

A Band Hazing May Forever Increase the Legal Consequences for Hazing Deaths

The beating death of Robert Champion in a band hazing at Florida A & M last November may change forever the consequences associated with a hazing death.

The FAMU band members accused of killing Champion with their fists as he ran through a gantlet in a parked bus may set a new bar for prison sentencing involving college students in a hazing.

Champion was the first band member ever to die in a hazing. It shocked the nation that someone died for the privilege of association with a high-status marching band at the largest public historically black university.

Like many a respected, award-winning fraternity chapter caught tolerating extreme physical hazing for years and years, the famed FAMU Marching 100 cloaked itself in lofty principles. Its web site boasts these primary values:

Highest Quality of CHARACTER”
 “Achievement in ACADEMICS”
 “Attainment in LEADERSHIP”
 “Perfection in MUSICIANSHIP”
 “Precision in MARCHING”
 “Dedication to SERVICE”

Indeed, the Marching 100, except for lack of Greek letters associated with its name, in many respects theoretically provided its 420 undergraduate members with what to me are the best aspects of fraternity: high values, camaraderie, lifelong friendships, service to community, and an opportunity to excel individually and collectively.

It took far less than a minute to sully the reputation of a band that began in 1892.

Robert Champion’s death did not meet the standard definition of hazing: the “welcoming” of a newcomer in some silly, demeaning or dangerous way with the expectation that he will enjoy all the fruits of full membership once the ordeal is over.

No, the 26-year-old Champion was already a member of the prestigious FAMU band, but that day on the field in a football game against Bethune-Cookman University, he dropped a baton to the purported embarrassment of his fellows. They broadened the definition of hazing to include physical punishment for letting down the group. Another story circling in the press is that Champion was beaten as a precondition to join high-status members who took a certain

bus called “Bus C” on game trips.

Punishing a veteran member for real or imagined transgressions has happened before in fraternities.

-- Fred P. Bronner, 21, a Chi Chi Chi local fraternity brother at Pierce College, angered three fellow members who abandoned him in a forest without his eyeglasses, leading to a fatal fall over a 500-foot cliff.

-- Two Alfred University Zeta Beta Taus beat up member Benjamin Klein for revealing their hazing secrets to another chapter. Klein committed suicide afterwards.

The Alfred fraternity members pleaded guilty to mere third-degree assault and second-degree hazing. The Chi Chi Chi brothers received probation and a ten-day community service stint with the U.S. Forest Service.

Unlike the Philippines, where fraternity members convicted of killing a newcomer can receive a life sentence, the United States traditionally has been forgiving of fraternity members and athletes who haze someone to death.

A Chi Tau local fraternity member at Chico State was given a one-year sentence for his felony conviction after the death of pledge Matthew Carrington, while three others received lesser sentences. That’s the longest sentence for a fraternity death. (The longest sentence for a fraternity beating without a death occurred at FAMU, as will be discussed in a moment).

One other recent fraternity hazing death at Radford University also ended in the courts with light sentences for nearly all defendants. In mid-December 2011, following the alcohol-related hazing death of Samuel Mason, six Tau Kappa Epsilon members received suspended sentences and a token fine (one has his case continuing for six months). A seventh, the big brother of Mason, received a two-month sentence. The eighth and final member now goes to trial.

The courts were far less lenient over occupational hazing in Texas. A judge gave two men 18- and 5-year sentences for an on-the-job hazing death in which new drilling rig worker Shawn Davis, 23, dangled while tied to a crane. One wonders what the ripple effect might have been if the hazers involved in deaths at the University of Texas or Texas A & M were given similar long sentences.

Here's why members of the FAMU band could receive serious prison time if charged and convicted.

First, the Florida law signed in 2005 by then-Governor Jeb Bush makes conviction of a third-degree felony hazing possible in the event of a death. The police investigation as of this writing continues with no arrests as this goes to press. Individuals charged and convicted under the felony hazing law could receive a five-year sentence.

Rep. Adam Hasner (R.Delray), Sen. Walter Campbell (D-Ft. Lauderdale) and the parents of Chad Meredith (with the counsel of their attorney David W. Bianchi) led the lobbying for that 2005 law. Meredith, a pledge, drowned in a little over six-feet of water while University of Miami Kappa Sigma members watched and failed to call 911 in a timely manner. No criminal charges were filed, but the Meredith family was awarded millions in a civil suit.

Significantly, two Florida A & M Kappa Alpha Psi fraternity members in 2006 went on trial, becoming the first test case for the constitutionality of the Florida law. Their trial was nationally televised. The two were convicted and received two-year prison terms.

