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***59** INTIMATE ASSOCIATIONS UNDER THE LAW: THE RIGHTS OF SOCIAL FRATERNITIES TO EXIST AND TO BE FREE FROM UNDUE INTERFERENCE BY HOST INSTITUTIONS

Gregory F. Hauser [FNa1]

INTRODUCTION

There exists a history of dispute among commentators concerning whether college social fraternity [FN1] chapters may claim a legal right to exist and to be recognized by the host institution or to be free from certain regulations, restrictions, discipline or even bans on existence imposed by some colleges and universities. [FN2] Growing dissatisfaction with the aftermath of the demise of in loco parentis, [FN3] studies providing evidence of heightened levels of alcohol abuse and lowered levels of academic achievement in fraternities, [FN4] and philosophical discomfort with, or even disdain for, certain traditional aspects of fraternities (such as selectivity and single sex status) [FN5] may be among the impetuses for such actions by colleges and universities, but such actions may themselves provide an impetus for a fraternity chapter to forswear a traditional reluctance to engage the host institution in court. [FN6]

Recent appellate decisions concerning private social clubs, unreported decisions in other actions brought by fraternities, and developments in related case law have ***60** strengthened the position that social fraternity chapters at public colleges and universities may claim a full range of legal protections under the constitutional doctrine that is most frequently termed freedom of intimate association. [FN7] As it has developed, that doctrine suggests strongly that many of the controls imposed by such institutions would not withstand a challenge under the civil rights laws. [FN8] The potential application of the doctrine to the relationship between a host institution and fraternity chapters at public campuses thus merits detailed consideration. The case for a legal remedy against a private host institution, however, presents far more problematic prospects. [FN9]

I. BACKGROUND

A lengthening line of commentators has discussed the legal aspects of the associational relationship between fraternities and host institutions in the abstract, with particular attention to the implication of the constitutional doctrine of freedom of association that has developed over the last forty years. [FN10] These aspects include whether and to what extent:

. fraternity chapters have rights to exist, to be recognized by the college or university, to recruit new members and to have access to the same resources as other student organizations;

. students not already fraternity members have a right to form a new chapter or to join an existing chapter;

. universities and colleges have a right to impose regulations or disciplinary measures thatburden the associational activities of fraternity

chapters, their members and prospective members, to deny recognition to fraternities, or to discipline students for participating in a banned fraternity; and

. even whether outsiders have a right to solicit students to form a new fraternity chapter. More succinctly, the overarching legal question is whether fraternity chapters and their members have the same rights that political, religious, and other student groups and their members enjoy at public campuses under the landmark decision of Healy v. James [FN11] and the case law it has spawned. [FN12]

***61** The majority of the commentary has concluded that fraternities and their members may invoke freedom of association as a bulwark against a ban or undue regulation by public colleges and universities. [FN13] A minority disputes that fraternity chapters have any such right, [FN14] while one commentator apparently takes a third position, implicitly conceding their right to exist at public campuses but arguing that the institution nonetheless retains broad authority to regulate. [FN15] There is uniform opinion that the case for invoking the law against restrictions by private colleges or universities is questionable. [FN16] Those arguing that the prerogatives of even public colleges and universities take precedence over any claim of constitutional right by students or their fraternity chapters base their conclusion on fraternities' social nature, the fact of their relationship with the host institutions, the traditional judicial deference accorded decisions of such institutions, and arguments that fraternity chapters are insufficiently "intimate" to qualify for the narrow category of constitutionally protected associations. [FN17]

Public colleges and universities are increasingly imposing restrictions on fraternity chapters. While no such institution has acted to try to ban fraternities, [FN18] many continue to regulate or to restrict the formation of new chapters, generally delegating some or all control over expansion of the fraternity system to pan-Greek student organizations such as an Interfraternity Council (usually made up of all-men's groups), a Panhellenic ***62** Council (usually made up of all-women's groups), or an All-Greek Council (usually made up of both). [FN19] A frequent disciplinary sanction is a prohibition on participating in "rush" (the process of recruiting new members), [FN20] which is imposed sometimes directly by the host institution and sometimes by a Greek student organization to which the institution has delegated disciplinary authority. [FN21] At some campuses, fraternity chapters are denied funding or other resources accorded other student organizations on the ground(s) that the Greeks discriminate on the basis of sex and/or are selective and exclusive. [FN22] Other steps taken or proposed by state universities and colleges include a bar to recruitment of students during their first semester/term or first year, regulation of the length-or even a blanket prohibition-of "pledge" or "associate member" periods (the transition time prior to full membership), [FN23] and a requirement of live-in supervision [FN24] for chapter houses. [FN25]

As the level of regulation increases,fraternity members naturally increasingly ask: "Can "they' do this to us?" The short answer is that "they," if at a public college or university, very probably as a matter of law may not.

II. FREEDOM OF ASSOCIATION AND SOCIAL ACTIVITIES

The term "social" entered freedom of association

A. Generally jurisprudence in 1965 in dicta in the United States Supreme Court decision in Griswold v. Connecticut: [FN26] "the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association' that are not political in the customary sense but pertain to the social, legal and economic benefit of the members." [FN27] The earliest application of this language in the lower courts was to social issues or concerns, i.e., pertaining to the larger society, rather than activities related to companionship as engaged in by a smaller, convivial company. [FN28] The Supreme ***63** Court used the term again when it struck down a municipal loitering statute as unconstitutional in Coates v. City of Cincinnati, [FN29] referring to "the right of

people to gather in public places for social or political purposes . . . ." [FN30]

There followed in the 1970's and early 1980's a string of federal court decisions and at least one state court decision that, largely on the basis of the language from Griswold v. Connecticut just quoted, extended protection to "purely social or personal associations." [FN31]

In addition, although not relied upon by these lower courts, the 1960's and 1970's had seen a series of statements from members of the Supreme Court, either in dicta or in concurring or dissenting opinions, that pointed in the same direction, beginning with Justice Harlan, who had authored the original decision establishing freedom of association as a constitutional right: "Freedom of the individual to choose his associates or his neighbors, . . . to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference." [FN32] To his voice was added, at one time or another, the voices of most of the other members of the Court during those years. Justice Goldberg, joined by then Chief Justice Warren and Justice Douglas, perhaps three of the most ardent civil libertarians to sit on the High Court, wrote to make the point that a person's civil rights did not extend to infringement of another's "social" rights:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudice including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties. [FN33]

***64** Justice Douglas himself not long after wrote for a majority of the Court in dicta that "[a] private golf club . . . is one expression of freedom of association." [FN34] And he followed that some years later in a dissenting opinion with an elaboration of his position:

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates may be. The individual can be as selective as he desires. [FN35]

This exact language was cited approvingly only two years later by a majority that included then Associate-currently Chief-Justice Rehnquist. [FN36]

Despite all of this jurisprudential history, [FN37] however, in the wake of the Supreme Court's parsing of freedom of association into freedom of expressive association and freedom of intimate association in two cases, the first involving the Jaycees and the second the Rotary, [FN38] some commentators and at least one court questioned whether the latter right, primarily grounded as it was in family related situations, could ever extend ***65** to protect from state interference a "purely" social organization. [FN39] They expressed this doubt despite the Court's caution that "[o]f course, we have not held that constitutional protection is restricted to relationships among family members." [FN40]

Lower courts nonetheless began exploring the extent to which freedom of intimate association as specifically defined by the Supreme Court would extend to relationships outside the family paradigm. A California appellate court, although ruling that the famed Bohemian Club could not invoke freedom of association to preserve its all-male employment practices, indicated also that the club had a constitutional right to retain its all-male membership practices. [FN41] A concurrence from Supreme Court Associate Justice O'Connor in a case that did not reach the issue made clear her view that there would be many a private club entitled to invoke the Constitution to protect discriminatory membership practices. [FN42] A federal district court held that the constitu-tional guarantee of freedom of association extended to the social and personal associations of mentally retarded adults. [FN43] And both another California appellate court and a federal district court held that relationships with friends and neighbors could be constitutionally

protected as intimate associations. [FN44]

At least these last two decisions and many others that had rested on the language from Griswold v. Connecticut came into some question when the Supreme Court in City of Dallas v. Stanglin [FN45] overruled an intermediate state appellate court and upheld a municipal ordinance restricting admission into certain dance halls to persons between fourteen and eighteen years of age against a claim that the ordinance violated the right of those patrons to associate with others outside their age bracket. A critical paragraph of the majority opinion stated:

> Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of "social association" that includes chance encounters in dance halls. The Texas Court of Appeals relied, mistakenly we think, on a statement from our opinion in Griswold v. Connecticut . . . that "[t]he right to freely associate is not limited to "political' assemblies, but includes those that "pertain to the social, legal, and economic benefit' of our citizens." But the quoted language from Griswold recognizes nothing more than that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics. [FN46]

***66** This language seems to have had an effect on at least two categories of cases, forestalling previously sanctioned court protection of escort services and of minors in the face of curfew laws. [FN47] To the extent previous case law might have been read to protect social activities that lacked a formal organization or other sort of continuing existence, social encounters, or short term or casual social relationships, these have also been ruled out of the zone of constitutional protection. [FN48]

The courts have also consistently refused to allow freedom of intimate association to be invoked to protect sports organizations or activities [FN49] or commercial recreational activities. [FN50]

Since virtually all of the lower court decisions granting constitutional protection from government action to social organizations or activities had rested on the language from Griswold v. Connecticut, the Supreme Court's drastic narrowing of the import of that language in City of Dallas v. Stanglin called into fresh question what form, if any, of social organization could successfully lay claim on the basis of freedom of intimate association to a constitutional entitlement to protection from governmental interference. Country clubs have not succeeded with such a claim, [FN51] nor have the ***67** Eagles, [FN52] the Lions, [FN53] or the Elks except in a very early decision that might merit reconsideration in light of the intervening legal development. [FN54]

In the 1990's, however, a series of state and federal appellate decisions have found other private organizations to qualify as constitutionally protected intimate associations.

B. The California and New Orleans Intimate Association Cases

The first of these came from a California intermediate state appellate court in Pacific-Union Club v. Superior Court. [FN55] The State Franchise Tax Board sought disclosure of the Pacific-Union Club's membership list to test for compliance with the ban on deduction of expenses related to discriminatory private clubs. The club conceded that it practiced age discrimination by restricting membership to those over twenty-five years of age, but no finding was made concerning the allegation that it also refused to admit women members. [FN56] The trial court ordered enforcement of an administrative subpoena duces tecum, the club appealed on the ground that the subpoena infringed its members' right of intimate association, and the appellate court reversed. [FN57]

It began its analysis of whether the club could be "enfolded within the freedom of associational privacy" by listing what the United States Supreme Court had established as "[t]he factors pertinent to this assessment . . . size, purpose,

policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." [FN58] The unanimous panel then made the following findings, for the most part comparing the Pacific-Union Club to the Jaycees and Rotary chapters that had been considered by the Court in its seminal decisions on freedom of intimate association:

[T]he Club has a fixed membership, limited to [958] . . . . The Club does not advertise or recruit new members, and does not encourage expansion of its membership.

The Club is more intimate in terms of its purpose for existence, and therefore its degree of congeniality. . . . [T]he Club has no outwardly directed civic or community objectives and exists solely for the enjoyment of social intercourse among members carefully chosen for their congeniality and social compatibility. ***68** Moreover, the Club associates within the compact geographic area of the City of San Francisco. . . .

In pursuit of its sole purpose of conviviality the Club is more selective than the Jaycees or Rotary Club. . . . the Club's membership process is highly selective and involves a time-consuming evaluation of the proposed member's personality, compatibility and degree of successful assimilation into the collective conviviality of the membership.

The Club bars its doors . . . [which] do not open from the outside; members and guests must identify themselves and be admitted by a security staff. No member may bring the same person as a guest more than four times a month. It appears a nonmember who is perhaps not a guest may call at the Club for a member, but the security guards apparently have discretion to deny entry. Any such person may not leave a certain confined area in which they must await the member. As noted, the proceedings at the Club facility may not be described or photographed . . . .

