

The Law of
Fraternities and Sororities

The Law of Fraternities and Sororities

Edited by

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Introduction

In my 2011 co-edited book, *Black Greek-Letter Organizations 2.0: New Directions in the Study of African American Fraternities and Sororities*, Craig Torbenson offered an excellent overview of the early history of collegiate Greek-letter fraternities and sororities. He highlighted that college fraternities and sororities were made to meet the intellectual and social needs of students. The early American attempts to replicate physical and social features of English college provided the framework for student college life in US colleges. Due to the dispersed population in the colonies, the education system was both diffused and decentralized. Using memorization and recitation as methods of classroom learning, courses were taken by all, allowing for little flexibility in curriculum. Colonial colleges also modeled the English system by dividing the student body into classes, which formed as the first form of student associations, as each class designation had its own rituals, customs, clothes, and social activities. However, within the early collegiate world, the individual student had little freedom, as there were consistent tensions between faculty and students. Students aimed to take control of their own college life through the establishment of organizations, clubs, and eventual sororities and fraternities.

The earliest British North American student organization on record was established in 1703 at Harvard. While this organization was rooted in religious context, by 1719 several more secular organizations had been established. Student organizations often emerged out of a few individuals' thoughts and interests. By 1760, literary societies became the paramount form of student organization, providing students with the

intellectual opportunity and spirit often lacking in the recitation structure of the classroom. The competition for entry, along with the resources of these literary societies resulted in its membership and activities often taking priority over the college curriculum.

The decline of literary societies is closely associated with the rise of fraternities and sororities. A given fraternity or sorority was created by a few individuals sharing similar ideals, with goals of prompting brotherhood or sisterhood. Fraternities and sororities shared similar characteristics as literary societies, with initiation rites, pins, and mottos. However, while literary societies filled an intellectual vacuum, the fraternity system was social, providing an escape from class work and training.

Phi Beta Kappa was the first prototype of a college fraternity, established at William and Mary College in 1776, functioning originally as a literary society. However, this organization departed from the norm by also providing an avenue for social activities. Phi Beta Kappa first spread through Southern states, establishing chapters at around twenty colleges. Though the records from this time have been lost, it is known that communication among early chapters was infrequent, meaning each chapter developed as an autonomous unit with its own traditions and practices. The next recorded appearance of Greek-letter organizations occurred in 1812 at University of North Carolina, with the establishment of Kappa Alpha. With further expansion, by the late 1820s, the fraternity movement had been fully established.

The origins of sororities are associated with coeducational colleges of the Midwest and South, as an imitation of the established men's fraternities. The first women's organizations were established at Wesleyan in 1851, with these secret literary societies remaining local organizations until the early 1900s. The first sorority was established in 1874 at Syracuse, as the term sorority became more frequently used to specify female fraternities.

Fraternities and sororities initially expanded in several ways, including via personal contact and recruitment over summer vacations. An additional process involved local organizations building up their qualifications, soliciting from well-established organizations, and applying for membership in a national fraternity or sorority. The modern method of expansion is called colonization. Colonization entails a national organization identifying a college and determining that it wishes to establish a chapter, then sending representatives to recruit members.

Fraternities expanded during the 1800s. However, their growth was periodic and interspersed between inactive periods. Growth was stagnated during such inactive periods because the fraternity system was greatly affected by a host of factors. Some factors included the Civil War and faculty opposition. It also included anti-fraternity state regulations stemming from populist attacks on their perceived exclusive, undemocratic, and unsavory behavior.

A great expansion of fraternities and sororities was then seen from 1900 to 1930. Growth was not only spurred by the economic prosperity of the 1920s, which resulted in increased college enrollment, but also by sororities and fraternities filling the housing vacuum left by discontinued student dormitories on college campuses. Amid this growth, umbrella organizations, including the National Interfraternity Conference, National Panhellenic Conference, and eventual National Panhellenic Council, were formed by 1929.

The 1930s showed a continued spread of organizations, yet the establishment of new organizations slowed. The Great Depression of the 1930s, World War II in the 1940s, and anti-fraternity legislation in the 1950s saw many national organizations becoming defunct, merging with other organizations, or going inactive. Ultimately, this process of consolidation was likely healthy for these organizations as a social institution, as the number of total fraternities and sororities had become otherwise unwieldy.

From the 1960s onward, the Greek system continued to grow. The 1970s showed more than 2000 new chapters established at 545 schools, predominantly in the South. Despite the internal problems which plagued the institutions in the 1980s—including sexual abuse, hazing, and racism charges—fraternity and sorority membership reached an all-time high by the 1990s. By 2000, the proliferation of new organizations and chapters throughout the country changed the fraternity landscape, with a variety of other organizations, such as Latino, multicultural, religious, black, and LGBTQ, providing other organization options as well.

The overall growth of fraternities and sororities is reflected by the composition of the student body throughout time. By 1928, more than half of the national fraternities had membership exclusivity based on rules or religion, resulting in non-secret and nonsectarian fraternities being organized to counter these ideals. Many college students believed

actual brotherhood was best enacted through integrating different religious and races, resulting in the eventual formation of interracial fraternities. Similarly, as enrollments of students from different backgrounds increased, many of these individuals banded together to form a fraternity. The establishment of the first black fraternity did not occur until 1906, at Cornell; however, the emergence of these organizations largely occurred at Howard University between 1908 and 1920. This process of proliferation of organizations based on specific religions, races, and nationalities allowed fraternities to include all types of students, expanding to new campuses in the process.

