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# BOY SCOUTS RULING SUPPORTS FRATERNITY RIGHTS

On June 28, 2000, the United States Supreme Court issued its ruling in *Boy Scouts of America v. Dale*.[1] The case is significant because for the first time, the Supreme Court upheld an organization's assertion of "freedom of association" as a defense against application of a state antidiscrimination statute. The decision also further developed the principles governing freedom of association in a way which should have positive implications for Greek-letter student organizations.

The issue in *Dale* was whether the State of New Jersey could force the Boy Scouts to reinstate James Dale, an assistant scoutmaster whose membership was revoked when the organization learned that he was homosexual and a gay rights activist. In a 5-4 decision authored by Chief Justice Rehnquist, the Court held that forcing the Boy Scouts to reinstate Dale would violate the Scouts' First Amendment right of "expressive association." The Court accepted the Boy Scouts' assertion that the organization's values are inconsistent with homosexual conduct, and agreed that Dale's membership would force the Boy Scouts to compromise those values.

## The Right of Expressive Association

Sixteen years ago, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court was confronted with a dispute over the State of Minnesota's attempt to compel its Jaycees chapters to admit women. In considering the issue, the Court explained that there are two types of freedom of association. First, there is the right to associate with others in close personal relationships, which the Court labeled the right of "intimate association." Second, there is the right to associate with others to conduct activities protected by the First Amendment, which the Court labeled the right of "expressive association." As the Court noted in *Roberts*, the right of free expression implies a corresponding right to join with others in pursuit of political, social, economic, educational, religious, and cultural ends. The right of association also implies the right *not* to associate with those who do not share a group's ideals. The government may not interfere in the internal affairs of such an organization except to advance a compelling state interest, and only using the method having the least impact on the nature of the organization's speech.

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Reviewing the evidence in *Roberts*, the Court found that a substantial part of the Jaycees' activities consisted of advocacy on political and social issues, as well as civic and charitable activities, all of which are protected forms of expression under the First Amendment. The Court made similar findings regarding Rotary Clubs in the later case of *Board of Directors of Rotary Intl. v. Rotary Club*, 481 U.S. 537 (1987), which also involved the compelled admission of women. Both Jaycees chapters and Rotary Clubs were therefore held to be expressive associations. However, both the Jaycees and Rotary still lost their cases; the Court found that eliminating discrimination against women was a compelling state interest, and that the admission of women to those groups would not affect the nature of their expressive activities.

## Are Fraternities Expressive Associations?

After *Roberts* and *Rotary*, it seemed that only groups which conducted substantial political, civic, religious, or charitable activities could qualify as expressive associations. No court has ever been asked to decide if a Greek-letter

organization qualifies as an expressive association, but the question has been debated in the pages of *Fraternal Law* and elsewhere. Some observers dismissed fraternities as "purely social" organizations, presuming that they engage in no activities protected by the First Amendment. Some argued that fraternities do conduct at least some expressive activities, such as charitable events and religious worship; still others argued that the very purpose of a fraternity is expressive, finding support in a portion of Justice O'Connor's concurrence in *Roberts*:

> "Protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service ...
>
> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."

However, Justice O'Connor's comments were not contained in the opinion of the Court in *Roberts*, and it was not until *Dale* that the Court confirmed that a group such as the Boy Scouts or a fraternity could be considered an "expressive" association. As the *Dale* Court explained:

> "The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."

The Court quoted portions of the Boy Scouts' mission statement, Scout Oath, and Scout Law, and concluded:

> "Thus, the general mission of the Boy Scouts is clear: To instill values in young people. ...
>
> During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values - both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."

The *Dale* Court then cited with approval the above-quoted portion of Justice O'Connor's concurrence in *Roberts*, thereby adopting her views as the opinion of the majority of the Supreme Court.