Florida Governor Rick Scott is as dedicated to keeping his state hazing-free as former Gov. Bush was. He unsuccessfully lobbied with A & M trustees to dismiss FAMU President James Ammons. Longtime, award-winning band director Julian White was fired and then rehired and put on paid leave.

If a five-year sentence is imposed, it is conceivable that legislators in other states could be persuaded to follow Florida's example and institute tougher prison penalties for those convicted of causing hazing deaths. (There are 44 states with hazing laws at present). If tough sentencing becomes the new norm, the sentences for those convicted of hazing in the Mason death may be the last to get off that lightly.

Fraternity hazing deaths go back to 1873 at Cornell

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when the son of a onetime Civil War hero fell into a gulch while being led through the countryside by Kappa Alpha Society members. Significantly, Cornell again had a hazing death in February of 2011 when member George Desdunes, 19, died of alcohol poisoning during a hazing of a member that was conducted by Sigma Alpha Epsilon pledges. That death prompted the mother to file a \$25 million suit.

Cornell was hardly alone in tragedy. Academic year 2008-2009 saw six young men lose their lives joining fraternities local and national. Five of the six deaths definitely can be attributed to hazing.

The Meredith family continues to speak out on haz-

ing. William Meredith, Chad's father, spoke at a law enforcement symposium in Indianapolis and also addressed students at Franklin College. W. (Jerry) Meredith, Chad's brother and a volunteer for HazingPrevention.org., does anti-hazing presentations for high school athletes.

Chad's sister Kelly Meredith-Henson of Indianapolis takes a different approach. She wants the Greek system abolished.

"If it were up to me, the Greek system would be a

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thing of the past in our schools," Meredith-Henson said. "If you could imagine the worst pain in the world, and unless you have experienced it you can't, only then would you know what hazing has done to our family."

Several international fraternities have taken the high road and demonstrated no-nonsense actions when a chapter is caught hazing, particularly if alcohol or physical violence occurs.

Executive Vice President Robert Biggs of Phi Delta Theta has become himself well known for speaking against hazing following the death of a Phi Delt pledge at Auburn University in 1993. In addition to dedicating much of the fraternity's web site to hazing education, Biggs and others in Phi Delta Theta are looking into the pros and cons of supporting attempts to create a federal law that bans hazing. The main advocate for creation of a federal antihazing law is the campus watchdog Security on Campus.

Douglas Fierberg, a Washington attorney who has filed several high-profile lawsuits against national fraternities, says that the one action all international fraternities might take is to go back to the "Dry House" reform movement and do it by mandate, not by an undergraduate vote. Undergraduates need to understand that all Greek houses theoretically were substance-free for decades prior to the 1960s.

Fierberg likens the need for international fraternity executives to curtail alcohol abuse and hazing as campus safety and sound business issues where reforms are needed if Greek deaths and serious injuries are ever to end.

Clearly hazing needs to be on the agenda of every national fraternity and sorority's board of directors in 2012. In 2009, the Delta Lambda chapter of Sigma Alpha Mu was fined \$50,000 and convicted after the hazing death of Brett Griffin at the University of Delaware. That was a landmark case since it involved such a huge penalty against an unincorporated association.

Sororities and female fraternities such as Zeta Tau Alpha have committed thousands of dollars to anti-hazing education programs. Many other distinguished Greeks have taken volunteer and board positions for HazingPrevention.Org, an

organization dedicated to empowering people to end hazing.

The latest from Florida A & M is that the family of Robert Champion plans to sue the school for what the family claims was doing too little too late to end “a culture of hazing.” The family of a female FAMU band member also has filed a lawsuit, claiming she suffered a broken bone during a hazing beating.

Thus, when it comes to hazing, crime not only

doesn't pay, it pays out big bucks.

- Hank Nuwer

Hank Nuwer's last book is *The Hazing Reader* (Indiana University Press). He is an outgoing board member of HazingPrevention.org and serves as a volunteer adviser on hazing issues to Security on Campus. He is a member of a fraternity and founded the Hazing Collection at Buffalo State College, a clearinghouse of scholarly books and articles on hazing for free use by all researchers and students.

Federal Hazing Law Coming

In response to the death of Robert Champion, the Florida A & M drum major mentioned in Mr. Nuwer's article above, United States Representative Frederica Wilson announced that she plans to introduce a federal anti-hazing bill in Congress early this year. Rep. Wilson, from Miami, stated, “Hazing is demeaning, dangerous, and, sadly, deadly. It's time that we put an end to this horrible and humiliating ritual once and for all, so that no more students suffer the way that Robert and others have.”

