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CRIMINAL PROSECUTION AT MIT

> *"We sent our son to MIT for five weeks and came down here and picked him up in a box...." Darlene Krueger, mother of Scott Krueger.*

The heartsickness of Scott Krueger's mother was evident in the New England cable news broadcast though it was just 12 days short of a year since Scott, a freshman Gamma Phi Delta pledge at MIT, had died. She wondered whether those who may have been involved in Scott's death:

> *"Had any idea what it is like to get a phone call at 1:00 in the morning and have a hospital tell you that they have just spent 40 minutes getting your son's heart beating again, that he was dumped in a basement, puking, passed out, and they left him there to go up and have another drink."*

Mrs. Krueger's comments came at a press conference held in Boston at which Suffolk County District Attorney Ralph C. Martin II announced the indictment of the Phi Gamma Delta Chapter at MIT.

The text of District Attorney Martin's statement follows:

> BOSTON, MA., Sept. 17 -- Shortly after midnight on September 27, 1997, Scott Krueger, an 18-year-old Massachusetts Institute of Technology freshman, was found unconscious in his bedroom at Phi Gamma Delta house, an MIT fraternity located at 28 The Fenway.
>
> Scott Krueger was rushed by ambulance to Beth Israel Hospital where his blood alcohol level registered .401. He remained in a coma until he was pronounced dead on September 29, 1997. The cause of death was acute alcohol poisoning and aspiration.
>
> Shortly after Scott Krueger's death a grand jury began hearing evidence pertinent to the case. Today I am announcing that the grand jury has returned two indictments against the local chapter of the Phi Gamma Delta fraternity.
>
> Specifically, the fraternity has been indicted on one count of manslaughter and one count of hazing.
>
> My staff has devoted an extraordinary amount of time researching all the law applicable to this incident, and our research -- along with information developed through the investigation into Scott Krueger's death -- have resulted in these indictments.
>
> The length of this investigation reflects the unique and extraordinary nature of the case and of the legal groundwork required to move forward. This case marks the first time in my memory that the hazing statute has been applied against a fraternity in Massachusetts. It also marks the first time, to our knowledge, that a fraternity has been charged with manslaughter anywhere.
>
> At this time I can not release much of the information regarding the case, but I can tell you that these indictments are based upon specific actions that occurred on the night of September 27, and that those actions were related to a traditional pledge event sponsored and sanctioned by the Phi Gamma Delta fraternity.
>
> There were incorrect reports today that the grand jury did not determine who purchased the alcohol that night. The grand jury did in fact determine who purchased the alcohol. My office determined that the indictments should be aimed at the fraternity that promoted and orchestrated the activities that ultimately led to Scott Krueger's death, not at the people [who] were sent on a purchasing errand.

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> Also, it was reported that the grand jury returned indictments today. In fact, those indictments were returned Monday and unsealed today.
>
> I can also tell you that my office and the grand jury spent a great deal of time investigating the culpability of the MIT administration in the death of Scott Krueger.
>
> We ultimately concluded that criminal charges against the administration were not warranted.
>
> However, we did discover a troubling lack of supervision over a fraternity that was the source of numerous alcohol infractions, continuous neighborhood complaints and serious concerns from within the MIT community itself.
>
> The pressure of the criminal investigation has led to a series of changes at MIT. But it is clear that the administration moved too slowly in addressing a trouble-plagued fraternity and in addressing the larger issue of inadequate housing capacity for MIT freshmen.
>
> I have spoken with Scott Krueger's parents, and I want to point out that they have been extremely understanding and cooperative. They have demonstrated tremendous patience and respect for this investigation.

Each year, there continue to be tragic deaths like that of Scott Krueger.

National fraternal organizations have almost universally adopted clear, strong policies against the abuse or illegal use of alcohol. Many national organizations have developed solid educational programs and put in place disciplinary codes to deal with alcohol-related violations. Still, some local chapters, who would justify their activities on the basis of "tradition," "we just want to have fun," "we're just college students and it doesn't mean anything anyway," choose to ignore national directives and engage in what is clearly illegal conduct -- supplying alcohol to minors.