*Dale* seems to settle the question of whether Greek-letter organizations are "expressive associations" entitled to First Amendment protection. The very purpose of a fraternity or sorority is the development of character traits such as loyalty, integrity, and self-awareness through association with close friends, and this is closely analogous to the Boy Scouts' mission to instill positive values in its members.

## Who Determines Values?

Of course, there are critics who dispute whether developing character is really the purpose of a fraternity; they suggest that modern fraternities are nothing more than "superficially selective drinking clubs" whose stated values and principles are just window dressing. The issue is one of perspective: From whose vantage point do we determine the values of an organization? Its rank and file members? Its national leadership? The public? In *Dale*, the Supreme Court addressed the question of who has the power to determine the nature of a group's expression, and whether it matters that individual members or chapters may not practice, support, or even acknowledge those values.

In *Dale*, the Scouts asserted that its stated values, which include urging its members to be "morally straight" and "clean" as part of the Scout Oath, were inconsistent with homosexual behavior. The New Jersey Supreme Court rejected that assertion, finding that a position on sexuality was not part of the Scouts' values. The U.S. Supreme Court disagreed, holding that it was not the place of the court to second-guess the meaning of a group's expressed values:

> "[O]ur cases reject this sort of inquiry, it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."

The Court examined the evidence, and determined that the official position of the Boy Scouts, as expressed by its national leadership, is that homosexuals cannot serve as scoutmasters. The fact that many members might disagree with that position, or be unaware of it, was deemed irrelevant:

> "The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."

Therefore, after *Dale*, it seems clear that a Greek-letter organization will be judged, for associational purposes, by the values and positions stated by its national or international leadership, or set forth in its official publications. Fraternities will not be defined by the conduct of their undergraduate chapter members, nor by the opinions of hostile university administrators, nor by media stereotypes.

## Fraternities and the *Healy* Burden

*Dale* also seems to resolve any lingering doubts about whether Greek-letter organizations are protected by the landmark case of *Healy v. James*, 408 U.S. 169 (1972), in which the Supreme Court held that unless a student group disrupts campus order, it must be granted the benefits of university recognition and be allowed to conduct its activities free of interference. Although the *Healy* decision was stated in broad terms, the case actually concerned a denial of recognition to a student political group, which was clearly an expressive association. After *Healy*, it was suggested that the ruling only applied to that type of organization, not to a nonpolitical "social" group like a fraternity. Many universities have used this perceived difference to justify singling out their Greek-letter groups for extensive regulation. Since after *Dale* it appears that fraternities are expressive associations, they are entitled to the same protections as any other student group.

This has important practical implications. Under *Healy*, a university must meet a "heavy burden" to justify denying a student group the benefits of campus recognition, and may withdraw those benefits only if the students refuse to abide by reasonable rules of conduct. However, either ignoring *Healy* or arguing that it does not apply to "social" groups, many universities have made fraternity recognition a privilege, not a right.

This development in the law should assist Greek-letter organizations if they find themselves in disputes or litigation in regard to their right to remain free of university interference.

• James C. Harvey

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[1] ____ U.S. ____, 120 S.Ct. 2446, ____ L.Ed.2d ____ (2000).

## Editor's Note

Neither Jim Harvey, the author of the accompanying article, nor the publishers of *Fraternal Law*, advocate the use of membership selection policies designed to exclude broad groups of people.

While the Supreme Court's decision in *Boy Scouts of America v. Dale* upheld the ability of the Boy Scouts to exclude a homosexual from participation in the Scouts, it should by no means be read as carte blanche approval of discriminatory membership policies or practices. Federal law and the laws of most states and many municipalities prohibit discriminatory practices in a wide variety of situations. At the state and local levels, antidiscrimination regulations vary greatly in extending protections to many categories of people. Particularly those prohibitions against discrimination in the providing of public accommodations could, in a different factual setting than the *Boy Scouts* case, cause problems for a fraternity group which acted in a discriminatory manner toward a protected class where that group was providing housing and/or food service. It should also be kept in mind that the Supreme Court's decision in the *Boy Scouts* case was a narrow 5-4 decision and clearly a close case. Slightly different facts could result in a very different decision.

