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Fraternizing with Franchises: A Franchise Approach to Fraternities

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FRATERNIZING WITH FRANCHISES: A FRANCHISE APPROACH TO FRATERNITIES

ABSTRACT

Fraternalities are founded on ideals such as scholarship, leadership, and community service, and provide benefits to their members such as lifelong friendship and leadership experience. But news headlines frequently highlight a dark side of fraternities and their members' out-of-control conduct—hazing, sexual assaults, and excessive partying. Despite this conduct, national organizations may avoid liability for their local chapters' actions. National organizations have insulated themselves from liability by not supervising local chapters actively, shifting responsibility, and developing policies that they know members may not follow. As one court expressed, it did not find a national organization liable in an effort to continue encouraging the fraternity to develop these policies.

Fraternalities consist of a national organization and numerous local chapters located nationally, which operate similarly, hold the same values, and perform the same rituals. Fraternalities are operationally and structurally similar to franchises. This Comment argues for courts to consider fraternities to be franchise arrangements and to apply franchise case law when determining the liability of national organizations. A franchise model provides a ready-made approach that considers fraternity structure and operation and finds liability when the requisite relationship and control exist. Accordingly, this Comment analyzes how fraternities are franchise arrangements and demonstrates the ready-made approach a franchise model provides by applying franchise liability to a fraternity using recent Maine cases.

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INTRODUCTION

Fraternities are founded on values and principles relating to community service, scholarship, and leadership.¹ Fraternities are also beneficial for their members. For example, fraternity members often have higher grade point averages and higher graduation rates than unaffiliated students.² Additionally, students in fraternities collectively raise millions of dollars for philanthropies and spend millions of hours serving the community annually.³ Further, fraternities help students establish valuable friendships⁴ and provide leadership opportunities and experience for their members.⁵ However, recent headlines reveal a dark side to fraternity life: *85 Yale Frat Members Included in Suit over Death, Injury at 2011 Harvard Game*;⁶ *5 from Baruch College Face Murder Charges in 2013 Fraternity Hazing*;⁷ *UAPD Investigates Sexual Assault*

¹ *Fraternity and Sorority*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Special:Cite?page=Fraternity_and_sorority (last visited Aug. 23, 2016).

² Peter Jacobs, *I Joined a Fraternity and It Was One of the Best Decisions I Ever Made*, BUS. INSIDER (Jan. 8, 2014, 3:57 PM), <http://www.businessinsider.com/dont-ban-fraternities-2014-1>. During the 2013–2014 academic year, the grade point average for fraternity members was 2.912, and the grade point average for male non-fraternity members was 2.892. *Fraternity Stats at a Glance*, N.-AM. INTERFRATERNITY CONFERENCE [hereinafter *Fraternity Stats*], <http://nicindy.org/press/fraternity-statistics> (last visited Aug. 23, 2016).

³ Caitlin Flanagan, *The Dark Power of Fraternities*, THE ATLANTIC, Mar. 2014, at 72, 75. From 2013–2014, fraternity members, collectively, completed 3.8 million community service hours and raised \$20.3 million dollars for philanthropies. *Fraternity Stats*, *supra* note 2.

⁴ Jacobs, *supra* note 2; *see also* Angela N. Marshlain, *Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association Be Required to Assume a Parental Role?*, 5 APPALACHIAN J.L. 1, 1 (2006) (“To many students, a fraternity or sorority provides a group of close friends, many social opportunities, an opportunity to take part in philanthropic activities . . .”); Julia Ryan, *How Colleges Could Get Rid of Fraternities*, THE ATLANTIC (Mar. 3, 2014), <http://www.theatlantic.com/education/archive/2014/03/how-colleges-could-get-rid-of-fraternities/284176/> (“Fraternities offer their members opportunities for community service, friendship, and leadership.”).

⁵ Flanagan, *supra* note 3, at 75. Many American politicians and businessmen are members of fraternities. For example, in the 112th U.S. Congress, 42% of Senators and 23% of Congressmen were members of fraternities. *About*, I AM A FRATERNITY MAN, <http://www.iamafraternityman.org/about> (last visited Aug. 23, 2016) (citing *Fraternity Stats*, *supra* note 2). Additionally, in the 113th U.S. Congress, 39% of Senators and 24% of Congressmen were members of fraternities. *Id.* Further, “44% of all U.S. Presidents” and “31% of all U.S. Supreme Court Justices” were members of fraternities. *Id.* Lastly, “50% of the Top 10 Fortune 500 CEOs” were members of fraternities and “15% of Fortune 100 CEOs belong[ed] to a Greek organization.” *Id.*

⁶ Ed Stannard, *85 Yale Frat Members Included in Suit over Death, Injury at 2011 Harvard Game*, NEW HAVEN REGISTER (Sept. 17, 2015), <http://www.nhregister.com/general-news/20150917/85-yale-frat-members-included-in-suit-over-death-injury-at-2011-harvard-game>.

⁷ Rick Rojas & Ashley Southall, *5 from Baruch College Face Murder Charges in 2013 Fraternity Hazing*, N.Y. TIMES (Sept. 14, 2015), <http://www.nytimes.com/2015/09/15/nyregion/5-from-baruch-college-face-murder-charges-in-2013-fraternity-hazing.html>.

Allegation Near Fraternity House;⁸ *Fresno State Suspends Alpha Gamma Rho Fraternity for Hazing Activity*.⁹ Not all fraternity members and chapters live up to the *Animal House* stereotype,¹⁰ but headlines do not lie: with increasing frequency, national organizations may face legal issues stemming from local chapters' actions.

When an unfortunate fraternity incident occurs, who is responsible? The member(s), the local chapter, or the national organization?¹¹ That question is an overarching concern in the days following an incident. As to individual chapter members, they can face liability for their actions.¹² Typically, a local chapter is an unincorporated association¹³ and whether it faces liability

⁸ Brandi Walker, Christianna Silva & Meghan Fernandez, *UAPD Investigates Sexual Assault Allegation Near Fraternity House*, DAILY WILDCAT (Apr. 14, 2016, 9:02 AM), <http://www.wildcat.arizona.edu/article/2015/09/uapd-investigates-sexual-assault-allegation-at-a-fraternity-house> (“The fraternity issued a response . . . addressing claims of its involvement with the sexual assault . . . [that] included a statement from a UAPD Sergeant . . . which said that the investigation doesn’t involve the fraternity.”).

⁹ Gene Haagenson, *Fresno State Suspends Alpha Gamma Rho Fraternity for Hazing Activity*, ABC30 ACTION NEWS (Sept. 18, 2015), <http://abc30.com/education/fresno-state-suspends-alpha-gamma-rho-fraternity-for-hazing-activity/991113/>.

¹⁰ “The stereotypical image of a fraternity depicts a scene from *Animal House*: a group of men running around drinking and causing chaos.” Kerri Mumford, Comment, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL’Y 737, 737 (2001) (footnote omitted); see also Ashley Fetters, *Pop Culture’s War on Fraternities*, THE ATLANTIC (Feb. 28, 2014), <http://www.theatlantic.com/entertainment/archive/2014/02/pop-cultures-war-on-fraternities/284126> (“*Animal House* and its many descendants didn’t glorify the Greek system—they mocked it.”); Ryan, *supra* note 4 (discussing fraternities’ “capability for evil” and methods that universities could use to remove fraternities from campuses).

¹¹ See Gregory E. Rutledge, *Hell Night Hath No Fury Like A Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 366–68 (1998) (discussing the possible parties to fraternity hazing litigation); A. Catherine Kendrick, Comment, *Ex Parte Barran: In Search of Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407, 407–08 (2000) (discussing, in the context of hazing, that “[t]he local fraternity, national fraternity, [and] fraternity members . . . may all be co-defendants in a lawsuit”).

¹² See *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 333 (Wis. 2004) (“A person is generally only liable for his or her own torts.”); Byron L. LeFlore, Jr., Note, *Alcohol and Hazing Risks in College Fraternities: Re-Evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 195–96 (1988) (explaining a lawsuit against a local chapter that is formed as an unincorporated association is a lawsuit against the entity and the individual members of the association, but, “[w]ith regard to the individual members, liability extends only to those members of a social or benevolent unincorporated association who authorized, planned, directed, or participated in an event encompassing the tortious conduct”).

¹³ See, e.g., SIGMA PHI EPSILON FRATERNITY, INC., GRAND CHAPTER BYLAWS AND ADMINISTRATIVE PROCEDURES 5 (33d ed. 2015), <http://www.sigep.org/resourcedocs/about-resources/2015-Grand-Chapter-Bylaws-of-Sigma-Phi-Epsilon-Fraternity.pdf> (“The undergraduate chapter is an unincorporated association . . . [which] is responsible for all aspects of its own existence.”); see also *Marshall v. Univ. of Del.*, 1986 WL 11566, at *1–2 (Del. Super. Ct. Oct. 8, 1986) (discussing the liability of a Sigma Nu local chapter formed as an unincorporated association); LeFlore, *supra* note 12, at 195–96 (1988) (discussing how local chapters “typically are unincorporated associations acting through their members”).

depends on the laws under which it was formed.¹⁴ But what about the national organization? It can be difficult to hold the national organization liable¹⁵ despite tragic incidents, and *Smith v. Delta Tau Delta, Inc.*¹⁶ depicts this difficulty. In *Smith*, Johnny Smith, a college freshman, had to participate in a “‘hell week’ of hazing and sleep deprivation” to gain membership into the Beta Psi Chapter of Delta Tau Delta and died as a result.¹⁷ Smith was spray painted when he failed to participate in an event to the fraternity brothers’ satisfaction and had to clean the house kitchen wearing only an apron.¹⁸ At a house party at the conclusion of “hell week,” Smith, after he “was visibly intoxicated,” participated in “pledge family drink night,” an event the chapter required freshmen pledges to participate in from time to time as a condition of membership, which involved “drink[ing] alcohol with their fraternity families.”¹⁹ That night, Smith consumed numerous beers and shots, fell down a stairwell sustaining several cuts, could not walk, and could barely talk.²⁰ Smith, with a blood alcohol level near 0.40%, died in a pool of his own vomit and was not discovered until four to eight hours later.²¹ Despite the national organization’s broad enforcement powers and provision of “informational resources, organizational guidance, common traditions, and its brand” to the local chapter, the Indiana Supreme Court did not hold the national organization liable.²²

¹⁴ See *Marshall*, 1986 WL 11566, at *2 (stating Delaware unincorporated associations may be sued); *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So. 2d 889, 891–94 (Miss. 1992) (discussing whether unincorporated associations may be sued and holding that “Beta is a suable entity”); see also *LeFlore*, *supra* note 12, at 195–96 (discussing how local chapters “typically are unincorporated associations” and “[w]hen a suit is brought against a chapter, the plaintiff effectively sues both the unincorporated association as an entity and the individual”); Reni Gertner, *Fraternity Lawsuits Becoming More Common: What to Evaluate in Suing a Fraternity*, LAW. WKLY. USA (Mar. 16, 2005), http://justiceatwork.com/wp-content/media/fraternity_lawsuits.pdf (discussing a case in which an attorney “wasn’t able to sue the local fraternity because state law consider[ed] fraternities unincorporated associations that can’t be sued”).

¹⁵ See Gertner, *supra* note 14; Rutledge, *supra* note 11, at 391–92 (discussing the types of cases that are resolved in favor of, and against, fraternities). *But see id.* at 386 (“[I]njured pledges . . . have, since the late 1970s, been winning sizeable jury verdicts, or obtaining even larger settlements, against Greek organizations for hazing practices.”).

¹⁶ 9 N.E.3d 154 (Ind. 2014).

¹⁷ *Smith v. Delta Tau Delta*, 988 N.E.2d 325, 328–29 (Ind. Ct. App. 2013), *aff’d in part and superseded in part by Smith*, 9 N.E.3d 154.

¹⁸ *Id.* at 328–29.

¹⁹ *Id.* at 329.

²⁰ *Id.*

²¹ *Id.*

²² *Smith*, 9 N.E.3d at 163–65 (holding that “[t]he national fraternity did not have a duty to insure the safety of the freshman pledges at the local fraternity,” and thus not holding the national fraternity liable on the claim of negligence for a breach of an assumed duty and concluding that “an agency relationship d[id] not exist between the national fraternity and the local fraternity or its members” and thus not holding the national

In addition to the difficulty of holding national organizations liable, the public generally does not realize the extent to which national organizations go to prevent liability.²³ National organizations have learned what subjects them to liability and have evolved in response.²⁴ To prevent liability, national organizations have self-insured, developed procedures and policies to transfer liability to outside parties, found creative ways to protect their assets from juries, and found ways to indemnify the national and local organizations for undergraduate members' conduct.²⁵ Moreover, a national organization's imposed protocol following a fraternity incident can be self-serving:

Those questionnaires and honest accounts—submitted gratefully to the grown-ups who have arrived, the brothers believe, to help them—may return to haunt many of the brothers, providing possible cause for separating them from the fraternity, dropping them from the fraternity's insurance, laying the blame on them as individuals and not on the fraternity as the sponsoring organization.²⁶

Further, national organizations may not “actively supervise” local chapters, rather they may remain “predominantly passive;” however, national organizations or local fraternity leadership may know of a local chapter's

fraternity vicariously liable). Maine examined Delta Tau Delta in a recent case and rejected a claim of vicarious liability. *Brown v. Delta Tau Delta*, 118 A.3d 789, 791 (Me. 2015). The court found Delta Tau Delta could be liable under a negligence theory, specifically premises liability, and held that the national organization had a duty to the social invitees of its local chapters. *Id.* at 795–96. In so holding, the court found the national organization “had the authority to control its individual members, . . . actually did [control its individual members.] . . . [and] had a close, integrated relationship with [the local chapter], as demonstrated by [Delta Tau Delta's] corporate structure.” *Id.* at 796.

