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THE CHRONICLE OF HIGHER EDUCATION

Students

From the issue dated January 28, 2005

Choosing Their Flock

Conservative Christian groups have forced colleges to allow them to bar gay students and nonbelievers. Some institutions are finally ready to fight back

By BURTON BOLLAG

In the fall of 2003, two law students at Ohio State University's main campus complained to the administration that the campus chapter of the Christian Legal Society, a student group, was violating the institution's nondiscrimination rules.

Those rules stated that all officially recognized student organizations -- which are eligible to use meeting rooms and receive university funds -- could not discriminate on the basis of race, religion, sexual orientation, and a number of other factors. Recognized student groups each had to sign a form promising to respect those requirements.

Yet the two students said the society would not let them join because one of them was not an evangelical Christian and the other was gay. The group said it would not accept students who did not share its religious views, or those who engaged in "homosexual conduct," which, it held, is condemned in the Bible.

It is not clear whether the two students, whom the university declines to name, ever tried to join the group or had just inquired about its membership requirements. But they succeeded in making their point: The Christian group was thumbing its nose at campus rules. The administration agreed to investigate.

The Christian group "couldn't hold this position with regards to race," asserts Cherish L. Cronmiller, co-president of the Outlaws, an association of gay law

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Join a [live, online discussion](#) with David A. French, president of the Foundation for Individual Rights in Education, a watchdog group, about whether the First Amendment's free-speech guarantee trumps the 14th Amendment's promise of protection from bias in a series of lawsuits pitting Christian student groups against universities' nondiscrimination policies, on Thursday, January 27, at 1 p.m., U.S. Eastern time.



students at Ohio State. "Gays are unfortunately the last group on the totem pole."

In the bitter controversy that followed, the Christian Legal Society sued Ohio State, charging that the university's nondiscrimination policy violated the group's First Amendment right to freedom of religion by forcing it to accept unwanted members.

This past fall, without ever going to court, the group won a complete victory when Ohio State changed its policy to exempt student groups formed to promote "sincerely held religious beliefs."

That pattern has been repeated at several dozen institutions in the last few years. In virtually every case, Christian groups have won the right to restrict membership or leadership to heterosexual students who share their evangelical religious beliefs.

But now, after several years in which one college after another has caved when faced with an actual or threatened lawsuit, the dispute may have finally begun moving toward a resolution. Three of the four institutions with lawsuits pending against them --

Arizona State University at Tempe, the University of California's Hastings College of Law, and the University of North Carolina at Chapel Hill are determined to fight the legal challenge, despite considerable costs. A spokesman for the fourth, Pennsylvania State University at University Park, declined to speculate on its intentions.

"We're definitely going to court on this matter," says Elise K. Traynum, general counsel for Hastings. "We think we can win it."

Although Ms. Traynum concedes that the constitutional issues and legal precedents are, at best, unclear, she notes that several alumni have offered to help the institution fight the lawsuit on a pro bono basis. And a recent judicial decision seems to strengthen Hastings' position. In December a federal appeals court ruled that colleges may bar military recruiters since the military discriminates against gay people (*The Chronicle*, December 10, 2004).

David A. French, president of the Foundation for Individual Rights in Education, the Philadelphia-based watchdog group for free speech on college campuses, has provided legal advice to Christian student groups at

several dozen institutions. "It looks like we're coming to the moment of truth on this," he says. "If three universities from widely divergent regions intend to contest this issue, it's very possible that within the next three or four years we might have some definitive rulings.

"And if the courts of appeal are split in their decisions, that is typically seen as an invitation to the Supreme Court to act."

Principles at Odds

Meanwhile, the two sides continue battling. Proponents of nondiscrimination policies, including college administrators and gay-rights advocates, say Christian student groups that flout the rules should forfeit the subsidies that officially recognized groups receive.

"Public funds should not be used to sponsor discrimination," says Elizabeth A. Seaton, deputy legal director of the Human Rights Campaign, the nation's largest gay and lesbian organization. "Recognized student groups should be held to the same standards on sexual orientation as they would be with regard to race or disability."

Indeed, in almost all the cases, the Christian groups could have chosen to operate without official recognition, but they would have lost their financial support, preferential access to campus facilities, and the right to use their college's name.

However, the groups and their supporters say there is a higher principle at stake. Requiring a Christian-student association to admit non-Christians or gay people, "would be like requiring a vegetarian group to admit meat eaters," asserts Jordan Lorence, a senior lawyer at the Alliance Defense Fund, which is based in Scottsdale, Ariz. "It would be like forcing the College Democrats to accept Republicans."

In most of the campus disputes, the Christian student organizations have been assisted by outside Christian legal groups, the largest of which are the Alliance Defense Fund and the Christian Legal Society, of Annandale, Va. In at least eight of the cases, the student groups have sued, though no case has gone to trial.