The bottom line is that membership selection decisions should be made in a positive manner on the basis of the criteria contained in the organization's governing documents. Denying membership solely on the basis of some broad category into which an individual is pigeonholed based on their race, national origin, religion, handicap status, veteran's status, or sexual preference is an invitation to legal trouble.

• Timothy M. Burke

## SECOND GREAT MIGRATION

More than 9 million legal immigrants were admitted to the United States between 1991 and 2000. The previous record was set in the first decade of the 20th Century with 8.8 million immigrants. The Federal Reserve Bank of Dallas recently estimated that in the first decade of the 21st Century, 11 million immigrants will arrive. This does not count illegal arrivals.

Their places of origin generally are in Latin America and Asia. The immigrants are relatively young. The percentage of those in the age range of 10-34 is substantially greater than the native born U.S. population. Approximately 38% of the foreign born men in 1998 lacked high school diplomas as compared with approximately 8% of native born men.

A recent study published by the Federal Reserve Bank of Dallas suggests that the great migration is one of the reasons that we have had outstanding prosperity in the 90's. Had we not had this supply of new workers, there would have been cost push inflation generally associated with a rising business cycle.

The implications of this information for the Greek world are profound. As the children of these immigrants finish high school and enter colleges, campus after campus will experience a dramatic change in the ethnic composition of its student body. Greek organizations that are hospitable to students of non-European ancestry will prosper. Those who are not may be short on membership.

# U.S. SUPREME COURT RULES ON MANDATORY STUDENT FEES

In March, the Supreme Court of the United States[1] ruled unanimously that public universities may charge a mandatory student activities fee and use those fees to support a wide variety of advocacy student organizations even though some students may oppose the positions advocated by some of the university-funded groups.

In 1996, a group of University of Wisconsin students filed suit, contending that the University could not require them to help fund student organizations that engage in political and ideologic expression which was offensive to their personal beliefs. That argument was successful in the trial court and in the United States Court of Appeals, but the Supreme Court had no difficulty in reaching a different conclusion. The majority opinion in which six justices joined, held clearly that "the First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral." Three of the justices, joining in a concurring opinion, would have gone even further, indicating that a "cast-iron viewpoint neutrality requirement" was not necessary.

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At issue in this case was only about 20% of the activity fees which were generally left to the student government of the university to allocate (80% went to the student union facilities, health services, intramural sports and so on). A wide variety of organizations received funding, including the College Democrats, the College Republicans, the campus chapter of the American Civil Liberties Union and the International Socialist Organization. Whether or not the principal portion of the student government determined allocation was viewpoint neutral was not at issue since the parties entered into a stipulation in the trial court that the administration of the program was viewpoint neutral. However, since viewpoint neutrality was a clearly articulated condition in the court's majority decision, the obvious implication is that if it could be established that the administration of the funding for student advocacy groups depended on what particular positions a group advocated, such a program would be a violation of the First Amendment.

The decision is a ringing endorsement for academic freedom. It encourages a wide variety of speech and expression on public campuses, noting:

> "The speech the university seeks to encourage in the program before us is distinguished not by discernible limits, but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the university seeks to pursue. It is not for the court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."

Thus, Justice Kennedy, writing for the court, refused to limit the topics or types of speech that could be engaged in by groups receiving university funding, stating:

> "The University may determine that its mission is well-served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the university reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."

In the concurring opinion written by Justice Suter, the viewpoint neutrality requirement is criticized, with a comment suggesting that the University should be allowed to exercise some judgment:

> "Least of all, does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement.... The university need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy, as well as democracy, or teach Nietzsche, as well as St. Thomas. Since uses of tuition payments (not optional for anyone who wishes to stay in college) may fund offensive speech far more obviously than the student activity fee does, it is difficult to see how the activity fee could present a stronger argument for a refund."

