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Freedom of Association and College Fraternities and Sororities: Legal Update

The courts of the United States have at best presented only a faint glimmer of hope that associational rights of fraternities[1] and their members merit constitutional protection. Indeed, the two most recent appellate court decisions suggest that colleges may ban fraternities without chilling students' freedom of association.[2]

Early Case Law: No Help For Fraternities

In 1915, the United States Supreme Court upheld the state of Mississippi's authority to ban fraternities and sororities at state-supported institutions.[3] The University of Mississippi had required each applicant to the school to sign a pledge disavowing fraternity membership or any intent to join a fraternity. Alluding generally to associational rights, the Court held that the state's authority to create and enforce educational policy trumped other rights.[4]

For many years, the State University of New York forbid any student social group from affiliating withy any national or international organization. A local fraternity challenged the policy in 1954, but the State University prevailed at trial.[5]

In 1965, the University of Colorado alleged that Sigma Chi imposed membership restrictions based on race and threatened to suspend its chapter unless the fraternity could prove otherwise.[6] Sigma Chi instead chose to litigate and lost when the court held that "the right of association is not . . . an absolute right but is always subject to evaluation in relation to the interest which the state seeks to advance."[7]

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[1] Fraternities and sororities will be referred to generically as "fraternities," and intended to include greek letter and non-greek letter single-sex and coeducational selective membership organizations primarily focused on fellowship.
[2] See Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435 (3rd Cir. 2000); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 502 F.3d 136 (2nd Cir. 2007).
[3] Waugh v. Board of Trustees of University of Mississippi, 237 U.S. 589 (1915).
[4] Id. at 596.
[5] Webb v. State University of New York, 125 F. Supp. 910 (N.D.N.Y. 1954). The State University of New York ended its prohibition of national and international fraternities in 1982.
[6] Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (D. Colo. 1966).
[7] Id. at 525.

In 1972, the Supreme Court considered students' freedom of association for a non-fraternity and held that concern for campus disturbance outweighed students' associational rights.[8] Central Connecticut State College denied recognition to an organization identified with disturbances and radical activities on other college campuses. The Court held that a college may ban an activity likely to disrupt a college's mission, even before any such activity has occurred.[9]

Fraternities at private colleges have not had greater success. A typical case involved Lambda Chi Alpha fraternity after Colby College banned all fraternities. Nineteen members of the fraternity were either suspended or placed on probation for their continuing membership and the students sued Colby under the Maine Civil Rights Act.[10] The trial court denied relief to the students and the Maine Supreme Court affirmed, holding that the Maine Civil Rights Act did not authorize "Maine courts to mediate disputes between private parties exercising their respective rights of free expression and association."[11]

Jaycees Case: A Glimmer of Hope

The Unites States Jaycees is a national civic association which formerly restricted its membership to men. Two local chapters in Minnesota were sanctioned for admitting women and sued the national organization.[12] The Jaycees countered that requiring women to be admitted would violate the male members' right of free association. While the Supreme Court held that the all-male Jaycees chapters were not protected associations, the decision implied that fraternities might be entitled to greater protection.

Because of the size of Jaycees chapters, and the Jaycees' overall mission of civic involvement, the Court held that the Jaycees was not an intimate association characterized by smallness, selectivity and seclusion.[13] The average Jaycees chapter had over four hundred members and chapters were as large as nine hundred.[14] Selectivity

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[8] Healy v. James, 408 U.S. 169, 284 (1972). The Court contrasted its holding to Tinker v. Des Moines Independent School District and its famous admonition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969). See also Gay Student Services v. Texas A & M University, 737 F.2d 1317 (5th Cir. 1984) (state supported university may not exclude a particular group based on the content of the group's speech absent compelling state interest and proof that the interest would not be served by a less restrictive alternative)

[9] Id. at 286-87.

[10] Phelps v. President and Trustees of Colby Coll., 595 A.2.d 403 (Me. 1991).

[11] Id. at 407. But see Frank v. Ivy Club, 120 N.J. 73 (1990) (Princeton eating clubs subject to New Jersey's law against discrimination as a place of public accommodation by virtue of the clubs' close relationship with the University). Cf. 42 USC §§ 2000a(e), 2000e(h), 3607 & 12187 (Congressional exemption of fraternities from anti-discrimination provisions dealing with public accommodations, employment, disability, and housing).

[12] Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

[13] Id. at 618-19.

