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SPEECH CODES REMAIN UNDER ATTACK

The Foundation for Individual Rights in Education (FIRE) has launched a campaign to eliminate campus speech codes. While acknowledging that few universities today maintain what they label as "speech codes," FIRE defines speech codes as "any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech."

To achieve its goal, FIRE has launched a series of lawsuits against universities that FIRE perceives to be restricting speech. In the first of those lawsuits, FIRE sued Shippensburg University of Pennsylvania, challenging a student code of conduct that, according to a report in *The Chronicle of Higher Education* of May 23, 2003, states that speech that is 'inflammatory, demeaning, or harmful toward others is not deserving of protection."

A second suit filed by FIRE against Texas Tech University challenges restrictions on freedom of speech, including requirements to either restrict activities to the "free speech Gazebo" or obtain permission six working days in advance "to hold expressive activities on campus." The Texas Tech suit argues that the university's restrictions are a violation of the First Amendment of the Constitution's right to freedom of speech and freedom of assembly, as well as a violation of the due process and equal protection clauses of the Fourteenth Amendment.

In commenting generally on such restrictions Gary Pavela, the Director of Judicial Programming at the University of Maryland at College Park, pointed out in the May 23, 2003 *Chronicle of Higher Education* that "what administrators want to do, some of them, is to punish the kid who flies the Confederate flag or puts on an offensive skit, hoping the speech code will cover it. But such actions, however offensive, are clearly protected under the First Amendment."

Other university representatives have argued that FIRE is behind the times and that colleges and universities are generally no longer enforcing speech restrictions. Silverglate and Greg Lukianoff, a FIRE attorney, argued the opposite in the August 1, 2003 *Chronicle Review* of the *Chronicle of Higher Education*. They cited examples of continued enforcement of what FIRE defines as "speech codes" at Harvard, Columbia University School of Law, University of Texas at Austin, Tufts University, California Polytechnic State University and Ithaca College. Harvey A. Silverglate of FIRE and Lukianoff argue that "speech codes have proved remarkably impervious to reasoned arguments for while FIRE often can snatch individual students from the jaws of speech prosecutions, administrators rarely abandon the codes themselves."

Speech codes or speech regulations have been a topic of debate on college campuses for decades, if not centuries. (More than 200 years ago fraternities began as literacy and debating societies.) In 1964, on the steps of Sproul Hall at Berkeley, Mario Savio, a "student radical," launched what became known as the Free Speech Movement. By the '80s many campuses had adopted speech codes designed to encourage "politically correct" speech. In some instances, campuses sought to punish those who engaged in conduct which may have been insensitive, boorish, or otherwise deemed to have been inappropriate. However, in every reported case where punishment on a public university campus was challenged in court, the speech codes were struck down as being a violation of the First Amendment of the Constitution.

Speech codes also drew sharp criticism in a National Public Radio commentary, reprinted in the September 1990 issue of *Fraternal Law*. U.S. Representative Eleanor Holmes Norton, former Chair of the Equal Employment Opportunity Commission and a member of the faculty of Georgetown Law School, commented:

> "The university is not a microcosm of society. It is both more and less than that. It must be better than the rest of society – more tolerant, more open to all ideas, less willing to explain away its problems. If the university suppresses rather than takes on bigoted speech, it betrays our faith in the efficacy of education."

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Silverglate and Lukianoff, in their recent *Chronicle Review* article, put it this way:

> "Colleges must recognize that growth, progress and innovation require the free and occasionally outrageous exchange of views. Without speech codes, students are more likely to interact honestly. Having one's beliefs challenged, is not a regrettable side effect of openness and intellectual diversity, but an essential part of the educational process and, in fact, liberty is more than simply a prerequisite for progress; it is, at the deepest level, a fundamental and indispensable way of being human."