Two major developments helped set the stage for the recent spate of confrontations. Since the passage of the

1964 Civil Rights Act, colleges and universities have moved steadily to strengthen protections against discrimination on the basis of race, religion, sex, disability, and other factors. Hundreds of colleges have adopted their own nondiscrimination rules, and many institutions include "sexual orientation" on that list.

At the same time, conservative Christian groups on campuses have been demanding the right to operate according to their own religious beliefs.

A Thorny Issue

Emotionally charged conflicts like the one at Ohio State have forced colleges to choose which of two basic principles is more important: freedom of religion, guaranteed by the First Amendment, or equal protection under the law, as established by the 14th Amendment.

"There are times when constitutional rights come into conflict with one another," says Jeffrey Gamsco, legal director of the American Civil Liberties Union of Ohio. The chapter's board has scheduled a meeting for February to discuss whether to get involved in the continuing dispute over the Ohio State case, and if so, which side to support.

The ACLU is not alone in grappling with that question. William H. Hall, Ohio State's vice president for student affairs, who ended the lawsuit by granting the Christian group an exemption from the university's nondiscrimination rules, says the case was "one of the most difficult decisions I've had to make."

He insists that the policy change was the result of a principled consideration of the issue. But he also concedes that the legal challenge forced the university to decide the issue faster than it would have otherwise. "When the lawsuit got filed," he says, "it curtailed the plans for an open debate that we had."

Many Ohio State law professors are unhappy with Mr. Hall's decision. Half of them signed a petition asserting that the change of policy "will make our gay, lesbian, and bisexual students second-class citizens."

Critics of the change are particularly concerned that the settlement exempts only religious student groups from nondiscrimination rules, which may represent an unconstitutional favoring of religious groups over nonreligious ones, says Ruth Colker, a professor of

constitutional law at Ohio State. She predicts that the decision could lead to future lawsuits if nonreligious groups are denied recognition because they practice some form of discrimination.

Those concerns do not sway David A. Goldberger, another constitutional-law professor at Ohio State. A former legal director of the American Civil Liberties Union of Illinois, Mr. Goldberger successfully represented a neo-Nazi group that had sued for the right to march in Skokie, Ill., in the late 1970s.

Mr. Goldberger says he abhorred the neo-Nazis he defended, and he does not like the Christian Legal Society's views on gay people. But in both cases, he says, the legal principles he defended were paramount. At Ohio State, students who form an association for religious purposes should have the right to determine how they will worship and who may join them, he says.

"I believe the role of the university is to be a forum for all views, beliefs, and perspectives," says Mr. Goldberger. "Students need to be exposed to differences as part of learning about tolerance."

That view is shared by George M. Marsden, a professor of history at the University of Notre Dame and an expert on religion in America. "If you want to have religious pluralism," he asks, "does it make sense to force all groups to have the same norms of behavior?"

For now the answer is complicated by the absence of a clear legal precedent. Two rulings by the U.S. Supreme Court bear only indirectly on the issue. In *Widmar vs. Vincent*, a 1981 case, the court ruled for the first time that a college -- the University of Missouri at Kansas City -- could not deny recognition to a Christian student group simply because it was religiously oriented.

In *Rosenberger vs. Rector and Visitors of the University of Virginia*, a 1995 case, the court ruled that the institution could not deny funds to a Christian student newspaper on the basis of its religious content.

Those two rulings put an end to the argument that the constitutional separation of church and state prevented public institutions from recognizing or supporting religious student groups.

But "the absence of a slam-dunk, drop-dead precedent" as to whether institutions can require all recognized

student groups to respect college nondiscrimination rules has kept the controversy alive, says Gregory S. Baylor, director of the Center for Law and Religious Freedom, a division of the Christian Legal Society.

Striking A Balance?

Mr. French, of FIRE, estimates that since 2000 there have been about 50 cases in which colleges have first told a Christian student group it had to comply with nondiscrimination rules, only to relent after the group resisted. Nearly all of those cases have been at public universities.

Typically, colleges fight attempts to weaken their nondiscrimination policies by arguing that the policies are necessary to protect the rights of all students. For instance, last August the University of North Carolina at Chapel Hill was sued by Alpha Iota Omega, a seven-member fraternity that the university refused to recognize because it bars non-Christian and gay students from joining.

In a letter to FIRE, which is supporting the fraternity in its lawsuit, James C. Moeser, Chapel Hill's chancellor, wrote that the institution "strikes a proper balance between the interests of nondiscrimination and free association."

He explained that under Chapel Hill's policy, student groups may not discriminate on the basis of "status" -- for example, requiring prospective members to be Presbyterian or male -- but may require them to support the group's aims. "So for example," wrote Mr. Moeser, "Baptist student groups are open to Presbyterian students ... and the Black Student Movement is open to white students."

But groups may require prospective members to pass "an objective test," Mr. Moeser continued, to prove they support the group's mission, and may require their officers to "subscribe to the tenets of the organization."