The indictment of the MIT Chapter ought to cause national organizations to redouble their leadership efforts. Where the respect for the lives of their brothers and sisters in their chapters has not convinced chapter leaders in the past to get in step with national directives, they ought to take this indictment to heart as the ultimate reason for insisting that laws on alcohol be obeyed at chapter parties and events. This is particularly true with regard to activity directed at pledges where alcohol and hazing can form a potentially deadly mix. Given the indictment in the Krueger case, it can be virtually guaranteed that those chapters that do not learn from this indictment and suffer a tragedy like Scott Krueger's death, may very well find themselves in the same position as the Phi Gamma Chapter. Worse still, the individual chapter members and officers who purchased the alcohol, encouraged its use, or failed to act responsibly to prevent the illegal use or abuse of alcohol, could find themselves facing charges against themselves personally.

This case marks the first time in my memory that the hazing statute has been applied against a fraternity in Massachusetts. It also marks the first time, to our knowledge, that a fraternity has been charged with manslaughter anywhere.

The fact that the District Attorney chose to issue indictments in this case is not in and of itself surprising, though this does appear to be the first time that a chapter, as opposed to individual members, has been the target of such a criminal proceeding. It was predictable. In January of 1984, *Fraternal Law* reported on a similar death at Tennessee State University. That article is reprinted in its entirety on page 6. As that article pointed out, the concept of criminal indictments for manslaughter where a death occurs as a result of the violation of a misdemeanor statute like providing alcohol to minors, is not new. That application of law is consistent with general common law notions of misdemeanor and manslaughter that provide that if a person commits a misdemeanor which results in the death of another person, the misdemeanant may thereby be guilty of manslaughter. For example, it is not at all unusual for the driver of a car, whose violation of a traffic law causes an accident in which a death occurs, to be charged with a homicide. Since it is a misdemeanor to provide alcoholic beverages to minors as a general rule, and if the violation of a statute is the proximate cause of the death of an individual, the entity or individual that commits that violation may be charged with and convicted, if the charges are proven, of manslaughter or some other degree of homicide.

This indictment ought to be made widely known to chapters all across the country. Perhaps it will serve as a slap in the face to chapters and their leaders who still choose an ill-conceived notion of "fun" over obeying the law and social responsibility.

• **Timothy M. Burke**

WARNING CRIMINAL SUSPECTS

The MIT prosecution makes it clear that there will be more criminal investigations of accidents and deaths caused by alcohol on college campuses. It is likely that individuals will be criminally prosecuted if they participated in or aided the supply of alcohol in an unlawful manner. Unlawful provision of alcohol includes providing it to a minor, providing it to someone who is already intoxicated, and selling it without an alcohol vendor's license.

If there is ever another alcohol-related death or injury in connection with a fraternity, all of the advisors and active members of the chapter should be advised:

1. Any member or advisor who knows he or she participated, encouraged or aided the provision of alcohol in an unlawful manner which may have caused serious injury or death should consult a lawyer at his or her own expense for advice before talking to the police.

2. Once the police determine that an individual is a suspect, the police must warn the suspect:

   a. The suspect has the right to have a lawyer.

   b. The suspect has the right to remain silent.

   c. Anything the suspect says to the police may be used against the suspect.

3. By the time that the police have determined that an individual is a suspect, it may be too late for the person who knows that he or she has responsibility for the illegal provision of alcohol to consult a lawyer. The suspect may have already made sufficient admissions to cause the suspect's conviction.

4. It would be against public policy for a non-profit organization to pay for the legal defense of an individual member who has engaged in criminal conduct in regard to alcohol.

• **Robert E. Manley**

RAPE AT IOWA STATE?

An Iowa State University student was found not guilty of rape. A jury in the Story County District Court exonerated John Richard Tate, 25.

His lawyer told the jury that he had sex with another member's date and reminded the jury that this activity is not a crime in Iowa. Tate testified that the sexual activity was consensual and reciprocal. The prosecuting witness, a 20-year old female, testified that she had no more than seven drinks and indicated that this normally would not impair her judgment. In Iowa consumption of alcohol by anyone under 21 is illegal.