²³ See *Brown*, 118 A.3d at 798 (Alexander, J., concurring in part and dissenting in part) (“[Delta Tau Delta National Housing Corporation's] ownership of the Orono chapter's real estate, and creation of the local chapter as an unincorporated association of students, is part of a sophisticated legal mechanism, managed by [Delta Tau Delta], to attempt to immunize its local chapter real estate from court process and liability for foreseeable lawsuits”); Flanagan, *supra* note 3, at 82 (“The way fraternities [obtain insurance, transfer liability to outside parties, protect their assets, and obtain indemnification] is the underlying story in the lawsuits they face, and it is something that few members—and . . . even fewer parents of members—grasp completely, comprising a set of realities you should absolutely understand in detail if your son ever decides to join a fraternity.”).

²⁴ See David Glovin, *Fraternities Resist Blame for Tragedies; Surge in Greek Membership, Binge Drinking—and Lawsuits—Are Followed by Tactics to Avoid Liability*, DAILY REP. (Mar. 29, 2013), <http://www.dailyreportonline.com/id=1202593945401?sreturn=20170214150822> (discussing a fraternity incident and the lawsuit that followed, and how national fraternities have “insulat[ed] themselves from legal and financial responsibility for a wave of alcohol and hazing-related deaths and injuries.”); Max Kennerly, *The Fraternity Mindset: Why Be Responsible When You Can Dodge Responsibility?*, KENNERLY LOUTEY (Mar. 4, 2014), <https://www.kennerlyloutey.com/fraternity-mindset-responsible-can-dodge-responsibility/>.

²⁵ Flanagan, *supra* note 3, at 82.

²⁶ *Id.* at 84.

conduct.²⁷ National organizations have the resources and ability to reform their local chapters, but incidents continue and the consequences often fall on their local chapters and individual members.²⁸

This Comment proposes that fraternities are unofficial franchise arrangements due to their similarities in structure and operation. Consequently, this Comment argues for courts to apply franchise law when determining the liability of a national organization. A franchise model is a sensible approach because it provides a ready-made test for determining the degree of control national organizations have over local chapters. Similar to franchises, fraternity control and oversight varies, and a franchise model would impose liability when national organizations have the requisite control and prevent liability when it is absent.

This Comment proceeds in four Parts. Part I provides a background on fraternities by tracing their developmental history and explaining their structure. Part II discusses liability theories typically used to hold a national organization liable. Part III provides a background on franchise arrangements by discussing the structure of a franchise and franchisor liability for franchisee actions. Lastly, Part IV argues that courts should view fraternities as unofficial franchise arrangements and look to franchise case law when deciding the liability of a national organization.

I. A PORTRAIT OF FRATERNITIES

This Part proceeds in two sections. First, it provides a brief history of how fraternities developed by highlighting the progression, establishment and characteristics of modern social fraternities. Second, it explains how fraternities are typically structured and discusses the powers shared among the

²⁷ See *National Fraternities Face More Legal Risk After Court Ruling*, INDIANAPOLIS BUS. J. (May 15, 2013), <http://www.ibj.com/articles/41361-national-fraternities-face-more-legal-risk-after-court-ruling> (discussing that fraternities choose passive supervision); see also *Grenier v. Comm’r of Transp.*, 51. A.3d 367, 389 (Conn. 2012) (discussing the national consultant’s recommendation to use public transportation if the local chapter were “to continue conducting the search and rescue mission as part of the pledging activities”). *But see* Gertner, *supra* note 14 (“[A] national fraternity has no intent to control the day-to-day activities of a local chapter . . .”).

²⁸ See Flanagan, *supra* note 3, at 83 (quoting a plaintiff’s attorney who has “recovered millions and millions of dollars from homeowners’ policies . . . For that is how many of the claims against boys who violate the strict policies are paid . . .”); *National Fraternities Face More Legal Risk After Court Ruling*, *supra* note 27 (noting a fraternity and its charitable foundation had \$5.5 million of revenue in 2011). For further discussion about fraternity insurance, see generally Shane Kimzey, Note, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459 (1997).

three typical fraternal entities: the national organization, the local chapter, and the alumni organization.

A. *Engrained in American History: The Development of Fraternities*

Fraternities are engrained in American history.²⁹ The first Greek-letter organization, established in 1776, was Phi Beta Kappa.³⁰ Formed for literary and social purposes, Phi Beta Kappa “had all the characteristics of the present-day fraternity.”³¹ For example, Phi Beta Kappa had regular meetings, “secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, [and] an urge for sharing its value through nation-wide expansion.”³² Although Phi Beta Kappa was the first Greek letter organization, fraternal associations and secret societies were not a new concept in America.³³ The Flat Hat Club was a secret society established in 1750,³⁴ and the Freemasons’ establishment dates back as early as 1390.³⁵

Most Americans are familiar with social, Greek-letter fraternities.³⁶ These fraternities are the focus of this Comment.³⁷ The first fraternity of this nature was the Kappa Alpha Society, established in 1825.³⁸ Following the Kappa

²⁹ See Stevie V. Tran, Note, *Embracing Our Values: Title IX, the “The Single-Sex Exemption,” and Fraternities’ Inclusion of Transgender Members*, 41 HOFSTRA L. REV. 503, 519 (2012) (discussing the development of fraternities and their values).

³⁰ BAIRD’S MANUAL OF AMERICAN COLLEGE FRATERNITIES 5 (John Robson ed., 19th ed. 1977) [hereinafter BAIRD’S MANUAL].

³¹ *Id.*

³² *Id.*

³³ See, e.g., *General History of Fraternities and Sororities in the United States*, SAN JOSÉ ST. U. [hereinafter *General History*], <http://www.sjsu.edu/getinvolved/frso/history/usfslhistory/> (last visited Aug. 23, 2016).

³⁴ BAIRD’S MANUAL, *supra* note 30, at 5; *The Flat Hat Club*, 25 WM. & MARY Q. 161, 161 (1917). The Flat Hat Club, established at William and Mary, had members who were influential in American history, such as Thomas Jefferson. *Id.*

³⁵ *History of Freemasonry*, MASONIC SERV. ASS’N OF N. AM., <http://www.msana.com/historyfm.asp> (last visited Aug. 23, 2016) (“The oldest document that makes reference to Masons is the Regius Poem, printed about 1390, which was a copy of an earlier work.”). The fraternity spread to the colonies about thirty years after the first Grand Lodge of England formed in 1717. *Id.* Famous forefathers George Washington and Benjamin Franklin, along with Chief Justice of the Supreme Court, John Marshall, were Freemasons. *Id.*

³⁶ See *Fraternity and Sorority*, *supra* note 1.

³⁷ This Comment focuses on social Greek-letter fraternities rather than on other types of Greek-letter fraternities, such as honor or professional Greek-letter fraternities.

³⁸ BAIRD’S MANUAL, *supra* note 30, at 6; see also *General History*, *supra* note 33 (“The new fraternity was much like Phi Beta Kappa except that its purpose was social more than literary.”).

Alpha Society, Sigma Phi and Delta Phi were established in 1827.³⁹ Encompassing the same characteristics as Phi Beta Kappa, these organizations comprised the “‘Union Triad,’ . . . the pattern for the American Fraternity system.”⁴⁰

With the emergence of more fraternities, national organizations formed the National Interfraternity Conference in 1909.⁴¹ The purpose of the conference was to discuss “question[s] of mutual interest and . . . present[] to the fraternities represented . . . recommendations . . . the Conference shall deem wise, it being understood that the function of such Conference shall be purely advisory.”⁴² Today, the conference is known as the North-American Interfraternity Conference, and it has sixty-nine member fraternities.⁴³

B. The Structure of Fraternities: From Anarchy to Uniformity

Fraternity structure has evolved over time. Fraternities today are comprised of local chapters across the United States; but, in the beginning, local chapters were “united only by a common name and common principles. Each chapter was independent to the verge of anarchy and did pretty much as it pleased”⁴⁴ Fraternities took a step toward organization by designating either the parent chapter or another chapter to be the “grand” or “presiding” chapter.⁴⁵ With that designation, the local chapter served as the governing body of the fraternity and “was to preserve and maintain some sort of settled policy in the administration of fraternity affairs.”⁴⁶ The grand chapter was subject to

³⁹ BAIRD’S MANUAL, *supra* note 30, at 6.

⁴⁰ *Id.* Additional triads developed as the Union Triad expanded in the East. *Id.* at 7. The Miami Triad, consisting of Beta Theta Pi, Phi Delta Theta, and Sigma Chi, developed in the South and West. *Id.* The Lexington Triad, consisting of Alpha Tau Omega, Kappa Alpha Order, and Sigma Nu, also developed in the Virginia area. *See id.*; *Sigma Nu Fraternity*, SAN JOSÉ ST. U., <http://www.sjsu.edu/getinvolved/frso/groups/ifc/sn/> (last visited Aug. 20, 2016).

⁴¹ BAIRD’S MANUAL, *supra* note 30, at 29.

⁴² *Id.* at 30. Today the North-American Interfraternity Conference’s purpose is “to promote the well-being of its member fraternities by providing such services to them as the Meeting of Members may determine.” N.-AM. INTERFRATERNITY CONF., CONSTITUTION OF THE NORTH-AMERICAN INTERFRATERNITY CONFERENCE art. II, http://nicindy.org/wp-content/uploads/2016/07/nic_constitution_and_bylaws_1.r_12.2.15_.pdf (last updated Dec. 2, 2015). Such services include “promotion of cooperative action in dealing with fraternity matters of mutual concern, research in areas of fraternity operations and procedures, fact-finding and data gathering, and the dissemination of such data to the member fraternities.” *Id.*

⁴³ N.-AM. INTERFRATERNITY CONF., <http://nicindy.org> (last visited Aug. 23, 2016); *Fraternities Who Belong to the NIC*, N.-AM. INTERFRATERNITY CONF., <http://www.nicindy.org/member-fraternities.html> (last visited Aug. 23, 2016).

⁴⁴ BAIRD’S MANUAL, *supra* note 30, at 11–12.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.*

the assembly of delegates from the remaining chapters who met at a convention.⁴⁷ Over time, the convention of delegates retained fraternity “legislative power” and fraternity alumni received the administrative and executive functions.⁴⁸ The alumni soon became known as the executive council and frequently became legally incorporated.⁴⁹ The rise of fraternity chapters necessitated central fraternity offices.⁵⁰ The central fraternity office

handles numerous business activities, such as maintenance of membership records and mailing lists, issuing of various publications, preservation of historical material, checking the financial operations of undergraduate chapters, arranging for conventions and conferences, issuing reports of national officers, directing the field staff, participating in interfraternity activities, and taking care of voluminous correspondence.⁵¹

Coupled with guidance from the central fraternity office, local chapters normally have local undergraduate chapter counselors, faculty advisers, and alumni board officers.⁵²

Today, fraternity structure and governance is a historical hybrid. Generally, a fraternity has a national organization that governs matters affecting all local chapters.⁵³ Fraternities also continue to hold conventions of chapter delegates.⁵⁴ However, conventions now are held biennially or triennially, rather than annually, and may offer training opportunities where delegates gain skills relating to important chapter aspects, such as social life, public relations, house management, pledge training, and rituals.⁵⁵ The national organization and the local chapter may be legally incorporated or unincorporated associations.⁵⁶ For example, the fraternity Sigma Phi Epsilon consists of the undergraduate chapter, formed as an unincorporated association; the

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *infra* note 57 and accompanying text.

⁵⁰ See BAIRD'S MANUAL, *supra* note 30, at 12.

⁵¹ *Id.* at 13.

⁵² *Id.* at 12.

⁵³ See *supra* notes 50–52 and accompanying text; see also Mumford, *supra* note 10, at 763 (discussing the role and purpose of the national fraternity); C. Sidney Neuhoff, Note, *Legal Status of Fraternities*, 11 ST. LOUIS L. REV. 30, 36 (1925) (“Most national college fraternities consist of three units; the national organization, the local chapter, and the property holding unit for the local chapter.”).

⁵⁴ See BAIRD'S MANUAL, *supra* note 30, at 13; Kendrick, *supra* note 11, at 409 n.13 (discussing that full membership in a fraternity or sorority allows members to attend the national convention).

⁵⁵ See BAIRD'S MANUAL, *supra* note 30, at 13.

⁵⁶ See Neuhoff, *supra* note 53 at 36–37; Gertner, *supra* note 14; *supra* notes 13–14 and accompanying text.

undergraduate chapter alumni, incorporated as the Alumni and Volunteer Corporation; and the national fraternity, composed of a Board of Directors elected by the Grand Chapter that convenes biennially “to legislate and govern Sigma Phi Epsilon at-large.”⁵⁷ Although Sigma Phi Epsilon is comprised of three legally separate, independent entities, they work together to “promote and foster the ideals and principles of Sigma Phi Epsilon.”⁵⁸ Ultimately, fraternity structure is an important component when determining who may be held responsible for a fraternity incident.

II. HOLDING THE NATIONAL ORGANIZATION LIABLE

From 2014 to 2015, there were “6,186 fraternity chapters on roughly 800 college campuses,” for a total of “380,487 undergraduate[.]” fraternity members.⁵⁹ With large fraternity participation, it is not a surprise that unfortunate incidents occur, which could result in future litigation.⁶⁰ According to “a 2010 analysis by Willis, a major fraternity insurer,” liability claims against a fraternity include assault and battery, sexual assault, slip and fall, falls from heights, auto accidents, and hazing.⁶¹ When a fraternity incident occurs, several theories of liability may be asserted to hold a national organization liable.⁶² Negligence⁶³ and vicarious liability are common theories

⁵⁷ SIGMA PHI EPSILON FRATERNITY, INC., *supra* note 13, at 5. The alumni “serve as [the] landlord” and “provide advice and counsel to the undergraduate chapter.” *Id.* “The national Fraternity exists to advise and counsel the collective membership of Sigma Phi Epsilon.” *Id.*

⁵⁸ *Id.*

⁵⁹ *Fraternity Stats*, *supra* note 2.