The Club is more than sufficiently intimate to be located within that portion of the associational privacy continuum deserving of constitutional protection. [FN59]

The court also dismissed arguments that the Pacific-Union Club was "not selective because nonmember guests may attend the Club premises and partake of the Club's restaurant's meal service" and that intimate associations are not entitled to the same protections as expressive association, noting tersely as to the first that "[t]his factor is not determinative of the degree of intimacy of a private club" and more expansively as to the second that "[t]he Board present[ed] no authority for the premise that intimate associations are relegated to the basement of First Amendment protections while expressive ones glide to the penthouse. Under the Board's argument, groups which eschew the controversy of political advocacy for the comforting hearth of private social intercourse would become only second class citizens in the nation of the First Amendment." [FN60]

Finally, the court found that neither did the Franchise Tax Board have a compelling state interest for its request nor had it established that less intrusive measures could not be employed. [FN61]

Two years later, in Hart v. Cult Awareness Network, [FN62] another California appellate court affirmed a trial court's refusal to issue a preliminary injunction against the Cult Awareness Network and its affiliated Los Angeles chapter, finding that the trial court had not abused its discretion in holding that the plaintiff, a member of the Church of Scientology, had no reasonable probability of successfully demonstrating that the chapter was a business establishment under the California Unruh Civil Rights Act, a ***69** predicate for his claim that it had committed unlawful religious discrimination when it refused to allow him to join. [FN63] Among the grounds for the court's decision was that application of the Unruh Act would infringe the chapter members' right of intimate association. [FN64]

Although the chapter was affiliated with the larger, national organization, [FN65] the court found that it was a "'well-defined subgroup' whose membership is highly restricted and selective" and that, from the record (apparently referring to the chapter's refusal to allow the plaintiff to join), it could be inferred that the chapter "carefully inquires into the background of its prospective members and examines their reasons for wanting to join." [FN66] The court went on to note that the chapter's activities as wellas its membership were restricted, since the chapter did

not offer any goods and services to the general public; rather it counsels and provides support to its very selective membership and its members may also choose to speak at certain events. Thus, . . . the relationship between the members of [the chapter], objectively assessed, primarily concerns the intimate personal concerns and activities deserving of a high level of constitutional protection. [FN67]

The court did not address any of the other factors assessed in the decision in favor of the Pacific-Union Club (indeed, did not even cite that decision), but also found that the chapter could invoke the freedom of expressive association as well and that plaintiff had identified no sufficiently countervailing and compelling state interest for the application of the Unruh Act in his case. [FN68]

That same year, four clubs in New Orleans filed civil rights claims in federal court against the City of New Orleans to prevent its attempt to apply to them a city ordinance that criminalized discrimination in membership by clubs that constituted "public accommodations" and provided for extensive investigatory powers to evaluate any complaint. [FN69] The clubs claimed not only that they were private and not public accommodations but also that the intended investigation threatened their constitutionally protected right of intimate association. [FN70] The district court granted summary judgment in favor of the clubs, [FN71] and the United States Court of Appeals for the Fifth Circuit affirmed without dissent. [FN72]

The federal court of appeals applied a more comprehensive test than either of the California courts:

***70** In determining whether a particular association is sufficiently private to warrant constitutional protection, as well as the scope of that protection, the [Supreme] Court has considered several factors, including: (1) the organization's size; (2) its purposes; (3) the selectivity in choosing its members; (4) the congeniality among its members; (5) whether others are excluded from critical aspects of the relationship; and, (6) other characteristics that in a particular case may be pertinent." [FN73]

In a footnote, the court identified the factors that might "fall into the "other characteristics' category": "(1) the history of the organization; (2) the use of facilities by nonmembers; (3) whether the club advertises for members; and (4) whether the club is nonprofit or for profit." [FN74] The court of appeals echoed the district court's extensive findings in the resulting analysis:

(i) Founded in the 1800s, the Clubs have a longstanding history of existing exclusively for private, social purposes. In addition to serving purely social functions, the Clubs prohibit the transaction or discussion of any business on their premises. . . . Accordingly, the Clubs have a purely social purpose and history. (ii) The Clubs' members share common social interests and backgrounds; often, the relationships predate membership in the Clubs through either family, religious activity, or other social groups. The criteria that the Clubs use in selecting members include character, relationships and acquaintances, congeniality, and compatibility. Thus, a close nexus exists between the Clubs' purposes and membership criteria.

Like the membership criteria, the admission process is very restrictive. Only existing members may propose a new member, and a proposal does not ensure admission. The Clubs engage in a fairly rigorous screening process to determine whether the prospective new member meets that club's criteria. Finally, whether to admit the prospective member is voted on by the general membership. A very limited number of objections deny membership: five at [one club]; three at each of the others. (iii) Each club has only one facility which is maintained for the exclusive use of its members and guests. No signs outside the Clubs' buildings identify the locations to the public. Nonmembers are strictly prohibited from using the facilities. Even though the Clubs permit members to bring guests, this practice is severely limited. . . . (iv) The Clubs are managed and controlled locally by their members; either directly, by an elected Board of Governors, or by both; none of the Clubs is ***71** associated with or controlled by a national organization. Additionally, the Clubs restrict total membership to a limited number [[ranging from 325 to 600]. [FN75]

Based on that record, the court went on to conclude:

Relatively small in size, they seek to maintain an atmosphere in which their

members can enjoy the comradery [sic] and congeniality of one another. Employing very restrictive guest and admission policies, they seek to remain isolated. In light of the undisputed facts, . . . we conclude, as did the district court, that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are "most intimate". Accordingly, they enjoy the fullest protection of their right of private association. [FN76]

The court of appeals also noted that this conclusion was one of law and not a finding of fact. [FN77] Finally, it found that, although the eradication of discrimination in places of public accommodation constituted a compelling state interest, [FN78] the city had "failed to meet its burden of demonstrating how the means it has selected to enforce the [ordinance] are the least intrusive on the Clubs' and their members' right of private association." [FN79]

Meanwhile, back in California, two cases involving the Boy Scouts of America had reached the intermediate appellate level and produced divergent results on their status as an intimate association. Prior to the United States Supreme Court's decisions in the Jaycees and Rotary cases, in a suit brought under the Unruh Act by a former scout whose application for a leadership position had been turned down because of his homosexuality, the Mount Diablo Council of the Boy Scouts had lost a motion to dismiss the suit despite its claim that the Acts' application would be "an infringement of its rights of privacy and free association as a membership organization" (Mount Diablo I). [FN80]

After a full trial, the lower court held that application of the Unruh Act would indeed violate the Boy Scouts' First Amendment rights as an expressive association, and the case returned to the appellate court, where two of the judges who had joined in the Cult Awareness Network decision formed a majority that not only affirmed the trial court's ruling but also held that application of the Act would violate the right of intimate association of individual Boy Scout troops (Mount Diablo II), citing, inter alia, the decision in Pacific-Union Club v. Superior Court [FN81] but not their own earlier ***72** opinion. [FN82] In assessing the claim of intimate association, the court reviewed several factors:

Here, the relevant local unit is the troop. As the trial court found, scouting activities "take place principally in small, intimate, primary groups where the relationships among the members can be characterized as continuous, close and personal." Troop meetings are usually attended only by members of the troop. . . . Withrespect to their size, they are undeniably small . . . . With respect to their purpose, Boy Scout troops join with all of scouting in the educational goal of instilling values in young people. In addition, the troops are selective in ways not noted in the statement of decision. All boys must subscribe to the Scout Oath and the Scout Law, and agree to live by them. Boys choose the Boy Scout troops which they join, and they often do so based upon a preexisting personal affinity. Within the troop, the relationships are personal and "intimate." Moreover, the troops are very selective with respect to their adult leadership. . . .

The [trial] court characterized troops and patrols as "primary" groups based upon sociological testimony showing that "[t]he purpose among the members of the group is simply to be together. . . ." As such, the personal relationships in the troop differ fundamentally from those in Little League or other "task-oriented" youth groups. [FN83]

There was a lengthy dissent based in part on Mount Diablo I. [FN84]

Ironically, Mount Diablo II followed by only one month a decision by a different California appellate court that affirmed a judgment after trial applying the Unruh Act to prohibit the Boy Scouts from excluding atheists, relying on Mount Diablo I to hold that there was no violation of the Boy Scouts' constitutional right of free association without any analysis of the Rotary/Jaycees factors and specifically declining to apply the Cult Awareness Network decision. [FN85] Again, there was a dissent, arguing that the Supreme Court decisions in the Rotary and Jaycees cases had "effectively superceded" Mount Diablo I. [FN86]

***73** Both of these Boy Scout cases are currently before the Supreme Court of California. [FN87]

A discussion of the application of

C. The Fraternity Decisions the right to freedom of association to a fraternity chapter at a state college or university needs no longer to remain entirely abstract. There have been three unreported cases, one before each of a federal court, a state court and a campus tribunal, in which the issue has been ruled upon. In each case, the chapter's claim has prevailed. [FN88]

1. The Middle Tennessee State University Case

On September 29, 1993, a member of the Pi Kappa Alpha fraternity chapter at Middle Tennessee State University ("MTSU") was arrested on various criminal charges, including underage drinking, after attending a rush function at the chapter house. The Interfraternity Council ("IFC") brought formal disciplinary charges against the chapter and a hearing was scheduled before the IFC Judicial Board on October 15, 1993. At that hearing, the IFC Chief Justice dismissed the charges on the ground that the hearing had not been held within two weeks of the incident as required by the IFC by-laws. On October 26, however, the Dean of Students and IFC Advisor vetoed that decision and reinstated the charges.

After a full hearing before the Judicial Board, at which the chapter's lawyer was allowed to be present but prevented from speaking other than to his clients and at which an objection to certain double hearsay evidence against the chapter was overruled, the Board found the chapter guilty of conduct dangerous to a student and hazing. As a result, the chapter was suspended from IFC membership and all IFC activities and privileges, including social events with other Greek chapters and organized rush. The chapter remained able to solicit students on its own and to use campus facilities. Its formal appeal to the IFC as a whole was denied and its informal appeal to the President of MTSU was rejected. [FN89]

The fraternity chapter then filed a federal civil rights suit against the IFC Judicial Board, the Dean of Students and President of MTSU, and the Board of Regents, claiming denial of due process and equal protection and violation of the right to freedom of association, and sought a temporary injunction against the sanctions. That ***74** motion and motions to dismiss from several of the defendants were referred to a magistrate judge, who conducted an evidentiary hearing and issued a lengthy Report and Recommendation granting the plaintiff fraternity's motion and for the most part denying the motions to dismiss. [FN90]

The decision was significant in two respects. First, there was a finding that the relationship between the university and the IFC meant that the IFC actions were state action. [FN91] Second, the decision also upheld the claim that the constitutional right of freedom of association of the fraternity chapter and its members had been violated as well as the other constitutional claims:

> PKA's claims are on behalf of itself and its members for violations of their First Amendment rights of association . . . . As a result of the disciplinary sanctions imposed by IFC, PKA contends that its members' First Amendment right of association to socialize with other members of the IFC fraternities has been violated. . . . PKA and its members . . . enjoy a First Amendment right of association with all other students, a right that state officials alone or in conjunction with others, cannot infringe. * * * [The PKA chapter president] testified that the IFC membership . . . carries as its principal benefit the association with other IFC fraternities and sororities as well as IFC sponsored social and athletic events. PKA contends, that without IFC affiliation, it is also difficult to solicit significant numbers of new member who are needed to sustain the MTSU chapter of PKA. [FN92]

After citing a number of United States Supreme Court decisions on freedom of association (but neither of the Rotary and Jaycees decisions) and quoting from Healy v. James, [FN93] the decision went on:

> Here, MTSU in conjunction with IFC officials, have effectively imposed

disciplinary sanctions that infringe upon PKA's member right to associate with other IFC fraternities and their members. PKA deems IFC membership to be valuable in recruitment of new members as well as its continued status as a chapter of a national organization. . . . PKA's complaint presents a substantial claim of a First Amendment violation of its members' right to associate with other college students. * * * For the reasons stated earlier, the Magistrate Judge concludes that PKA has presented, through its proof, substantial due process and equal protection violations relating to denial of right to counsel and discriminatory and selective ***75** enforcement of state administered IFC by-laws. As a result of these violations, PKA has suffered violations of its First Amendment rights of association with other students. [FN94]

The decision neither distinguished between intimate association and expressive association nor engaged in any extended analysis of their application.

2. The Longwood College Case

On January 19, 1996, after a hearing the day before on disciplinary charges, the chapter of Alpha Sigma Alpha Sorority at Longwood College, a state institution in Virginia, was sanctioned by the Greek Judicial Board at the college, including exclusion from organized sorority rush. [FN95] The chapter was also informed that even an attempt to engage in recruitment outside of organized rush would be considered a violation of the sanctions. The chapter exhausted its appeal and then filed suit in state court, seeking a declaration that it had the right to recruit outside of organized sorority rush, and seeking a temporary injunction against any effort to impose an overall restriction on recruitment. [FN96] In essence, the sorority argued that, although its violation of conduct rules justified its exclusion from the organized rush, a complete ban on recruitment violated rights of freedom of association. After a hearing on January 26, 1996, the court entered an order declaring "that the Sanctions set forth by the Action of the Greek Judicial Board dated January 19, 1996 shall stand. Longwood College and the Greek Judicial Board shall not otherwise interfere with plaintiff's recruitment and pledging of members which are protected by its Constitutional right to freedom of association." [FN97]

3. The University of Arizona Case

On March 24, 1994, the Associated Students of the University of Arizona ("ASUA") Central Governing Council voted to deny funding to fraternities because of their exclusionary and discriminatory nature. [FN98] The presidents of the Interfraternity and Panhellenic Councils filed a challenge to the bill with the ASUA Supreme Court, made up of five University of Arizona law students. [FN99] The complaint attacked the bill as a burden on the fraternities' right of freedom of intimate association and ***76** concomitant right to exclude others from their membership, including on the basis of sex, relying, inter alia, on the decision in Pacific-Union Club v. Superior Court and the district court decision in the New Orleans club case, which had not yet been affirmed. The campus court ruled unanimously for the fraternities. [FN100]

Although these three decisions, for varying reasons, have at best limited precedential value, they are nonetheless instructive in the consistency of the rulings that fraternity chapters at state campuses may invoke freedom of association against actions by the host institution and student organizations to which the institution has delegated certain authority and indicative of how other courts could consider the issues presented.

D. Fraternities as Intimate Associations?

An appellate court has not, however, yet ruled on the issue of whether college social fraternities may claim the legal protections of the constitutional right under discussion here. Although this issue has been discussed at length in

commentary that preceded the California intimate association cases and the New Orleans club case, [FN101] those decisions make the issue ripe for reconsideration, applying the factors set forth in the test applied by the highest ranking court (which was also the most exhaustive of the tests), those from Fifth Circuit decision in the New Orleans club case: [FN102]

1. Size

The membership of the average fraternity chapter is in the range of fifty to sixty-five, [FN103] and is usually less than one hundred [FN104] although in individual chapters the membership may exceed 150. [FN105] Even at the upper end of this range, fraternity chapters are significantly smaller than any of the groups that have successfully claimed intimate association status except the scout troops, and, at the opposite end, some fraternity chapters are smaller than some scout troops. Like the Pacific-Union Club, a fraternity chapter's members associate within a single compact community, in the fraternity's case, a campus community.