For fraternities and sororities, the battle over First Amendment rights remains important. While public institutions have a right to place reasonable time, place and manner restrictions on activities on campus in order to prevent disruption of the educational mission of the school, the freedom of association rights of their students must be respected. That includes the rights of students to elect to join together in fraternities and sororities of their choosing. Challenges to speech codes benefit fraternities and sororities, at least those on public campuses, by continuing to focus the attention of courts on the constitutional protections due American college students.

On private campuses such rights are less secure but may be found in the contracts entered into between the school and its students - such as in the rights of students set out in college catalogs. Alternatively, while untested in the courts, the 1998 amendments to the Higher Education Act sets out the "Sense of Congress" that institutions of higher education receiving federal support under the Act may not discriminate against their students who engage in constitutionally protected speech or association. (20 U.S. §1011).

• Timothy M. Burke

On September 4, 2003, Shippenburg University was enjoined from enforcing parts of its speech code until the litigation is concluded. Further information about the preliminary injunction will be reported in the November issue of *Fraternal Law*. See *Bair v. Shippenburg Univ.*, 2003 WL 22075681 (M.D.Pa.).

Additional argument on speech codes can be found in *Speaking Freely, the Case Against Speech Codes*, edited by Henry Mark Holzer, Second Thought Books, 1994.

MISSISSIPPI WRONGFUL DEATH CASES SETTLED

Two twenty-year-old Sigma Phi Epsilon recruits died July 26, 1998, the evening they attended a recruiting event for the Mississippi State University Chapter at the Iron Horse Grill in Jackson, Mississippi. Joshua Jones and Matthew Freeman were killed when the vehicle they were passengers in flipped over a bridge railing. At the time of the accident, the driver, Kevin Tabereaux, then 20, had a blood alcohol level of 0.23 percent, more than double the legal limit of 0.10. He was convicted of vehicular homicide.

A Sigma Phi Epsilon designated driver started out taking the three young men home and reportedly dropped them off a block from one of their houses. There is evidence that the boys were seen at a convenience store approximately 30 minutes after being dropped off by the designated driver. The Toyota 4-Runner driven by Tabereaux flipped over the bridge a short time thereafter.

Well-intentioned programs like designated drivers are not a security blanket protecting against all liability or suits.

Tabereaux was given a 10-year sentence, then Circuit Judge Robert Goza suspended about nine years, with Tabereaux having to spend six months in jail and six to eight months under house arrest.[1]

In the civil suits that followed, attorneys for the families of the dead recruits argued that because the Fraternity knew of past drinking problems at the Chapter, the fraternity was liable for the deaths.

Confidential settlement agreements earlier this year ultimately ended the cases brought by the Jones and Freeman families against The Great Iron Horse Corporation and Sigma Phi Epsilon.

Several lessons can be found in this case. First, obviously, is the tragic deaths of young people that can result from the abuse of alcohol. Second, the consequences from such abuse, even for the survivors, can be long lasting – five years from the deaths to settlement of the suits, potentially long jail sentences. Third, well-intentioned programs like designated drivers are not a security blanket protecting against all liability or suits, especially when underage drinking is involved.

• Nathan W. Sprong

[1] *The Clarion-Ledger*, May 21, 2003, by Jimmie E. Gates

GREEKS AND THE CAMPUS

Every human contact is a potential human dispute. College fraternities have thousands of human contacts on every campus, every week. Sometimes, these contacts lead to interpersonal conflicts that attract the attention of the college administration. Sometimes, these interpersonal conflicts become extremely serious and require a lot of attention. In the past thirty-one (31) years, my experience teaches me that there are certain basic approaches that are constructive when serious problems arise in a Greek organization or with a Greek system on a particular campus.

When a problem rises to the level that it is a serious concern to the administration of a campus, it is not only a problem for the host institution, but it is primarily a problem for the Greek organization. When the local advisors and the national management of a fraternity learn of a serious problem on a particular campus, it is their responsibility to move swiftly and surely to deal with the problem. If the national organization learns of alcohol poisoning, the distribution of drugs, theft, or any serious personal injury at a particular chapter, the national organization should jump right on the problem. It should work with the host institution and both should develop a pragmatic approach to minimize the consequences of the problem and to prevent it from recurring in the future.