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The prosecuting witness claimed that she could not remember what happened. All she knew is that she suddenly became conscious of the fact that she was in a bunk with Tate on top of her. She got up, dressed, went to the bathroom, and collapsed in tears.

The date with whom she had come to the fraternity party found her and offered to take her to the hospital or to the police. She declined.

Fourteen months after the party, Iowa State University officials publicized the "date rape" drug, Rohypnol. Shortly thereafter, she reported the incident to the police. The investigation, arrest, prosecution, trial and acquital followed.

It is not unusual for defense verdicts to be rendered when the victim fails to report an alleged offense immediately after the event and fails to seek medical attention.

The prosecuting witness wanted to testify that she was victimized by the "date rape" drug. She offered her testimony outside of the presence of the jury. The court ruled that the evidence was not admissible because she had no factual foundation for the accusation other than the fact that she learned of the existence of the drug 14 months after the sexual activity.

Tate withdrew from the University as a result of the prosecution.

• **Robert E. Manley**

PRIVATE ACTION FOR FREEDOM OF ASSOCIATION

A new law that guarantees Freedom of Association to students on privately funded campuses that receive federal support may give rise to private lawsuits against colleges and universities. (Public Law 105-244.)

A substantial article published in the *DEKE Quarterly*, and authored by David K. Easlick, Jr., Executive Director of Delta Kappa Epsilon and a lawyer, reviews the arguments for the private cause of action by students against their college.

The following excerpts[1] give the gist of the argument in the article which reflects on a case involving a similar statute.

> *Student Coalition for Peace v. Lower Merion School Dist. for the School Directors*, 776 F.2d 431 (3d Cir. 1985), applied prior decisions of the Supreme Court in finding a private cause of action under the Equal Access Act. The Act provides that it is unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access to or discriminate against any students who wish to conduct a meeting within that forum on the basis of the religious, political, philosophical or other content of the speech at such meetings. 20 U.S.C. §4071. The court initially pointed out that although the Act also provided that the failure to abide by its terms should not affect federal financial assistance, there was no mechanism for enforcement set forth in the statute.... The court then pointed out that the language and legislative history of the Act, including statements by Congressmen that the Act was needed to "protect" and "guarantee" the rights of students, indicating that it was meant to extend to secondary school students the same protection which the Supreme Court had recently extended to college students concerning access to school facilities.
>
> *The Student Coalition* ... noting that the fact that Congress was silent on the existence of a private right of action did not foreclose the possibility of implying such a right.... The court also pointed out that the fact that there was no enforcement mechanism indicated that a private cause of action should be implied. It distinguished other Supreme Court decisions holding the private causes of action could not be implied under particular legislation noting that the legislation involved in those cases "invariably contained other express remedies." "Conversely, the absence of any express or remedial provision suggests that Congress intended for us to imply an appropriate remedy. We would be extremely reluctant to conclude that Congress intended to create mandatory duties but no means of enforcing them." *Id.* The court then found that the statute was enacted for the special benefit of students because it named them particularly. After referring to legislative history which indicated an intent to create a private cause of action, the court ruled that the "guiding purpose of Congress was to remedy what it saw as the unwarranted refusal of the lower federal courts to extend Supreme Court precedents to secondary schools." *Id.* at 441. Given all these factors, the court held that a private cause of action existed under the Equal Access Act. *Id.*
>
> The reasoning of *Student Coalition* is highly persuasive, if not controlling, in the instant case. As in that case, Section 112 was enacted by Congress to extend to students attending federally-assisted private universities the same rights of free speech and association afforded by Supreme Court precedent to public university students. In his floor remarks upon offering the amendment which became Section 112, Representative Livingston pointed out that colleges throughout the country are attacking the constitutional rights of students by banning fraternities and sororities. He then referred to the decision in *Healy v. James*, 408 U.S. 169 (1972), which established the constitutional right of university students to free association and reaffirmed the commitment to vigilantly protect constitutional freedoms on college campuses. The amendment was to "put Congress on record defending the rights of students who face expulsion and other severe consequences by daring to enjoy their most basic constitutional freedoms of speech and association, often off campus on their own time." Representative Livingston concluded that "students attending private colleges have the right to enjoy the same freedoms of association and speech that all of us hold everywhere else as American citizens. We owe it to them and to all of those who sacrificed so much for those freedoms to adopt my amendment."
>
> These sentiments were seconded by Representative McKeon who stated that "colleges and universities which accept Federal funds under the Higher Education Act should not restrict their students' rights to free speech or association, as protected under the First and Fourteenth Amendments to the Constitution." Representative Mc-