What of the affiliation of many chapters with larger national or international organizations, some with over two hundred or even three hundred chapters? The same is trueof Rotary and Jaycees chapters, but the Supreme Court's analysis focused on ***77** the size of the individual chapters. [FN106] This was exactly the approach taken in the Cult Awareness Network and Mount Diablo II decisions. [FN107] Although both the Pacific-Union Club decision and the Fifth Circuit's decision in the New Orleans private clubs case noted the clubs' lack of any such national affiliation, [FN108] neither indicated the significance of this factor, and the latter also noted in this regard a Seventh Circuit decision qualifying the Boy Scouts under the private club exception to Title II of the Civil Rights Act of 1964 [FN109] despite their having five million members, the same decision from which the Fifth Circuit had drawn a portion of its test for the constitutional right of freedom of intimate association. [FN110] Thus, the clear weight of the case law indicates that it is an individual chapter's size that must be assessed and that college social fraternity chapters are well within the "relatively small" requirement. [FN111]

2. Purposes

Fraternity chapters, as one commentator has succinctly put it, "are formed, not to promote the business interest of their members, but rather to promote and encourage an interpersonal relationship and a life-long personal bond." [FN112]

The opening chapter of the most comprehensive reference book on fraternities described their purposes at greater length:

> Let it be said that fraternities are about what matters most: enduring friendships founded on shared principles and personal affinities; living out good lives, not just having good times; cordial laughter, delightful gaiety, robust merriment; the lively pleasures of good companions; the sustaining loyalty of old comrades through whatever fortune or adversity may appear; the settled conviction that lives are lived to the best effect when firmly secured by mutual bonds of deep ***78** affection, admiration, and respect. In freedom, if wisely chosen, there is fraternity, and in fraternity, if rightly used, there is joy. [FN113]

Secondary purposes include personal social and emotional development [FN114] and, like Boy Scoot troops, the instillation of values. [FN115]

The purposes of fraternities match well with the purposes found consistent with constitutionally protectible intimacy in the California and New Orleans private clubs cases [FN116] and strongly support fraternity chapters' claim to a right to the same protection. [FN117]

Some have pointed to the involvement of some fraternity chapters in community service and the resulting arguable resemblance with Rotary and Jaycees chapters, [FN118] an involvement which also distinguishes fraternities from the Pacific-Union Club. But the very significant differences are, in the case of fraternities, the

peripheral role that these activities play as compared to the relationships among members [FN119] and the absence of evidence that close personal relationships constituted a purpose, much less the primary purpose, of Rotary or Jaycees, for each of which community service was a significant purpose. [FN120]

3. Selectivity

The selectivity of fraternity chapters has not been questioned. [FN121] Indeed, it has often been the focus of criticism. [FN122] Sometimes the relationships among chapter members predate membership "through either family, religious activity, or other social groups," although less often than was the case with the New Orleans private clubs, and, as with those clubs: the criteria chapters "use in selecting members include character, relationships and acquaintances, congeniality, and compatibility"; only existing members can propose new members; and "a proposal does not insure admission". [FN123] Although the length of the selection and assimilation process and any probation period can range from a week or so to many weeks and the mechanics also vary, the consideration and vote to extend a "bid" (invitation to membership) are generally confidential, always involve individual consideration and almost always require a super-majority, ranging up to unanimity, [FN124] as with the New Orleans private clubs. [FN125] Many chapters require a second such vote towards the end of the associate member/pledge period before initiation into full membership. Selectivity is clearly a factor militating in favor of fraternity chapters as intimate associations. [FN126]

4. Congeniality

While the distinction between this factor and an organization's purposes when they prominently include congeniality is unclear in the case law, the intent may be a separ-ate inquiry into whether congeniality is in fact achieved. The commentary on this issue supporting fraternities, to the extent it has not been blended with discussion of their purposes, beyond noting the longstanding role of fraternity chapters as surrogate families, [FN127] has been cursory. [FN128] The arguments in opposition have been unsupported. [FN129]

Fraternity chapters constitute "primary groups," [FN130] like the Boy Scouts. The available research indicates member satisfaction with choice of chapter can exceed ninety percent. [FN131] Additional and more recent evidence comes from two academic critics who have studied fraternities and acknowledge that they achieve a high degree of congeniality:

> In our first chapter we leveled much criticism at Greek life on campus. There is indeed much to criticize, especially among our fraternities. Yet for all their faults, fraternities play an important role in many students' lives. Sororities and fraternities are criticized, but many first- year students find that they need to enter a fraternity or a sorority to have a sense of themselves, a sense that anybody out there cares about them. . . . The Greek system provides one of the ***80** few places . . . where students can be together in face-to-face, intimate, sustained ways. In short, fraternities are an experiment in friendship. [FN132]

These words, from outsiders whose objectivity is hard to assail, are a potent testimonial to the congeniality of fraternity chapters and at least a partial answer to the claim that, because fraternity membership necessarily turns over as students leave school, they lack the stability necessary for a truly intimate association. [FN133] An additional answer to that claim comes from the courts of New Jersey. In considering a claim in the context of a zoning dispute that an informal group of college students could not be the functional equivalent of a family, the trial court-which was specifically affirmed by the New Jersey Appellate Division and Supreme Courton this point - responded:

> While it is true that the tenure of occupancy of each student is transitory, life itself is transitory. The test of tenure is thus not its transitory nature, since that is common to all living souls, but whether it is of such sufficient duration that it transcends the evanescent.

This one does. . . .
The Court finds from the testimony presented at trial that this group of young men exhibits the "generic character" of a family. [FN134]

The conclusion can only be stronger for a fraternity chapter, many of the structure and programs of which are devoted to the development of congeniality.

5. Exclusion of Others from Critical Aspects

As previous commentary has discussed at length, this factor fits fraternity chapters like a glove. [FN135] The argument that the fact that fraternity members entertain guests at their social events and in their chapter houses or hold social events away from their houses at public locations somehow serves to "undo" their chapters' intimacy or outweighs non-members' exclusion from so many other critical aspects of the members' relationship [FN136] is meritless in light of the case law. [FN137]

***81** 6. Other Characteristics

Even if nonmembers attend chapter events, residence in the chapter house is generally restricted to members. [FN138] Fraternity chapters have always been relatively small and also have a long history behind their selectivity, secrecy, purposes and success at congeniality. [FN139] They are nonprofit. [FN140]

One way in which fraternity chapters concededly differ from the Pacific-Union Club or the New Orleans private clubs is that Greeks very frequently advertise during the rush process. This in no way, however, detracts from their selective and exclusive nature as a matter of fact and thus should not detract from a conclusion that they are intimate associations as a matter of law. [FN141] Case law has indicated that no one factor will defeat such a conclusion when the overwhelming weight of other factors supports it. [FN142]

It has also been argued that an additional factor should be taken into account in the case of fraternity chapters: their relationship with the host college or university. [FN143] This argument is circular sophistry and turns the proper inquiry on its head when the issue is to what sort of relationship with the host institution the intrinsic characteristics of fraternity chapters entitles them; the nature of that relationship in the absence of its ***82** legal assessment can not dictate the result of such an assessment. [FN144] In its baldest form, the argument has been made that fraternity chapters waive their constitutional rights when they seek recognition, stated without supporting authority, [FN145] which is not surprising since it is an argument that would effectively make such a waiver a condition of recognition, a condition that would itself be unconstitutional. [FN146]

The net result is that a thorough analysis solidly supports the conclusion reached by the tribunals in each of the three fraternity cases: fraternity chapters are sufficiently intimate associations to claim constitutional protection. This result is entirely appropriate since, upon examination, the record shows that the relationships among the members of fraternity chapters, borrowing the words of the Supreme Court in the Jaycees case, are the "kinds of personal bonds that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," have been the source of "much . . . emotional enrichment" for those individuals, have been part of the members' effort to define their identity, and have "involve[d] deep attachments and commitments" among brothers and sisters with whom have been "share[d] not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of" their lives. [FN147] The decisions by fraternity members to form or to join their chapters are exactly the sorts of personal decisions that the High Court intends be protected from state interference. [FN148]

III. FRATERNITIES AS EXPRESSIVE ASSOCIATIONS?

The classic expressive activities of politics, religion, etc., are neither central nor apparent purposes of social fraternity chapters. But First Amendment protection also extends to "expression about philosophical, social, artistic, economic, literary or ethical matters," [FN149] "the transformation of taste [and] cultural expression." [FN150] As the Supreme Court said in the Jaycees case:

***83** [P]rotected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. . . . Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self- improvement. [FN151]

Since fraternities include among their purposes the instillation of values, engage in instruction of their pledges/neophytes/associate members, and participate in community service as a means of personal development, [FN152] fraternity chapters may be able to claim protection as expressive associations under the First Amendment. [FN153] And, as noted in prior commentary, the minority of social fraternities that include among their purposes the expression of religious, ethnic, or racial identity may have an even stronger claim to qualify as expressive associations. [FN154]

But what would the significance be of such a claim in the light of the comparatively greater intimate nature of most if not all fraternity chapters? Protected associations can be both intimate and expressive. [FN155] If the rights of each category of association are identical, the claim could constitute mere icing on the cake. If, however, there is an argument that intimate associations are afforded any less constitutional shelter than expressive associations (an argument rejected by the court in Pacific-Union Club v. Superior Court [FN156]), the expressive claim could be significant. It may also be that, although a fraternity chapter's right to exist and to be recognized must be evaluated under freedom of intimate association, any restriction or regulation of its expressive activities, such as new member programs, community service, or publicity about itself-especially as concerns recruitment [FN157]-will be assessed as an infringement of the right to expressive association.

It could be especially significant if the issue is a fraternity's membership selection practices. There is an argument that choosing to join and continuing to belong to a single-sex fraternity is an expression of a belief or philosophy that single-sex social associations have value, an idea that is certainly currently controverted in the larger society and thus a social issue in more than one sense. Should the daily practice of the ***84** belief be accorded any less protection than its mere utterance obviously would? This may be the sort of situation the Supreme Court had in mind when it warned in the Jaycees case that "in particular, when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated." [FN158]

IV. THE RIGHTS OF PROTECTED ASSOCIATIONS

In the words of the Fifth Circuit in the New Orleans

A. Generally club case:

Of course, as is also true for expressive associational rights, the constitutional right of private association is not protected absolutely against infringement by the state. As stated in Rotary Club, the protection is "against unjustified government interference." As a fundamental right, however, any such infringement is subject to strict scrutiny. Strict scrutiny analysis requires the government to demonstrate that (1) the state action serves a compelling state interest which (2) cannot be achieved through means significantly less restrictive of one's associational freedom. [FN159]

Thus, once an association qualifies for constitutional protection, there is a three step inquiry: (1) Is there an infringement of associational rights by the

state?; (2) Does the infringement serve a compelling state interest?; and (3) Are the means employed the least intrusive of those rights?

""There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [the] associational right." [FN160] University or college action that seriously harms the ability of a student group "to exist and grow" is interference with associational activities, [FN161] as is limitation of its "ability . . . to ***85** pursue its stated purposes." [FN162] There can be no less doubt that interference with an association's membership practices or policies is an infringement of associational rights as well, [FN163] including an attempt "to regulate . . . the right to associate ab initio or to regulate what occurs when the individuals associate." [FN164] Furthermore, "[s]tate action that withholds a privilege from an individual because she has engaged in a protected association infringes on that constitutionally protected interest. . . . The crucial factor in deciding whether the state action has invaded the interest is whether individuals are likely to be deterred from engaging in constitutionally protected association." [FN165] Put more generally by the Supreme Court, state action that affects this fundamental right of association "in any significant way" triggers the strict scrutiny analysis. [FN166] Accordingly, the types of institutional regulations or restrictions concerning fraternities currently in controversy on campuses [FN167] constitute infringements on the associational rights of the chapters and their members. And even indirect infringement through the actions of a student organization to which a public college or university has delegated authority constitutes such state action. [FN168]

Once the second step is reached, "[t]he State bears a "particularly heavy' burden of establishing a compelling state interest . . . ; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." [FN169] Thus, a college or university may not impose on a fraternity chapter a burden to show that it should be free of a restriction or regulation, but the institution must prove that any action against a fraternity member, chapter or system is justified by a compelling state interest. There may be only three such interests: "(1) failure or refusal to abide by reasonable housekeeping rules; (2) "demonstrated danger of violence' or disruption of the university's educational mission; and (3) violation of the criminal law by the organization or by its members at a function sponsored by the organization." [FN170]

***86** What do these encompass? [FN171] Does a university's concern over the effect of fraternity membership on grades amount to disruption of the university's educational mission? "Disruption" must be material and substantial before its prevention becomes a compelling state interest, [FN172] and the only sanctioned instances of its invocation have involved physical disruption of the campus, detriment to the rights of those not involved with the activity in question, and even destruction of property. [FN173] The effect of fraternity members' behavior or attitudes on their own grades does not qualify as material and substantial disruption of a campus.