⁶⁰ See Mumford, *supra* note 10, at 742; William C. Terrell, Note, *Pledging to Stay Viable: Why Fraternities and Sororities Should Adopt Arbitration as a Response to the Litigation Dilemma*, 43 U. MEMPHIS L. REV. 511, 514 (2012).

⁶¹ Flanagan, *supra* note 3, at 79.

⁶² See, e.g., Rutledge, *supra* note 11, at 372–75 (discussing theories generally used in fraternity hazing litigation); Spring J. Walton, Stephen E. Bassler & Robert Briggs Cunningham, *The High Cost of Partying: Social Host Liability for Fraternities and Colleges*, 14 WHITTIER L. REV. 659, 667–68 (1993) (discussing the theory of social host liability and a case in which the court “stated that a national fraternity could possibly be liable for the tortious actions of the local chapter acting as a social host”); LeFlore, *supra* note 12, at 206–10 (identifying four methods that could be used to find a national organization liable for its local chapter’s actions: (1) a “traditional agency analysis”; (2) a “master-servant theory of vicarious liability, or respondeat superior” analysis; (3) an “agency by estoppel or ostensible agency” analysis, which is a form “vicarious liability . . . [that] can arise if the agent acts within the scope of apparent authority”; and (4) “custodial liability” (emphasis omitted)); Mumford, *supra* note 10, at 742 (“[C]ourts have held national fraternities liable for injuries in local chapters under theories of agency and general duty” (footnotes omitted)); *infra* notes 63–66, 102 and accompanying text.

⁶³ A variation on the theory of negligence commonly used is negligence per se. See *Shaheen v. Yonts*, 394 F. App’x 224, 230 (6th Cir. 2010) (discussing the allegation of negligence per se and stating “there is no evidence that LXA [Lambda Chi Alpha] knowingly induced, assisted or caused Yonts to possess [sic]

asserted to hold a national organization liable⁶⁴ and this Part considers each in turn.

A. *Examining National Organization Liability Under the Theory of Negligence*

Negligence is one theory of liability that can be asserted to hold a national organization liable, and it presupposes that the national organization owed a duty to the injured individual.⁶⁵ When a theory of negligence is asserted, a duty is not always found;⁶⁶ however, *Brown v. Delta Tau Delta*,⁶⁷ a recent Maine case, illustrates a finding of a duty.

The *Brown* court held the national organization of Delta Tau Delta could be liable for its local chapter's actions under a theory of negligence, in particular, premises liability.⁶⁸ In *Brown*, a member of the local Gamma Nu chapter sexually assaulted Brown at a party held at the fraternity house.⁶⁹ Brown reported the incident to the Gamma Nu chapter president, who then reported the incident to the chapter consultant, an employee of the national organization.⁷⁰ The local chapter expelled the chapter member who assaulted

alcohol"); *Smith v. Delta Tau Delta, Inc.*, 9 N.E.3d 154, 157 (Ind. 2014) ("[A]s to the national fraternity, the plaintiffs' amended complaint presents three theories of liability. Count I claims negligence per se for engaging in hazing in violation of [the] Indiana Code . . ."); *see also Kendrick, supra* note 11, at 427–29 (discussing negligence per se in hazing cases); *LeFlore, supra* note 12, at 199–200.

⁶⁴ *See* Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities' Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 87 (2014) ("[A]s the corporation is vicariously liable for its employees' acts in service of their employer, the national is liable for its members' acts in service of the fraternity. This paradigm conceives an agency relationship . . ."); *Gertner, supra* note 15; *infra* Part II.A–B.

⁶⁵ *See, e.g., Grenier v. Comm'r of Transp.*, 51 A.3d 367, 389 (Conn. 2012) ("[T]he plaintiff presented evidence sufficient to create a genuine issue of material fact that Delta National was sufficiently involved with the activities of Phi Chapter to owe [the deceased] a duty of care."); *Mann v. Alpha Tau Omega Fraternity, Inc.*, No. W2012–00972–COA–R3–CV, 2013 WL 1188954, at *5 (Tenn. Ct. App. 2013) ("Plaintiffs . . . contend that a special relationship existed between National ATO and Local ATO and/or its members/prospective members, and therefore, that National ATO owed a duty of care to Plaintiffs."); *infra* note 66 and accompanying text.

⁶⁶ *See, e.g., Smith*, 9 N.E.3d at 163 ("[T]he national fraternity's conduct did not demonstrate any assumption of a duty directly to supervise and control the actions of the local fraternity and its members. The national fraternity did not have a duty to insure the safety of the freshman pledges at the local fraternity."); *Yost v. Wabash Coll.*, 3 N.E.3d 509, 521 (Ind. 2014) ("[W]e conclude that the national fraternity had no general duty to Yost upon which this negligence action may be based. . . . We find that the national fraternity did not assume any duty upon which Yost may now claim liability for damages.").

⁶⁷ 118 A.3d 789 (Me. 2015).

⁶⁸ *Id.* at 795.

⁶⁹ *Id.* at 790.

⁷⁰ *Id.* at 790–91.

Brown “for engaging in conduct unbecoming a member and for violating the national fraternity’s code of conduct and rules regarding alcohol and hazing.”⁷¹ As a result of the sexual assault, Brown brought an action against the national organization of Delta Tau Delta, alleging, in relevant part, vicarious liability, negligence, and premises liability.⁷²

The court rejected Brown’s claim of vicarious liability because nothing in the record indicated the chapter member was acting as an agent of Delta Tau Delta’s national organization.⁷³ However, the court focused on Brown’s negligence claims and held the national organization could be liable based on a premises liability theory.⁷⁴ The court found the national organization had “a duty to exercise reasonable care in providing a reasonably safe environment for any social invitee to an event at the fraternity house.”⁷⁵ To find a duty between the national organization and the local chapter’s social invitees, the court considered three principles: foreseeability, control, and relationship of the parties.⁷⁶

First, examining the principle of foreseeability, the court found a national fraternity knows, or ought to know, that social events involving alcohol at a local chapter house could result in sexual assaults.⁷⁷ The national organization of Delta Tau Delta was aware of such a possibility because it instituted the

⁷¹ *Id.* at 791. Before the incident with Brown, the fraternity member “had developed a drinking problem and had recently caused property damage and engaged in fights with other fraternity brothers.” *Id.* at 790–91.

⁷² *Id.* at 791. Brown also brought a claim of negligent infliction of emotional distress against the national organization. *Id.* Against the Delta Tau Delta National Housing Corporation, Brown brought claims of vicarious liability, negligence, premises liability, and negligent infliction of emotional distress. *Id.* Brown also brought claims of assault, false imprisonment, negligence, premises liability, and negligent infliction of emotional distress against the fraternity member who assaulted her, and Brown also sought punitive damages. *Id.* Brown ultimately settled with the fraternity member and he was dismissed from the case. *Id.* Brown did not sue the local chapter because it was formed as an unincorporated association and could not be sued. *Id.* at 790 n.1.

⁷³ *Id.* at 791.

⁷⁴ *Id.* at 791, 795. As to Brown’s general negligence claim and negligent infliction of emotional distress claim, the court stated that:

[t]he undisputed facts in this case do not give rise to a duty beyond that related to Brown’s premises liability claim. . . . [T]he summary judgment record reveals no ‘special relationship’ between Brown and [Delta Tau Delta] sufficient to sustain Brown’s general negligence claim, . . . nor does it reveal a special relationship or facts that would give rise to bystander liability sufficient to support Brown’s negligent infliction of emotional distress claim.

Id. at 792 (citation omitted).

⁷⁵ *Id.* at 796.

⁷⁶ *Id.* at 793.

⁷⁷ *Id.* at 793–94.

“Policy on Alcohol and Substance Abuse” to control fraternity member conduct, which was integrated into the Member Responsibility Guidelines (MRGs).⁷⁸ The policies recognized alcohol and substance abuse could result in dangers, such as sexual assaults or harassment, and indicated that the national organization would not tolerate such behavior.⁷⁹ The court found Brown’s assault foreseeable because of the policies Delta Tau Delta established for its members.⁸⁰

Second, examining the principle of control, the court found the national organization of Delta Tau Delta had the authority to control, and actually controlled, its members.⁸¹ Delta Tau Delta exercised “significant control over its individual members,” evidenced by its constitution and bylaws, administrative connection to the local chapter’s day-to-day activities, and its “broad authority to impose sanctions.”⁸² Considering Delta Tau Delta’s constitution and bylaws, the court found persuasive that local chapters were required to adopt local bylaws consistent with the national organization’s constitution and bylaws.⁸³ The local bylaws were “expected to address local risk management plans that supplement[ed] the national MRGs” and to implement Delta Tau Delta’s alcohol programming.⁸⁴ Additionally, local chapter bylaws were expected to require chapter members to sign the national code of conduct and the local chapter had to send a certified copy of its bylaws to the national central office.⁸⁵ Further, the local chapter had to present the MRGs to members and pledges “[a]s part of the chapter accreditation process.”⁸⁶ The MRGs described specific rules and regulations regarding member conduct at social events, and the national code of conduct described general behavioral standards members had to follow.⁸⁷ Next, considering the administrative connection between the national organization and local chapter, the court found the alumni advisors and chapter consultant visits persuasive in establishing such connection.⁸⁸ The duty of the local chapter alumni advisor was to oversee the local chapter’s compliance with national rules and

⁷⁸ *Id.* at 793.

⁷⁹ *Id.* at 793–94.

⁸⁰ *Id.* at 794.

⁸¹ *Id.*

⁸² *Id.* at 794–95.

⁸³ *Id.* at 794.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 795.

regulations and to report its compliance to the national organization.⁸⁹ Similarly, the chapter consultant was responsible for meeting with “local fraternity leadership and alumni advisors” at least once per semester about the chapter’s operations, to suggest possible improvements, and to inform Delta Tau Delta about the visit.⁹⁰ Lastly, the court found persuasive that the national organization had “broad authority” to discipline local chapter members who violated rules and regulations.⁹¹ Delta Tau Delta’s “comprehensive process for disciplining members” included different categories of MRG violations and consequences.⁹² The court stated, “the national fraternity does more than simply suggest that its members conform to certain norms; it enforces its rules, regulations, and codes of conduct through constant monitoring, oversight, and intervention.”⁹³ Delta Tau Delta’s constitution and bylaws, administrative connection, and ability to discipline local chapter members indicated the national organization had control over the members of its local chapters.

Finally, examining the relationship of the parties, the court found that the Delta Tau Delta national organization had a close relationship with its local chapters and members because of its control.⁹⁴ Through its “hierarchy of rules and regulations” and its constitution, the national organization established a “clear command structure” for local chapter adherence.⁹⁵ The national organization’s constitution provided for a chapter advisor and assistant chapter advisors who were “a direct link between the national fraternity and each local chapter.”⁹⁶ The chapter advisor’s “full-time job [was] to monitor and provide oversight of the functioning of the local chapter, to ‘assist the local chapter in understanding and living the Mission and Values of the Fraternity,’ and to report” regularly to the national organization.⁹⁷ “Through its comprehensive articles and clearly defined power structure, [Delta Tau Delta] expressly reaches into the day-to-day affairs of its local chapters and creates a close, mutually beneficial relationship with its individual members.”⁹⁸

⁸⁹ *Id.*

⁹⁰ *Id.* The consultants also inform Delta Tau Delta supervisors of potential rule violations by local chapters, and the supervisors then investigate as necessary. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Consequently, the Supreme Judicial Court of Maine held the national organization of Delta Tau Delta had a duty to the social invitees of its local chapters.⁹⁹ The national organization, “which provided its name, its credibility, its corporate structure, and its code of conduct” to a local chapter, “should have anticipated that alcohol-related parties on the premises would follow, as could the social problems that accompany such activities.”¹⁰⁰

B. Examining National Organization Liability Under the Theory of Vicarious Liability

Vicarious liability is the second theory of liability that can be asserted against a national organization to hold it liable for a fraternity incident. A form of vicarious liability is a “master-servant theory” in which “[t]he master-servant relationship is an extension of the principal-agent relationship, in that the principal has the right to control the details of the physical conduct of the agent while the agent is performing services within the scope of the agency.”¹⁰¹

Courts do not always impose vicarious liability to national organizations.¹⁰² However, this section discusses a case where the court held imposing vicarious liability, in the context of a fraternity party, may be appropriate.¹⁰³

In *Marshall v. Delaware University*, the court considered whether to impose vicarious liability on the national organizations of Sigma Nu and

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 795–96.

¹⁰¹ LeFlore, *supra* note 13, at 206.

¹⁰² *See, e.g.,* Smith v. Delta Tau Delta, Inc., 9 N.E.3d 154, 164–65 (Ind. 2014) (finding the national organization was not vicariously liable because its power over the local chapter was remedial and no agency relationship existed); Yost v. Wabash Coll., 3 N.E.3d 509, 521–22 (Ind. 2014) (holding the national organization of Phi Kappa Psi could not be vicariously liable for the actions of its local chapters because there was no evidence the local chapter controlled its members at the “direction of” or “on behalf of” the national organization); Rogers v. Sigma Chi Int’l Fraternity, 9 N.E.3d 755, 764–65 (Ind. Ct. App. 2014) (discussing the vicarious liability claim and concluding that Sigma Chi International Fraternity “was not vicariously liable for the acts of the persons at the premises because it had no actual or apparent authority over them”); Wehner v. Weinstein, 444 S.E.2d 27, 35 (W. Va. 1994) (“[W]e find that the evidence decidedly preponderates against the jury’s conclusion that the [Sigma Phi Epsilon] Fraternity and the [Sigma Phi Epsilon Building] Association were directly negligent and the proximate cause of the accident, or that they are vicariously liable for the acts of their alleged agent, Mr. Kiser[, a fraternity pledge.]”).