Details of the proposed bill have not yet been announced. However, Rep. Wilson told several newspapers that her bill will target those who haze, those who are hazed and those who witness hazing but do not intervene.

Meanwhile, others are calling for more government action following the suicide of Private Danny Chen. Private Chen's body was found on October 3 in a guard tower on his military base in southern Afghanistan. The military said that Private Chen died of “an apparent self-inflicted gunshot wound.” In a highly unusual case of criminal charges in a suicide, the Army has charged eight soldiers in connection with the death, alleging they bullied Private Chen into killing himself. Of the eight men charged, seven face counts that include involuntary manslaughter, negligent homicide and assault. One man, a first lieutenant, is charged with dereliction

of duty.

According to reports, Private Chen was dragged out of bed, hit with rocks, was subject to racial taunts and forced to crawl along the ground and do exercises without swallowing or spitting out a mouthful of water. The abuse of Private Chen was apparently because he forgot to turn off a water heater after taking a shower.

The deaths of Mr. Champion and Private Chen both received a great deal of national press. These unfortunate and unnecessary deaths reminded the public that hazing is not just a Greek problem. With the extensive press coverage, passage of a federal hazing law has become much more likely at some point in the very near future.

If a federal hazing law is enacted, it will become imperative for Greek organizations to become familiar with the definitions, prohibitions and penalties set forth in any such law. Given that 46 states currently have hazing laws, practically every institution prohibits hazing and every Greek organization explicitly prohibits hazing, it is important to keep the various definitions and penalties clear.

Fraternal Law will update this story as the bill progresses through Congress.

- Daniel J. McCarthy

Wise Use of Free Speech

Two recent events demonstrate the ability of national fraternities and sororities to deal with conduct that is inappropriate but may not constitutionally be treated as a violation of the policies of state universities.

A few years ago, great controversy surrounded the adoption of politically correct speech codes by universities. Those were regulations designed to prohibit or punish speech which negatively commented on individuals or groups based upon their sex, color, religion, race, nationality, and other protective classifications. In each instance, where such regulations were challenged after an attempt by a university to impose discipline, such regulations were found to be unconstitutional violations of freedom of speech.¹

The situation is different, however, when fraternities and sororities choose to respond to such conduct. Two exam-

ples occurred this past fall.

In November, at the University of Southern Mississippi, six members of Phi Mu attended a 1980s themed costume party dressed in black face and curly haired wigs, attempting to depict themselves as the Huxtable family of the *Cosby* show. While both Phi Mu and the university conceded that the women had no “ill intent,” as Dean of Students, Eddie Holloway, said, they also “did not understand the historical implication of costuming in black face.” Chris Bridges, National President of Phi Mu, quickly responded expressing her disappointment. The national fraternity imposed probation on the women and required them to undergo diversity training and required the chapter to conduct a campus-wide program.

In December, at the University of Vermont, the Sigma Phi Epsilon Chapter was closed by the fraternity after a

questionnaire, apparently put together by one of its members, included the question, “who would you like to rape?” The national fraternity, through Brian Warren, its Executive Director, made it clear that the fraternity “will not tolerate this behavior.”

Both the black face and the “rape” survey may have involved issues of constitutionality, even if inappropriate in the case of the black face and appalling in the case of the rape question, protected speech. Such protections do in fact limit the ability of state colleges and universities to discipline for such conduct, but constitutional protections do not apply to disciplinary actions or conditions of membership imposed by fraternities and sororities.

Most fraternities and sororities are founded upon high ideals and aspirations, and their rules frequently include broad, though somewhat vague, terms which might be unconstitutional if adopted as law, such as conduct unbecoming a member or conduct which brings disrepute on the organization. Both the blackface and survey brought embarrassing national publicity focused on the organizations involved, triggering for both groups the need and legal ability to respond.

The law across the country is generally very clear that courts will avoid becoming involved in second guessing the disciplinary decisions of private social organizations so long as in doing so, the organizations have complied with their own rules and procedures. Private colleges and universities may have the same broad ability but that does not apply to state colleges and universities which are state actors under the law, which must honor the constitutional protections afforded by the first and fourteenth amendments.

Colleges and universities, even private ones, may be better off doing what they do best, educating, rather than trying to punish inappropriate speech. Northwestern set a good example of that, when in preparation for the 2010 Halloween costume season, its Dean of Students, and the President of Student Government and others, issued a joint letter encouraging its students to recognize the sensibilities of one another and the inappropriateness of ridiculing by costume and speech, the diversity of any elements of the Northwestern community.