One court has considered a state university's claim that promotion of academic success was an interest sufficiently compelling to justify interference with a fundamental right and held that it was legitimate and important, but not compelling, especially when the rule at issue was not applied to significant portions of the student body. [FN174] Thus, if a college or university prohibits first semester or first year participation in fraternities on academic achievement grounds but does not apply the same prohibition to other activities that present the same problem, such as athletics [FN175] or part-time work, the rule will not pass constitutional muster. [FN176] "[A] law cannot be regarded as protecting an interest "of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." [FN177] To make the point even more plain, marriage and child-bearing are relationships protected by freedom of intimate association. Although one might prove that marrying or having a child during college has a negative effect on grades, it is inconceivable that a court would accept this as an interest compelling enough to allow a college or university to restrict its students from doing either.

Even if, arguendo, the academic achievement concerns voiced by colleges and universities were accepted as an interest compelling enough to consider allowing infringement of a fundamental constitutional right such as freedom of association, a blanket rule prohibiting membership in all fraternities to all students in a given class would also founder on the third step of the inquiry. This third step asks whether the institutiton's interference with associational rights is the least restrictive available. When a rule indiscriminately prohibits membership in any fraternity chapter to all first semester or first year students, irrespective of their demonstrated academic potential ***87** or the academic achievement records of the individual fraternity chapters, there is no available argument that the rule has been narrowly tailored. In contrast, if a college or university required a certain level of prior academic achievement, such as high school grades or scores on standardized tests that are good predictors of college performance, before a student could join any fraternity chapter with a demonstrated deficit in academic achievement, the least intrusive requirement might be met.

Those seeking to regulate fraternities have also cited evidence of the persistence of hazing and underage drinking in fraternities. Underage drinking is illegal in every state, and hazing has been outlawed in most. [FN178] Clearly, however broad a fraternity's claim to freedom of association is, a college or university may directly prohibit hazing, [FN179] individuals may be prosecuted for committing hazing, [FN180] association rights and, as just noted, a host institution has the right to discipline or even to withdraw recognition from a fraternity chapter if, as an organization, it engages in criminal behavior, all without violating association rights. [FN181]

The more difficult question is, faced with the surreptitious nature of hazing and underage drinking, to what extent may a college or university directly regulate other fraternity activities in an effort indirectly to reduce the incidence of illegal activities? If those other activities are constitutionally protected, measures regulating them in an effort to reach illegal activities are unconstitutional. [FN182] If restrictions on fraternity membership would prevent or deter a student from joining a chapter that tolerates no underage drinking or commits no hazing, or if regulation of pledge /associate member programs would preempt such a chapter's control of its membership program, the restrictions or regulations are overbroad because they intrude on activities that present no compelling state interest. [FN183] Actions directed against how a fraternity may instruct new members intrude into a particularly sensitive area since infringement on expressive associational activities, to be constitutionally defensible, must be "unrelated to the suppression of ideas." [FN184] The university's permissible remedy is to regulate wrongful activities directly. [FN185]

Discipline imposed on a fraternity chapter that effectively punishes those that neither played a role in, nor bore any other responsibility for, the wrongful activity raises similar issues. For example, restrictions on rush would both burden existing ***88** innocent members and deny prospective members the right to consider joining the chapter even if they had no intent ever to engage in illegal activity. The Supreme Court has placed stringent limits on punishment or liability imposed solely for association with the guilty, as set forth in NAACP v. Claiborne Hardware Co.: [FN186]

> The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected. . . .
>
> The First Amendment . . . similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. In Scales v. United States, 367 U.S. 203, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." . . .

In Healy v. James, 408 U.S. 169, the Court applied these principles in a non-criminal context. . . . It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." Id., at

185-186. The Court stated that "it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government' is an impermissible basis upon which to deny First Amendment rights." Id., at 186 (quoting United States v. Robel, 389 U.S. 258, 265). "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U.S., at 186 (footnote omitted). . . .

. . . For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. [FN187]

***89** And, before a chapter may be disciplined for the actions of some of its members, there must be substantial evidence that they acted with the apparent authority of the chapter. [FN188]

When all other arguments fail, those supporting the authority of the host institutions to act against fraternities invoke the talisman of the university's own claimed rights and the mantra of academic freedom. [FN189] This is no more than a disguised argument that, when a student goes through the gates of a public college or university campus, the government in the form of the institution and the Constitution are somehow transmogrified because there are classrooms on the campus.

As the Second Circuit has noted, though, there is judicial reluctance to intrude "upon the decisions of a university administration . . . [w]here, however, constitutional values have been infringed, the court will not remain silent." [FN190] In the words of one federal district court, "a student does not give up any basic constitutional right when he enters a State college or university." [FN191] Even if a college or university administration "may impose upon . . . students reasonable regulations that would be impermissible if imposed by the government upon all citizens," [FN192] an assertion to which only one member of the Supreme Court has subscribed, if they pertain to a fundamental right, they must still meet the strict scrutiny test. [FN193]

Moreover, although the Supreme Court has recognized that academic freedom has four aspects of constitutional significance, the rights "of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," [FN194] it has also declined to expand on those ***90** rights. [FN195] Commentators have frequently argued that an invocation (incantation?) of academic freedom should not lead to judicial deference to college or university decisions that are beyond its central, academic function. [FN196] More pithily, one has said that to use the doctrine of academic freedom to "constitutionalize the concept of administrative prerogative" would be perverse. [FN197] Finally, it is worth noting that the federal courts have firmly resisted the efforts of state universities to invoke their educational mission as a defense to claims that discipline of fraternity chapters for allegedly offensive speech or conduct violates the First Amendment guarantee of freedom of speech. [FN198]

In the words of

B. The Right to Discriminate in Membership Decisions the Supreme Court:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association therefore plainly supposes a freedom not to associate. [FN199]

This principle applies with no apparent limitation to university student organizations. [FN200]

Fraternities are regularly assailed for the fact that most are single sex. [FN201] They are also occasionally accused of discriminating against homosexuals. [FN202]

The obvious implication of the California and New Orleans intimate association

decisions is that such organizations are constitutionally privileged to discriminate on the basis of factors such as age and sex. Among the findings in the Pacific-Union Club and New Orleans private clubs decisions was that there was strong evidence that no business was conducted in the clubs and that the state interest in eradicating ***91** discrimination in access to public accommodations or economic opportunities was not implicated. [FN203]

The Mount Diablo II and Cult Awareness Network decisions held that enforcement of a civil rights statute to prohibit membership discrimination on the basis of homosexuality or religion, respectively, would ipso facto violate the right of intimate association and, if it conflicted with any of the announced purposes of the associations at bar, violate the right of expressive association as well. [FN204] The latter principle has since been affirmed by the United States Supreme Court in the Boston St. Patrick's Day Parade decision, [FN205] and has been applied to protect religious discrimination by a high school Bible club in eligibility for officer positions. [FN206] The former seems inherent in the nature of the decision to enter into an intimate association, which is necessarily a subjective decision that any governmental interference with would unduly distort or destroy. [FN207] Further, if it were necessary to identify some essential aspect of a fraternity's intimate association that a prohibition on sex or sexual orientation discrimination would threaten, their cohesiveness, congeniality and camaraderie, which would be threatened by the possibility of romantic relationships between members, are just such aspects, [FN208] as is respect for the members' desire to be in a single sex environment for certain activities, if that desire is legitimate and sincere and even if not everyone in society shares the same desire. [FN209]

***92** As a general proposition, eliminating discrimination against women is clearly a compelling governmental interest, [FN210] as is eradicating discrimination on many other grounds. But does the compelling nature of this interest reach as far as the membership practices of an association that, under constitutional standards, is intimate? Public policy as embodied in legislation just as clearly indicates that it does not, since private clubs are exempted from the anti-discrimination provisions of federal statutes dealing with public accommodations, [FN211] employment, [FN212] disability, [FN213] and housing, [FN214] and from most of the existing state public accommodation statutes. [FN215] More specifically, the membership practices of college social fraternities have been exempted from the federal prohibition against sex discrimination in education (Title IX) [FN216] and from the authority of federal regulators, [FN217] and the Supreme Court of California, even as it affirmed the application of the Unruh Act against sex discrimination at a country club, indicated in strongly worded dictum that the Act would not reach single sex fraternities. [FN218]

As for the arguments floated a decade or more ago that there should be recognized a state interest in ending sex discrimination in private, social organizations such as fraternities because they are important "networking" opportunities, [FN219] a more recent commentator has responded that:

> courts should be skeptical of nebulous claims of lost opportunities to "network" or meet people. Such claims are based on nothing more than the plaintiff's desire to socialize in a particular private setting, the very thing that freedom of private association presupposes he may not do absent others' consent. . . . In the context of private clubs, often it is the mere fact of exclusion, the raw insult of being kept out, that animates the claim to access. [FN220]

***93** And, as an example of just such judicial skepticism, Maine's highest court reversed a lower court, rebuffed a woman's claim of sex discrimination and declined to apply its Human Rights Act to an all-male club, reasoning:

> The Superior Court focused on the size of the club and its many and varied fundraising activities to find that it offered its advantages or privileges to the general public. The privilege to which plaintiff . . . seeks access, however, is not attendance at the beano games or festivals or catered events, which are undeniably public and open to all. Plaintiff seeks membership in the club and access to the weekly meetings and other activities conducted solely for members. Throughout its history, Le Club Calumet has confined access to such meetings and activities to its male Franco-American members.

We recognize that under different circumstances membership in a club could constitute an advantage or privilege . . . . In the present case, however, plaintiffs offered no evidence that club membership is essential to the maintenance of social or business opportunities in the Augusta community. [FN221]

Finally, even if there could be identified some compelling state interest that could reach the single sex membership practices by fraternities, interference with those practices could still run afoul of the First Amendment. Forced sexual integration would constitute the imposition of an institutional ideology of indiscriminate egalitarianism on students whose choice to join a single sex fraternity was an expression of their belief that single sex social organizations have value. [FN222] Thus, the institutional action would not be "unrelated to the suppression of ideas" and could not be justified on any ground. [FN223]

VI. FRATERNITIES AT PRIVATE COLLEGES AND UNIVERSITIES

Perhaps the looming force of thelegal concepts just discussed has been among the reasons that no public university has ventured to challenge the right of its fraternity system to exist. A series of private colleges, however, has indeed shut down fraternity life on their campuses or imposed regulatory measures that go well beyond anything attempted by a state school. [FN224] Other private colleges and universities, many of them religiously affiliated, have never allowed fraternity or sorority chapters. Since past experience suggests that confrontations between a college or university and students interested in fraternity membership are more likely to arise on a private campus, whether the members of such a system have legal recourse merits examination. The broader and largely philosophical issue of the appropriateness of an American ***94** college's invoking its private status to deny constitutional rights to its students who as alumni/ae citizens could only benefit from experience with those rights is beyond the scope of this article.

The exemption of private institutions of higher education from the guarantees of the Bill of Rights as they pertain to fraternities and their members and the possibility of nonetheless applying state civil rights statutes in some states has been noted and discussed in detail in previous commentary. [FN225]

There are, however, two additional albeit untested theories to consider in the private context and one statutory development to note.

The standard description of the legally recognized relationship between private colleges or universities and their students is one of contract, [FN226] including with respect to fraternities. [FN227] As a matter of black letter law, however, "[a] promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." [FN228]

There is case law indication that public policy concerns can limit the authority of a private college or university that would otherwise be enforced as a term of the institution-student contract. [FN229] A fraternity chapter is often described as a surrogate family and does indeed resemble a family in certain respects, [FN230] which contributes to its status as a constitutionally privileged intimate association. The relationship among members of a fraternity is also itself contractual in nature. The types of contractual terms that may be unenforceable as a matter of public policy include those that impair family relations or interfere with another contract. [FN231]

Joining these legal principles provides an argument that a private college or university should not be able to restrict its students from joining a fraternity on the ground of public policy. The foundation for this argument is somewhat sandy, ***95** however, since the courts' application of the principles of contract law to the private college/university-student relationship has been inconsistent and varied in its strictness [FN232] and they have held in most circumstances that student claims have been outweighed by the institution's interests, a tendency that has been criticized as results oriented analysis. [FN233]

As a result of this last trend, one commentator has proposed that tort principles be applied to claims by students against the institution. [FN234] And, at least one court has held that "any intentional invasion of, or interference with, property rights or personal liberty causing injury without just cause is an actionable tort." [FN235] Since intimate association such as fraternity membership is a liberty right under, inter alia, the Fourteenth Amendment, [FN236] there is the germ of an argument that a private college's or university's interference with a student's decision to join or to form a fraternity chapter is an actionable tort. Even if accepted by a court, however, the argument leaves open the question of the obtainable relief.

One statutory development has been the enactment in California of the Leonard Law:

> No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution. [FN237]

The statute authorizes civil actions for injunctive and declaratory relief and the award of attorney's fees to a prevailing plaintiff. [FN238] To date, the law has resulted in the invalidation of Stanford University's speech code and a challenge to disciplinary sanctions against a fraternity chapter at Occidental College that brought a quick settlement dropping all charges against the fraternity. [FN239] A companion law applicable to public universities [FN240] was the basis for a similar suit by a fraternity chapter against ***96** the University of California at Riverside that resulted not only in the rescission of all sanctions but also mandated sensitivity training on the First Amendment for two student affairs administrators. [FN241] Although there has not yet been a claim that joining or belonging to a fraternity constitutes protected speech, the First Amendment case law and commentary already discussed provides some support for such a claim. [FN242] The Leonard Law also illustrates the potential for similar legislation to provide the same protection for freedom of association as it provides for freedom of speech. [FN243]

CONCLUSION

The recent gradual development of the law determining when social organizations have a constitutional right to intimate association free of governmental interference and current overbroad or misdirected efforts by public colleges and universities to deal with concerns about fraternities may join to set the stage for a court confrontation to resolve issues such as those discussed here. A more desirable alternative would be for the administrators of such institutions to tailor their actions along the lines suggested by the case law. A warning should also be posted for fraternity chapters intent on invoking their right to freedom of association: resistance to less drastic action by a college or university may increase the probability that the institution will resort to the harsher but more probably legal measure of draconian discipline for alcohol or hazing infractions by a chapter. The most desirable scenario would see each of fraternity chapters and their host institutions live up to their own high ideals.