¹⁰³ *But see* LeFlore, *supra* note 12, at 236 (“Courts should be consistent with college and fraternity cases across the board, and should not misapply vicarious . . . liability to national fraternity organizations by attempting to create control where, in reality, it does not exist.”).

Kappa Alpha Order for an incident arising from a fraternity party.¹⁰⁴ In *Marshall*, a third party was injured when a fight between Sigma Nu and Kappa Alpha members occurred because Sigma Nus tried to enter Kappa Alpha's party without paying.¹⁰⁵

In regards to the national organization of Sigma Nu, the court examined whether the national organization could be held vicariously liable for Sigma Nu's alleged misconduct and for the conduct of the members who allegedly started the fight.¹⁰⁶

The court stated the national organization could be vicariously liable for Sigma Nu's alleged misconduct if the local chapter's conduct "was within the scope of an agency relationship with" the national organization and it "had a right to control Sigma Nu's day-to-day activities."¹⁰⁷ The court found that one purpose of a fraternity "is to provide an opportunity for the members of the organization to associate 'in a responsible fashion.'"¹⁰⁸ The court stated "[a] concomitant of responsible association is some system of control."¹⁰⁹ Thus, the court held that it could be concluded "that Sigma Nu's alleged failure to control its members was within the scope of its alleged agency with" the national organization.¹¹⁰ As to whether the national organization had "a right to control Sigma Nu's day-to-day activities," the court found evidence that it did.¹¹¹ The court found persuasive that the national organization's Executive Director, its "highest ranking executive officer, ha[d] the power 'to inspect and supervise' local chapters," the Executive Director "ha[d] the power to remove a local chapter's officer for failure to perform his duties," and the national organization "reserved to itself the right to 'place [a local chapter] under the control of the Alumni Board of Receivers.'"¹¹² Consequently, the court held

¹⁰⁴ 1986 WL 11566, at *1 (Del. Super. Ct. Oct. 8, 1986). The Delaware Superior Court denied the summary judgment motions on vicarious liability for both the national organizations of Sigma Nu and Kappa Alpha Order. *Id.* at *7, *11.

¹⁰⁵ *Id.* at *1. As the court did, this Comment refers to the local chapters as Kappa Alpha and Sigma Nu. *See id.*

¹⁰⁶ *Id.* at *7-8.

¹⁰⁷ *Id.* at *7. Regarding the local chapter, the court stated it "has already found that one could reasonably hold Sigma Nu liable for negligently failing to control the conduct of those members who allegedly started the fight at the election eve party." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

that it could be concluded “that [the national organization] had the right to control Sigma Nu’s day-to-day activities.”¹¹³

As to whether the national organization of Sigma Nu could be vicariously liable for the members’ conduct who allegedly started the fight, the court reiterated that the national organization may be vicariously liable if the conduct “was within the scope of an agency relationship” and the national organization “had the right to control the day-to-day activities of those members.”¹¹⁴ Examining whether the local chapter members’ attendance at the party was within the scope of an agency relationship with the national organization, the court found evidence that one goal of a fraternity “is to encourage the development of relationships of fellowship and friendship among its members.”¹¹⁵ The court held that it could be concluded that the Sigma Nu members who attended the party acted “within the scope of that goal,” because “by attending a social event together, [they] were likely to develop the kind of brotherhood which [the national organization] was seeking to develop in members of its locals.”¹¹⁶ Examining whether the national organization had a “right to control day-to-day activities of the Sigma Nu membership,” the court again looked to the “provisions of the ‘Law of Sigma Nu Fraternity.’”¹¹⁷ The court found that the national organization may have had the power to control the local chapter members and the local chapter because the Executive Director had the power to inspect and supervise the local chapters.¹¹⁸ Additionally, the

¹¹³ *Id.* The court denied the national organization’s motion for summary judgment as to the vicarious liability claim for the local chapter’s alleged misconduct. *Id.*

¹¹⁴ *Id.* The court began by stating that it “ha[d] already held that a jury could reasonably conclude that those Sigma Nus were negligent and that their negligence actually and proximately caused the plaintiff’s injuries.” *Id.*

¹¹⁵ *Id.* at *8. The South Carolina Court of Appeals made a similar finding in *Ballou v. Sigma Nu Gen. Fraternity*, 352 S.E.2d 488 (S.C. Ct. App. 1986), where a local Sigma Nu chapter required members to participate in a “hell night” that included excessive drinking. *Id.* at 491–92. The court looked to the theory of agency, rather than vicarious liability expressly, to determine if the national organization could be liable for the local chapters’ actions. *Id.* at 496. During his efforts to join the local chapter, Ballou participated in the hell night and died. *Id.* at 492. “Sigma Nu concede[d] that an agency relationship existed between it and the local chapter,” and the court looked to whether the local chapter conducted the hell night within the scope of the agency relationship. *Id.* at 495–96. The court found the local chapter’s hell night was within the scope of the agency relationship with the national organization because the Sigma Nu bylaws did not prohibit a local chapter from requiring additional initiation activities. *Id.* at 496. Additionally, adding new members to the fraternity accomplished the purpose and was the business of Sigma Nu. *Id.* The local chapter’s actions bound the national organization because the local chapter performed in the apparent scope of authority. *Id.* For further discussion of *Ballou* and a survey of commentary on the case, see Sunshine, *supra* note 64, at 120–29.

¹¹⁶ *Marshall*, 1986 WL 11566, at *8.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

court found that the national organization may have had a right to control local chapter members because a provision of the Law of Sigma Nu Fraternity gave the Executive Director the power “to prescribe disciplinary measures for local members who violate[d] Chapter House rules contained in the Laws of Sigma Nu Fraternity.”¹¹⁹

Consequently, the court denied the national organization’s motion for summary judgment as to the vicarious liability claim for Sigma Nu’s alleged misconduct and for the members’ conduct who allegedly started the fight at the party.¹²⁰

Further, the court examined Kappa Alpha Order’s motion for summary judgment in which it argued that Kappa Alpha’s conduct was not “within the scope of any agency relationship” and it had no right to control Kappa Alpha’s day-to-day activities.¹²¹ The court stated an agency relationship is “entered into to accomplish some constitutive end, the accomplishment of which actually requires the accomplishment of various derivative ends.”¹²² The court looked to whether there was an agency relationship with respect to a constitutive end in which holding the party was a derivative act; if the party was such an act, then the national organization “may be liable for any injuries to third persons resulting from the negligent performance of that act by Kappa Alpha.”¹²³ The court found “that one of the constitutive goals” of the national organization’s and the local chapter’s relationship “was to promote fellowship among men.”¹²⁴ The court held that it could be concluded that holding “an open party is an act derivative of that constitutive goal (i.e., within the scope of the agency relationship created to accomplish that goal).”¹²⁵

Next, the court examined whether Kappa Alpha Order “had the right to control the day-to-day activities (i.e., the derivative acts)” of the Kappa Alpha chapter to determine whether the national organization could be liable for the local chapter’s actions.¹²⁶ The national organization “contend[ed] that it had no right to control the day-to-day activities of Kappa Alpha” and claimed that it

¹¹⁹ *Id.*

¹²⁰ *Id.* at 7–8. The court also examined whether the national organization of Sigma Nu could be liable under a custodial liability theory and denied its motion for summary judgment as to that claim. *Id.* at *8–9. *But see* LeFlore, *supra* note 12, at 204–05, 227–30 (critiquing *Marshall*).

¹²¹ *Marshall*, 1986 WL 11566, at *10.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

“seldom, if ever, sought to exercise control over the day-to-day activities of Kappa Alpha.”¹²⁷ The court stated this claim indicated that either the national organization did not have a right to control or that it had such right but did not exercise it.¹²⁸ Because Kappa Alpha Order moved for summary judgment, the court viewed the evidence in the light most favorable to the plaintiff and inferred that the national organization “may have had a right to control, but simply failed to exercise it.”¹²⁹ Additionally, the national organization claimed that Kappa Alpha’s day-to-day activities were subject to the University of Delaware’s control.¹³⁰ In this claim, the national organization relied on its “[c]onstitution which require[d] local chapters . . . to comply with the rules and regulations of the institution at which they are located[,] establish[ing] that [the national organization] surrendered all right to control the day-to-day activities of its local chapters to those institutions.”¹³¹ However, the court stated the “adopt[ion] [of] standards external to the principal-agent relationship to govern the conduct of [the] agent hardly establishes that the principal has abandoned [its] right to control his agents’ day-to-day activities.”¹³² Rather, the court held that it could be concluded “that such an adoption merely constituted a decision to control the agent in accordance with those external standards.”¹³³ Accordingly, the court denied Kappa Alpha Order’s motion for summary judgment as to vicarious liability.¹³⁴

In sum, negligence and vicarious liability are theories that may be asserted to hold national organizations liable for local chapter actions and may be successful.¹³⁵ However, a fraternity’s essential nature, structure, and oversight are not always accounted for under those theories. Franchise law provides a consistent framework for approaching fraternities that considers their structure and operational control. Before considering the franchise model, an

¹²⁷ *Id.*

¹²⁸ *Id.* at *11.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* The court also examined whether Kappa Alpha Order could be liable under the theory of custodial liability and denied its motion for summary judgment. *Id.* at *11–12.

¹³⁵ *But see* Marshlain, *supra* note 4, at 4 (discussing suits by members against fraternities and sororities seeking to impute the negligence of the local chapter to the national organization using agency and respondeat superior theories and stating “[d]espite being rooted in well-established and frequently applied theories, plaintiffs are often unsuccessful as to proving the national defendant’s liability”); *supra* notes 66, 102 and accompanying text.

explanation of the fundamental elements and requirements of a franchise is necessary.

III. A PORTRAIT OF FRANCHISES

This Part proceeds in two sections. First, it explains a franchise arrangement by discussing the four elements of a franchise—the grant, the trademark, the marketing or community of interest plan, and the fee—and explaining additional establishment and operational characteristics. Second, it explains franchise liability by discussing the traditional right to control test, which focuses on day-to-day operational control.

A. Independent but Consistent: The Characteristics of a Franchise Arrangement

A franchise is a business relationship where a franchisor grants a franchisee the right to “conduct a business offering goods and services to others.”¹³⁶ Generally, “the franchisee’s establishment and operation of the franchised business is closely governed by the terms of a franchise agreement and identified by one or more brands provided by the franchisor.”¹³⁷ A franchise consists of four elements: 1) the grant; 2) the trademark; 3) the marketing or community of interest plan; 4) and the franchisee fee.¹³⁸ Additionally, franchise agreements have provisions regarding the establishment and daily operation of a franchise. This section considers each element and additional provision in turn.

The first element of a franchise is the grant.¹³⁹ The grant refers to when “[o]ne party grants another the right to offer or sell goods or services.”¹⁴⁰ The second element, the trademark, refers to the franchisee “[u]sing the grantor’s brand identification (trade- or servicemark, logo, etc.), trade name, or advertising.”¹⁴¹ The third element is the marketing or community of interest plan, which is satisfied “[w]here the grantor either imposes significant controls over, or offers significant assistance in respect to, the grantee’s operation of the

¹³⁶ FUNDAMENTALS OF FRANCHISING xvii (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

¹³⁷ *Id.*

¹³⁸ *Id.* at xvii–xviii.

¹³⁹ *Id.* at xviii.

¹⁴⁰ *Id.* at xvii.

¹⁴¹ *Id.* “The trademark sections of a franchise agreement are fairly elaborate and prescribe how the franchisee may or may not use the franchisor’s commercial symbols” *Id.* at 66.

franchised business.”¹⁴² “The key idea behind the ‘marketing plan/community of interest’ element is that the franchisor *controls* at least some dimensions of how the franchisee operates or conducts the franchised business”¹⁴³ Lastly, the fourth element, the franchisee fee, requires “[t]he grantee [to] pay[] consideration for the right to enter into or maintain the relationship” with the grantor.¹⁴⁴ In addition to the four elements of a franchise, most franchise agreements have provisions that relate to the establishment and daily operation of the franchise.¹⁴⁵

Provisions relating to the establishment of a franchise are those regarding a term, reservation of rights, control over the business premises, and aid in developing the business premises.¹⁴⁶ A franchisor grants a franchise arrangement for a term, which may or may not be renewed.¹⁴⁷ Further, when determining territorial exclusivity, franchisors may reserve for themselves certain types of customers and the right to determine whether to operate comparable businesses in the franchisee’s area.¹⁴⁸ Next, franchisors typically include franchise agreement provisions that allow “some form of control over the [franchisee’s] premises.”¹⁴⁹ Lastly, franchisors help a franchisee develop its business facility before opening.¹⁵⁰

Provisions relating to the daily operation of a franchise are those regarding training, operational assistance, supplying the franchisee, standards, and termination.¹⁵¹ To begin, franchisors normally establish a training program and dictate its content, duration, and location.¹⁵² Generally, the purpose of the training program is to teach “skills, knowledge, and management know-how” and to “help align expectations, correct attitudes, create a desire and confidence in the franchisee to succeed, teach entrepreneurial skills, develop a

¹⁴² *Id.* at xviii.

¹⁴³ *Id.* at xix.

¹⁴⁴ *Id.* at xviii.

¹⁴⁵ *See id.* at 59–60. There are several different types of franchise relationships. This Comment discusses the provisions associated with a unit franchise relationship.

¹⁴⁶ *See id.* at 60–73.

¹⁴⁷ *Id.* at 60.

¹⁴⁸ *Id.* at 62.

¹⁴⁹ *Id.* at 67. The franchisor can acquire the franchisee’s location “by purchase or lease, and [then] lease[] or sublease[] the site to the franchisee.” *Id.*

¹⁵⁰ *Id.* at 68. The franchisor’s help varies, ranging from providing a location that is “turnkey” ready, to requiring the franchisee to establish the business facility on its own and the franchisor reserving the right to approve the business location and to provide general plans and specifications. *Id.*

¹⁵¹ *See id.* at 74–78, 87–90.