Under a general notion of subsidiarity, it is preferable for the Greek organization to solve the problem with guidance and educational input from the host institution. Student leaders can manage to avoid thousands of problems if they are properly prepared to recognize the problems and to prevent them from becoming notorious events. *Fraternal Law* is published because of our belief that student leaders are the ones who can avoid trouble. It is written primarily for them.

Experience teaches that the more we can focus on areas where representatives of the Greek organizations on campus and representatives of host institutions agree, collaborate and cooperate, the more successful the management of relations between the educational institutions and the Greek organizations will be.

In many cases, it is preferable that the host institution delay intervention to give the Greek management a chance to solve the problem. If the Greek organization is unwilling or unable to deal with the problems, if the problems have immediate adverse impact on the educational mission of the institution, or if there is immediate jeopardy to the safety of members to the institution, the administration has no choice but to act swiftly.

In most cases, Greek leaders can jump right in and take charge of the problem and bring it to a satisfactory conclusion. A satisfactory conclusion is to bring an outcome that protects the students, protects the Greek organization and protects the host institution from the recurrence of similar ongoing difficulties.

In the past, some host institutional representatives have tried to solve problems in advance through promulgation of generic regulations without looking at the regulation both from the standpoint of the educational institution and from the standpoint of the Greek organization. This has sometimes led to regulations being promulgated that would not stand the test of legality. Often the administrators bypass the lawyers for the host institution. Examples include:

- Failure to recognize that a Fifth Amendment property right is being taken if a host institution, owned or operated by a state, mandates that a Greek organization deposit all of its money in a non-interest-bearing account with the institution's treasurer. Assuming the chapter had assets in interest-bearing accounts, this constitutes a taking of property in violation of the Fifth Amendment of the United States Constitution.

- Sometimes administrators fail to recognize that, while they may be able to withdraw recognition from a Greek organization, that does not revoke the First Amendment rights of students to assemble freely without the use of university space or property.

Experience teaches that the more we can focus on areas where representatives of the Greek organizations on campus and representatives of host institutions agree, collaborate and cooperate, the more successful the management of relations between the educational institutions and the Greek organizations will be.

In a recent six-year period, we found twenty-nine (29) decisions reported in law books that involved Greek organizations. This was an average of 4.83 cases reported per year. Undoubtedly, there were many more claims and lawsuits filed, but only 4.83 cases found their way into the law books with written decisions by courts each year during this six-year period. When one considers that every human interaction has the potential to explode into a lawsuit, in these litigious days, this is a remarkable statistic. The more human contacts an organization has, the more potential it has for lawsuits.

Were it not for the fact that college administrators and Greek leaders at the campus level, the regional level and the

national level are doing an awful lot of things properly, there would be far more lawsuits reported annually.

The sample we selected is reflected in the following table:

Hazing	10
Alcohol	7
Premises Liability	1
University Discipline for Drugs	1
Antitrust Violation	1
Trademark Infringement	1
Fraternity Animals and Liability	1
Defamation	1
Negligent Acts	1
Unhappy Neighbors	3
Liability for Criminal Acts	1
Service of Process	1

The table above shows the areas where Greek leaders and campus leaders should be emphasizing their collaboration. Obviously, hazing and alcohol are at the top of the list.

Every college fraternity at the national and local level has programs to educate against both hazing and unlawful use of alcohol. Every campus has similar programs. The meeting of the minds should be fostering close collaboration for pragmatic solutions to these two principal opportunities for disaster.

- Robert E. Manley

HISTORY CHANNEL LOOKS AT FRATERNITIES

On September 1, 2003, the History Channel aired an hour and a half special entitled "Frat Boys." Focusing on the Phi Delta Theta Chapter at the University of Mississippi (Ole Miss), the program traced the recruiting of new members by the fraternity system at Ole Miss. Interspersed throughout the program was information on the history of the American Greek movement going back to the 1820s. It briefly considered the centuries-old tradition of related organizations, and examined the critical challenges facing Greek organizations today, including the twin challenges of hazing and alcohol abuse.