[FNa1]. B.S. 1975, M.S. 1977, Michigan State University; J.D. 1981, New York University; Walter, Conston, Alexander & Green, P.C., New York, New York; past president of The Delta Chi Fraternity, Iowa City, Iowa; member and past chairman of the Law Committee, director, and treasurer of the National Interfraternity Conference, Indianapolis, Indiana.

[FN1]. The term "fraternity" as used in this article includes all-male, co- ed and all-female groups, also often referred to as Greek(s). Most of the all- female groups colloquially referred to as sororities are in fact formally named women's

fraternities. See Baird's Manual of American College Fraternities I-12, I-37, IV-1-74 (Jack L. Anson & Robert F. Marchesani, Jr., eds., 20th ed. 1991); CLYDE S. JOHNSON, FRATERNITIES IN OUR COLLEGES 60 (1972).

[FN2]. See infra notes 13-17 and accompanying text.

[FN3]. See generally, e.g., William H. Willimon & Thomas H. Naylor, The Abandoned Generation 86-96 (1995).

[FN4]. See Henry Wechsler, Alcohol and the American College Campus: A Report from the Harvard School of Public Health, Change, July 1996, at 20; Alice Dembner, Some Social Groups, Sports Seen Slowing Academic Progress, THE BOSTON GLOBE, July 11, 1995, at 4.

[FN5]. See, e.g., Baird's Manual, supra note 1, at I-6; Fred E. Baumann, Fraternities in the "PC" Environment, FRATERNAL LAW, Jan. 1992, at 1-3.

[FN6]. See Gregory F. Hauser, Denial of Due Process at Michigan State, Fraternal Law, Nov. 1988, at 6 (noting such reluctance); Ralph S. Rumsey, Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence or Student Membership, 11 J.C. & U.L. 465, 479 (1985) (same).

[FN7]. See infra notes 55-148 and accompanying text. The term "intimate association" presents the advantage over "private association" of avoiding confusion with the private club exception to public accommodations and other civil rights statutes, a related but not identical legal concept. Compare Louisana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483 (5th Cir.), cert. denied, 515 U.S. 1145, 115 S. Ct. 2583 (1995), with EEOC v. Chicago Club, 86 F.3d 1423 (7th Cir. 1996), and Pacific-Union Club v. Superior Court of San Francisco County, 232 Cal. App. 3d 60, 283 Cal. Rptr. 287 (Ct. App. 1991), with Warfield v. Peninsula Golf & Country Club, 896 P.2d 776 (1989).

[FN8]. See infra notes 159-223 and accompanying text.

[FN9]. See infra notes 16 & 224-41 and accompanying text.

[FN10]. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163 (1958) and progeny.

[FN11]. 408 U.S. 169, 92 S. Ct. 2338 (1972).

[FN12]. See, e.g., the Gay Students cases, discussed, e.g., in Gregory F. Hauser, Social Frater-nities at Public Institutions of Higher Education: Their Rights Under the First and Fourteenth Amendments, 19 J.L. & Educ. 433, 445- 50 (1990) [hereinafter Hauser, Social Fraternities]; see also id. at 459-64 for a detailed discussion of rights fraternity chapters may claim.

[FN13]. See, e.g., Timothy A. Fischer, Single Sex Status Protected, Fraternal Law, Mar. 1994, at 3-4 [hereinafter Fischer, Single Sex Status]; James C. Harvey, Rights, Privileges and Fraternities: Requiem for Waugh, FRATERNAL LAW, Jan. 1991, at 3-4

[hereinafter Harvey, Requiem]; James C. Harvey, Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Rights, 17 J.C. & U.L. 11, 22-42 (1990) [[hereinafter Harvey, Fraternities and the Constitution]; James C. Harvey, Fraternities and the Right of Expressive Association, FRATERNAL LAW, Mar. 1990, at 1-3 (and works cited) [hereinafter Harvey, Expressive Association]; Hauser, Social Fraternities, supra note 12, at 450-66 (and six earlier works in accord cited infra including Rumsey, supra note 6, at 478-79); Nancy S. Horton, Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?, 18 J.C. & U.L. 419, 432-45 (1992); Steven M. Colloton, Note, Freedom of Association: The Attack on Single-Sex College Social Organizations, 4 YALE L. & POL'Y REV. 433-40 (1986).

[FN14]. See J. Freedley Hunsicker, Jr., Counterpoint: A Constitutional Right to Party?, 21 J.L. & Educ. 205 (1992); Daniel L. Schwartz, Comment, Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations, 75 CAL. L. REV. 2117, 2142-47 (1987); see also Harvey, Requiem, supra note 13, at 3 (citing three works concluding that fraternities have no legal right to exist that are of questionable relevance here because they gave little or no consideration to modern case law concerning student rights and freedom of association).

[FN15]. Gary Pavela, Regulating Fraternities, 7 Synthesis: Law & Pol'y in Higher Educ. 489, 490-508 (1995).

[FN16]. See, e.g., Hauser, Social Fraternities, supra note 12, at 434 n.7; Robert E. Manley, First Amendment Freedoms on Private Campuses, Fraternal Law, Mar. 1992, at 4-6; Michael W. Gosk, From Animal House to No House: Legal Rights of the Banned Fraternity, 28 CONN. L. REV. 167 (1995).

[FN17]. See authorities cited supra notes 14-15.

[FN18]. Such a recommendation was rejected at the University of Rhode Island, Faculty Senate Rejects Call to Abolish URI Fraternities, The Providence Journal-Bulletin, Apr. 29, 1994, at 8B, but disbanding the fraternity system is currently an option under consideration at the University of New Hampshire, Review of Frats Planned. Substance - Free Dorms Popular, THE UNION LEADER, Sept. 5, 1996, at A4.

[FN19]. See Robert E. Manley & Timothy M. Burke, All-Greek Councils, Fraternal Law, Mar. 1996, at 5; see also Harvey, Fraternities and the Constitution, supra note 13, at 37; Hauser, Social Fraternities, supra note 12, at 436-37.

[FN20]. See generally Johnson, supra note 1, at 254.

[FN21]. See, e.g., infra at notes 89-97 and accompanying text.

[FN22]. See, e.g., infra notes 98-100 and accompanying text.

[FN23]. See generally Johnson, supra note 1, at 254-55, 276.

[FN24]. Generally termed "house directors," the gender-neutral term for the older and perhaps better known housemothers and housefathers.

[FN25]. See, e.g., University of Maryland at College Park Office of the Vice President for Student Affairs, Greek Life: A Foundation for the Future (1995), reprinted in 7 SYNTHESIS: LAW AND POL'Y IN HIGHER EDUC. 495 (1995).

[FN26]. 381 U.S. 479, 85 S. Ct. 1678 (1965).

[FN27]. Id. at 483, 85 S. Ct. at 1681 (emphasis added).

[FN28]. See, e.g., Pollard v. Roberts, 283 F. Supp. 248, 256 (E.D. Ark.) ("[T] he First and Fourteenth Amendments protect the rights of people to associate together to advocate and promote legitimate, albeit controversial, political, social or economic action . . . .") (emphasis added), aff'd, 393 U.S. 14, 89 S. Ct. 1686 (1968); see also, e.g., Bruns v. Pomerlau, 319 F. Supp. 58, 64 (D. Md. 1970) (citing Pollard v. Roberts as authority for the protection of the "right to associate with any person of one's choosing for the purpose of advocating and promoting legitimate, albeit controversial, political, social or economic views") (emphasis added).

[FN29]. 402 U.S. 611, 91 S. Ct. 1686 (1971) (emphasis added).

[FN30]. Id. at 615, 91 S. Ct. at 1689.

[FN31]. Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984); see United States v. Rubio, 727 F.2d 786, 791 (9th Cir. 1984); Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1984); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1041-42 (5th Cir. 1980), rev'd in part on other grounds, 455 U.S. 283, 102 S. Ct. 1070 (1982); Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980); McKenna v. Peekskill Hous. Auth., 497 F. Supp. 1217, 1220-21 (S.D.N.Y. 1980), aff'd in part and rev'd in part, 647 F.2d 332 (2d Cir. 1981); Fisher v. Snyder, 346 F. Supp. 396, 398-99 (D. Neb. 1972), aff'd, 476 F.2d 375 (8th Cir. 1973); In re Application of Martin, 447 A.2d 1290, 1305-08 (1982); see also Bursey v. United States, 466 F.2d 1059, 1082 (9th Cir. 1972) ("All . . . associational relationships are presumptively protected by the First Amendment.").

[FN32]. Peterson v. City of Greenville, 373 U.S. 244, 250, 83 S. Ct. 1133, 1133-34 (1963) (Harlan, J., concurring in part and dissenting in part).

[FN33]. Bell v. Maryland, 378 U.S. 226, 313, 84 S. Ct. 1814, 1862 (1964) (Goldberg, J., concurring) (citing Ferguson v. Gies, 46 N.W. 720, 721 (1890) ("Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds . . . .")); see also id., 378 U.S. at 294 n.14, 84 S. Ct. at 1852 n.14 (observing that legislative history of the Thirteenth and Fourteenth Amendments displayed an intent that the law not control certain human relations involving "social rights"-as opposed to civil rights-that should be controlled by "purely personal choice"); Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 789 (1995) (drawing same distinction).

[FN34]. Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 489 (1966).

[FN35]. Moose Lodge v. Irvis, 407 U.S. 163, 179-80, 92 S. Ct. 1965, 1974- 75 (1972) (Douglas, J., dissenting).

[FN36]. See Gilmore v. City of Montgomery, 417 U.S. 556, 575, 94 S. Ct. 2416, 2427 (1974).

[FN37]. See also Hishon v. King & Spalding, 467 U.S. 69, 80 n.4, 104 S. Ct. 2229, 2236 (1984) (Powell, J., dissenting) ("Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendments."). On the other hand, the one district court that relied on the Supreme Court statements quoted here in turning back a legal challenge to a private club's membership practices was reversed on the facts. See Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, 390-91 (E.D. Va. 1979), rev'd, 632 F.2d 309 (4th Cir. 1980).

[FN38]. See Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249-50 (1984); Board of Directors v. Rotary Club, 481 U.S. 537, 544-45, 107 S. Ct. 1940, 1945-46 (1987). The distinction has a constitutional dimension. Freedom of expressive association is penumbral to the First Amendment freedoms of speech, religion, petition and assembly, Roberts, 468 U.S. at 618, 104 S. Ct. at 3249-50; see also Republican Party v. Faulkner County, 49 F.3d 1289, 1292 (8th Cir. 1995). Some courts have interpreted Roberts and Rotary as grounding the freedom of intimate association in the Fourteenth Amendment's liberty guarantee (in the due process clause) to the exclusion of any basis in the First Amendment. E.g., Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990); IDK, Inc. v. County of Clark, 836 F.2d 1185, 1192 (9th Cir. 1988); Christy v. Servitto, 699 F. Supp. 618, 656 (E.D. Mich. 1988), aff'd, 932 F.2d 502 (6th Cir. 1991); Lafayette v. Frank, 688 F. Supp. 138, 145 (D. Vt. 1988). But others, also relying on Roberts and Rotary, have stated that intimate associations are protected by the First Amendment as well. E.g., Parks v. City of Warner Robins, 43 F.3d 609, 615 (11th Cir. 1995) (and cases cited); Divergilio v. Skiba, 919 F. Supp. 265, 267 (E.D. Mich. 1996); State v. BurningTree Club, Inc., 554 A.2d 366, 378 n.7 (Md. 1989). Still others have indicated that the right of intimate association is related to the right of privacy. E.g., Fleisher v. City of Signal Hill, 829 F.2d 1491, 1499-1500 (9th Cir. 1987); Able v. United States, 863 F. Supp. 112, 115 (E.D.N.Y. 1994). The uncertainty could have more than academic implications. See infra note 159.

[FN39]. See, e.g., State v. Burning Tree Club, Inc., 554 A.2d at 378-81; (Md. 1989); William P. Marshall, Discrimination and the Right of Association, 81 Nw. U. L. Rev. 68, 80-83 (1986); see also Hauser, Social Fraternities, supra note 12, at 450.

[FN40]. Rotary, 481 U.S. at 545, 107 S. Ct. at 1946.

[FN41]. See Bohemian Club v. Fair Employment and Hous. Comm'n, 231 Cal. Rptr. 769, 774-76 (Ct. App. 1986).

[FN42]. See New York State Club Ass'n v. New York City, 487 U.S. 1, 18- 19, 108 S. Ct. 2225, 2227 (1988) (O'Connor, J., concurring).

[FN43]. See Thomas S. ex rel. Brooks v. Flaherty, 699 F. Supp. 1178, 1203-04 (W.D.N.C. 1988), aff'd, 902 F.2d 250 (4th Cir. 1990).

[FN44]. See O'Leary v. Luongo, 692 F. Supp. 893, 900 (N.D. Ill. 1988); City of Glendale v. George, 256 Cal. Rptr. 742, 749 (Ct. App. 1989).

[FN45]. 490 U.S. 19, 104 S. Ct. 1591 (1989).

[FN46]. Id. at 25, 109 S. Ct. at 1595 (citations omitted).

