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ALABAMA'S LEARNING OPPORTUNITY

Fall rush at the University of Alabama was accompanied by effervescent racial rhetoric. The Faculty Senate is reported by the *Associated Press* to have unanimously approved a resolution for white fraternities and sororities on campus to accept black members or "risk penalties."

> The campus NAACP Chapter President suggested that the existence of black and white fraternities "has more to do with cultural differences than racism." He added, "I haven't experienced racism with the Greek system. I think the organizations are doing their best."

In August, President Andrew Sorensen was quoted in the media about the racial divide in the fraternity system: "We clearly cannot tolerate that." He was later reported on September 18, 2001 as stating he would not mandate integration or institute a quota system for fraternities.

Reporting these affairs, *The Christian Science Monitor* of September 18, 2001 reflected back nearly forty years when Governor George Wallace opposed integration at this campus. The Faculty Senate President, Norm Baldwin, was quoted as saying, "The whole history of desegregation clearly illustrates you have to have forceful intervention to bring it about."

The campus NAACP Chapter President, Dave Washington, was reported in the national media as saying that integration of fraternities and sororities should be left to students and the faculty, and the news media should stop interfering. He suggested that the existence of black and white fraternities "has more to do with cultural differences than racism." He added, "I haven't experienced racism with the Greek system. I think the organizations are doing their best."

The university administration modified the rush schedule with the hope of increasing diversity in the Greek groups. This change was attributed to criticisms from Melody Twilley, a black undergraduate who complained that she was not accepted by any white sorority.

After the eruption of this controversy, more national news arose when it was reported that Christian Houston, whose father is black, joined a previously all-white chapter of Gamma Phi Beta in November 2000 as a freshman, without any fanfare. She was quoted by the *Associated Press* as saying that she felt "very, very accepted" by her sorority sisters. She complained about hostile remarks by some fraternity men.

If the faculty members want to bring about change in the racial composition of Greek chapters on the Alabama campus, they ought to continue to talk about the wisdom of this policy, rather than about force. Faculty members should be able to talk endlessly and eloquently about the wisdom of racial integration and use their intellectual powers of persuasion to move students in that direction, if that is the goal they want.

What is more, if national fraternities want to exist fifty years from now, they ought to be encouraging their chapters to look for diversity on the Alabama campus and elsewhere. The reason is that by the middle of the 21st Century, people of white, northern European ancestry will be just one more minority in the United States. Already on many campuses, people of white, northern European ancestry are a minority. Unless the Greek organizations achieve diversity now, they may be writing their own death warrants for the future. That is simple, demographic reality.

If Alabama keeps these discussions at the level of rational analysis and persuasion and avoids coercion, there can be a great learning experience for the Greek system throughout North America. If they fall into coercion, it can

YOU'VE WON THE ELECTION

With chapter elections taking place over the next few months, your new chapter officers need factual, clear and concise information regarding their specific duties and responsibilities as newly elected representatives of their fraternities or sororities. The pamphlet "You've Won the Election!" provides just that information. These pocket-sized pamphlets are available for $1.00 each from Fraternal Law, 225 West Court Street, Cincinnati, Ohio 45202.

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produce expensive litigation that almost certainly will not solve any problems, but instead fatten the wallets of attorneys.

A number of fraternities have fraternity houses on university property which they lease for $100.00 a year.

> If national fraternities want to exist fifty years from now, they ought to be encouraging their chapters to look for diversity on the Alabama campus and elsewhere.

The fact that fraternity houses occupy state land for a nominal rent is not enough to entangle the State of Alabama into the internal affairs of the fraternities to bring the civil rights laws to bear on the fraternities. Even if it were true that the fraternities had a racially exclusionary policy, there probably would be no court remedy.