¹⁵² *Id.* at 74.

willingness to cooperate for mutual benefit, and create enthusiasm for the franchise program.”¹⁵³ The training is normally structured and comprised of “a training school, . . . field experience, . . . and training manuals and materials.”¹⁵⁴ Franchisees “usually must complete the training program satisfactorily” and may be required to complete refresher-training programs.¹⁵⁵ Additionally, franchisors generally give operational assistance to the franchisee by providing manuals and marketing programs, and franchisor employee assistance.¹⁵⁶ The operations manual generally details the type and extent of franchisor assistance.¹⁵⁷ “An effective operations manual aids in maintaining product and service standards and overall uniformity”¹⁵⁸ Along with providing an operations manual, some franchisors provide marketing and advertising assistance and franchisor employee assistance.¹⁵⁹ Franchisors typically send an employee to assist the franchisee in opening the business and then thereafter for periodic inspections and evaluations of the franchisee’s performance.¹⁶⁰ Similarly, franchisors generally dictate standards for a franchisee to maintain.¹⁶¹ These standards help to maintain a “consistent appearance, operation, and array of products and services across numerous independently owned and operated businesses,” which are hallmark characteristics of a franchise arrangement.¹⁶² In addition to manuals,

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 75.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* The operations manual will typically include a variety of sections such as: “franchisor policies; business practices; suggested standards, procedures, and documentation for hiring staff; . . . job descriptions; . . . maintaining premises; . . . customer service; operations forms, record-keeping forms, and related procedures; . . . advertising and promotion; and safety and security recommendations.” *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The franchisor will assist franchisees on a variety of concerns after the business opens, such as: “operating problems, . . . the business facility’s appearance and service, product quality, adherence to specifications and standards[;] . . . advertising and promotion programs; . . . [and] administrative procedures” *Id.* at 75–76. This assistance may be provided through “operations manuals, other written communications, websites, extranets, field assistance, periodic refresher training courses, and telephone consultations.” *Id.* at 76.

¹⁶¹ *Id.* at 79. The court will consider the standards dictated in the franchise agreement when it inquires whether the franchisor is liable for the franchisee’s actions. *See infra* Part III.B. The court must determine whether the standards in the franchise agreement grant the franchisor control over specific aspects of a franchisee’s business or if it grants the franchisor the right to control the franchisee’s daily operations. *See Miller v. McDonald’s Corp.* 945 P.2d 1107, 1110 (Or. Ct. App. 1997); *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004).

¹⁶² FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 79. The standards typically regard “the business facility’s equipment, . . . authorized and required products and services[,] . . . suppliers[,] . . . [employee] appearance and training[,] . . . trademarks[,] . . . advertising, . . . promotional programs[,] . . . displays[,]

employees, and standards, franchisors may also “become involved in supplying goods or services to [the] franchisee[.]” once the business is operational.¹⁶³ Lastly, franchisors generally include termination provisions in the franchise agreement.¹⁶⁴ A complete termination provision provides for the franchisor’s and the franchisee’s obligations after termination.¹⁶⁵

In sum, franchise agreement provisions regarding the establishment and daily operations of a franchise may indicate franchisor control, which can lead to liability.

B. Holding the Franchisor Liable—The Traditional Right to Control Test

Imposing vicarious liability in a franchise context can be difficult for courts because of the inherent structure and requirements of a franchise arrangement.¹⁶⁶ Because a franchisee receives the right to use a franchisor’s trademark, trademark law heavily influences the franchise relationship.¹⁶⁷ The Lanham Act imposes a duty on a franchisor to “take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration.”¹⁶⁸ As a result, a franchisor must control a franchisee to some extent, but such control is not intended to make a franchisor vicariously liable.¹⁶⁹ Thus, when determining whether a franchisor is vicariously liable, courts must consider the control the Lanham Act inherently requires. Consequently, two tests have developed to hold a

staffing levels,” record keeping and reporting requirements, required periodic reporting, and maintenance of a computer system. *Id.* at 79–80.

¹⁶³ *Id.* at 76.

¹⁶⁴ *Id.* at 87.

¹⁶⁵ *See id.* at 88–90.

¹⁶⁶ *See Rainey v. Langen*, 998 A.2d 342, 347–48 (Me. 2010); *see also Drexel v. Union Prescription Ctrs.*, 582 F.2d 781,785–86 (3d Cir. 1978) (“The difficulties are perhaps especially evident where, as here, the alleged master and servant also occupy the status of franchisor and franchisee. Some degree of control . . . would appear to be inherent in the franchise relationship, and may even be mandated by federal law.” (citation omitted)); *Font v. Stanley Steamer Int’l, Inc.*, 849 So. 2d 1214, 1216 (Fla. Dist. Ct. App. 2003) (“Applying the ‘control’ test to a franchise is not an easy task. On the one hand a franchise clearly has an independent aspect to it. . . . On the other hand, a franchisor by necessity must retain some control over the use of its names, goods or services.” (emphasis omitted)).

¹⁶⁷ *See Rainey*, 998 A.2d at 347–48; *Kerl*, 682 N.W.2d at 338; Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 99–102.

¹⁶⁸ *Rainey*, 998 A.2d at 348 (quoting *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959)); *see also Flynn*, *supra* note 167, at 101.

¹⁶⁹ *See Drexel*, 582 F.2d at 785–86; *Rainey*, 998 A.2d at 348; *Kerl*, 682 N.W.2d at 338; Flynn, *supra* note 167, at 101–02.

franchisor vicariously liable for a franchisee's actions: the traditional right to control test and the instrumentality test.¹⁷⁰

First, the traditional right to control test seeks to determine whether “the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise.”¹⁷¹ Under the traditional right to control test, the control inquiry is “distinct” from the Lanham Act inquiry.¹⁷² While the Lanham Act considers whether the franchisor has maintained sufficient control over the licensee's end product to ensure the trademark is applied to the same product or to a product with the same quality to which the public is accustomed,¹⁷³ the traditional “right to control” test focuses on a franchisor's control over a franchisee's performance of its day-to-day operations.¹⁷⁴ Second, the instrumentality test is a narrowing of the traditional right to control test.¹⁷⁵ The instrumentality test seeks to determine whether “the franchisor has control or a right of control over the daily operation of the *specific aspect* of the franchisee's business that

¹⁷⁰ *Rainey*, 998 A.2d at 348–49.

¹⁷¹ *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (quoting *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197–98 (Del. 1978)). Oregon has adopted and applied the traditional right to control test. *See id.* at 1110–11 (holding there was sufficient evidence “to raise an issue of actual agency” because “there [was] evidence that [the] defendant had the right to control 3K in the precise part of its business that allegedly resulted in plaintiff's injuries”); *Viado v. Domino's Pizza, LLC*, 217 P.3d 199, 211–12 (Or. Ct. App. 2009) (holding Domino's Pizza was not vicariously liable for the car accident caused by a franchisee employee because the franchise agreement provided general driving standards and Domino's Pizza did not retain a “right to control the physical details of the manner of performance of [the employee's] driving”). However, Oregon's application of the traditional right to control test may be similar to the instrumentality test. *See Kerl*, 682 N.W.2d at 341 (stating *Miller* is consistent with the focus of the instrumentality test “to the extent that it focused on the particular aspect of the franchisee's business that was alleged to have caused the harm”).

¹⁷² *See Rainey*, 998 A.2d at 348–49.

¹⁷³ *See id.* at 349.

¹⁷⁴ *Id.*

¹⁷⁵ *See Kerl*, 682 N.W.2d at 340.

is alleged to have caused the harm.”¹⁷⁶ This Comment focuses on the application of the traditional right to control test.¹⁷⁷

Maine adopted the traditional right to control test in 2010 when it decided *Rainey v. Langen*,¹⁷⁸ a case of first impression.¹⁷⁹ The *Rainey* case arose from a car accident that occurred when Langen, an employee of a franchised Domino’s Pizza, collided with a motorcycle driven by Paul Rainey.¹⁸⁰ The court concluded the traditional right to control test “strikes an appropriate balance” and adopted the traditional test over the instrumentality test.¹⁸¹ The court found “[t]he traditional test allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability.”¹⁸² The court indicated that “[i]f a franchisor takes further measures to reserve control over a franchisee’s performance of its day-

¹⁷⁶ *Id.* at 341 (emphasis added). The *Kerl* court “[r]eason[ed] that the Lanham Act-related obligations incumbent upon franchisors weighed in favor of narrowing the focus of the ‘right to control’ test.” *Rainey*, 998 A.2d at 348 (citing *Kerl*, 682 N.W.2d at 342); see also *Hong Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83, 94 (E.D.N.Y. 2000) (determining that the franchisor was not vicariously liable for the alleged lapse in security because the franchisor did not control specific security measures, the instrumentality); *Papa John’s Int’l, Inc. v. McCoy*, 244 S.W.3d 44, 55 (Ky. 2008) (adopting the instrumentality test because it is “well-reasoned” and “will lead to consistent results”). Under the instrumentality test, “[t]he quality and operational standards typically found in franchise agreements do not establish the sort of close supervisory control or right to control necessary to support imposing vicarious liability.” *Kerl*, 682 N.W.2d at 340.

¹⁷⁷ This Comment focuses on the traditional right to control test because that is the test Maine adopted, and this Comment applies the franchise model using both a Maine franchise and fraternity case. Florida’s Fifth District Court of Appeals has also applied the traditional right to control test. See *Font v. Stanley Steemer Int’l, Inc.*, 849 So. 2d 1214 (Fla. Dist. Ct. App. 2003) (reversing summary judgment to determine whether an agency relationship existed between the franchisee and the franchisor, Stanley Steemer, and thus whether Stanley Steemer might be vicariously liable for the car accident involving the franchisee’s employee, who was driving the work vehicle that killed Font).

¹⁷⁸ 998 A.2d at 349.

¹⁷⁹ *Id.* at 346. The U.S. District Court for the District of Rhode Island has also applied the traditional right to control test. See *Butler v. McDonald’s Corp.*, 110 F. Supp. 2d 62, 67–68 (Dist. R.I. 2000) (denying summary judgment because the franchise license agreement, operator’s lease and license agreement, operational manuals, and training manuals indicated a jury could find McDonald’s vicariously liable for Butler’s injuries that resulted from the door shattering). The Third Circuit Court of Appeals has also applied the traditional right to control test. See *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 788 (3rd Cir. 1978) (reversing summary judgment because “reasonable minds could differ as to whether or not [the franchisor] had the right to control [the franchisee’s] physical conduct and the manner in which he operated the store, including the prescription filling activity”).

¹⁸⁰ *Rainey*, 998 A.2d at 344.

¹⁸¹ *Id.* at 349. The court found the common distinction other courts make when “evaluating the requisite level of control”—control over a franchisee’s day-to-day operations and control designed to insure uniformity and standardization—to be consistent with its emphasis on the “‘power to control and direct the details of the work’ rather than the ‘results to be obtained.’” *Id.* at 347 (quoting *Legassie v. Bangor Pub’g Co.*, 741 A.2d 442, 444 (Me. 1999)).

¹⁸² *Id.* at 349.

to-day operations, . . . the franchisor is no longer merely protecting its mark, and imposing vicarious liability may be appropriate.”¹⁸³ Applying the traditional test, the Supreme Judicial Court of Maine did not impose vicarious liability to Domino’s Pizza because it found that “the quality, marketing, and operational standards present in the Agreement and Guide [did] not establish the supervisory control or right of control necessary to impose vicarious liability.”¹⁸⁴

The *Rainey* court began its analysis by looking at the relationship between Domino’s Pizza—the franchisor—and the franchisee.¹⁸⁵ The court indicated that if the franchisee was “an agent-employee of Domino’s Pizza,” then employees of the franchisee were “agent[s]-employee[s] of Domino’s Pizza.”¹⁸⁶ While the franchise agreement indicated that Domino’s Pizza and the franchisee were independent contractors, the court stated that label was relevant but not controlling.¹⁸⁷ For guidance in determining the control included in the franchisor–franchisee relationship, the court looked to the *Murray’s Case*¹⁸⁸ factors, “particularly the degree of control reserved by Domino’s Pizza, as evidenced by the terms of the [franchise] [a]greement and [manager’s reference] [g]uide.”¹⁸⁹ The court “conclude[d] that, although the quality control requirements and minimum operational standards [were] numerous,” Domino’s Pizza did not “reserv[e] control over the performance of [the franchisee’s] day-to-day operations.”¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 350. Consequently, the court affirmed the lower court as it “did not err in granting Domino’s Pizza’s motion for partial summary judgment.” *Id.* at 351.

¹⁸⁵ *Id.* at 349–50 (noting the employee’s relationship with Domino’s Pizza was not the proper relationship to examine in determining whether to hold Domino’s Pizza liable for the employee’s actions). The court stated this was “a preliminary issue [that] warrants explanation.” *Id.* at 349.

¹⁸⁶ *Id.* at 349–50.

¹⁸⁷ *Id.* at 350.

¹⁸⁸ 154 A. 352, 352–54 (Me. 1931) (determining whether a person was an employee or an independent contractor). The court listed the “[c]ommonly recognized tests” to distinguish employees and independent contractors:

- (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Id.

¹⁸⁹ *Rainey*, 998 A.2d at 350.