Keon also referred to the efforts by some colleges and universities to restrict fraternal organization activities on campuses and remarked that the amendment "sends a strong signal to schools which participate in programs funded under the Higher Education Act that we intend for them to honor the rights of their students under the Constitution [.]"

The legislative history makes clear that Section 112 was enacted for the especial benefit of certain persons, i.e., college students engaged in fraternal organizations and other private associations. The remarks of Representatives Livingston and McKeon show that the legislation was intended as a response to the actions of some private schools to restrict the activities of or even ban fraternities and sororities at their schools.... The irony, of course, is that traditionally private colleges were the bastion of free speech.

Who would have ever thought that legislation would be required to force a private college to grant basic freedoms to its students. However, the need is readily seen in the Orwellian shrinking rights enumerated in the college catalog. For example, the Colgate University Catalog has provided for more than 25 years that "students on campus as of campus are subject to federal, state and local laws." In 1974-92, this provision was followed by the following language "students surrender none of their constitutional rights as citizens of the United States by becoming members of the Colgate community." ... In 1993-94, the provision changed to "and enjoy the same constitutional protections against improper governmental actions as all other citizens." ... In 1997-98, only the "subject to" clause survived. Presumably, a Colgate student enjoys no constitutional protections!...

It is now past time to stand up for our principles. And, hopefully, the offending administrations, having fought the good fight and lost, will welcome the Greek system back to its accustomed place on the campus. However, for those who continue to resist, armed with our new statutory expansion of an old right, we will restore our right to exist and be heard. We now have the tools to stop the continuing erosion of rights through unconstitutional penalties ranging from expulsion to other offensive restrictions on association.

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HIGHER EDUCATION CIVIL RIGHTS LIABILITY

The amendments to the Higher Education Act of 1998 extend first amendment protection to students in all nongovernment run universities or colleges that receive federal aid. The United States Supreme Court in *Maine, et al. v. Thiboutot, et vir.*, 448 U.S. 1 (1980), held that an action under the Federal Civil Rights Statute, 42 U.S.C.S. 1983, can be brought by any person who is deprived of his rights, privileges or immunities "secured by the Constitution and laws" of the United States. This holding has been widely interpreted to make it possible to use the civil rights laws to enforce any right protected by statutes of the United States. The doctrine was curtailed by the holding in *Middlesex County Sewerage Authority, et al. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981), which rejected the civil rights approach in statutory schemes that contain their own comprehensive system of enforcement. Since the amendments of the Higher Education Act appear to lack a comprehensive system of enforcement they may be enforceable by civil rights litigation. This would include the right to recover attorney's fees under 42 U.S.C.S. 1988. For a more complete discussion of this, see Robert E. Manley: "The Next Thirty Years of Civil Rights Litigation," 13 Urban Lawyer 541 (1981).

COURT CLEARS FRATERNITY

An Iowa Court dismissed a case against Lambda Chi Alpha fraternity brought by the parents of Matthew Garofalo for wrongful death after their son died from alcohol poisoning. Matthew was 19 years old, too young to consume alcohol under Iowa law. He had twice as much alcohol in his blood as is necessary to be considered legally drunk in Iowa.

Matthew died on September 8, 1995 following a party at the fraternity house.

The Johnson County District Court dismissed the claim that the fraternity was negligent. The only defendant remaining in the case is University of Iowa Senior Chad Diehl who was Matthew's "Big Brother" during the ceremony that preceded the party.