Examples of this exist in previous case law. The Biscayne Bay Yacht Club leased land from the City of Miami for the "token rental of $1.00 per year." The Yacht Club built a "genuinely private" club on property owned by the City. Persons who claimed to be excluded for racial and ethnic reasons filed suit. The Federal District Court found:

> 1. That the policy, practice and custom of the Defendant Biscayne Bay Yacht Club in denying membership to the members of the Jewish religion and black race is hereby declared violative of the Fourteenth Amendment to the United States Constitution.
>
> 2. Defendant Biscayne Bay Yacht Club is hereby ordered to cease the barring of membership to applicants solely on the account of their race and religious affiliations***
>
> 3. Jurisdiction is retained for the enforcement of the decree.

The District Court's finding was appealed to the Court of Appeals for the Fifth Circuit, which initially affirmed it, but then after a motion for rehearing *en banc,* reversed the District Court's decision.

The mere fact that the Yacht Club leased land from the City of Miami was not enough to create state action to bring to bear the civil rights laws. In order to have a remedy under the civil rights laws, it would be necessary to show that the City of Miami had "significantly involved itself with the invidious discrimination." *Golden v. Biscayne Yacht Club*, 530 F.2d.16 (5th Cir. 1976).

Ironically, for faculty members to be talking about coercion implies the need to cure a civil rights wrong. In order to prove that there is a civil rights remedy, the faculty would have to prove that the state university that employs the faculty had "significantly involved itself with the invidious discrimination." In other words, the faculty would have to prove that they, or other state officials of the university, had encouraged, promoted and fostered racial exclusion by the Greek organizations.

It may very well be true that, as suggested by the NAACP campus chapter president, the matter is not racial, but is based upon cultural differences. If that is the case, education, not coercion, is the only appropriate answer.

In light of a whole series of recent decisions about racially-shaped admission decisions by academic institutions, for the University of Alabama to impose quotas or other University sanctions to promote integration of the fraternity system seems to invite celebrated litigation that will probably make the situation less desirable for everyone. Preferential admissions policies at the University of Georgia have been held unlawful. *Johnson v. Board of Regents at the University of Georgia*, 2001 U.S. App. Lexis 19154 (11th Cir. 2001). The Court held an admissions policy that gives preference based upon race unconstitutional by a state university "not because student body diversity can never be a compelling interest (we assume for the present purposes it can be), rather because the policy is not narrowly tailored to serve that interest." This is just one of many cases that has applied the "strict scrutiny" test on all actions by state agencies based upon race.

In *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), the U.S. Supreme Court found unconstitutional the City of Richmond's attempt to create racial quotas for contractors. It said that:

> The Equal Protection Clause of the Fourteenth Amendment provides that, '[n]o state shall... deny to *any person* within its jurisdiction the equal protection of the laws.' (emphasis added). As this court has noted in the past, the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'...The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making.
>
> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test always ensures that the means chosen

> 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

If the University of Alabama is going to be faced with controversy over the racial composition of Greek chapters, it must be discussed rationally by the students and by the faculty. Coercion should not be used unless the advocates of coercion are prepared to engage in multi-year litigation that will probably strike down the coercive efforts.

> If they fall into coercion, it can produce expensive litigation that almost certainly will not solve any problems, but instead fatten the wallets of attorneys.

The faculty must stress their educational role and avoid engaging in what the Supreme Court calls "simple racial politics." To the extent that they bring the majesty of the state action enforced by Alabama down on the fraternities, they may be defeating a great educational opportunity and leading the university into wasteful litigation.

The First Amendment of the United States Constitution protects the rights of state university faculty members to express their opinions about fraternities and to urge that they embrace minority members. The same First Amendment also protects the freedom of association of the undergraduate members of fraternity chapters. Freedom of association is a First Amendment right just like freedom of speech. There exists a hazard that racial politics in the faculty can cause a university administration to breech the First Amendment rights of freedom of association of undergraduate students. This leads to a legal morass that any rational university leadership will avoid.

Faculty can and should teach. Students can learn and also teach. The professional leadership of fraternities has a teaching role, also.

Every campus has its own culture and its own way of doing things. If the fraternity chapters on the University of Alabama campus can find their way clear to voluntarily attract minority students, they will demonstrate the effectiveness of faculty who teach. They also may be leading the way for the future survival of Greek organizations, because that survival is weakened by the demographic reality that white people of northern European ancestry inevitably will become just another minority in the United States. This has not happened at the University of Alabama, but it already has happened on numerous campuses across the country.

