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BAD FACTS MAKE BAD LAW AND FRATERNITIES SUFFER

For the first time, a published court opinion has addressed the question of whether a Greek-letter student organization is protected by “freedom of association” against disciplinary action by its host university, and the news is not good. In *Pi Lambda Phi Fraternity v. University of Pittsburgh*, 229 F.3d 435 (3rd Cir. 2000), a federal court held that the Pi Lambda Phi chapter at the University of Pittsburgh was not entitled to constitutional protections as either an “intimate” or “expressive” association. The decision is unfortunate, because it was based on an embarrassing factual record which overshadowed the fraternity’s legal arguments. The case should be a reminder that litigation of this type should not be pursued lightly because all fraternities and sororities can be affected by the outcome.

A federal court held that the Pi Lambda Phi chapter at the University of Pittsburgh was not entitled to constitutional protections as either an “intimate” or “expressive” association.

In April 1996, Pittsburgh police raided the house belonging to the University of Pittsburgh chapter of Pi Lambda Phi fraternity. A search found a large quantity of drugs and drug paraphernalia, including heroin, cocaine, hashish, and the so-called “date rape” drug, Rohypnol. Four chapter members were arrested; among the four were the chapter’s risk manager and the University’s IFC president. The University’s investigating panel recommended the chapter be placed on three years of probation, in part because the chapter had previously been sanctioned for drug activity within its house.¹ The University’s Vice Chancellor instead suspended the chapter’s status as a recognized student organization for one year, and barred it from hosting social events or participating in rush, intramural sports, or IFC activities during that suspension. Despite the suspension, the

chapter continued to recruit new members and to host social events at its house.

In April 1997, after the University refused to lift the suspension (in part because of local community opposition), the chapter filed suit against the University and several individuals in the United States District Court, alleging violation of its members’ right of association, as well as violation of the Equal Protection Clause of the 14th Amendment. The chapter’s request for a preliminary injunction was denied. After discovery and testimony at fact-finding hearings, on July 28, 1999 the District Court granted summary judgment in favor of the University.² The District Court determined that the chapter’s activities were social in nature, and that it merited no freedom of association protection. The court also held that even if the chapter did merit such protection, the University’s interest in enforcing campus order justified the infringement of the chapter’s rights. The court also rejected the chapter’s Equal Protection argument, holding that the University did not treat the fraternity differently than any other group of students by imposing liability for the acts of its members and guests.

The chapter appealed to the Third Circuit Court of Appeals. In an opinion issued on October 25, 2000, the court upheld the judgment in favor of the University, albeit using a slightly different analysis than that applied by the District Court. The court agreed that the chapter did not qualify as either an intimate or expressive association on the facts before it. The court further held that even if the chapter was an expressive association, the University’s action was justified by its interest in maintaining order on campus.

Freedom of Association

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the U.S. Supreme Court explained that there are two distinct types of freedom of association which may protect an organization from government interference. First, there is the right to associate with others in close personal relationships, which the court labeled the right of “intimate association.”

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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." Even earning the status of intimate or expressive association is not a complete defense to government intrusion; there is still the government's interests to be considered, and the nature of the infringement being imposed on the group's associational activities.

The question of whether fraternities and sororities are entitled to claim constitutional protection under either branch of freedom of association had been extensively debated in *Fraternal Law* and in several law review articles, with most commentators opining that fraternities stood a good chance of successfully claiming protection under one or both branches. It is unfortunate that the first case to actually test those theories had a factual background involving drug activity, which gave the University a strong basis for its actions and diminished the fraternity's position.

Intimate Association

The Supreme Court has held that groups protected by the right of intimate association would be characterized by relative smallness, a high degree of selectivity in decisions to begin and maintain the relationship, and seclusion from others in critical aspects of the relationship. In separate cases, the Court held that Jaycees chapters and Rotary Clubs fell on the unprotected side of the scale, primarily due to their unselective membership policies and practice of involving non-members in most of their activities.

Reviewing the evidence, the *Pi Lambda Phi* court determined that the University of Pittsburgh chapter was not sufficiently "small" to merit protection. Its membership had been reduced to 22 in the aftermath of the drug raid. However, in the year prior to the raid it had initiated 20 new members, and the court extrapolated from this a normal chapter size of 80. The court held that a chapter size of 20 to 80 would place it within the same range as the Jaycees chapters and Rotary Clubs which had been held not to be intimate associations. The court also noted that the chapter recruits actively from within the University population, and is "not particularly selective" in whom it admits, although it did not explain what evidence led to this conclusion. The court also decided that the chapter was not secluded in its activities; it invites members of the public into its house for social events and participates in many public university events. The court therefore held that the chapter was not an "intimate" association.