In that letter, after discussing why blackface was offensive and urging it not be used, the authors made the point that could be applied much more broadly, that:

“Northwestern is a community that values free expression as well as inclusivity. And while students, graduate and undergraduate, have the right to express themselves, we would hope the people would actively avoid those circumstances that threaten our sense of community or disrespects, alienates, or ridicules segments of our population based on race, nationality, religious belief or gender.”²

• Timothy M. Burke

1 See for example, *Doe v. University of Michigan*, 721 F.Supp. 852 (1989), *IotaX Chapter of Sigma Chi v. George Mason University*, 993 F.2d 386 (1993) and Fraternal Law “Klan Costumes and Black Face Can Anyone Punish,” January 2002.

2 See gawker.com/5673657/northwestern-students-reminded-no-blackface-this-halloween.

Beware of Unconstitutional Social Media Policies

Facebook, Twitter and other forms of social media are growing in popularity and importance on a daily basis. The advances in technology are moving at the speed of light but schools are not as quick to adopt and enforce effective and legal social media policies. While schools may have compelling reasons to adopt policies concerning student social media use, the First Amendment provides strong protection against overreaching policies.

Recently Sam Houston State University, a public institution, proposed a new social media policy that included, among other problematic provisions, a requirement that student organizations turn over their social media passwords to the school. The University could then censor postings that were inconsistent with the school’s overall message.

FIRE (The Foundation for Individual Rights in Education) brought national attention to Sam Houston State’s proposed policy after a professor tried to censor a “free speech wall.” FIRE now reports that the University has eliminated its policy and has decided to start over with a yet-to-be announced social media policy.

Recent hazing at a high school in Montana led Cascade County Attorney John Parker to release the following statement to all students at three public high schools in the area:

“Regarding the recent arrest of a... student... any student who posts messages on any social networking sites (Facebook, Myspace) or sends text messages, etc., regarding the alleged victims or hearsay information regarding the investigation or victims, per the County Attorney, you will be arrested and prosecuted to the fullest extent of the law for the crimes of intimidation and/or Tampering with a Witness. Government officials are monitoring all Facebook/Myspace and other social networking postings and they would recommend anyone that has posted names regarding this incident to immediately remove the names from the sites. This will be everyone’s one and only warning... failure to comply with this demand will result in prosecution, regardless of your age.”

In Missouri, the state legislature passed a law that imposed a statewide ban on electronic communication between teachers and students. The law quickly earned the nickname "The Facebook Law," and provided in parts,

- No teacher shall establish, maintain, or use a work-related internet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian.
- No teacher shall establish, maintain, or use a nonwork-related internet site which allows exclusive access with a current or former student.

The state teacher's union challenged the law on free speech grounds. Cole County Circuit Court Judge Jon Beetem, the trial judge, issued an injunction banning the state from enforcing the new law for at least 180 days. "The breadth of the prohibition is staggering," Beetem wrote.

Following Judge Beetem's decision enjoining the law, the legislature rewrote the bill, dropped the statewide ban but ordered all school boards to develop their own social media policies by March 1, 2012.

These are just some recent examples of institutions or officials overreaching when trying to control social media use. The First Amendment affords great protection against government interference with speech. Prior restraint is only allowed in very narrow and specific circumstances. Schools are still struggling to find the proper balance between allowed regulation and unconstitutional prior restraint.

Expect more attempts to enact and enforce unconstitutional social media policies in this rapidly developing area of the law.

- Daniel J. McCarthy

Is a Greek Council A State Actor?

A recent decision by the Greek Council at Montclair State University in New Jersey may well lead to litigation. For two years, Alpha Sigma Phi had been working to develop a chapter at Montclair State. The final steps were to obtain approval from the Montclair State Greek Council. That is where the trouble began. The meeting of the Council began as a public meeting. According to the *Montclairion*, the campus newspaper, initial comments on Alpha Sigma Phi were positive. The would-be chapter was particularly recognized for its work supporting the Women Herstory Jeopardy event.

But there had apparently been trouble and one member of the Council raised an issue of potential domestic violence in which the former leader of the Alpha Sigma Phi Interest Group had been arrested. The individual was not identified, nor did the *Montclairion* report any details of the alleged event. That, combined with claims that the interest group had not been involved in enough campus events in the last year, turned the matter controversial. As the discussion apparently grew heated, the Council chose to go into what the *Montclairion* described as "closed session." When the floor was reopened, the Council proceeded to vote down the request for recognition.

Within a week, the attorney who serves as general counsel of Alpha Sigma Phi Fraternity, Inc. sent a strongly worded letter to the Greek Council, its board expansion and recognition committee members, and to Chapter presidents, threatening litigation if recognition was not granted. The letter, written by Steven M. Gnewkowski, warned that the action of the Council was "a gross violation of the constitutionally protected rights of free speech and freedom of assembly that cannot and will not be tolerated."