Dialogue is not dramatic, but dialogue can produce results that litigation, coercion and regulation will never produce.

• Robert E. Manley

ALCOHOL DROWNS INDIANA FRATERNITY

In 1998, Joe Bisanz died from asphyxia, according to *The Indianapolis Star*, as a result of ingesting so much alcohol at a party in the Pi Kappa Alpha fraternity house that he choked on his own vomit. Indiana University suspended Pi Kappa Alpha for one year. Now the chapter faces trouble again.

The Indianapolis Star reported on September 21, 2001, that a 20-year old pledge had to be hospitalized "with an apparent overdose of whiskey." The student is reported to have had a blood alcohol level of 0.375 percent, almost four times the legal limit. The good news is that the student, who was comatose at the time he was hospitalized, recovered and was released from the hospital. Reports are unclear as to the details of the drinking bout in which the student was engaged. Reportedly, 12 fraternity members and pledges were drinking whiskey.

The bad news is that the chapter has become the fifth Indiana University fraternity chapter to be kicked off campus in less than two years. *The Indianapolis Star* reports that a student fraternity judicial board unanimously voted that the chapter be banned and Indiana's Dean of Students imposed the penalty.

The recent record at Indiana University is discouraging. The alcohol-related death of Joe Bisanz just three years ago while the chapter was already on University probation for an alcohol violation was but one example. A rash of recent incidents included the death of Seth Korona, who died as a result of a brain injury suffered at a rush party. Korona fell, hitting his head, after he had performed a hand-stand on a beer barrel while drinking from the barrel's tap.

> The student is reported to have had a blood alcohol level of 0.375 percent, almost four times the legal limit.

In a separate story, *The Indianapolis Star* reported on Indiana's efforts to control drinking campus-wide. While using a one-man "party patrol," alcohol arrests more than doubled in three years from 450 in 1998 to 953 in 2000.

Against that backdrop, the swift and tough response by the University is understandable. Even the Executive Director of the national fraternity was reported to have supported the University's decision.

• Timothy M. Burke

LATEST DEVELOPMENTS ON FRATERNITY FOUNDATION FUNDING OF EDUCATIONAL AREAS IN FRATERNITY CHAPTER HOUSES

As many of you are aware, for some time there were ongoing discussions between a small group of attorneys who represent fraternal organizations, including this author, and IRS representatives in the IRS National Office in Washington, D.C., on the subject of fraternal foundation funding of educational areas in local chapter houses. There had been some concern that the IRS would take a negative approach to this subject and, consequently, that funding of such projects in the manner that the fraternal world has become accustomed to in the last 20 years or so would be adversely affected.

I am pleased to report that these discussions and negotiations were concluded in July, 2001, on what I believe hopefully to be a favorable and workable basis. The IRS is again processing requests for private letter rulings and exemption applications that reflect this type of activity and this is indeed good news. In fact, in late September 2001, two new favorable IRS exemption rulings incorporating the guidelines discussed below and granting recognition of charitable tax exempt status to organizations were made public. The IRS is asking organizations that submit exemption applications showing plans to engage in this type of activity to sign a statement that they will adhere to these new guidelines.

In most respects, it appears that these projects will be able to continue much as they have in the past and in many aspects the documentation for such projects should not change. For example, the qualifying percentage of fundable space in a fraternity chapter house will still be allocated based upon the ratio that educational spaces bear to the overall square footage in the house. Also, annual maintenance and operational costs attributable to the educational areas may still be so funded according to the same percentage. In determining the educational percentage qualifying for funding by fraternal foundations, any reasonable allocation consistently applied may be used to determine the amount of educational space in a fraternity house. A grant agreement will of course still be required.

There are a few important differences in the new IRS operational rules as opposed to the previous guidelines, and many of these are favorable changes.

