproval of the ideas expressed."

In this particular instance, based upon the University's pretrial sworn statements, the federal appeals court found "University officials sanctioned Sigma Chi for the message conveyed by the 'ugly woman contest' because it ran counter to the views the University sought to communicate to its students and the community":

> The mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well.

ALTERNATIVES TO VIEWPOINT PUNISHMENT?

On appeal, the University had further urged the court "to weigh Sigma Chi's conduct against the substantial interests inherent in educational endeavors." In response, the appeals court acknowledged: "The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education." That being said, the court found "equally apparent" that the University "has available numerous alternatives to imposing punishment on students based on the viewpoints they express":

> We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that the manner of its action cannot consist of selective limitations upon speech.

As noted by the federal appeals court: "The First Amendment forbids the government from restricting expression because of its message or its ideas." Accordingly, the court held: "The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint." The federal appeals court, therefore, affirmed the decision of the district court to grant summary judgment in favor of the Fraternity.

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