[FN47]. Compare IDK, Inc. v. County of Clark, 836 F.2d 1185, 1191-93 (9th Cir. 1988) with Treants Enter. v. Onslow County, 380 S.E.2d 602, 604-06 (N.C. Ct. App. 1989); and compare In re Appeal in Maricopa County, 887 P.2d 599, 604-10 (Ariz. 1994) with Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981); but see Waters v. Barry, 711 F. Supp. 1125, 1134-35 (D.D.C. 1989).

[FN48]. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 237, 110 S. Ct. 596, 610-11 (1990) (discussing motel room stays of fewer than ten hours); Swank v. Smart, 898 F.2d 1247, 1251-52 (7th Cir. 1990) (involving casual, first-time encounter between policeman and college student); Contreras v. City of Chicago, 920 F. Supp. 1370, 1388 (N.D. Ill. 1996) (informal social encounters in a restaurant), aff'd in part and vacated in part on other grounds, 119 F.3d 1286 (7th Cir. 1997); Greiner v. City of Champlin, 816 F. Supp. 528, 538, 545 (D. Minn. 1993) (loud parties and inviting party guests to stay overnight), aff'd in part, 27 F.3d 1346 (8th Cir. 1994); Bush v. Dassel-Cokato Board of Educ., 745 F. Supp. 562, 570 (D. Minn. 1990) (parties); People v. Rodriguez, 608 N.Y.S.2d 594, 597-98 (Sup. Ct. 1993) (sidewalk gathering); Smith v. Indiana State Board of Health, 307 N.E.2d 294 (Ind. Ct. App. 1974) (rock festival); but see Tillman v. City of West Point, 953 F. Supp. 145, 151 (E.D. Tex. 1996) (even after Dallas v. Stanglin, "friendships can indeed rise to such a level as to create a protected intimate First Amendment Association. . . ."), aff'd, 109 F.3d 765 (5th Cir. 1997) (no opinion).

[FN49]. See Wallace v. Texas Tech Univ., 80 F.3d 1042, 1051-52 (5th Cir. 1996); Gardner v. City of Moore, 48 F.3d 1231 (10th Cir. 1995); Brayton v. Monson Public Schools, 950 F. Supp. 33, 38 (D. Mass. 1997); Burrows v. Ohio High School Ath. Ass'n, 891 F.2d 122, 125 (6th Cir. 1989); Karmanos v. Baker, 816 F.2d 258, 260 (6th Cir. 1987); Graham v. Tennessee Secondary Sch. Ath. Ass'n, 1995 U.S. Dist. LEXIS 3211, *20 (E.D. Tenn. 1995); Semaphore Ent. Group Sports Corp. v. Gonzalez, 919 F. Supp. 543, 550 n.4 (D.P.R. 1996); Parish v. NCAA, 361 F. Supp. 1220, 1229 (W.D. La. 1973), aff'd, 506 F.2d 1028 (5th Cir. 1975); Concord Rod and Gun Club v. Massachusetts Comm'n Against Discrimination, 524 N.E.2d 1364, 1367 (Mass. 1988).

[FN50]. See Freeman v. City of Santa Ana, 68 F.3d 1180, 1188-89 (9th Cir. 1996) (bar/dance hall); Allendale Leasing, Inc. v. Stone, 614 F. Supp. 1440, 1455-56 (D.R.I. 1985), aff'd, 788 F.2d 830 (1st Cir. 1986) (bingo game); Sunset Amusement Co. v. Board of Police Commissioners, 496 P.2d 840, 845-56 (Cal. 1972) (roller skating rink); People v. Morone, 198 Cal. Rptr. 316, 318 (Ct. App. 1983) (swingers club); City of New York v. New Saint Mark's Baths, 497 N.Y.S.2d 979, 989 (Sup. Ct.), aff'd, 505 N.Y.S.2d 1015 (App. Div. 1986) (bathhouse); Callaway v. City of Edmond, 791 P.2d 104, 105 (Okla. Crim. App. 1990) (pool halls).

[FN51]. See Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 794- 98 (Cal. 1995); State v. Burning Tree Club, Inc., 554 A.2d 366, 377-81 (Md. 1989).

[FN52]. See Watson v. Fraternal Order of the Eagles, 915 F.2d 235, 243- 44 (6th Cir. 1990); Fraternal Order of Eagles v. City of Tucson, 816 P.2d 255, 258-59 (Ariz. Ct. App. 1991).

[FN53]. See Lloyd Lions Club v. International Ass'n of Lions Clubs, 724 P.2d 887, 891 (Ore. 1986).

[FN54]. See Benevolent and Protective Order of Elks v. Reynolds, 863 F. Supp. 529, 533-34 (W.D. Mich. 1994); Cornelius v. Benevolent and Protective Order of Elks, 382 F. Supp. 1182, 1195 (D. Conn. 1974); Elks Lodges v. Department of Alcoholic Bev. Control, 905 P.2d 1189, 1193-1200 (Utah 1995), cert. denied, 116 S. Ct. 1850 (1996); Beynon v. St. George-Dixie Lodge, 854 P.2d 513, 518-19 (Utah 1993).

[FN55]. 23 Cal. Rptr. 287 (Ct. App. 1991).

[FN56]. Id. at 289-90.

[FN57]. Id. at 288-89.

[FN58]. Id. 294 (citing Roberts v. United States Jaycees, 468 U.S. 609, 620, 104 S. Ct. 3244, 3251 (1984)).

[FN59]. Pacific-Union Club, 283 Cal. Rptr. at 294-96. The finding that a membership of 958 was consistent with intimacy was itself consistent with the same court's previous ruling that the Bohemian Club's membership of 2000, because it was "extremely selective", was "undoubtedly "intimate' in associational terms." Bohemian Club v. Fair Employment and Hous. Comm'n, 231 Cal. Rptr. 769, 776 (Ct. App. 1986).

[FN60]. Pacific-Union Club, 283 Cal. Rptr. at 295 n.5, 297.

[FN61]. See id. at 297-99.

[FN62]. 16 Cal. Rptr. 2d 705 (Ct. App. 1993).

[FN63]. See id. at 705-08.

[FN64]. Id. at 710-11.

[FN65]. Id. at 706.

[FN66]. Id. at 710-11.

[FN67]. Id. at 711.

[FN68]. See id. at 711-13.

[FN69]. See Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1485-88 (5th Cir.), cert. denied, 515 U.S. 1145, 115 S. Ct. 2583 (1995).

[FN70]. Id. at 1488.

[FN71]. Id.

[FN72]. Id. at 1483.

[FN73]. Id. at 1494 (citations omitted).

[FN74]. Id. at 1494 n.16. The court identified these factors as drawn from the cases considering the private club exception of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (1994). Id.

[FN75]. Id. at 1495-97 (footnotes omitted).

[FN76]. Id. at 1497-98 (footnote omitted).

[FN77]. See id. at 1495.

[FN78]. Id. at 1498.

[FN79]. Id. at 1500.

[FN80]. Curran v. Mount Diablo Council, 195 Cal. Rptr. 325, 336-38 (Ct. App. 1983), review granted & opinion superseded by 874 P.2d 901 (1994).

[FN81]. 283 Cal. Rptr. 287 (Ct. App. 1991).

[FN82]. Curran v. Mount Diablio Council, 29 Cal. Rptr. 2d 580, 597 (Ct. App. 1994).

[FN83]. Id. at 597-98.

[FN84]. Id. at 602 (Staniforth, Assoc. J., dissenting).

[FN85]. Randall v. Orange County Council, 28 Cal. Rptr. 2d 53, 55-56 (Ct. App.), review granted, 874 P.2d 900 (Cal. 1994).

[FN86]. Id. at 60-61. As of this writing, there has been no further word from the California Supreme Court, but a recent unreported decision by the Randall court apparently reversed its earlier holding that the Boy Scouts constituted a business establishment subject to the Unruh Act when it ruled unanimously they were entitled to dismiss a police officer as a scout leader because he was gay, and a concurring opinion argued that forcing them to accept gay leaders would violate the Boy Scouts' right to freedom of expressive association. Tony Perry, State Court Upholds Firing of Boy Scout Leader, Los Angeles Times, May 23, 1997, at A3. Still another of California's intermediate appellate courts that had not yet ruled on the issue has also recently held that the Unruh Act does not apply to the Boy Scouts, but it declined to reach the freedom of association issue. See Yeaw v. Boy Scouts, 64 Cal. Rptr. 2d 85 (Ct. App. 1997).

[FN87]. See Curran v. Mount Diablo Council, 874 P.2d 901 (Cal. 1994); Randall v. Orange County Council, 874 P.2d 900 (1994); Scott Graham, State Supreme Court to Decide Boy Scout Cases Itself, The Recorder, July 18, 1995, at 3.

[FN88]. One other suit, in federal court against Ohio University for refusal to grant recognition to a new fraternity chapter, was mooted before a court decision when the university abandoned its position that recognition would be denied because of its right to control the system; the university granted recognition and paid a portion of the fraternity's legal fees. See Timothy A. Fischer, Recognition Lawsuit Settled, Fraternal Law, Jan. 1992, at 6.

[FN89]. See Report and Recommendation at 4-12, Eta Zeta Chapter v. Interfraternity Council (No. 3:94 - 0424) (copy on file with author); see also Plaintiff's Complaint and Memorandum Brief, Eta Zeta Chapter (No. 3:94 - 0424) (copy on file with author). Gregory F. Hauser, University-IFC Sanctions Violate Chapter Rights, Fraternal Law, Mar. 1995, at 1-3.

[FN90]. Report and Recommendation at 4-12, Eta Zeta Chapter v. Interfraternity Council (No. 3:94 - 0424) (copy on file with author).

[FN91]. Id. at 12-17.

[FN92]. Id. at 2-3, 12.

[FN93]. 408 U.S. 169, 92 S. Ct. 2338 (1972).

[FN94]. Report and Recommendation at 19, 33, Eta Zeta Chapter (No. 3:94 - 0424) (copy on file with author).

[FN95]. Letter from Chief Justice, Greek Judicial Board Longwood College to President, Alpha Sigma Alpha (Jan. 19, 1996).

[FN96]. Bill of Complaint and Motion for Temporary Injunction Alpha Sigma Alpha Sorority v. Longwood College, (No. CH6-4) (Va.) (both filed Jan. 25, 1996).

[FN97]. Id., Order (Cir. Ct. Prince Edward Co., Feb. 1, 1996).

[FN98]. Joseph Barrios, Council Votes on Funding, Arizona Daily Wildcat, Mar. 25, 1994, at 5-6; see also University of Arizona Graduate and Professional Student Council Bill #3 and Undergraduate Senate Bill #3, adopted by ASUA Central Governing Council on March 24, 1994 (on file with author).

[FN99]. Joseph Barrios, Greeks appeal funding issue decision, Arizona Daily Wildcat, Apr. 7, 1994, at 5; see ASUA Const. Art. IV § 2.

[FN100]. Joseph Barrios, Court Allows Greeks to get ASUA funds, Arizona Daily Wildcat, Apr. 27, 1994, at 1; see also Gregory F. Hauser, UA Campus Court Finds for Greeks, FRATERNAL LAW, Sept. 1994, at 6.

[FN101]. See supra notes 13-15.

[FN102]. See Louisana Debating and Literary Assoc. v. City of New Orleans, 42 F.3d 1483, 1494 (5th Cir.), cert. denied, 515 U.S. 1145, 115 S. Ct. 2583 (1995).

[FN103]. See Hauser, Social Fraternities, supra note 12, at 452 n.139; Rumsey, supra note 6, at 467.

[FN104]. See Harvey, Fraternities and the Constitution, supra note 13, at 24 n.94.

[FN105]. Horton, supra note 13, at 436.

[FN106]. See Board of Directors v. Rotary Club, 481 U.S. 537, 539-93, 107 S. Ct. 1940, 1942-44 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 613-14, 621-22, 104 S. Ct. 3244, 3251-52 (1984).

[FN107]. See supra notes 65-83 and accompanying text.

[FN108]. See Pacific-Union Club v. Superior Court, 283 Cal. Rptr. 287, 294 (Ct. App. 1991); see also supra note 75 and accompanying text.

[FN109]. 42 U.S.C. § 2000a(e) (1994).

[FN110]. See Louisiana Debating, 42 F.3d at 1494 n.16, 1497 n.28 (citing Welsh v. Boy Scouts, 993 F.2d 1267, 1276-77 (7th Cir. 1993).

[FN111]. The issue of a chapter's alumni/ae has been discussed in previous commentary. See Hauser, Social Fraternities, supra note 12, at 452-53; Colloton, supra note 13, at 434, and the intervening case law has shed little further light on the issue except for the finding in Mount Diablo II that the involvement of a few adult leaders was consistent with the intimate nature of the scout troops, see Curran v. Mount Diablo Council, 29 Cal. Rptr. 2d at 598, which would support the same conclusion concerning the handful of alumni/ae typically involved as fraternity chapter advisors, see Hauser, Social Fraternities, supra note 12, at 452.

[FN112]. Fischer, Single Sex Status, supra note 13, at 3; see also Colloton, supra note 13, at 434-35 (noting that fraternities and similar organizations "choose memberships with friendships in mind" and one of their purposes "is to foster a congenial and intimate environment that provides a small community for college students").

[FN113]. Baird's Manual, supra note 1, at I-7.

[FN114]. Johnson, supra note 1, at 136-40.

[FN115]. Id. at 114-16, 141; Horton, supra note 13, at 438-39.

[FN116]. See supra notes 59, 67, 75 & 83 and accompanying text.

[FN117]. See also Hauser, Social Fraternities, supra note 12, at 454-55.