However, there are a few important differences in the new IRS operational rules as opposed to the previous guidelines, and many of these are favorable changes. The following are some highlights. First, the guiding principle with regard to the allowability of such funding will be that the facilities provided by the funding must be similar to those provided by the specific college or university at which the house is located for the education of the general student body. Thus, complete wiring of a fraternity house for computer use will be allowable for funding by a fraternal foundation if the dormitories at the particular college or university are similarly wired for computer use. Grants can also be made for fire alarms, smoke detectors, and internal sprinkler systems for educational areas in a chapter house.

Thus, complete wiring of a fraternity house for computer use will be allowable for funding by a fraternal foundation if the dormitories at the particular college or university are similarly wired for computer use.

In determining those areas of a chapter house which qualify as educational, as in the past, no mixed-use areas such as dining areas and sleeping quarters may be considered educational, however, a minor social or recreational use such as a reception occasionally held in a library will not be considered to change an educational facility into one of mixed-use. A fraternal foundation may not make grants for the purpose of funding the purchase of computers, computer desks, computer chairs, and similar items owned by individual members. However, a computer, desk, and chair that are similar to those included in student dormitory rooms may now be the subject of such grants (as long as they are not owned by individual members). As in the past, furnishings and fixtures contained in educational areas of the house may be so funded.

This article is necessarily an oversimplification and generalization as to the new IRS guidelines that apply with respect to fraternal foundation funding of chapter house projects. It would be advantageous for each organization to review with its advisors its particular chapter housing program as soon as possible to determine how these new guidelines affect the organization and its ability to continue, begin, or reinstitute such a program, as the case may be.

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TIME FOR A SAFETY CHECK

The nearly unbelievable events of September 11, 2001 at the World Trade Center and at the Pentagon remind us of many things that we should have known, but have taken for granted.

One of those lessons is the need to regularly check on the local security of our fraternity houses.

There have been a few horrific experiences like the time when the "towny" who was ejected from a fraternity party returned in the wee hours of the morning and set the house on fire at Indiana University or when homicidal Ted Bundy invaded a sorority house at Florida State University in Tallahassee, Florida. Generally, we think of our fraternity houses as safe havens, but every fraternity house should be checked for safety every year. What should be examined?

- Do the smoke detectors work and are there enough of them to provide an early warning so that people will evacuate in case of fire?
- Are the exit ways clear and unobstructed so in case an emergency evacuation is necessary, it can take place without impediments to the flow of people?
- Are the doors kept locked with a key system that provides adequate key control? Adequate key control means keeping keys out of hands of non-chapter members or perhaps using an electronic keypad where the combination is changed periodically.
- Has the fraternity house been inspected for safety hazards with regard to wiring, plumbing, gas lines and so forth? Many insurers will do this at little or no cost. Private contractors will do it. In some cities, the fire department makes a regular inspection.
- Do the chapter programs include one or more sessions on personal safety and self defense?
- Does the chapter regularly follow state law with regard to the use of alcoholic beverages?
- Does the chapter regularly follow the fraternity's national guidelines on the use of alcohol at social events?
- Have the chapter officers developed a working relationship with the campus security personnel?
- Have the chapter officers developed a good neighborly relationship with occupants of residential properties close to the chapter house?
- If there have been reports of car break-ins, thefts or other criminal activity in the vicinity of the chapter house, has the chapter developed a coordinated neighborhood watch program? Local police often will help the chapter develop such a program.
- Do the chapter standard operating procedures call for a review of the physical and environmental safety of the chapter house each year?
- Is the interior and exterior lighting conducive to safety?

• Robert E. Manley

COULD CAREER NETWORKING WORK AGAINST YOU?

Given the brotherhood/sisterhood relationship so admirably encouraged by Greek organizations, it is not surprising that many Greek groups encourage networking within their membership by those members seeking or having employment opportunities. Some groups have gone so far as to install a job networking page on their web site. As well-intentioned and helpful to members as that may be, it is a practice with the potential to create problems if the organization should ever face a challenge to its single sex status.