[14] Id. at 621.

played no concern in choosing Jaycees members.[15] Finally Jaycees involve outsiders in most of their activities and seek media coverage of their activities.[16]

Because fraternities invariably have fewer than four hundred members in individual chapters, are selective in membership decisions, and conduct many if not most activities in seclusion, there was reason to believe that the Jaycees decision would protect fraternities' freedom of association.

Pi Lambda Phi and *Chi Iota* Cases: The Glimmer is (More or Less) Extinguished

In 1996 Pittsburgh police raided the Pi Lambda Phi fraternity house at the University of Pittsburgh, arresting several members and confiscating illegal drugs and drug paraphernalia.[17] The University subsequently determined that the membership at large either tacitly approved of the drug activity or failed to take responsibility to stop it. Accordingly, the University withdrew recognition of the fraternity.[18]

Members of the fraternity sued alleging, inter alia, that the University had violated their associational rights. Although citing the *Jaycees* standard of smallness, selectivity and seclusion, the court held that the fraternity was not the type of association that warranted constitutional protection as an intimate association.[19] The court pointed to the chapter's size (as many as eighty members, with as many as twenty new members each year), lack of selectivity (the fraternity recruited from general student body) and lack of seclusion (the fraternity held parties open to non-members and participated in University events) as evidence to support its conclusion.[20]

Last year the Second Circuit upheld City University of New York's[21] ("CUNY") decision to deny recognition to an Alpha Epsilon Pi expansion group.[22] CUNY denied recognition to any student group that discriminated on the basis of gender. The court balanced the fraternity's associational rights against CUNY's interest in preventing discrimination and held for the University.[23]

In reviewing the Jaycees standard for size, the court found that the fraternity placed no limit on size and had only eighteen members because of circumstances and not because of a desire to maintain intimacy.[24] With regard to selectivity, the court found that the fraternity's aggressive recruitment practices suggested it was not selective.[25]

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[15] Id. at 620.
[16] Id. See also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).
[17] Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435, 439 (3rd Cir. 2000).
[18] Id. at 439-40.
[19] Id. at 442.
[20] Id. The court also held that the fraternity was not an expressive association. Jaycees, 468 U.S. at 622-23; Rotary, 481 U.S. at 548-49; and Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
[21] The incident arose at the College of Staten Island campus of CUNY.
[22] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 502 F.3d 136 (2nd Cir. 2007).
[23] Id. at 139.
[24] Id. at 145.
[25] Id. at 145-46.

Further, affiliation with the national Alpha Epsilon Pi would further dilute any semblance of selectivity.[26] Finally, the court found that while some fraternity activities took place only among members, the fraternity involved non-members in "several crucial aspects of its existence," including parties, recruitment events and CUNY activities.[27]

Problems with *Pi Lambda Phi* and *Chi Iota* Cases: Potential for Future Developments

With case law solidly against recognition of substantially any freedom of association for fraternities or their members, it is difficult to suggest much hope in this area of the law. Still, the extreme positions taken by the *Pi Lambda Phi* and *Chi Iota* courts merit review and even retrenchment.

The *Jaycees* decision was largely premised on the fact that an intimate association was unlikely in a group hosting an average of four hundred members, but with as many as nine hundred members. The *Pi Lambda Phi* and *Chi Iota* courts seized on the fact that fraternities place no upper limit on membership to analogize fraternity chapters to Jaycees. While that may be true, no fraternity chapter has four hundred members, and the overwhelming majority have substantially fewer than one hundred members. On a large number of campuses, fraternity members live in group housing and share meals together, allowing even large groups a great degree of intimacy.[28]

The fact that students graduate and fraternities must continually recruit new members does not betray selectivity. Many fraternity members stay involved in both their greek organization and college precisely because of the bonds to both created through selective admissions. Most national and international fraternities have ample data to suggest that the affiliations beyond the local campus add to the selectivity, seclusion and intimacy and do not detract from it.

Although the *Pi Lambda Phi* and *Chi Iota* courts focused on the fact that some fraternity activities were non-private, no attempt was made to gauge the importance or significance of these activities to members, versus the activities conducted privately. The mere fact that any organization has a public face does not necessarily mean that its private activities are irrelevant.

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[26] Id. at 147. The court also found unpersuasive the fraternity's Jewish heritage, connection to Jewish organizations and high percentage of Jewish members. Id. at 145-46.
[27] Id. at 146-47.
[28] See Clyde S. Johnson, *Fraternities in Our Colleges* 103-104 (National Interfraternity Foundation 1972); William H. Willimon & Thomas H. Naylon, *The Abandoned Generation: Rethinking Higher Education* 179 (Wm. B. Eerdmans Publ. Co. 1995).