The court can be criticized for its emphasis on size; the Supreme court has never stated that size is the most important factor, and other courts have held far larger groups to be sufficiently "small." In *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287 (Cal App. 1991), a California appellate court held that a club with fixed membership of

over 900 was small enough, given the other evidence of the club's selectivity and seclusion from the public. In *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995), clubs with sizes of between 325 and 600 were held to be "relatively small in size" and found to be intimate associations because of their selectivity and seclusion from others. (Neither case was cited to the court by Pi Lambda Phi.)

It appears that this fraternity chapter was hardly the ideal model to serve as the basis for a case with implications for all Greek-letter groups.

The other factors set forth by the Supreme Court in *Roberts*, selectivity, congeniality, and seclusion from others in critical aspects of the relationship, have seemed to be the most important factors in practice, and most commentary has held that a fraternity would have a strong argument as to all such factors. However, Pi Lambda Phi did not present evidence on these issues, which allowed the court to simply apply the stereotype of fraternities as drinking clubs and thereby dismiss its intimate association claim.

Expressive Association

The District Court had summarily rejected Pi Lambda Phi's claim to be an expressive association, assuming that the fraternity was merely a "social" organization which conducted no activity protected by the First Amendment. However, in June 2000, in *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000), the U.S. Supreme Court had expanded the scope of "expressive association." 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 then 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. . . . It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."

In *Pi Lambda Phi*, the court recognized that in light of *Dale*, even the associational claims of a "social" organization are not so easily dismissed, and require reference to the evidentiary record:

"The expansive notions of expressive association used in *Roberts* and *Dale* demonstrate that there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity."

Pi Lambda Phi argued that it engaged in expressive activity through its charity work and by promoting the ideals embraced by its parent organization. This was the right argument to make, since the very purpose of a fraternity is to instill positive values in its members. Unfortunately, in the court's view, the actual evidence to support those assertions was lacking:

"Although members of the Chapter claimed in their deposition testimony that the Chapter still promotes those ideals, they did not give any specific examples of how it does so. Furthermore, while Pi Lambda Phi's international organization runs various programs aimed at individual development, there is no evidence in the record that even a single member of the University chapter participated in any of these programs."

The court also found the evidence of Pi Lambda Phi's charity work to be "underwhelming," consisting of just three relatively minor acts of charity, apparently performed *after* the disciplinary suspension. Further, the chapter did not show that these activities had any connection to its purpose. Aside from the drug activity itself, it appears that this fraternity chapter was hardly the ideal model to serve as the basis for a case with implications for all Greek-letter groups.

The case should be a reminder that litigation of this type should not be pursued lightly because all fraternities and sororities can be affected by the outcome.

Even if a better evidentiary record had allowed Pi Lambda Phi to successfully claim the status of an "expressive" association, the court held that the action under challenge (revoking the chapter's campus recognition because of the drug activity) would still have been upheld as a permissible infringement of the chapter's rights. The court noted that universities have traditionally been given power to regulate student behavior to maintain campus order. Even under *Healy v. James*, 408 U.S. 169 (1972), which mandates that student groups be given the benefits of campus recognition, a university may withdraw that recognition from a student group which violates campus rules or disrupts campus order. Here, the court held that the University of Pittsburgh reasonably concluded that the chapter was fostering illegal and disruptive activity.

The only good news was that the court confined its holding to the particular facts before it, and expressly left the door open for other fraternities:

"We add that we are not holding that fraternities per se do not engage in constitutionally protected

expressive association. It is entirely possible that a fraternity (or sorority, or similar group) could make out a successful expressive association claim . . . We hold only that the University chapter of Pi Lambda Phi has failed to make out such a claim on the record before us."

A Bad Precedent is Set

Prior to *Pi Lambda Phi*, there was no published case precedent involving fraternity associational rights. Although the weight of academic opinion favored fraternities, it was critical that the first actual case be based on a factual record which was carefully and fully developed. Many fraternity legal observers believed that *Pi Lambda Phi* was far from the ideal case, and should not have been pursued. Pi Lambda Phi's request for financial assistance from the NIC Legal Advocacy Fund was denied for this reason, although the NIC did separately file an *amicus* brief supporting the fraternity.

A defense by a fraternity or sorority with a record of campus involvement, high academic standing, and community service, with the evidence and legal arguments properly presented, would have a good chance of success.

Rather than a chapter facing disciplinary action, a far better "test" case might involve a chapter resisting university regulations which seek to control its private associational activities. For example, some universities have recently adopted standards documents requiring a wide range of information from chapters. Some of these are quite intrusive, even inquiring into chapter finances and ritual practices. A defense by a fraternity or sorority with a record of campus involvement, high academic standing, and community service, with the evidence and legal arguments properly presented, would have a good chance of success.

Although *Pi Lambda Phi* was based on unfortunate facts, it is currently the only available precedent, and will have to be dealt with by any future Greek-letter group seeking to establish or protect its rights via litigation.