Matthew died after inhaling his own vomit. Alcohol intoxication led to the problem.

Originally this suit was against Lambda Chi Alpha National Fraternity, the local chapter and three fraternity members.

The University severed its ties with Lambda Chi Alpha and the fraternity is off campus until at least the year 2000. The University decided to ban alcohol at all fraternity houses commencing in 1999. The Greek system voluntarily went dry effective August 1, 1998.

ALCOHOL-RELATED DEATH AT TSU

(Reprinted from *Fraternal Law*, January, 1984.)

A Tennessee State University student died recently from alcohol poisoning at an off-campus party celebrating his fraternity initiation.

Van L. Watts, of Birmingham, Alabama, was a 20-year-old junior in the Department of Mechanical Engineering. He consumed so much alcohol at the party that he went to sleep and was found dead the next morning. Dr. Charles Harlan, Davidson County Medical Examiner, attributed the death to "drinking too much alcohol in too short a period of time."

The autopsy report records alcohol content of 0.52 in the bloodstream. A blood alcohol content of 0.10 is considered legally intoxicated in Tennessee, and a content of 0.30 is physiologically deadly.

Section 39-6-915 of the Tennessee Code Annotated provides as follows:

> "(a) Any person who shall sell, give away, or furnish to any other person for beverage purposes any intoxicating liquor, the drinking of which shall cause the death of any person, shall be deemed guilty of murder in the second degree; but if such person not being the manufacturer of such liquor, had no knowledge of the poisonous or injurious quality of such liquor, his offense shall be reduced to voluntary manslaughter***
>
> (c) The offense defined in subsections (a) and (b) shall be deemed to have been committed by any person who shall sell, give away, or furnish any such liquor for beverage purposes, whether the person injured received same directly from him or indirectly."

The death statute is probably intended to deal with bad "moonshine," and was not intended to deal with a death caused by alcohol poisoning through the excessive consumption of noncontaminated beverages. Nonetheless, the statute probably requires that there be a thorough police investigation of this death.

The police have determined that the death was accidental. Mr. Watts was not forced to drink. There was no violence. Alcohol was not used in connection with the initiation that preceded the party.

It remains to be seen what position will be taken by the prosecuting attorney with respect to this event. He may argue that notwithstanding the obvious intent of the legislature, the language of the statute is broad enough to include a death caused by the abusive consumption of noncontaminated alcoholic beverages. Initially it was not known what beverage Mr. Watts had consumed, but it has been described as "straight alcohol."

Tennessee law provides that the lawful drinking age is 19. Had Mr. Watts been under the lawful drinking age, the prosecuting attorney would also be investigating the possible violation of the general manslaughter statute of Tennessee which says:

> "Manslaughter is the unlawful killing of another without malice, either expressed or implied, which may be either voluntary or upon sudden heat, or involuntary, but in the commission of some unlawful act." T.C.A. 39-2-221

This doctrine is statutory acceptance of the common law notion of misdemeanor - manslaughter that basically provides that if a person commits a misdemeanor which results in the death of another person, the misdemeanant is thereby guilty of manslaughter. If it is a misdemeanor to provide alcoholic beverages, as a general rule any violation of a statute wherein death ensues constitutes involuntary manslaughter if the violation of the statute be the proximate cause of death. *Brown v. State*, 201 Tenn. 50, 296 S.W. 2d 848 (1946).

The next time a fraternity chapter contemplates serving alcoholic beverages in violation of state law or serving alcohol to anyone who is already clearly intoxicated, the officers and advisors of the chapter should give some thought to the fate of the Tennessee engineering student who never made it through the fall quarter of his junior year.

Editor's Note:

In light of the recent alcohol-related deaths at several U.S. colleges and universities and the criminal prosecution of the fraternity chapter at M.I.T., *Fraternal Law* reprints this article to emphasize the long-standing nature of this problem and to highlight the serious consequences that can result to fraternities and their members by ignoring state law concerning underage drinking. All states have laws on the books that could lead to a criminal prosecution of individuals who illegally provide alcohol to someone who eventually dies as a result.

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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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