The court was troubled by one aspect of the university's allocation of fees to student advocacy groups. For reasons not clearly explained in the court's decision, the student government followed a practice of subjecting the funding of certain student groups to a student referendum. As the court

noted, that potentially left the question of funding to be decided by majority rule, which could call into question the viewpoint neutrality aspect of the program since only the views of those groups approved by a majority of students might be funded. That aspect of the Wisconsin system was returned to the lower courts for further review.

This decision's support of viewpoint neutrality and its skepticism of the constitutionality of majority rule student referendum approval of selected student groups once again upholds the First Amendment freedoms of student organization. While not specifically dealing with the right to recognition, the rationale of the *Wisconsin* decision can, by extension, be used to support the freedom of association, as well as free speech rights of student groups.

While fraternities and sororities may not generally be viewed as advocacy organizations, their members have freedom of association rights which can be protected. Just as the court implied that funding for an advocacy group not supported by a majority of the students cannot be taken away, it is unlikely that fraternities and sororities could be constitutionally removed from a campus simply because the university or a majority of its students or its faculty do not like their membership selection policies or the groups programming, advocacy, purpose or choice of philanthropies. The decision in Wisconsin's student fee case, particularly when combined with the decision in the *Boy Scouts of America v. Dale* (reported elsewhere in this edition of *Fraternal Law*), provides strong support for the First Amendment protection available to fraternities and sororities, at least those on public campuses.

• Timothy M. Burke

[1] *Board of Regents of the University of Wisconsin System v. Southworth*, _____ U.S. _____, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000).

# PRIVATE UNIVERSITIES AND DUE PROCESS

The Supreme Judicial Court of Massachusetts will soon issue what could be a landmark decision with repercussions for universities and colleges around the nation. The State's highest court heard oral arguments in May on *Schaer v. Brandeis University*, a case concerning the extent to which courts can intervene in the disciplinary proceedings of students by colleges and universities.

In 1996, David Allen Schaer, a junior biology major at Brandeis University, was accused of rape after a late encounter with a female Brandeis student. The female student stated that she awoke to being raped after telling Schaer she did not want to have sexual intercourse subsequent to some foreplay. Schaer admits to sexual intercourse, but states that sex was not only consensual but ardently invited.

> The case stands out because generally courts do not like to intervene into disciplinary proceedings of private schools which are not bound to provide their students with constitutional imperatives of due process.

Although Schaer's accuser never brought criminal charges against him, the female student complained to Brandeis administration who referred the case to the university's Board of Student Conduct. Schaer received a hearing before the university board consisting of four students and two faculty members in April of 1996. The board found Schaer guilty of engaging in unwanted sexual activity with a female student and thereby creating a hostile environment for his accuser. The board forbade Schaer to be on Brandeis property during a three month suspension, which meant he was not able to complete a biomedical project on schedule that he had intended to work on over the summer. Schaer was also put on probation for the rest of his time at Brandeis. Furthermore, Schaer was ordered to undergo professional counseling. Schaer filed for a new hearing before the university appeals board but his request was denied.

Schaer then filed a complaint in Massachusetts Superior Court seeking an injunction against the suspension and compensatory damages. His case was dismissed by the Superior Court, but the Massachusetts Appeals Court ruled in 1999 that his case should be allowed to proceed. In the pending appeal before the Supreme Judicial Court of Massachusetts, Schaer has received support from both the ACLU of Massachusetts and FIRE, the Foundation for Individual Rights in Education Inc, which is a nonprofit organization devoted to academic freedom on college and university campuses. Both organizations have filed amicus briefs with the court.

In Schaer's complaint, Schaer alleged that the university both failed to provide a fair disciplinary process and that Brandeis did not abide by the rules it set for itself. The Appeals Court of Massachusetts found that based on Brandeis' description of the university's disciplinary procedure, the university provides a procedure that is "manifestly adequate for a private association" for its students.[1] However, the Appeals Court found merit in Schaer's claims that the university may have violated its own disciplinary proceedings set forth in its rights and responsibilities section of its student hand-

book.