¹⁹⁰ *Id.*

The court found that the franchise agreement specified that supervision and operation of the franchise store was the franchisee's responsibility.¹⁹¹ Additionally, the franchisee had the responsibility and duty to implement employee-training programs, to determine employee wages and employee schedules, and to maintain all day-to-day decisions concerning employee oversight.¹⁹² While "Domino's Pizza retain[ed] the right to conduct inspections and terminate the franchise relationship, such conditions [did] not constitute sufficient control to impose vicarious liability."¹⁹³ In regard to the manager's reference guide, the court found the provisions to which the Rainey's pointed were included "for informational purposes only."¹⁹⁴ The court indicated that "recommendations and requirements" are distinct and, generally, courts are "reluctant to impose liability based on mere suggestions."¹⁹⁵ Other sections of the guide were "comprehensive and detailed" but did not "dictate the precise methods by which [the franchisee was] required to carry out its daily responsibilities."¹⁹⁶ The Supreme Judicial Court of Maine indicated factors, present in the case, that were "inconsistent with an employer-employee relationship," such as, franchising generally required "independent businessmen to sell the franchisor's product or service;"¹⁹⁷ the franchisee was "responsible for purchasing or leasing its own equipment and supplies; and . . . Domino's Pizza [did] not compensate [the franchisee] as its employee; rather, [the franchisee was] paid by its customers and provide[d] Domino's Pizza with a royalty fee."¹⁹⁸ Consequently, relying on the *Murray's Case* factors, the court did not find Domino's Pizza vicariously liable; however, the court outlined a way to evaluate future franchise cases that involve a claim of vicarious liability.¹⁹⁹

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* The Rainey's pointed to sections 6 and 7 of the guide. *Id.* However, franchisees were only required to adhere to sections 2, 12, and 15 of the guide; the other sections were for informational purposes only and franchisees were not required to use them. *Id.* at 345.

¹⁹⁵ *Id.* (emphasis omitted) (quoting *Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 89 (E.D.N.Y. 2000)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (quoting 1 GLADYS GLICKMAN, FRANCHISING § 2.01 (2006)).

¹⁹⁸ *Id.* (citing *Legassie v. Bangor Publ'g Co.*, 741 A.2d 442, 444 (Me. 1999)).

¹⁹⁹ The *Rainey* court provided a framework to evaluate future franchise cases that involve a claim of vicarious liability: first, look to the relationship between the franchisor and franchisee; second, determine if the franchisor has the right to control the franchisee's day-to-day operations by analyzing the *Murray's Case* factors. *See id.* at 349–50.

Two rationales traditionally support the common law application of vicarious liability.²⁰⁰ First, vicarious liability is a function of risk allocation, and the predominant idea is that the “master benefits economically from the servant’s activities and can factor . . . insurance and the risk of damage awards” into its business costs.²⁰¹ Second, vicarious liability is imposed to motivate the master to control the servant’s conduct to avoid harm.²⁰² These historical rationales are meant to be upheld when applying vicarious liability, and should be analyzed when applying vicarious liability in new contexts.²⁰³

IV. ARGUMENT: A FRANCHISE APPROACH TO FRATERNITIES

This Comment proposes the idea of treating fraternities as franchises.²⁰⁴ Consequently, courts should consider fraternities to be franchise arrangements and look to franchise law when deciding whether a national organization is liable for its local chapter’s actions. As Caitlin Flanagan said, “[a] fraternity, it’s almost as though it’s a franchise operation with terrible quality control.”²⁰⁵

Recently, the Court of Appeals of Oregon explored this idea when it looked to franchise case law in *Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity*.²⁰⁶ The *Scheffel* court found its analysis in a past franchise case²⁰⁷

²⁰⁰ William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162, 165 (2005) (arguing that common law rationales do not fit franchise arrangements because “when judges and juries convert typical franchisor controls into vicarious liability, they turn franchising on its head”).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.* (discussing the rationales for vicarious liability in the context of franchise relationships); *see also* Flynn, *supra* note 167, at 95–99 (critiquing the application of historical rationales for respondeat superior to franchise relationships).

²⁰⁴ “An intriguing possibility, apparently not yet well-explored, lies in leveraging established law on liability in franchisor-franchisee relations, which may best illustrate the situation of a national fraternity that lends its name and formula for success to a widespread network of local outposts.” Sunshine, *supra* note 64, at 136 (footnote omitted).

²⁰⁵ *The Business of Frats: Shifting Liability for Trauma and Injury*, NPR (Feb. 25, 2014, 3:34 AM), <http://www.npr.org/2014/02/25/281994720/the-business-of-frats-shifting-liability-for-trauma-and-injury>; *see also* Total Frat Move—Another Perspective, FRATERNITY ADVISOR, <http://thefraternityadvisor.com/total-frat-move-another-perspective/> (highlighting a comment that analogizes fraternities to franchises); Hannah K. Gold, *5 Ways Fraternities Are Wielding Major Influence over University Administrations*, ALTERNET (Feb. 23, 2015), <http://www.alternet.org/education/5-ways-fraternities-are-wielding-major-influence-over-university-administrations> (quoting Professor Peter Lake’s 2013 observation that fraternities “[are] establishing a national brand and franchising”); Alex Mierjeski, *Why You Probably Should Never Join a Fraternity*, ATTN: (Mar. 24, 2015), <http://www.attn.com/stories/613/can-fraternities-be-fixed> (quoting Caitlin Flanagan’s statement that “[b]y design, fraternities are franchise operations with terrible quality control”).

²⁰⁶ 359 P.3d 436 (Or. Ct. App. 2015) (discussing whether the national organization could be vicariously liable for the conduct of the local chapter when a local chapter member sexually assaulted a guest at a

instructive even though it “involved an agency relationship between entities that was based on a franchise agreement.”²⁰⁸

Fraternal organizations have learned to insulate themselves from liability, while courts have shielded them from liability.²⁰⁹ To justify its decision in not holding a national organization liable, one state supreme court stated national organizations should be “encouraged, not disincentivized, to undertake programs to promote safe and positive behavior and to discourage hazing and other personally and socially undesirable conduct.”²¹⁰ One attorney criticized the court’s reasoning as backwards.²¹¹ The attorney advocated that the best way to encourage national organizations to undertake such programs and “‘discourage . . . undesirable conduct’ is to hold them liable when they fail to take reasonable steps to discourage dangerous conduct. Giving them a free pass just maintains the status quo.”²¹²

The franchise model that this Comment proposes provides an alternative way to view fraternities legally, which may cause national organizations to take further action to address the dark side of fraternities that may be affecting their local chapters.²¹³ Although the outcome of any particular case ultimately

Halloween party hosted by the local chapter at its house). The court made no indication that it was shifting to franchise reasoning or case law for future fraternity cases. *Id.*

²⁰⁷ The court of appeals referenced *Viado v. Domino’s Pizza, LLC*, 217 P.3d 199 (Or. Ct. App. 2009). *Scheffel*, 359 P.3d at 454.

²⁰⁸ *Scheffel*, 359 P.3d at 455. The court of appeals concluded there was no genuine issue of material fact as to whether Phi Kappa Psi “had the right to control the physical details of hosting and monitoring the [local chapter’s] Halloween party.” *Id.* The court stated that while Phi Kappa Psi had the “right to control intake, to suspend or expel members, to revoke charters, and to impose fraternity-wide policies aimed at curbing alcohol abuse and preventing sexual assaults,” the day-to-day control of the fraternity lied with the local chapter. *Id.* Phi Kappa Psi’s control over day-to-day activities was instead remedial in nature, and the national organization did not have the “right to control the physical details of hosting and monitoring the Halloween Party to the extent necessary” to be found vicariously liable. *Id.* *Scheffel* may be an example of the franchise model not imposing liability on the national organization because the requisite control and relationship were not present. However, the court of appeals did not expressly indicate that it was adopting a franchise model or reasoning for future fraternity cases when it decided *Scheffel*, which may have influenced its considerations of the fraternity in relation to a franchise.

²⁰⁹ See Timothy M. Burke, *Maine Supreme Court Says National May Be Liable*, 137 FRATERNAL L., 2, 2 (July 2015), <http://fraternallaw.com/wp-content/uploads/2015/07/Fraternal-Law-Newsletter-July-2015.pdf>; Michael Hill, *Holding College Fraternities Liable for Non-Hazing Injuries*, SPANGENBERG, SHIBLEY & LIBER (June 25, 2014), <http://www.spanglaw.com/blog/holding-college-fraternities-liable-non-hazing-injuries>; *supra* notes 23–27 and accompanying text.

²¹⁰ *Yost v. Wabash Coll.*, 3 N.E.3d 509, 521 (Ind. 2014).

²¹¹ Kennerly, *supra* note 24.

²¹² *Id.* (quoting *Yost*, 3 N.E.3d at 521).

²¹³ The organizations raise millions of dollars for worthy causes, contribute millions of hours in community service, and seek to steer young men toward lives of service and honorable action.

relies on which franchise test is adopted by the state and on a national organization's relationship with and control over its local chapters, a franchise model provides a consistent framework to analyze fraternities that considers their structure and operation. The model establishes a structured, ready-made approach to fraternities that considers the overall control a national organization has over local chapters, finds liability when the requisite control and relationship is present, and prevents liability when it is absent.²¹⁴

This argument proceeds in two sections. Section A applies the franchise model to fraternities, specifically using the Delta Tau Delta fraternity discussed in *Brown*, and demonstrates the structural and operational similarities between fraternities and franchises. Section B, using the findings in *Rainey* and *Brown*, applies franchise liability to fraternities, demonstrates the ready-made approach franchise law supplies, and exhibits how liability may be found when there is operational control.

A. *An Unofficial Franchise: Applying Franchise Characteristics to Fraternities*

Fraternities are essentially unofficial franchise arrangements—a national organization provides use of “its name, its credibility, its corporate structure, and its code of conduct to a local branch on a college campus.”²¹⁵ Part A of this section shows a fraternity is an unofficial franchise arrangement by analogizing a fraternity—Delta Tau Delta from the *Brown* case—and a franchise. A fraternity is similar to a franchise arrangement not only because it

They also have a long, dark history of violence against their own members and visitors to their houses, which makes them in many respects at odds with the core mission of college itself.

Flanagan, *supra* note 3, at 75; see also *The Business of Frats: Shifting Liability for Trauma and Injury*, *supra* note 205 (“If I ran [an] institution ostensibly dedicated to the betterment of young people and my number two source of liability was the rape of young women, I would say something’s seriously wrong.”).

²¹⁴ A franchise model accounts for the nature, structure, and oversight of a fraternity because fraternities are similar to franchises. See *infra* Part IV.A. Additionally, a franchise model is relevant to future fraternity law suits as it can be difficult to hold national organizations liable using the theories of negligence and vicarious liability. See, e.g., *Brown v. Delta Tau Delta*, 118 A.3d 789, 791, 794 (Me. 2015) (rejecting the claim of vicarious liability because nothing indicated the chapter member was an agent of the Delta Tau Delta national organization but finding actual control under a negligence theory); *Sunshine*, *supra* note 64, at 119 (discussing the rise and fall of respondeat superior liability in hazing incidents for national fraternities); *supra* notes 15, 23–24, 65–66, 102 and accompanying text.

²¹⁵ *Brown*, 118 A.3d at 795–96. *But compare* LeFlore, *supra* note 12, at 205–06 (discussing how “the national office and organization exist[s] for the benefit of the local chapters”), *with* *Sunshine*, *supra* note 64, at 134–35 (discussing “the national as supreme”).

satisfies the four elements of a franchise arrangement, but also because it shares additional franchise characteristics.

1. A Fraternity Satisfies the Four Elements of a Franchise Arrangement

A fraternity is an unofficial franchise arrangement because it satisfies the four elements of a franchise arrangement—the grant, the trademark, the community of interest or marketing plan, and the fee.²¹⁶ Just as a franchisor grants a franchisee the right to develop and operate its business,²¹⁷ a national organization of a fraternity grants local chapters the right to develop and operate by granting a charter.²¹⁸ The process and the requirements to receive a charter are unique to each fraternity.²¹⁹ For example, Delta Tau Delta grants a charter to undergraduates at institutions of higher learning approved by the Arch Chapter and approved and reviewed by the Arch Chapter and the Central Office.²²⁰ Delta Tau Delta's chartering process requires undergraduates to petition for a charter, the merits of the petition to be investigated, and the Arch Chapter to vote to approve the charter.²²¹ Along with the general chartering process, Delta Tau Delta has standards undergraduates must meet before receiving a charter, such as maintaining specific grade point averages, having enough members, and having local bylaws that do not conflict with Delta Tau Delta's constitution and bylaws.²²²

Additionally, a fraternity meets the second element of a franchise arrangement, the trademark,²²³ through allowing local chapters to use national insignia and brands. For example, Delta Tau Delta's bylaws describe permissive and nonpermissive uses of its insignia and intellectual property.²²⁴

²¹⁶ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at xvii–xviii; see also *supra* note 138 and accompanying text.

²¹⁷ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at xvii–xviii; see also *supra* notes 139–40.

²¹⁸ See BAIRD'S MANUAL, *supra* note 30, at 26.

²¹⁹ Compare SIGMA PHI EPSILON FRATERNITY, INC., *supra* note 13, at 33–34, with SIGMA CHI FRATERNITY, STANDARD OPERATING PROCEDURES MANUAL 9 (2013), <https://www.sigmachifrat.org/sites/default/files/Documents/sop.pdf>.

²²⁰ See DELTA TAU DELTA, CONSTITUTION AND BYLAWS OF DELTA TAU DELTA FRATERNITY 1–2 (2012), <https://life.babson.edu/organization/delts/documentlibrary>. Delta Tau Delta's constitution and bylaws outline the details of the review conducted by the Arch Chapter and Central Office. *Id.*

²²¹ See *id.*

²²² See *id.* at 51.

²²³ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at xvii–xviii; see also *supra* note 141 and accompanying text.

²²⁴ See DELTA TAU DELTA, *supra* note 220, at 53–54.