Congress has made it clear that fraternities and sororities do not violate federal anti-discrimination laws because of their single sex membership practices.[1] Such protections do not typically exist in local and state statutes. Should a Greek organization be challenged under a state or local regulation for its single sex membership practices, only the Freedom of Association protections of the First Amendment may be available to defend those practices.

The First Amendment Freedom of Association right is intermingled with the concept of privacy. Court decisions

suggest the protection against attacks on membership policies may be found under two separate theories of Freedom of Association.

The first is the relationship discussed in *Griswold v. Connecticut*,[2] where the right of intimate association and privacy was found to prohibit a state from criminalizing the sale of birth control devices to married couples. Courts may find the right to intimate association if the answers to the following questions are in the affirmative.

- Is the relationship one that is marked by a significant degree of intimacy such as a marriage or family?
- Is the organization relatively small?
- Are membership decisions highly selective in deciding to establish and maintain a membership relationship?
- Are non-members excluded from critical aspects of the relationship?

The second theory protects those organizations engaged in expressive speech, political advocacy, the exercise of religion and the like.

In spite of these protections, the Jaycees[3] (which had admitted only men to full membership) and others with similar membership policies, were unsuccessful in defending themselves against local antidiscrimination laws. One politically powerful argument against clubs whose membership policies discriminated on the basis of sex was that such clubs excluded women from the business networking opportunities available within the club. In essence, women were deprived by such restrictions from full participation in the economic and business life of the community.

On the other hand, clubs which specifically prohibited business conduct or contacts have been able to escape liability for discriminatory membership policies. The Pacific Union Club,[4] housed in a mansion on Knob Hill overlooking San Francisco, apparently restricted its membership of more than 700 to men only. The club's highly restrictive and selective membership policies apparently kept women out while those policies were otherwise similar to the rigorous new member selection practices of fraternities and sororities. Pacific Union did specifically prohibit business from being conducted on its premises and required members to certify that club expenditures were not incurred in furtherance of their trade, business or profession.

The court found it to be a purely social club and contrasted it with the Jaycees and rotary clubs[5], which were found to have included business development in their scopes of conduct.

Similarly, a series of men's clubs in New Orleans[6] with highly selective membership policies, significant size limitations, and which excluded the public from critical aspects of their relationships, also prohibited the transaction or discussion of business or even the displaying of business papers or the exchanging of business cards on their premises. Like the Pacific Union Club, the New Orleans clubs received protection under the First Amendment as intimate associations.

Whether the *Pacific Union* and *New Orleans* cases would have been decided differently were it not for each club's rules against conducting business on the premises is uncertain. What is clear is that the clubs' arguments would have been far less appealing.

How dangerous a practice posting job networking information on a fraternity or sorority's web site is not certain. Clearly, however, what such a web site posting does is turn a social organization whose purposes do not include the economic advancement of their members into, at least in part, a business promotion organization. That puts the fraternity or sorority involved in the stream of commerce and provides a significant argument for those who would undermine the single sex status of the overwhelming majority of fraternities and sororities. This danger should be weighed against the perceived benefits. At the very least, fraternities and sororities should not cavalierly push forward with job networking or emphasize business connections over social connections. A better course, if any is necessary, might be a page on the web site which is simply networking. It could list social, cultural and recreational activities, not just jobs and business opportunities. The First Amendment Freedom of Association protections which might be available to defend a single sex group as described above have been found to exist in intimate social contacts and in the context of political expression. Extending those protections to business and commercial activities is likely to be much more difficult to justify. Thus there remains need for caution in the area of career web sites, job postings, and job bulletin boards, on even the most well-intentioned web site.

• Timothy M. Burke

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1 See 20 U.S.C. §1681 (Title IX of the Education Act Amendments of 1972), and 42 U.S.C. 2000, et seq.

2 *Griswold v. Connecti*cut, 381 U.S. 479 (1965).

3 *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

4 *Pacific Union Club v. Superior Court*, 232 Cal. App.3d 60 (1991).

5 *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

6 *Louisiana Debating and Literary Society v. The City of New Orleans*, 42 F.3d 1483 (1995).

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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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