Gnewkowski's letter indicated that Alpha Sigma Phi

had spent more than \$100,000.00 in developing its interest group and potential chapter at Montclair State and that the denial of recognition was not based on any criteria or legitimate reason. As a result, cautioned Gnewkowski, a lawsuit would "seek to recover costs associated with the establishment of a chapter on your campus, obtain injunctive relief, and seek an additional \$5,000,000.00 in exemplary and punitive damages."

A subsequent article by the *Montclairion* reported that the Student Government Association (SGA), which received a copy of the letter, because the Greek Council falls under SGA's jurisdiction, said through its press secretary that "The SGA is confident that this conflict can be resolved without litigation, giving both sides what they want."

This issue presents an interesting question. Assuming that the Montclair State University, which is a state institution, has essentially turned over the ability to grant recognition to the Greek Council, has the Greek Council become a state actor under the United States Civil Rights Act, 42 USC § 1983? If it is the Greek Council that grants university recognition and with it the benefits of recognition that are received from the state university, perhaps it is. If a court were to agree with that and determine that the Greek Council had violated either the due process rights or the equal protection rights of Alpha Sigma Phi and its potential members, they may be entitled to recover not only damages, but also their attorneys' fees under 42 USC § 1988.

While several relatively recent cases have gone against student organizations (including fraternities) who have challenged a denial of recognition at state universities, those cases have all turned on the university's desire to deal with one form or another of discrimination.¹ That doesn't appear to be the case here. *Healy v. James*² is still good law. If the Stu-

dents for a Democratic Society (in *Healy*), generally recognized as an anti-government group, was entitled to recognition, there appears to remain a strong argument that so would any fraternity or sorority, provided it had not violated any law or the regulations properly adopted by the state university from whom recognition was sought.

At press time, this issue is unresolved and Alpha Sigma Phi is pursuing its legal options.

- Timothy M. Burke

1 *Christian Legal Society v Matinez*, 130 S.Ct. 2971 (2010) (Discrimination based on sexual preference); *Ch. Iota Colony of Alpha Epsilon Pi v. City University of New York*, 502 F.3d 136 (2nd Cir. 2007) (discrimination based on sex).

2 408 U.S. 169 (1972)

New Law Partnership Focuses on Fraternities, Sororities and Student-Life Non-Profits



Timothy M. Burke, Sean P. Callan, John E. Christopher and Daniel J. McCarthy announced the establishment of Fraternal Law Partners, the nation's only legal partnership dedicated to serving fraternities, sororities, student life organizations and their related educational and charitable foundations. The partnership builds upon 70 combined years of legal experience in fraternal law. Burke is a founding partner of Manley Burke, which has published the *Fraternal Law* newsletter for 30 years. Callan and Christopher, both former partners of Dinsmore & Shohl LLP, have long-represented Greek organizations in all facets of their operations. McCarthy serves as the Editor of this newsletter and monitors the Greek National Anti-Hazing Hotline, which is sponsored by 37 national Greek organizations.

Fraternal Law Partners offers the most complete depth and breadth of legal services tailored to the issues confronting the Greek community. Services offered by the new firm include legal counsel on business matters – real estate and housing within Greek communities, corporate governance for fraternities, foundations and house corporations, employment issues, tax and grant-making – as well as risk management, anti-hazing education, crisis and incident management, litigation and other liability issues.

According to Callan, the partnership with Fraternal Law Partners was a natural extension of both his and Christopher's experience. Both are frequent contributors to the *Fraternal Law* newsletter and other legal publications. They have also presented case studies, seminars and workshops at numerous legal conferences, including the Fraternal Law Conference, a leading legal conference for fraternities, sororities and their foundations.

"Our careers have been largely dedicated to the business law challenges and risk management issues facing for fraternities,

sororities and their charitable foundations. We felt it was the right time to partner with Tim and Dan to dedicate ourselves solely more fully to the practice of law in this context," Callan said.

Fraternal Law Partners will continue to publish the *Fraternal Law* newsletter, and will host the next *Fraternal Law Conference* on an annual basis beginning in the Fall of 2012.

About Fraternal Law Partners

Fraternal Law Partners is the only legal partnership dedicated to the legal issues impacting fraternities, sororities, student life organizations and their related educational and charitable foundations. The firm provides experienced legal counsel on business matters – real estate and housing, corporate governance, employment issues, tax and grant-making – as well as risk management, anti-hazing education, crisis and incident management, litigation and other liability issues. More information can be found at <http://www.fraternalallaw.com>.

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