The case stands out because generally courts do not like to intervene into disciplinary proceedings of private schools which are not bound to provide their students with constitutional imperatives of due process. While state universities usually have well identified disciplinary proceedings in which they are required to provide certain due process rights, courts usually associate the relationship between a private college and a student as similar to a contract relationship, or the relationship between an employer and employee. Similar to an association, rules are created by that private college or university and the students must agree to abide by them. When those rules are followed, courts do not intervene unless those rules are arbitrary or unreasonable. However, a court can and will intervene when a university or college does not follow its own guidelines. That is the crux of Schaer's argument.

Brandeis University's Student Handbook clearly sets forth that Brandeis University is required to provide its students with a hearing. No one argues Brian Schaer received a hearing. However, Schaer claims that the hearing he received did not comport with the rights and responsibilities code in the Student Handbook.

The code requires that the board make a careful evaluation both of the facts and of the credibility of those that report the facts. The Appeals Court noted that nothing in the record seemed to establish that these careful evaluations were made, such as interviewing Schaer prior to the proceedings to make sure he had not been unwarrantably placed on trial in what the complaint describes as a superheated atmosphere. Furthermore, the code requires that a record of the proceedings be made. The hearing lasted almost six hours and yet what the accuser and accused said was summarized in a total of twelve lines. The board also, against requirements of the code, allowed prejudicial evidence such as the testimony of a police officer who stated that when he saw the accuser one month after the encounter, "she looked like a rape victim." The code also requires a clear and convincing evidence standard, a requirement that Schaer claims was not met.

Several questions arise as to the ability of the Brandeis Board of Student Conduct, or any university disciplinary board for that matter, to adjudicate fairly. It is important for students and the administration to have a strong understanding of what constitutes date rape as it becomes more and more of a problem across college campuses nationwide. Can a university have a less stringent definition of date rape than the criminal standard that courts apply and yet still be fair to both the accuser and the accused? Can a university reduce the burden of proof necessary to convict males of rape to show that sexual crimes are not tolerated on their campus in hopes of not deterring qualified students? The Brandeis Board of Student Conduct's standard requiring only clear and convincing evidence could be much easier to meet than that of the traditional criminal standard of beyond a reasonable doubt. Undoubtedly, criminal courts are better equipped to provide due process than a board composed of mostly students who may not understand what due process requires. One might wonder if students and faculty alike are trained well enough to deal with sexual crimes, as these issues differ dramatically from the more common alcohol or academic violations.

Private universities and colleges have the right to determine their own disciplinary proceedings. This fact is one of many that differentiates those schools from publicly-funded institutions. Whether private institutions are adequately equipped to deal with sexual misconduct could depend on how strictly universities adhere to their established codes. While the Massachusetts Court of Appeals was quick to reiterate that private universities do not have to abide by Constitutional requirements of due process unless necessitated by a university code, students may want to question both the university's disciplinary proceedings and how fairly those proceedings are abided by before choosing a school. The Supreme Judicial Court of Massachusetts may make that decision for itself soon enough, and could expand the obligations of private universities to provide greater due process protections to their students.

• Mackenzie Becker

[1] *Schaer v. Brandeis Univ.*, 48 Mass. App. Ct. 23, 716 N.E.2d 1055 (1999).

## 2001 FRATERNAL LAW CONFERENCE

Start planning now to attend the 2001 Fraternal Law Conference in Cincinnati, Ohio. The 10th National Fraternal Law Conference is scheduled for November 9-10, 2001. The 2001 conference will be held at the new Kingsgate Marriott Conference Center on the University of Cincinnati Campus. More information will be forthcoming as conference time draws closer. If you are not a subscriber and wish to receive all conference announcements, please send your name and address to Fraternal Law, 225 West Court Street, Cincinnati, Ohio 45202. For further information, contact Jana Hitt, Managing Editor of Fraternal Law, at (513) 721-5525.





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