• James C. Harvey

¹ According to the University of Pittsburgh's brief on appeal, page 4, fn. 3.

² *Pi Lambda Phi v. University of Pittsburgh*, 58 F.Supp.2d 619 (W. D. Pa. 1999).

Mr. Harvey is an attorney in Newport Beach, California. He is a member of Phi Delta Theta and a member of the NIC Law Committee. The assistance of Timothy M. Burke and Gregory F. Hauser is gratefully acknowledged.

PROTECT YOUR RIGHTS

In light of the decision in the Pi Lambda Phi case, fraternities should keep in mind that constitutional rights, like most other rights, sometimes need active attention in order to be protected. Here are a few suggestions for actions that can be taken to help protect the First Amendment Freedom of Association rights of Greek organizations.

Intimate association activity should be practiced and includes, among other things:

- 1) Emphasis on the quality of new members rather than overall size of a chapter;
- 2) Underscoring that membership is limited to active students at a particular academic institution who are willing to maintain specific academic and social standards in compliance with the rules of the organization;
- 3) A documented interview process and/or review of a prospective candidate's background to determine compatibility and qualification for membership;
- 4) Emphasizing the fact that meetings, rituals and other critical aspects of participation in the organization are closed to members;
- 5) Maintaining the secrecy of rituals and enforcing disciplinary penalties for violating the confidentiality of ritual;
- 6) Maintaining social events that are relatively exclusive; in addition to being a good risk management practice, protecting the chapter's First Amendment rights is just another reason to avoid "open" parties;
- 7) The family-like setting of chapter housing, whether it is in a house or a suite or wing in a dormitory, should be highlighted;
- 8) Dining together by chapter members ought to be encouraged on a regular basis; If the chapter doesn't have a house offering a meal plan, consideration ought to at least be given to joining together periodically, whether it is once a week or once a month for a meal as a group;
- 9) Internal support program for members, academic, or personal counseling help to emphasize the friendship, comradery, and emotional

support for one another that should be a part of any good chapter;

- 10) Celebrate the lifelong nature of the fraternity relationship and emphasize alumni events as an important part of Greek life;
- 11) Using terms like "brother," "sister," "sisterhood" and "brotherhood" highlight in a meaningful way the family-like intimate association of a good chapter.

Many of the above activities will also help to protect the expressive association First Amendment claims of a fraternity. So will the following:

- 1) During the recruitment process, celebrate more than the social nature of the organization. Social compatibility is part of the membership relationship, but so is the moral, academic and leadership advancement and camaraderie that is found in the purpose clauses of most Greek organizations.
- 2) Clearly emphasize community service programs that the chapter engages in and don't hide the fact that they are going on. Get articles in the campus newspaper and in the major media. A chapter that is cleaning up a mile of highway on a weekend or helping to build a Habitat for Humanity house, in all likelihood, can get television and newspaper coverage just by letting the press know the activity is going on.
- 3) Emphasize the chapter's philanthropic activities to be certain that they are active and documented and they are more than what the Pi Lambda Phi court called "underwhelming."
- 4) Consider sponsoring public programs on campus that address community needs and issues. For example, conduct a voter registration drive on campus or assist in a nonpartisan voter registration drive being conducted off campus or work with the League of Women Voters to distribute nonpartisan voter guides providing information on candidates of all parties and issues to perspective voters.

- 5) Sponsor campus-wide programs on serious issues like risk management, alcoholism, sexually transmitted diseases or personal safety.
- 6) Be involved in public issues and debate. For example, if your chapter's philanthropy is cancer research and there is a bill pending in the state legislature that would provide additional funding for cancer research, lobby for it. Spending a small amount of money on postage or gas mileage to go to a public hearing won't jeopardize your organization's tax status.
- 7) Actively participate in your national's leadership programs and relate information gained at those programs back to the chapter.

All of these activities should be documented. This is another good argument for maintaining an up-to-date chapter history and good files. You don't want to be in the position Pi Lambda Phi found itself in. By adopting some of the tips contained above, you won't be.

• Timothy M. Burke

ANOTHER DRINKING DEATH

On October 6, 2000, the Pi Kappa Phi Fraternity at the California State University at Chico conducted what *The San Francisco Chronicle* described as a "ceremony." By 1:00 a.m. the following morning, Adrian Heideman was dead in the fraternity house at the age of 18. *The Chronicle* reports that Heideman had a blood alcohol level of 0.37 percent at the time of his death, more than four times the legal limit for driving in the State of California. Witnesses reportedly told police that Heideman drank heavily at the "ceremony." The local district attorney reported that he was "most definitely" considering bringing criminal charges against members of the fraternity. Both the university and the national fraternity promptly moved to suspend the recognition of the chapter.