With the cooperation of the Phi Delt Chapter at Ole Miss, the program aired portions of a bid meeting at which voting on bids to new members was shown. It also showed the new members gathering for the Phi Delta Theta initiation.

Robert Biggs, the Executive Vice President of Phi Delta Theta, said about the unique view of the Chapter's internal functions that:

> "The History Channel respected the privacy of our ritual. They were not admitted to any chapter meeting nor to any portion of the ritual of initiation. Phi Delta Theta holds in confidence our fraternity ritual. Our chapter at Ole Miss maintained that confidentiality and The History Channel honored it."

There is a value in preserving the secrecy of the rituals of private social organizations. The Supreme Court of the United States has repeatedly recognized that when examining the right of certain groups to protect their intimate association, one of the factors the courts should consider is whether or not there are aspects of the relationship of the group involved that are kept from public view and from which non-members are excluded. A fraternal organization should endeavor to guard its secrets. It has a right, following its own disciplinary rules, to discipline members who reveal the organization's secrets.

"Frat Boys" is available for $29.95 from The History Channel and can be ordered through its web site ((http://store.aetv.com/html/home/index.jhtml)

- Timothy M. Burke

Observance of ritual is at the core of fraternity relationships

"Underlying the whole experience is the ritual that is exclusive to each fraternity.... A fraternity ritual is the solemn and historical rationale for an organization's existence. The ritual is often presented to new members during a serious church-like ceremony where new members learn the underlying meaning of their respective organizations." Baird's Manual of American College Fraternities, 20th Edition, p. ix.

ANTI-GREEK BIAS MOVES OHIO TAX COMMISSIONER

The Ohio Tax Commissioner, Thomas M. Zaino, challenged the tax exemption of a sorority residence known as Magnolia House, owned by the Case Western Reserve University in Cleveland, Ohio. Alpha Phi has a chapter whose members live in Magnolia House while attending Case Western Reserve as full-time students.

The Tax Commissioner's lawyer, Attorney General Jim Petro, through his assistant, Janyce C. Katz, asserted to the Supreme Court of Ohio:

- "Granting a tax exemption to CWRU for the Magnolia House occupied by students who are members of Alpha Phi 'would mock the purpose of a University, if that purpose is to impart the knowledge of scholars and to encourage independent, intellectual thought and study.'"

- "The use of this property is in no way primarily charitable, nor is it primarily educational."

- "The use of the Magnolia House by Alpha Phi students at CWRU is not properly used with reasonable certainty in carrying out the necessary objects and purposes of the University."

The case arises because the Ohio taxing authorities denied property tax exempt status on the property that Case Western Reserve University would have otherwise enjoyed for the value of the Magnolia House if the house had been occupied by randomly assigned students instead of by Alpha Phi.

The National Panhellenic Conference and Alpha Phi filed an Amicus Curiae brief with the Supreme Court of Ohio to demonstrate the misperceptions demonstrated by the Attorney General's Office. The brief was written by Timothy M. Burke, of Manley Burke, as counsel for National Panhellenic Conference and Alpha Phi.

Among a variety of facts called to the high court's attention, the brief quotes the constitution of the National Panhellenic Conference (NPC) which was founded in 1902: "The object of this organization shall be to maintain on a high plane fraternity and interfraternity relationships, *to cooperate with college and university authorities in their effort to maintain high social and scholastic standards throughout the whole college or university,* and to be a forum for discussion of questions of interest to the college or university and the fraternity world."

The brief also cites the Unanimous Agreements which begin with the Panhellenic Creed stating: "We, the undergraduate members of women's fraternities *stand for good scholarship*, for guarding of good health, for maintenance of fine standards; and *for serving, to the best of our ability, our college community.*"

The Supreme Court of Ohio will learn from the brief that the Panhellenic Conference's 26 member groups have initiated over 3,600,000 members and currently have 2,908 chapters on 620 campuses throughout the United States and Canada. In addition, there are 4,678 alumnae chapters. In the past academic year, more than 80,000 college and university students joined NPC member organizations.