Delta Tau Delta also requires merchandise bearing the fraternity's insignia or intellectual property to be purchased from approved vendors.²²⁵

Further, a fraternity meets the third element of a franchise arrangement, the community of interest or marketing plan, because it controls local chapter operations through its constitution and bylaws.²²⁶ "The key idea behind the 'marketing plan/community of interest' element is that the franchisor *controls* at least some dimensions of how the franchisee operates or conducts the franchised business"²²⁷ For example, Delta Tau Delta controls at least some dimensions of how local chapters operate through their constitution and bylaws.²²⁸ From dictating local chapter fraternity officer positions, to chapter officer duties, to the member responsibility guidelines, Delta Tau Delta controls how local chapters operate and conduct the fraternity locally.²²⁹ As the *Brown* court stated, "[t]hrough its constitution, by-laws, and administrative connection to its local chapters' day-to-day activities, [Delta Tau Delta] *exercises significant control* over its individual members."²³⁰

Lastly, a fraternity meets the fourth element of a franchise arrangement, the fee, by requiring dues and fees. In a franchise arrangement, the franchisee pays a fee to the franchisor to enter into and to maintain the relationship.²³¹ Dues and fees are the fraternity equivalent of the franchise fee.²³² For example, each Delta Tau Delta local chapter pays dues to the national organization by collecting the amount from local members.²³³ Delta Tau Delta then uses the dues to support the fraternity.²³⁴ Accordingly, a fraternity satisfies all four elements of a franchise arrangement and should be considered an unofficial franchise.

²²⁵ See *id.*

²²⁶ See, e.g., *id.* at 1–2, 33; SIGMA PHI EPSILON FRATERNITY, INC., *supra* note 13; SIGMA CHI FRATERNITY, *supra* note 219.

²²⁷ FUNDAMENTALS OF FRANCHISING, *supra* note 136, at xix; see also *supra* notes 142–43 and accompanying text.

²²⁸ See DELTA TAU DELTA, *supra* note 220.

²²⁹ See *id.* at 41, 54; see also *Brown v. Delta Tau Delta*, 118 A.3d 789, 793–95 (Me. 2015).

²³⁰ *Brown*, 118 A.3d at 794 (emphasis added).

²³¹ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at xviii; see also *supra* note 144 and accompanying text.

²³² See, e.g., SIGMA CHI FRATERNITY, *supra* note 219, at 16 (discussing the "Pledge Fee," the "Initiation Fee," and the "Member Fee"); SIGMA PHI EPSILON FRATERNITY, INC., *supra* note 13, at 42–43 (discussing member registration fees and annual fee).

²³³ See DELTA TAU DELTA, *supra* note 220, at 41–43.

²³⁴ See *id.* at 21–23; see also *The Business of Frats: Shifting Liability for Trauma and Injury*, *supra* note 205 ("The most expensive part of joining a fraternity is the portion of your dues that go to fraternity insurance.").

2. *A Fraternity Has Additional Franchise Characteristics that Further Establish a Franchise Relationship*

Fraternity national organizations provide operational assistance and support that exceed the four elements of a franchise arrangement.²³⁵ A franchisor generally helps establish the business premises, provides a training program, provides franchise manuals, organizes compliance visits, maintains a consistent identity nationwide, and outlines termination events and the obligations of both parties if such an event were to occur.²³⁶ National organizations provide similar operational assistance and support to local chapters, which helps further establish a relationship similar to a franchise.

As a franchisor helps a franchisee establish its business premises,²³⁷ a national organization helps local chapters establish a fraternity house.²³⁸ A national organization, a fraternity alumni corporation, or an institution of higher learning may own a fraternity house.²³⁹ However, a house corporation comprised of alumni generally owns a fraternity house and helps establish it by raising funds and consulting on plans.²⁴⁰ For example, as described in *Brown*, Delta Tau Delta's national housing corporation, a separate entity, owned and operated the fraternity house.²⁴¹

Additionally, a national organization offers training to local chapters to instruct members on fraternity values and history.²⁴² Fraternity education and training holds the same purpose as in a franchise because it explains how to operate the fraternity and builds enthusiasm for the fraternity.²⁴³ For example, before a candidate is initiated into Delta Tau Delta, he must complete "a period of pledgship in which he has successfully demonstrated acquisition of a sound and thorough knowledge of the *Mission and Values* of Delta Tau Delta Fraternity and of the ideals and principles upon which it and college

²³⁵ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 59–60; *supra* note 145 and accompanying text.

²³⁶ See *supra* Part III.A.

²³⁷ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 67–68; *supra* notes 149–50 and accompanying text.

²³⁸ See BAIRD'S MANUAL, *supra* note 30, at 10, 14.

²³⁹ See *id.* at 14; *Fraternity and Sorority*, *supra* note 1.

²⁴⁰ See BAIRD'S MANUAL, *supra* note 30, at 10, 14; *Fraternity and Sorority*, *supra* note 1.

²⁴¹ See *Brown v. Delta Tau Delta*, 118 A.3d 789, 798 (Me. 2015) (Alexander, J., concurring in part and dissenting in part).

²⁴² See BAIRD'S MANUAL, *supra* note 30, at 13.

²⁴³ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 74; *supra* notes 152–50 and accompanying text.

fraternities were founded.”²⁴⁴ An additional prerequisite for initiation requires “[p]rospective initiates” to pass an exam that demonstrates their knowledge of “the most important points of the *Mission and Values*, ideals, purposes, history, laws, and customs of the Fraternity,” so that as members they can “contribute effectively to undergraduate chapters and the Fraternity.”²⁴⁵ Overall, Delta Tau Delta ensures members receive comprehensive fraternity training and education.

Similar to a franchisor, a national organization provides operational assistance to local chapters through its constitution and bylaws. A franchisor provides operational assistance through detailed operation manuals and marketing programs.²⁴⁶ The operations manual ensures the franchisee maintains product and service standards and overall uniformity.²⁴⁷ Instead of operation manuals and marketing programs, a national organization provides local chapters with the national constitution and bylaws, which are the manuals of how the fraternity operates and functions.²⁴⁸ For example, Delta Tau Delta’s constitution and bylaws are comprehensive and discuss many operational aspects, such as disciplining members and local chapters and establishing undergraduate chapter officer positions and their duties.²⁴⁹ Local chapters are also required to adhere to Delta Tau Delta’s constitution and bylaws and cannot enact contradictory, local bylaws.²⁵⁰ The standards and requirements outlined in Delta Tau Delta’s constitution and bylaws are mechanisms to help Delta Tau Delta maintain overall uniformity among its chapters.

To help maintain standards and uniformity, fraternities also provide chapter consultants, who perform roles similar to franchisor employees during compliance visits. A franchisor periodically sends an employee to visit a franchisee for inspection and to check business performance.²⁵¹ Similarly, a fraternity sends an employee of the national organization, often recently

²⁴⁴ DELTA TAU DELTA, *supra* note 220, at 5

²⁴⁵ *Id.* at 49. Delta Tau Delta also has an optional education program called “The Road: The Journey to Excellence,” which has four sections: new member education, recruitment, ritual, and member education. *The Road*, DELTA TAU DELTA, <http://www.delts.org/the-road/> (last visited Feb. 9, 2017).

²⁴⁶ *See* FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 75; *supra* notes 156–59 and accompanying text.

²⁴⁷ *See* FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 75; *supra* notes 156–59 and accompanying text.

²⁴⁸ *See* BAIRD’S MANUAL, *supra* note 30, at 26.

²⁴⁹ *See* DELTA TAU DELTA, *supra* note 220.

²⁵⁰ *See id.* at 45.

²⁵¹ *See* FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 75; *supra* note 160 and accompanying text.

graduated members, to inspect and check on local chapters.²⁵² For example, Delta Tau Delta sends a chapter consultant to visit a local chapter at least once per semester.²⁵³ The chapter consultant inspects the local chapter's operations, provides feedback to the local chapter and its leadership, and reports to the central office.²⁵⁴ Chapter consultants help Delta Tau Delta establish a command structure and relationship with its local chapters, while ensuring local chapters continue to comply with Delta Tau Delta's constitution and bylaws.²⁵⁵

Furthermore, a national organization provides standards to maintain "consistent appearance, operation, and . . . services"—the hallmarks of a franchise arrangement—among its chapters.²⁵⁶ A fraternity's standardization through its national constitution and bylaws and its organization under a "grand chapter" maintains a consistent identity despite the existence of numerous local chapters.²⁵⁷ For example, Delta Tau Delta's constitution and bylaws provide a consistent national identity by defining a clear command structure.²⁵⁸ Additionally, Delta Tau Delta's constitution outlines qualifications for membership and initiation, which help to ensure members possess qualities and values consistent with the fraternity.²⁵⁹

Lastly, like a franchise agreement, a national organization's constitution and bylaws provide termination provisions. A franchise agreement generally outlines events that will cause termination and the obligations of each party in such a situation.²⁶⁰ Generally, the constitution and bylaws of a fraternity state when the national organization can revoke a local chapter's charter and when a

²⁵² See, e.g., *Become a Consultant*, SIGMA NU FRATERNITY, <http://www.sigmanu.org/collegiate-members/consultation/become-a-consultant> (last visited Aug. 24, 2016); *Chapter Consultants*, PIKE, <https://www.pikes.org/about-pike/officers-and-staff/chapter-consultants> (last visited Aug. 24, 2016).

²⁵³ See *Brown v. Delta Tau Delta*, 118 A.3d 789, 795 (Me. 2015).

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 79; see also *supra* notes 161–62 and accompanying text.

²⁵⁷ BAIRD'S MANUAL, *supra* note 30, at 12, 26. An issue fraternities face today is inconsistency. For example, "you could go to Sigma Chi, the biggest American fraternity on one campus, and those guys are exemplary student leaders. . . . You could go to the next campus over to Sigma Chi and it's a bunch of thuggish kids who are perpetrating criminal acts and being drunk all the time." *The Business of Frats: Shifting Liability for Trauma and Injury*, *supra* note 205.

²⁵⁸ See *Brown*, 118 A.3d at 795.

²⁵⁹ See DELTA TAU DELTA, *supra* note 220, at 4–8.

²⁶⁰ See FUNDAMENTALS OF FRANCHISING, *supra* note 136, at 87; *supra* notes 164–65 and accompanying text.

local chapter member can be expelled from the fraternity.²⁶¹ For example, Delta Tau Delta “has a comprehensive process for disciplining members who violate its rules or regulations.”²⁶² The Arch Chapter of Delta Tau Delta may withdraw a local chapter’s charter if the “chapter fails to comply with the requirements of the *Constitution, Ritual*, or laws of the Fraternity, or if it appears that the interests of the Fraternity will suffer by the continued maintenance and operation of a chapter.”²⁶³ Additionally, the Arch Chapter of Delta Tau Delta may expel a local chapter member for various reasons, such as “[v]iolation of the Fraternity’s Oath or the Chapter’s Code of Conduct where such Code exists,” or for “[c]onduct . . . that renders his membership detrimental to the best interests of the Fraternity.”²⁶⁴

Accordingly, a fraternity is an unofficial franchise arrangement because it meets all four elements of a franchise arrangement and shares additional franchise characteristics that further establish a franchise relationship. A franchise model considers fraternity structure and operation, and consequently, it identifies cases where national organization liability is appropriate because of the national organization’s control over and its relationship with local chapters. Thus, courts should consider franchise case law when deciding national organization liability.

B. Applying Franchise Case Law to Fraternities: Rainey Meets Brown

Due to the operational and structural similarities of a fraternity and a franchise arrangement, courts should apply franchise case law when deciding a national organization’s liability. Franchise law provides a ready-made approach to fraternities that finds liability when the requisite relationship and control exists and prevents liability when it is absent. In *Rainey*, the Supreme Judicial Court of Maine outlined its franchise framework applying the traditional right-to-control test.²⁶⁵ Part B of this section applies the framework to Delta Tau Delta, the fraternity in *Brown*,²⁶⁶ to evidence how it identifies cases where liability may be imposed because the requisite control and relationship exists. The *Rainey* framework proceeds in two parts. First, as a

²⁶¹ See, e.g., SIGMA CHI FRATERNITY, *supra* note 219, at 19–21; SIGMA PHI EPSILON FRATERNITY, INC., *supra* note 13, at 12, 17, 35–37.

²⁶² *Brown*, 118 A.3d at 795.

²⁶³ DELTA TAU DELTA, *supra* note 220, at 23.

²⁶⁴ *Id.* at 26.

²⁶⁵ See *supra* Part III.B.

²⁶⁶ The Supreme Judicial Court of Maine also decided the *Brown* case. *Brown v. Delta Tau Delta*, 118 A.3d 789 (Me. 2015).

threshold issue, a court must identify and examine the proper relationship.²⁶⁷ Second, a court must decide whether the national organization has a right to control the daily operations of the local chapter.²⁶⁸

When applying the traditional right-to-control test, a court first must identify and examine the relationship between the franchisor and franchisee.²⁶⁹ In *Rainey*, the Supreme Judicial Court of Maine stated the superior court incorrectly looked to the relationship between the franchisor and the employee of the franchisee.²⁷⁰ Rather, when determining vicarious liability, the court should examine the relationship between the franchisor and the franchisee.²⁷¹ If a franchisee is “an agent-employee” of the franchisor, then an employee of the franchisee is also “an agent-employee” of the franchisor.²⁷² Thus, when a court has a case involving a fraternity national organization, it must identify and examine the relationship between the national organization and the local chapter. If the local chapter is “an agent-employee” of the national organization, then the local chapter member is also “an agent-employee” of the national organization.²⁷³ Since “[t]he mere existence of a franchise relationship does not necessarily trigger a master-servant relationship, nor does it automatically insulate the parties from such relationship,” the mere action of a national organization chartering a local chapter does not “trigger a master-servant relationship.”²⁷⁴ To determine if a master-servant relationship exists and whether imposing vicarious liability is appropriate, a court must examine the second step of the franchise framework.