[FN118]. E.g., Nathaniel R. Jones, The Future of Single Sex Fraternities, Fraternal Law, Jan. 1988, at 4.

[FN119]. See Horton, supra note 13, at 439; see also Johnson, supra note 1, at 157-58, 292; Bobby Lawrence McMinn, A Content Analysis of the Esoteric Ritual Manuals of National College Social Fraternities for Men 114, 135 (1979) (unpublished Ph.D. dissertation, University of Mississippi) (on file with author) (of twenty-two fraternity rituals studied, twenty included a promise of friendship in the membership oath while only three included service to others in the charge of responsibility).

[FN120]. See Rotary, 481 U.S. at 539, 546 n.5, 547-48, 107 S. Ct. 1940, 1946 n.5, 1947; Roberts, 468 U.S. at 621, 104 S. Ct. at 3251.

[FN121]. Hauser, Social Fraternities, supra note 12, at 451.

[FN122]. Robert E. Manley, Fraternal Selectivity v. Jaycees Commerciality, Fraternal Law, 2-3 (1984).

[FN123]. See Louisana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1496 (5th Cir.), cert. denied, 115 S. Ct. 2583 (1995); Harvey, Fraternities and the Constitution, supra note 13, at 25; Fischer, Single Sex Status, supra note 13, at 3; see also Johnson, supra note 1, at 255-58, 270- 72, 298, 304-08.

[FN124]. See Johnson, supra note 1, at 269-70; Horton, supra note 13, at 437. Some chapters delegate the decision to a committee, which is nonetheless under the circumstances entirely indicative of selectivity. See EEOC v. Chicago Club, 86 F.3d 1423, 1436-37 (7th Cir. 1996).

[FN125]. Louisana Debating, 42 F.3d at 1496.

[FN126]. See also Rumsey, supra note 6, at 478.

[FN127]. See Harvey, Fraternities and the Constitution, supra note 13, at 26; Colloton, supra note 13, at 436, 442.

[FN128]. See Horton, supra note 13, at 439-40; Rumsey, supra note 6, at 478; Colloton, supra note 13, at 435-36.

[FN129]. Hauser, Social Fraternities, supra note 12, at 454-55.

[FN130]. Johnson, supra note 1, at 130-31.

[FN131]. Id. at 270-71.

[FN132]. Willimon & Naylor, supra note 3, at 149 (1995) (emphasis in original).

[FN133]. See Hunsicker, supra note 14, at 211-12.

[FN134]. Borough of Glassboro v. Vallorosi, 535 A.2d 544, 549 (N.J. Super. Ct. 1987), aff'd, 539 A.2d 1223, 1224 (N.J. App. Div. 1988), aff'd, 568 A.2d 888, 894-95 (1990).

[FN135]. See Fischer, Single Sex Status, supra note 13, at 3; Harvey, Fraternities and the Constitution, supra note 13, at 25; Hauser, Social Fraternities, supra note 12, at 453-54; Horton, supra note 13, at 438; Colloton, supra note 13, at 435; see also Baird's Manual, supra note 1, at I- 13; JOHNSON, supra note 1, at 292-93; McMinn, supra note 119, at 6-7 (noting lack of available information on fraternities' secret initiations).

[FN136]. See Pavela, supra note 15, at 508; Schwartz, supra note 14, at 2136, 2145. To some extent, the argument opposing fraternities' right to freedom of association seems to result from a premise that they are no more than "superficially selective drinking clubs," Pavela, supra note 15, at 508; see Hunsicker, supra note 14, at 209, 213-15, a conclusion that might apply to isolated chapters but is demonstrably inconsistent with the considerably more complex nature of fraternities in general, see Baird's Manual, supra note 1, at I-1-24; JOHNSON, supra note 1 at 3-45, 56-65, 76-310; WILLIMON & NAYLOR, supra note 3, at 149; Horton, supra note 13, at 444.

[FN137]. See Pacific-Union Club v. Superior Court, 232 Cal. App. 3d 60, 75 n.5, 283 Cal. Rptr. 287, 295 n.5 (Ct. App. 1991); see also Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 474 (1986) (holding of meetings in public restaurant did not make private club place of public accommodation), reh'g denied, 811 F.2d 247 (3d Cir.), cert. denied, 483 U.S. 1050 (1987); Maine Human Rights Comm'n v. Le Club Calumet, 609 A.2d 285, 287 (Me. 1992) (holding that private club did not become public accommodation by having social and fund raising events open to the public since business meetings and other activities were confined to members). Of even less merit is the spurious argument by a student author that, since fraternity chapters sometimes provide their members with recreational equipment such pool tables, ping-pong tables and VCRs, they should be classified as public places of entertainment. See Schwartz, supra note 14, at 2128. This disingenuously ignores the fact that the equipment is for the members, not the public; furthermore, as another student author has noted, the provision of such equipment is evidence that the chapters function as surrogate family homes, see Colloton, supra note 13, at 436.

[FN138]. Hauser, Social Fraternities, supra note 12, at 454. Indeed, the exclusionary nature of fraternity chapter housing is among the motivations for the critics of fraternities. See Schwartz, supra note 14, at 2120.

[FN139]. See Baird's Manual, supra note 1, at I-2-24 & III-1-IV-89; JOHNSON, supra note 1, at 12-95, 206-22; Horton, supra note 13, at 424-25, 436-37.

[FN140]. Schwartz, supra note 14, at 2137 n.124.

[FN141]. See Hauser, Social Fraternities, supra note 12, at 453; see also Kiwanis

Int'l, 806 F.2d at 475 (holding that membership drive did not show private club was not selective since any candidate for membership still had to be sponsored by an existing member and meet compatibility and other requirements).

[FN142]. See Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497-98 (5th Cir.), cert. denied, 115 S. Ct. 2583 (1995); Pacific-Union Club, 283 Cal. Rtpr. at 295 n.5.

[FN143]. See Hunsicker, supra note 14, at 213; Schwartz, supra note 14, at 2137-39, 2145.

[FN144]. See also Hauser, Social Fraternities, supra note 12, at 451 n.138, 455.

[FN145]. See Hunsicker, supra note 14, at 213.

[FN146]. See Colloton, supra note 13, at 439-40; cf. Robinson v. Board of Regents, 475 F.2d 707, 709 (6th Cir. 1973), Morale v. Grigel, 422 F. Supp. 988, 999 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 788 (W.D. Mich. 1975) (noting cases holding that attendance at public institution of education may not be conditioned on waiver of constitutional right).

[FN147]. Roberts v. United States Jaycees, 486 U.S. 609, 618-20, 104 S. Ct. 3244 (1984); see Douglas O. Linder, Freedom of Association After Roberts v. United States Jaycees, 82 Mich. L. Rev. 1878, 1886 (1984).

[FN148]. See Lisa A. Hammond, Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination, 53 Ohio St. L.J. 1385, 1393 (1992) ("The heart of the intimate relationships that the Court has recognized as constitutionally protected is that personal affinity has caused those protected relationships to form.") (emphasis in original). Fraternity chapters also have available a claim to protection of their freedom of association under virtually all state constitutions, see Freedom of Association-State Protections, FRATERNAL LAW, 6 (1992); see also, e.g., Wyche v. State, 619 So. 2d 231, 234 (Fla. 1993) (holding that Florida Constitution protects "the rights of individuals to associate with whom they please and to assemble with others for . . . social purposes"), and, depending on the state, perhaps even an argument that its protection is broader than under the federal constitution.

[FN149]. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231, 97 S. Ct. 1782, 1799 (1977).

[FN150]. Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990).

[FN151]. Roberts v. United States Jaycees, 468 U.S. 609, 636, 104 S. Ct. 3244, 3259 (1984).

[FN152]. See, e.g., Johnson, supra note 1, at 114-16, 136-41 & 157-58.

[FN153]. See also Harvey, Fraternities and the Constitution, supra note 13, at 26-29; Harvey, Expressive Association, supra note 13, at 1-3; Horton, supra note 13, at 442-45; Rumsey, supra note 6, at 478.

[FN154]. Hauser, Social Fraternities, supra note 12, at 451 n.136.

[FN155]. Roberts, 468 U.S. at 618 n.136, 104 S. Ct. at 3249 n.136; see also McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994); IDK, Inc. v. Clark, 836 F.2d 1185, 1193-94 (9th Cir. 1988); Curran v. Mount Diablo Council of the Boy Scouts of America, 29 Cal. Rptr. 2d 580, 585-98 (Ct. App.), review granted, 874 P.2d 901 (1994); Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 710-12 (Ct. App. 1993).

[FN156]. 83 Cal. Rptr. 287, 297 (Ct. App. 1991).

[FN157]. See Gay Alliance of Students v. Matthews, 544 F.2d 162, 165-66 (4th Cir. 1976); Aumiller v. University of Del., 434 F. Supp. 1273, 1286 n.39 (Del. 1977); cf. Henderson v. Huecker, 744 F.2d 640, 645-46 (8th Cir. 1984) (holding that right of association under first and fourteenth amendments protects right to discuss and inform concerning union membership).

[FN158]. Roberts, 468 U.S. at 618, 104 S. Ct. at 3249; see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2338, 2351 (1995) (holding that state cannot "prohibit exclusion of those whose views were at odds with positions espoused by the general club membership" and, if association is engaged in expressive activity, access can not be compelled that would trespass on the organization's message).

[FN159]. Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1498 (5th Cir.), cert. denied, 115 S. Ct. 2583 (1995); accord, e.g., Roberts, 468 U.S. at 623, 104 S. Ct. at 3252; Healy v. James, 408 U.S. 169, 189, 92 S. Ct. 2338, 2350 (1972); Waters v. Barry, 711 F. Supp. 1134, 1134-35 (D.D.C. 1989); Pacific-Union Club v. Superior Court, 232 Cal. App. 3d 60, 78, 283 Cal. Rptr. 287, 297 (Ct. App. 1991); Wyche v. State, 619 So. 2d 231, 234 (Fla. 1993); Sills v. Irelan, 663 N.E.2d 1210, 1213 (Ind. Ct. App. 1996); but see Payne v. Fontenot, 925 F. Supp. 414, 419 (M.D. La. 1995) (suggesting that whether alleged infringement of the right of intimate association is subject to "strict scrutiny" or only to the "undue burden" standard is unclear). This last case points up the potential significance of determining the constitutional basis for the right of intimate association, see supra note 38, and whether a fraternity chapter is able to invoke the right of expressive association as well.

[FN160]. Healy v. James, 408 U.S. 169, 181, 92 S. Ct. 2338, 2346 (1972).

[FN161]. Aldrich v. Knab, 858 F. Supp. 1480, 1501 (W.D. Wash.), rev'd on other grounds, No. 93-35423, 1994 WL 465874, at *1 (9th Cir. Aug. 29, 1994).

[FN162]. Healy v. James, 408 U.S. at 181, 95 S. Ct. at 2346; see also Roberts, 468 U.S. at 622-23 (holding that interference with "internal organization or affairs of the group" can unconstitutionally infringe upon freedom of association).

[FN163]. See, e.g., Roberts, 468 U.S. at 623, 104 S. Ct. at 3244; Lousiana Debating, 1994 U.S. Dist. LEXIS 2781, at *28; Curran v. Mount Diablo Council of the Boy Scouts of America, 29 Cal. Rptr. 2d 580, 585-98 (Ct. App.), review granted, 874 P.2d 901 (1994); Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 710-11 (Ct. App. 1993).

[FN164]. State v. Allen, 905 S.W.2d 874, 877-78 (Mo. 1995).

[FN165]. In re Application of Martin, 447 A.2d 1290, 1306 (N.J. 1982); see also Roberts, 468 U.S at 622, 104 S. Ct. at 3244.

[FN166]. New York State Club Ass'n v. City of New York, 487 U.S. 1, 15- 16, 108 S. Ct. 2225, 2235 (1988).

[FN167]. See supra notes 18-25 and accompanying text.

[FN168]. See Report and Recommendation at 12-17, Eta Zeta Chapter v. Interfraternity Council (No. 3:94-0424) (M.D. Tenn. Sept. 9, 1994); Hauser, Social Fraternities, supra note 12, at 464.

[FN169]. Pacific-Union Club, 283 Cal. Rptr. at 297 (citation omitted); accord Britt v. Superior Court, 574 P.2d 766, 773 (1978); see also Healy v. James, 408 U.S. 169, 184, 92 S. Ct. 2338, 2348 (1972).

[FN170]. Gay Students Org. of the Univ. of N.H. v. Bonner, 367 F. Supp. 1088, 1098-99 (D.N.H.), aff'd in pertinent part and rev'd in part on other grounds, 509 F.2d 652 (1st Cir. 1974).

[FN171]. As to the issue of housekeeping rules, see Hauser, Social Fraternities, supra note 12, at 460, 462.

[FN172]. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513-14, 89 S. Ct. 733, 740 (1969).

[FN173]. See, e.g., Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1002-03 (5th Cir. 1975); Esteban v. Central Mo. State College, 415 F.2d 1077, 1086-90 (8th Cir. 1969).

[FN174]. See Rader v. Johnson, 924 F. Supp. 1540, 1556-57 (D. Neb. 1996). Sellman v. Baruch College, 482 F. Supp. 475 (S.D.N.Y. 1979), is not to the contrary, since it rested on a finding that no fundamental right had been abridged. Id. at 479-80.

[FN175]. See Dembner, supra note 4.

[FN176]. See Harvey, Fraternities and the Constitution, supra note 12, at 38-39; cf. Hays County Guardian v. Supple, 969 F.2d 111, 119 (5th Cir. 1992) (rejecting university's proffered reasons for restricting newspaper distribution including preserving the academic environment).