Mr. Moeser's reasoning did not convince the fraternity or its backers.

The arguments are "meaningless," says Mr. French, of FIRE. "The University of North Carolina is saying the nondiscrimination policy really means something different than what it says on its face."

A Key Distinction

The flood of recent cases started with a well-publicized conflict at Tufts University, a private institution, in 2000. That year a student panel withdrew its recognition of the Tufts Christian Fellowship after the group told one of its members, Julie Catalano, a gay student, that she could not become an officer.

Ms. Catalano, then a junior, had told the fellowship about her sexual orientation when she joined, in her freshman year. The group had accepted her and told her that prayer could make her a heterosexual. But after grappling with the issue for two years, she decided her sexual orientation was neither sinful nor changeable.

Curtis Chang, area director for InterVarsity Christian Fellowship/USA, a national organization, helped the Tufts student group appeal the decision. In defending the group's policy, Mr. Chang used an argument that would be frequently repeated by other Christian groups.

In an April 2000 letter to Bruce H. Reitman, then Tufts' acting dean of students, Mr. Chang wrote that the Christian group "does not and has never discriminated on the basis of sexual orientation." Ms. Catalano, he explained, was penalized not for being gay, but for asserting that her being gay was an acceptable lifestyle for a Christian.

A Tufts review panel nullified the earlier decision, which it said had been too hasty, and passed the case back to the original student panel. In a rather muddled decision, that body then re-recognized the Christian student group, but said it must avoid future confrontations.

FIRE's Mr. French says the case woke campuses up to the issue. Christian student groups began checking whether they had been unwittingly signing on to nondiscrimination policies they did not support, and colleges started looking at whether any campus groups were violating those rules.

Sensing an opportunity to rectify what they had considered unfair treatment of Christian student associations, evangelical advocacy groups urged students to demand their rights. In 2003 the Alliance Defense Fund ran half-page ads in student newspapers at five colleges.

The headline read, "Are You Experiencing Anti-Christian Bigotry on Campus?" The text began, "In the name of 'diversity' and 'tolerance,' schools are systematically violating the rights of students who follow Jesus."

At two of the institutions, Ohio State University and the University of Minnesota-Twin Cities, Christian legal groups soon filed lawsuits on behalf of student groups. Both institutions ultimately agreed to change their rules to allow religious groups to discriminate in admitting members.

At some universities, including Minnesota, an unofficial policy was already in place under which conservative Christian groups signed the annual commitment to honor campus nondiscrimination rules, but were allowed informally to choose members or officers according to their own principles.

Evangelical activists warned that such an arrangement was dangerous because it could be withdrawn at any time, leaving the groups potentially vulnerable. "Many of these Christian groups feel they're targets for infiltration and takeover," says Mr. Lorence, of the Alliance Defense Fund. "That's why we're filing these lawsuits."

Supporters of campus nondiscrimination policies say such problems have never come up. Indeed Nancy E. Tribbensee, Arizona State's associate vice president for legal affairs, goes further, arguing that it is a good thing for white students to have the right to join a black-student association, and for Jewish students to be able to join a Christian group.

"One of the values of university student organizations," she says, "is to allow students to join groups they may not fully agree with and be exposed to new ideas."

Ms. Tribbensee says Arizona State will stand up for that principle, and intends to fight the lawsuit filed against it.

But until the U.S. Supreme Court rules on the issue, the conflict appears likely to spread to more campuses. A new publicity campaign by the Alliance Defense Fund calls on Christian students to oppose nondiscrimination policies. The group's brochure states, "Americans will no longer tolerate the systematic stripping away of our constitutional rights on college campuses."

'We Still Care About Each Other'

Despite tensions, a few students on opposing sides of the issue are trying to overcome their differences.

After Ohio State's decision in the fall, members of the Outlaws, the association of gay law students on the campus, were angry. The group sold T-shirts and buttons protesting, "My tuition funds discrimination." There were also ugly incidents of name-calling between them and members of the Christian Legal Society.

But even before the university changed its policy, Ms. Cronmiller, the Outlaws' current co-president, had reached out to the leader of the Christian group. When she won a cup of coffee with a law professor at a fund-raising auction last April, for instance, she invited Alexis V. Andrews, president of the local Christian Legal Society, to join them. Ms. Andrews accepted.

"We just decided we weren't going to let this be taken out of our hands and turned into a gay-versus-Christian issue," Ms. Cronmiller says.

Ms. Andrews says she considers Ms. Cronmiller's lifestyle "sinful." Nonetheless, the two women have been trying to build a good relationship. To that end, Ms. Andrews says, she plans to visit Ms. Cronmiller's Jewish congregation. "We can disagree," says Ms. Andrews, "but we still care about each other."

The two women are also trying to organize joint charitable and social events that would allow members of their respective organizations to get to know each other.

Yet both of them say they haven't gotten very far. Most of the students in each group consider their counterparts little better than the incarnation of evil on campus.

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