Despite the prevalence of collegiate Greek-letter fraternities and sororities, research into the law as it relates to them is limited. In fact, there has never been a comprehensive work on the role of fraternity and sorority law. However, research into the broader organizational field has developed, giving rise to the 1970s theory of the organizational internalization of the law.

The internalization of the law theory posits the notion that large bureaucratic organizations have increasingly internalized necessary components of the legal system. As detailed by Lauren Edelman and Mark Suchman in their 1999 article, "When the Haves Hold Court: Speculations on the Organizational Internalization of Law," in *Law and Society Review*, internalization has likely occurred in four ways: legal rulemaking has internalized through the "legalization" of individual firms and or larger organizational fields, legal dispute processing through the increasing employment of alternative dispute resolution, legal expertise through the growing importance and changing role of inside counsel, and legal enforcement through the reemergence of private organizational security staff.

These internalizations are significant because they could allow organizations to "hold court" by blending many of the public legal system's roles. Internalized adjudication may additionally bestow advantages upon organizations. For example, the organization is usually benefited by turning organizational decisionmakers into private law makers, by enabling organizations to manage a larger range of problems through informal dispute resolution rather than through traditional litigation, and by expanding the role of private security within organizations while simultaneously reducing public accountability. On the other hand, a drawback of internalized adjudication is that organizations continue to

have bureaucratic hierarchical structures and mixed motivations, which can result in bias, and can possibly be forced to turn to outside forums of the public legal system if the internal system is deemed unsuccessful or illegitimate.

The advantages arising out of organizational internalization of the law become exaggerated under the light of Marc Galanter's "repeat player" theory. In his 1974 article, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," in *Law and Society Review*, Galanter details the differences between litigants who go to court once versus those that are "repeat players." He argues that "repeat players" have multiple advantages within the legal system, such as the initial knowledge and the ability to plan transactions, continuous access to specialists as well as reduced startup costs, and relationships with institutional members. Galanter's argument highlights that repeat litigants enjoy such advantages that they are able to significantly obstruct one-time litigants from attaining social reforms through alternatives to the legal system.

The internalization of law may be changing large organizations from "well-endowed players in the legal game (Galanter's repeat players) to being nothing less than the playing field itself." This trend of internalization of the law has had a great impact on the legal landscape as a whole. Internalization has allowed organizations to simultaneously become legislators, judges, counsels, and cops. These roles allow organizations to control and change external rules. Galanter's "repeat players" experienced benefits in gaining legal representation, promoting rule changes, and influencing courts, while, more recently, large bureaucratic organizations assume the roles throughout the entire legal process. To internalize law, however, organizations likely must alter their own structures. Instead of viewing this trend as replacing the public legal system, it can be viewed as bringing components of the public process into the decision-making of businesses in the private realm.

By combining the legislator, judge, counsel, and cop roles, the internalization of law has given organizations greater control and power than in previous years. The question is thus raised: what could the internalization of the law look like in collegiate Greek-letter fraternities and sororities? This book seeks to offer an overview of the legal landscape of the critical issues that collegiate Greek-letter fraternities and sororities should understand and integrate into their day-to-day work. In the first

section of the book, we explore the range of issues that deal with processes, standards, rules, and practices that fraternities and sororities must follow. Among the governance issues we explore are the role of organizational legal counsel (Chapter 1); the duty of oversight and director liability (Chapter 2); the role of organizational governing documents (Chapter 3); the strictures around Internal Revenue Code 501(c)(2), (3), (4), and (7) entities (Chapter 4); and board conduct that may give rise to organizational civil and criminal liability (Chapter 5). In the second section, we explore risk and liability issues such as arbitration in hazing cases (Chapter 6), sexual assault (Chapter 7), social host liability (Chapter 8), and liability insurance (Chapter 9). In the third section, we explore United States Constitutional issues like freedom of speech (Chapter 10), right to privacy and unreasonable searches and seizures (Chapter 11), equal protection law (Chapter 12), and fair housing (Chapter 13). In the final section, we explore broader issues like antitrust and consumer protection (Chapter 14), employment law (Chapter 15), intellectual property (Chapter 16), and property and zoning issues (Chapter 17).

In conclusion, thank you to my colleagues at Wake Forest University School of Law for supporting this project. Also, thank you to Ronald Stovall—a past Regional Vice President on the Board of Directors of our fraternity, Alpha Phi Alpha Fraternity, Incorporated—for letting me serve as an Associate Legal Counsel under his leadership. It gave me a more practical perspective on many of the issues covered in this book. Thank you to Sean Callan and John Christopher at Fraternal Law Partners for providing feedback and critique on many of the chapters in this book. They were critical in helping guide the research of the contributing authors—leaders in their areas of scholarship but who, mostly, had never studied fraternities and sororities. I also thank my Wake Forest University School of Law colleagues—Wilson Parker, Keith Robinson, Audra Savage, and Steve Virgil—for offering their critical eyes and feedback on chapters. Also, thank you to the judge I clerked for on the United States Court of Appeals, Andre M. Davis, for sharing his critiques on one chapter. Lastly, but most importantly, thank you to my research assistants—Tamara Allen, Clare Magee, Samantha Mondello, Victoria Riddle, and Lane Wilson-Powell—for their tremendous copy-editing and Bluebooking work.

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