Two months after Heideman's death, on December 5th, the university permanently banned the fraternity from campus. University President Manuel Estebaw said "The Pi Kappa Phi chapter must be punished for its actions related to Adrian Heideman's death."

The San Jose *Mercury News* reported on December 6th that the Butte County District Attorney is expected to announce shortly if criminal charges will be filed against chapter members or the national fraternity.

Undoubtedly, this is a tragedy about which more will be heard in the future.

2001 Fraternal Law Conference November 9-10, 2001 Cincinnati, Ohio

The 10th national Fraternal Law Conference will take place November 9-10, 2001, at the Kingsgate Marriott Conference Center in Cincinnati, Ohio beginning at 9 a.m. on Friday and continuing through noon on Saturday. The conference is designed to assist national and student fraternity leaders, university officials, and their legal professionals, in ensuring a healthy and vigorous fraternity system effective in preventing legal difficulties.

CATCH UP ON:

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The general registration fee is \$225 per participant; student fee is \$140. If you have questions about the conference or ideas for topics you would like to see covered at the conference, please direct these to jshaw@mbclclaw.com.

DUE PROCESS DENIED AT PUBLIC UNIVERSITY

A new decision¹ by a federal court in Cincinnati stands in stark contrast to the recent decision by the Supreme Court of Massachusetts in the *Brandeis* case. The *Brandeis* court refused to recognize the due process rights of a Brandeis student. On the other hand, the federal district court in Cincinnati recently enjoined the University of Cincinnati from enforcing its proposed disciplinary suspension of one of its students when the court believed that student had, in all likelihood, been deprived of his constitutional due process rights.

The facts in the two cases were remarkably similar. In each case, a male student had been accused of raping a female student. In both cases, local law enforcement chose not to prosecute the male student, apparently concluding that the evidence against the student in each case was not very strong. However, both universities proceeded to take the accused student through university discipline. The *Brandeis* case was fully reported in prior issues of *Fraternal Law*.²

The University of Cincinnati case resulted in proposed University discipline which included a one-year suspension from the University, an additional one year of probation, and banning the student from residing in University of Cincinnati residence halls. The student, a starting member of the University of Cincinnati football team, was on a full athletic scholarship to the University.

The ultimate difference between the *Brandeis* case and the University of Cincinnati case, is that *Brandeis* is a private university. The University of Cincinnati is a state university. The University of Cincinnati admitted in the defense of its lawsuit that its actions were taken under the color of state law, but denied that they had violated the Constitution. The court pointed out that "a public school student has property and liberty interests that are protected by the due process clause," and that when a student in a public school faced lengthy suspension, that student was, at a minimum, entitled to notice, an explanation of the case against him, and an opportunity to present his side of the story.

The ultimate difference between the *Brandeis* case and the University of Cincinnati case, is that *Brandeis* is a private university.

Rather than provide such notice to the student, a University of Cincinnati Administrator simply sent a letter to the student ordering him to report to his office to respond to unidentified "assault and harassment charges." The letter did not contain any reference to any specific incident, nor the name of the victim of any alleged assault. As a result of the deficiency in the notice, the court found that the university

failed to provide the protection afforded by the due process clause.

The court went on to note that because the plaintiff was not permitted to see the evidence against him in the form of his accuser's statement, or the written answers that the accuser provided to the university questions. Without stating precisely what rights the student may have had to confront the evidence against him, the court found that in the absence of providing some reasonable level of notice as to the evidence against him, the student was likely to prevail on his claim that refusing to allow him access to evidence deprived him of his due process rights.

As private social organizations, fraternities and sororities are not bound by the Constitution of the United States.

Finally, the court noted that since the student had been denied the right to present evidence and/or witnesses in his favor, his due process right had, in all likelihood, been denied as well. Thus, the court found three likely due process violations: lack of notice of the charges; lack of notice of the evidence; and lack of opportunity to present a defense.

This case was before the court on a motion for a preliminary injunction which was granted. The court did not issue a permanent injunction and presumably the University of Cincinnati is still free to consider disciplining the student if they do so in a manner which provides appropriate due process protections to the individual.

As private social organizations, fraternities and sororities are not bound by the Constitution of the United States. They are, however, bound by their own rules and regulations and, in disciplining one of their members, fraternities and sororities must follow their own procedures. However, should a university seek to discipline a fraternity chapter or one or more of its members, if that university is a state university, it appears to be clear that the chapter and its members are entitled to at least minimum due process protections. At a private university, those rights are far less clear.

• Timothy M. Burke

¹ *LaDaris Van v. University of Cincinnati*, United States District Court, Southern District of Ohio, Case No. C-1-00-846.

² See *Fraternal Law*, September 2000, No. 73, *Private Universities and Due Process* and *Fraternal Law*, November 2000, No. 74, *Massachusetts Supreme Court Rules in the Brandeis Case*.

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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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