The brief emphasizes that the NPC groups devote a great deal of time to support important charitable, artistic, and educational resources in our country. Examples include:

- McDowell Colony, a national haven for artists funded by Alpha Chi Omega

- Chaim Sheba Medical Center in Israel, supported by Alpha Epsilon Phi

- The Chi Omega Greek Theater on the University of Arkansas campus, the only structure of its kind in the United States, which is regarded as an almost exact replica of Dionysius's Theater at the foot of the Acropolis

- Pi Beta Phi's support of education and the arts in Gatlinburg, Tennessee, which began with funding and running the first medical center and the first public school in Gatlinburg, where the public school still is on Pi Beta Phi property and carries the fraternity name. In the same community, Pi Beta Phi operates Arrowmont, a nationally recognized school of arts and crafts accredited through the University of Tennessee at Knoxville

- Alpha Xi Delta's support of programs for respiratory health

- Delta Gamma's support of programs for vision health

- Delta Phi Epsilon's support of cystic fibrosis research
- Delta Zeta's promotion of programs for the prevention and cure of hearing problems
- Kappa Alpha Theta's support of curing communication disabilities
- Kappa Delta's support of programs to deal with child abuse and children's health
- Kappa Kappa Gamma's promotion of programs for rehabilitation of the handicapped
- PROJECT HOPE, supported by Phi Mu
- Phi Sigma Sigma's support of the National Kidney Foundation.

The brief also highlighted the great educational programs that NPC and its members have developed to promote academic excellence and that the 26 NPC member groups have scholarship programs which provide financial assistance to undergraduate active members and often to graduate members to encourage graduate education. During the 2001-2002 academic year, NPC alumnae associations awarded $130,000 in scholarships to 556 college and university students.

A Case Western Reserve University witness confirmed in his testimony before the taxing authorities that the sorority was a solid contributing member of the academic community. "The Alpha Phi Sorority has always been in good standing. It is a sorority that always makes the number of students that it can rush. It always rushes that number. They have never presented a problem. They have always been active in community service and educational programs. They have met all of the required program standards around alcohol and sexual harassment and risk management. They are in good standing.... Their academic performance is above average."

The NPC brief urges the Supreme Court to take judicial notice of the high standards of Case Western Reserve University and argues that to maintain academic performance above average in this institution does not happen "without serious attention to academic performance" in the "rigorous undergraduate program."

The NPC brief supports the arguments presented by Case Western Reserve University attorneys from the law firm of Taft, Stettinius & Hollister that:

- "The University is entitled to tax exemption for Magnolia House under the tax laws of Ohio because Magnolia House belongs to an educational institution and is used by the institution for educational purposes."
- Magnolia House is exempt from taxation under the statutes of Ohio because it is under the direct control of an educational institution, and made available "for use in furtherance of or incidental to" the institution's educational purposes; and not made available with a view to profit.
- Magnolia House is exempt from taxation under the statutes of Ohio because it is "a building connected with a public institution of learning and is not used with a view to profit."

This controversy is another illustration of how the "Animal House" image can close the minds of public officials and ordinary citizens to the reality of the positive educational impact that Greek organizations have throughout the country. Perhaps the Supreme Court of Ohio will take this opportunity to reject the preconceived notions of the taxing authorities and recognize the outstanding educational contribution that Greek organizations make to students on campuses throughout the United States.

This is not the first tax case in which Mr. Burke has challenged the unlawful imposition of real estate taxes on nonprofit organizations. He successfully argued before the Supreme Court of Ohio that a nature conservation organization that acquires property to preserve it and turn it over to local park authorities should not be taxed during the period when the preservation organization holds title to the real estate. *Little Miami, Inc. v. Kinney*, 68 Ohio St.2d 102, 428 NE.2d 859 (1981).

- Robert E. Manley

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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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