[FN177]. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547, 113 S. Ct. 2217 (1993) (citation omitted). Such selective regulation also raises equal protection issues. See Hauser, Social Fraternities, supra note 12, at 447-48.

[FN178]. See Anti-Hazing Statutes, Fraternal Law, Jan. 1996, at 4-5.

[FN179]. Buttny v. Smiley, 281 F. Supp. 280, 284-85 (D. Colo. 1968).

[FN180]. State v. Allen, 905 S.W.2d 874, 878 (Mo. 1995). Nor would a claim of freedom of association provide any defense to prosecution for sexual abuse. Cf. Fleisher v. City of Signal Hill, 829 F.2d 1491, 1500 (9th Cir. 1987).

[FN181]. See supra note 170 and accompanying text. Similarly, a municipality could close a fraternity chapter house for repeat violations under a properly drawn nuisance statute despite claims of freedom of association. See Hvamstad v. Suhler, 727 F. Supp. 511, 516-18 (D. Minn. 1989), aff'd, 915 F.2d 1218 (8th Cir. 1990).

[FN182]. See Waters v. Barry, 711 F. Supp. 1125, 1133-34 (D.D.C. 1989); State v. Allen, 905 S.W.2d 874, 877-78 (Mo. 1995).

[FN183]. See also Pavela, supra note 15, at 508 (conceding that a program directed against hazing and related misconduct would have to be "carefully designed" and that any "limits on student associational rights" would have to be "narrow").

[FN184]. Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984).

[FN185]. See Hays County Guardian v. Supple, 969 F.2d 111, 119 (5th Cir. 1992).

[FN186]. 458 U.S. 886, 102 S. Ct. 3409 (1982).

[FN187]. Id. at 908, 918-20, 102 S. Ct. at 3423 (footnotes omitted); see also Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 608-09, 87 S. Ct. 675, 686-87 (1967). By analogy with the general criminal law, however, there is an argument that a college or university could limit students' association with known violators of prohibitions of activities such as hazing and underage drinking, see United States v. Private Sanitation Indus. Ass'n, 995 F.2d 375, 377-78 (2d Cir. 1993); United States v. International Bd. of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991); sub nom., Senese v. United States, 502 U.S. 1091, 112 S. Ct. 1164 (1992); In re Hotel and Restaurant Employees and Bartenders Int'l Union, 496 A.2d 1111, 1124-27 (Super. Ct. App. Div. 1985) (and cases cited). By another analogy, an institution could restrict students from attending events where hazing, the sale or use of illegal drugs, or the unlawful furnishing or possession of alcoholic beverages "is practiced, allowed or tolerated." See Eberhart v. Massell, 311 F. Supp. 654, 657-59 (N.D. Ga. 1970).

[FN188]. Hauser, Social Fraternities, supra note 12, at 463.

[FN189]. See Hunsicker, supra note 14, at 214; Pavela, supra note 15, at 490, 508.

[FN190]. Levin v. Harleston, 966 F.2d 85, 88 (2d Cir. 1992); cf. Board of Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226, 289-90, 110 S. Ct. 2351,

2392 (1990) (Stevens, J., concurring: "We have, of course, sometimes found it necessary to limit local control over schools in order to protect the constitutional integrity of public education.").

[FN191]. Pratz v. Louisiana Polytechnic Univ., 316 F. Supp. 872, 877 (W.D. La. 1970), aff'd summarily per curiam, 401 U.S. 1004, 91 S. Ct. 1252 (1971); accord Rader v. Johnston, 924 F. Supp. 1540, 1557 n.34 (D. Neb. 1996); see also Widmar v. Vincent, 454 U.S. 263, 268-69, 102 S. Ct. 269, 274 (1981) (first amendment rights); American Future Systems Inc. v. Pennsylvania State Univ., 688 F.2d 907, 915 (3d Cir. 1982) (privacy rights). These holdings underline the fatal infirmity inherent in any claim that the decision in Waugh v. Board of Trustees, 237 U.S. 589, 35 S. Ct. 720 (1915), which rested on a finding that the state could impose the condition of barring fraternity membership, has any continuing force. See also Harvey, Requiem for Waugh, supra note 13; Hauser, Social Fraternities, supra note 12, at 456-57; Horton, supra note 13, at 428-31; Colloton, supra note 13, at 438 n.60; Comment, Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy, 1970 Duke L.J. 1181, 1204-06 (1970).

[FN192]. Healy v. James, 408 U.S. 169, 203, 92 S. Ct. 2338, 2357 (1972) (Rehnquist, J., concurring); see Pavela, supra note 15, at 490.

[FN193]. See Franklin v. Atkins, 409 F. Supp. 439, 450-51 (D. Colo. 1976), aff'd, 562 F.2d 1188 (10th Cir. 1977).

[FN194]. Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957) (Frankfurter, J., concurring) (citation omitted).

[FN195]. See University of Pa. v. EEOC, 493 U.S. 182, 199, 110 S. Ct. 577, 587 (1990).

[FN196]. See, e.g., Estelle A. Fishbein, New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities, 12 J.C. & U.L. 381, 384 (1985); Colloton, supra note 13, at 439.

[FN197]. Matthew W. Finkin, On "Institutional" Academic Freedom, 61 Tex. L. Rev. 817, 854 (1983).

[FN198]. See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); Timothy M. Burke, Politically Correct in New Mexico, Fraternal Law, Sept. 1991, at 4-5.

[FN199]. Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984); see also New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 368 (S.D.N.Y. 1993).

[FN200]. See Carroll v. Blinken, 957 F.2d 991, 1003 (2d Cir. 1997); Good v. Associated Students, 542, 906 P.2d 762, 768 (Wash. 1975).

[FN201]. See, e.g., Gosk, supra note 16, at 168; Schwartz, supra note 14, at 2119-24.

[FN202]. See, e.g., Michigan State Upholds Fraternity Independence, Fraternal Law, Nov. 1982, at 1-3; Royal Ford, Ouster of Gay Pledge Troubles UVM, THE BOSTON GLOBE, Mar. 11, 1990, at 77; Will Higgins, Gays, too, Crave Brotherhood That Fraternities Offer, THE INDIANAPOLIS STAR, May 24, 1996, at C5.

[FN203]. See Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1494-98 (5th Cir.), cert. denied, 515 U.S. 1145, 115 S. Ct. 2583 (1995); Pacific-Union Club v. Superior Court, 283 Cal. Rptr. 287, 289, 298 (Ct. App. 2d Dist. 1991).

[FN204]. See Curran v. Mount Diablo Council of the Boy Scouts of America, 29 Cal. Rptr. 2d 580, 585-98 (Ct. App.), review granted, 874 P.2d 901 (Cal. 1994); Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 710-12 (Ct. App. 1993).

[FN205]. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 581, 115 S. Ct. 2338, 2351 (1995) ("[A] private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.").

[FN206]. See Hsu v. Roslyn Union Free School Dist., 85 F.3d 839, 856-59 (2d Cir.), cert. denied, 117 S. Ct. 608 (1996).

[FN207]. See Roger Pilon, Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues, 45 Am. U.L. Rev. 775, 782-83 (1996); Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations, 104 HARV. L. REV. 1835, 1839 (1991); cf. Big Brothers, Inc. v. Minneapolis Comm'n on Civil Rights, 284 N.W.2d 823, 828-29 (Minn. 1979) (declining to apply prohibition of discrimination against homosexuals to Big Brothers because, inter alia, it would undermine the purpose of Big Brothers and the subjectively based big brother relationship). 1

[FN208]. Colloton, supra note 13, at 435-36, 441-44; Hauser, Social Fraternities, supra note 12, at 459; see also Jeff Ristine, SDSU's First Gay Fraternity as Traditional as Others, San Diego Union-Tribune, Mar. 16, 1993, at B-1 (noting that gay fraternity adopted "an unusual bylaw to forbid dating between members" because, inter alia, of "the trouble that has occurred in at least one other chapter").

[FN209]. Cf. Livingwell (North) Inc. v. Pennsylvania Human Relations Comm'n, 606 A.2d 1287, 1293-94 (Pa. Commw. Ct. 1992) (exempting single sex health club from Pa. Human Relations Act).

[FN210]. Board of Directors of Rotary Int'l of Duarte v. Rotary Club, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984).

[FN211]. 42 U.S.C. § 2000a(e) (1994).

[FN212]. 42 U.S.C. § 2000e(h) (1994).

[FN213]. 42 U.S.C. § 12187 (1994).

[FN214]. 42 U.S.C. § 3607 (1994).

[FN215]. See Horton, supra note 13, at 446-47; Steven B. Arbuss, Comment, The Unruh Civil Rights Act: An Uncertain Guarantee, 31 U.C.L.A. L. Rev. 443, 459 n.87 (1983); see also, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (1986) (exempting private club from New Jersey public accommodation statute).

[FN216]. 20 U.S.C. § 1681(6)(A) (1994); see also Colloton, supra note 13, at 442-43 (legislative history).

[FN217]. 20 U.S.C. § 1144 (1994); 42 U.S.C. § 1975a(b)(1994); see also Colloton, supra note 13, at 441-42 (legislative history of latter section).

[FN218]. See Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 790 (Cal. 1995).

[FN219]. See Michael M. Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.- C.L. L. Rev. 321, 322 (1983); Schwartz, supra note 14, at 2119-20.

[FN220]. Note, supra note 207, at 1855-56.

[FN221]. Maine Human Rights Comm'n v. Le Club Calumet, 609 A.2d 285, 287 (Me. 1992).

[FN222]. See Note, supra note 207, at 1850-56.

[FN223]. See Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984); see also Yeaw v. Boy Scouts of America, 64 Cal. Rptr. 2d 85, 93 (Ct. App. 1997); cf. Knights of the Ku Klux Klan v. Arkansas State Highway and Transp. Dep't, 807 F. Supp. 1427, 1435-37 (W.D. Ark. 1992).

[FN224]. See, e.g., William E. Simon, Stop Beating Up On Fraternities, The Des Moines Register, Oct. 10, 1995, at 9.

[FN225]. See supra note 16; see also, e.g., Ben-Yonatan v. Concordia College Corp., 863 F. Supp. 983, 987 (D. Minn. 1994) (holding that actions of private college, despite receiving state and federal support available to educational institutions generally, did not constitute state action); Winkley v. Bristol-Meyers Squibb Co., 793 F. Supp. 738, 741 (E.D. Mich. 1992) ("The right of freedom of association can be violated only be state action, as distinguished from private action.").

[FN226]. Robert L. Cherry, Jr., & John P. Geary, The College Catalog as a Contract, 21 J.L. & Ed. 1, 7 (1992); Gerald A. Fowler, The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal, 13 J.L. & ED. 401, 413 (1984); Audrey W. Latourette & Robert D. King, Judicial Intervention in the Student-University Relationship: Due Process and Contract Thinking, 65 U. DET. L. REV. 199, 231-35 (1988); Rebecca White, Comment, Wanted: A Strict Contractual Approach to the Private University/Student Relationship, 68 KY. L.J. 439, 439 (1979-80).

[FN227]. E.g., Psi Upsilon v. University of Penn., 591 A.2d 755, 758 (Pa. Super. Ct. 1991).

[FN228]. Restatement (Second) of Contracts § 178(1) (1981).

[FN229]. See Anthony v. Syracuse Univ., 223 N.Y.S. 796, 805 (Sup. Ct. 1927) ("Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the [university] authorities, and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy.") (emphasis in original), rev'd on other grounds, 231 N.Y.S. 435 (N.Y. App. Div. 1928).

[FN230]. See supra notes 127 & 134 and accompanying text.

[FN231]. See Restatement, supra note 228, § § 179, 189-91 & 194.

[FN232]. See Cherry & Geary, supra note 226, at 9-11; Victoria J. Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship, 33 Kan. L. Rev. 701, 709-12 (1985); Fowler, supra note 226, at 413; Eileen K. Jennings, Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?, 7 J.C. & U.L. 191, 217-18 (1981); Latourette & King, supra note 226, at 232-33, 240-43.

[FN233]. Dodd, supra note 232, at 709-11; Fishbein, supra note 196, at 201; Jennings, supra note 232, at 199, 219-21; White, supra note 226, at 440; Latourette & King, supra note 226, at 241-42.

[FN234]. Jennings, supra note 232, at 729-31.

[FN235]. Tippett v. Hart, 497 S.W.2d 606, 610 (Tex. Civ. App. 1973).

[FN236]. See supra note 38.

[FN237]. Cal. Educ. Code § 94367(a) (West Supp. 1997).

[FN238]. Id. § 94367(b).

[FN239]. See James C. Harvey, Another First Amendment Battleground, Fraternal Law, Sept. 1995, at 3; Robert E. Manley, ""Chilling the Nonsense" at Stanford, FRATERNAL LAW, Sept. 1995 at 5; Recent Case, Stanford University Speech Code Violates First Amendment, 16 ENT. L. REP. (May 1995).

[FN240]. Cal. Ed. Code § 66301 (West 1989 & Supp. 1997).

[FN241]. See James C. Harvey, Law Triumphs Over PC, Fraternal Law, Jan. 1994, at 3-4.

[FN242]. See supra notes 158 and 222-23 and accompanying text.

[FN243]. Legislation has been introduced into the House of Representatives that would deny funding under the Higher Education Act of 1965, 20 U.S.C. § 1001 et seq., to any institution of higher education that prohibits or punishes "the right to join, assemble, and reside with others that is protected under the 1st and 14th Amendments to the United States Constitution, or would be protected if the institution . . . were subject to those amendments." H.R. 980, 105th Cong. § 2 (1997).

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