The second step of the franchise framework requires a court to determine whether a national organization has control over the day-to-day operations of a local chapter. Imposing vicarious liability is only appropriate when further steps to reserve control over franchisee day-to-day operations are taken.²⁷⁵ The *Rainey* court determined whether a franchisor had control over the day-to-day

²⁶⁷ See *Rainey v. Langen*, 998 A.2d 342, 349–50 (Me. 2010).

²⁶⁸ See *id.* at 349.

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² *Id.* at 349–50.

²⁷³ See *Sunshine*, *supra* note 64, at 135 (“National fraternities, on the whole, are not so very unlike the traditional employer . . .”). *But see* *LeFlore*, *supra* note 12, at 231–32 (“Where a national fraternity is involved, the analogy to an employer and employee is not warranted.”).

²⁷⁴ *Rainey*, 998 A.2d at 349 (quoting *Drexel v. Union Prescription Ctrs.*, 582 F.2d 781, 786 (3d Cir. 1978)).

²⁷⁵ See *id.*

operations of the franchisee by looking to the *Murray's Case* factors.²⁷⁶ The court did not discuss how to balance the factors but did note that the degree of control reserved by the franchisor, as evidenced in the franchise agreement and manager's reference guide, was particularly important.²⁷⁷ Each of the eight *Murray's Case* factors listed below is applied to Delta Tau Delta to demonstrate that it may have had the proper relationship and control over local chapters that was necessary to impose vicarious liability to the national organization:

- 1) [T]he existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
- 2) independent nature of his business or his distinct calling;
- 3) his employment of assistants with the right to supervise their activities;
- 4) his obligation to furnish necessary tools, supplies, and materials;
- 5) his right to control the progress of the work except as to final results;
- 6) the time for which the workman is employed;
- 7) the method of payment, whether by time or by job;
- 8) whether the work is part of the regular business of the employer.²⁷⁸

The *Murray's Case* factors that reference "his" right or obligation examine the factor from the perspective of the person claiming to be an employee or independent contractor.²⁷⁹ In the context of a fraternity, those factors would be examined from the perspective of the local chapter.

The first *Murray's Case* factor is "the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price."²⁸⁰ The Supreme Judicial Court of Maine examined two aspects that may speak to

²⁷⁶ *Id.* at 350.

²⁷⁷ *Id.*; see also *Legassie v. Bangor Publ'g Co.*, 741 A.2d 442, 444 (Me. 1999) ("Since our decision in *Murray's Case*, we have held that control is the most important factor in determining whether an individual is an employee or an independent contractor." (citation omitted)). The Supreme Judicial Court of Maine did not expressly consider each *Murray's Case* factor, but stated "the ultimate determination turns on an analysis of the *Murray's Case* factors." *Rainey*, 998 A.2d at 350. *Murray's Case* stated the factors are "not necessarily concurrent or each in itself controlling." 154 A. 352, 354 (Me. 1931). Thus, this Comment considers and applies each factor in the second part of the franchise framework.

²⁷⁸ *Murray's Case*, 154 A. at 354.

²⁷⁹ *Id.* at 355 ("The only fact, in the instant case, which has the slightest tendency to uphold the contention that *petitioner* was an independent contractor, is the hiring by *him* of the men who assisted in unloading the coal." (emphasis added)).

²⁸⁰ *Id.* at 354.

this factor: how the franchise agreement defined the franchise relationship, stating this declaration was relevant but not controlling; and to what extent the franchisor retained control over the franchisee in the franchise agreement and manager's reference guide.²⁸¹ The court stated, "courts typically draw distinctions between *recommendations* and *requirements*' and are reluctant to impose liability based on mere suggestions."²⁸² When applied to Delta Tau Delta, this factor favors finding control over day-to-day operations. Delta Tau Delta's constitution and bylaws state that "no chapter, chapter member, [or] chapter advisor . . . has authority to sign a college or university document on behalf of the International Fraternity that would bind the Fraternity."²⁸³ This Comment assumes this statement indicates a chapter, chapter member, or chapter advisor is not an agent of the fraternity; however, while this statement is relevant as an indication of the legal relationship, it is not controlling.²⁸⁴ Additionally, Delta Tau Delta has, and retains, control over its local chapters through the chartering process and its national constitution and bylaws. Without the chartering process, local chapters would not exist or operate as an extension of the fraternity.²⁸⁵ Delta Tau Delta requires "local chapter[s] to adopt local by-laws that do not conflict with the national constitution or by-laws."²⁸⁶ Delta Tau Delta's control over local chapters is evidenced by the expectation that local bylaws "address local risk management plans that supplement the national MRGs [and] implement [Delta Tau Delta's] alcohol education program."²⁸⁷ Control is also evidenced by the requirements that "all members . . . sign the national code of conduct," local chapters "provide a certified copy of [their] by-laws, and any amendments thereto, to the national central office," the local chapters present the MRGs to pledges and members annually for chapter accreditation, and members adhere to the MRGs and sign and conform to the national code of conduct.²⁸⁸ Delta Tau Delta's constitution and bylaws impose more than *mere suggestions* and indicate its control over local chapters.

²⁸¹ See *Rainey*, 998 A.2d at 350.

²⁸² *Id.* (quoting *Hong Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 89 (E.D.N.Y. 2000)).

²⁸³ DELTA TAU DELTA, *supra* note 220, at 54 (discussing host indemnification).

²⁸⁴ See *Rainey*, 998 A.2d at 350.

²⁸⁵ See DELTA TAU DELTA, *supra* note 220, at 1–2.

²⁸⁶ *Brown v. Delta Tau Delta*, 118 A.3d 789, 794 (Me. 2015).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

The second *Murray's Case* factor is the “independent nature of his business or his distinct calling.”²⁸⁹ The distinction between a servant and a contractor “is the power of control, not the fact of control.”²⁹⁰ This right to control is most evident in the right to terminate or discharge a person from service without liability.²⁹¹ Local chapters of Delta Tau Delta are not independent, but rather they are controlled by the national organization, because Delta Tau Delta “has a comprehensive process for disciplining members who violate its rules or regulations.”²⁹² As the *Brown* court stated, Delta Tau Delta

has broad authority to impose sanctions, which may include . . . revoking a chapter's charter, or suspending or expelling individual members. In short, the national fraternity does more than simply suggest that its members conform to certain norms; it enforces its rules, regulations, and codes of conduct through constant monitoring, oversight, and intervention.²⁹³

The third *Murray's Case* factor is “his employment of assistants with the right to supervise their activities.”²⁹⁴ If a person has the right to employ and supervise assistants, that indicates that the person is similar to an independent contractor rather than an employee controlled by an employer.²⁹⁵ When applied in a fraternity context, this factor looks to whether the local chapter can employ “assistants with the right to supervise their activities.”²⁹⁶ Generally, national organizations employ and supervise more assistants than local chapters to maintain control over day-to-day operations of local chapters, thus fulfilling the local chapter's need to employ and supervise assistants.²⁹⁷ For example, Delta Tau Delta's chain of command of alumni advisors and consultants establish a close relationship between its national organization and

²⁸⁹ *Murray's Case*, 154 A. 352, 354 (Me. 1931).

²⁹⁰ *See id.* at 355.

²⁹¹ *Id.* at 354–55 (“The most important point in ‘determining the main question [contractor or employee] is the right of either to terminate the relation without liability.’” (quoting *Indus. Comm'n v. Hammond*, 236 P. 1006 (Colo. 1925))).

²⁹² *Brown*, 118 A.3d at 795.

²⁹³ *Id.*

²⁹⁴ *Murray's Case*, 154 A. at 354.

²⁹⁵ *Legassie v. Bangor Publ'g Co.*, 741 A.2d 442, 445 (Me. 1999) (listing the fact that “[the worker] was not required to deliver the papers himself, but was free to engage others to carry out the task” indicated an independent contractor relationship).

²⁹⁶ *Murray's Case*, 154 A. at 354–55 (stating the fact that the petitioner could hire men to assist in unloading the coal supported the contention that the petitioner was an independent contractor).

²⁹⁷ *See Brown*, 118 A.3d at 794–95 (discussing the close relationship the fraternity chain of command establishes between the national organization and local chapters); *supra* notes 88–90, 96–97, 252–55 and accompanying text; *infra* notes 298–301 and accompanying text.

local chapters and members.²⁹⁸ The alumni advisor is a “deputy of the Arch Chapter” and the chapter advisor’s “full-time job is to monitor and provide oversight of the functioning of the local chapter, to ‘assist the undergraduate chapter in understanding and living the Mission and Values of the Fraternity,’ and to report to [Delta Tau Delta] on a regular basis.”²⁹⁹ In addition, a chapter consultant interacts frequently with local chapters by visiting at least once per semester to suggest improvements and check on the chapter’s operations.³⁰⁰ Chapter consultants are required to report to Delta Tau Delta regarding the visit and inform it of potential rule violations committed by local chapters.³⁰¹ Through Delta Tau Delta’s “clearly defined power structure” of alumni advisors and consultants, the national organization maintains supervision and oversight over its local chapters.³⁰²

The fourth *Murray’s Case* factor is “his obligation to furnish necessary tools, supplies, and materials.”³⁰³ Delta Tau Delta requires local chapters “to adopt local by-laws that do not conflict with the national constitution or by-laws,” which impose organizational requirements and set standards for local chapters.³⁰⁴ Delta Tau Delta’s constitution and bylaws describe crucial aspects of the fraternity—its values, mission, purpose, and emblems.³⁰⁵ Additionally, the constitution and bylaws require local chapters to educate members in the fraternity’s ideals, mission, and values.³⁰⁶ In essence, because the national organization provides the constitution and bylaws—the fraternity’s foundation and guidebooks—local chapters do not provide the tools, supplies, and training necessary to operate.

The fifth *Murray’s Case* factor is “his right to control the progress of the work except as to final results.”³⁰⁷ “The essence of the . . . ‘right to control the progress of the work’ factor[] is the freedom of the employee or independent contractor to do the work without direction, so long as the work gets done.”³⁰⁸ The *Brown* court found Delta Tau Delta had “authority to control its members

²⁹⁸ See *Brown*, 118 A.3d at 794–95.

²⁹⁹ *Id.*

³⁰⁰ See *id.* at 795.

³⁰¹ See *id.*

³⁰² See *id.*

³⁰³ *Murray’s Case*, 154 A. 352, 354 (Me. 1931).

³⁰⁴ See *Brown*, 118 A.3d at 794.

³⁰⁵ See DELTA TAU DELTA, *supra* note 220, at 1, 30–31, 33.

³⁰⁶ See *id.* at 5, 20, 49.

³⁰⁷ *Murray’s Case*, 154 A. at 354.

³⁰⁸ *Legassie v. Bangor Publ’g Co.*, 741 A.2d 442, 446 (Me. 1999).

as well as its actual control. Through its constitution, by-laws, and administrative connection to its local chapters' day-to-day activities, [Delta Tau Delta] exercises significant control over its individual members."³⁰⁹ Delta Tau Delta's control is evident in the requirements imposed on local chapters, such as ensuring all members sign the national code of conduct, annually presenting the Member Responsibility Guidelines to the chapter to maintain chapter accreditation, and supplying the national central office a certified copy of the local bylaws.³¹⁰ Delta Tau Delta's administrative connection, as well as its constitution and bylaws, ensures it controls local chapter operations, which implies that local chapters must operate under the direction of the national organization.

The sixth *Murray's Case* factor is "the time for which the workman is employed."³¹¹ Delta Tau Delta may satisfy this factor because its constitution outlines membership qualifications and requires exclusivity.³¹² After "unit[ing] with Delta Tau Delta Fraternity," a person is "forever thereafter barred from membership in any other social college fraternity."³¹³ Delta Tau Delta's membership qualifications and exclusivity signal its control over its members and local chapters.

The seventh *Murray's Case* factor is "the method of payment, whether by time or by job."³¹⁴ Payment by "time or piece," for example, "\$4.00 per acre," generally indicates an employee, while payment by "lump sum for the task," for example, harvesting "twenty acres at \$4.00 an acre," generally indicates an independent contractor relationship.³¹⁵ In *Rainey*, the court found that the franchisor, Domino's Pizza, did not compensate the franchisee as an employee; rather, the franchisee was paid by customers and provided royalty payments to the franchisor.³¹⁶ The court indicated such conduct was "inconsistent with an employer-employee relationship."³¹⁷ In a fraternity context, local chapters collect dues from members and portions of the dues are remitted to the national

³⁰⁹ *Brown*, 118 A.3d at 794.

³¹⁰ *See id.* Additionally, a local chapter's bylaws must include several specific policies as outlined in Delta Tau Delta's constitution and bylaws. DELTA TAU DELTA, *supra* note 220, at 45.

³¹¹ *Murray's Case*, 154 A. at 354.

³¹² *See* DELTA TAU DELTA, *supra* note 220, at 4-8.

³¹³ *Id.* at 7.

³¹⁴ *Murray's Case*, 154 A. at 354.

³¹⁵ *See id.* (quoting *Indus. Comm'n v. Hammond*, 236 P. 1006, 1008 (Colo. 1925), *Norton v. Day Coal Co.*, 180 N.W. 905 (Iowa 1920)).

³¹⁶ *Rainey v. Langen*, 998 A.2d 342, 350 (Me. 2010).

³¹⁷ *Id.*

organization, similar to a royalty agreement.³¹⁸ While this factor indicates a lack of control, no single factor is dispositive.³¹⁹

The eighth *Murray's Case* factor is “whether the work is part of the regular business of the employer.”³²⁰ Application of this factor to fraternities can be difficult because some conduct by local chapters and members is obviously not regular fraternity business. For example, sexually assaulting a woman at a fraternity party is not the regular business of Delta Tau Delta and does not carry out its purpose, mission, or values.³²¹ A court would likely conclude that such conduct is not regular fraternity business but that of a rogue member.³²² However, depending on its relationship with the local chapter and constitution and bylaws, the national organization may still be liable because it had the ability to control the local chapter. Additionally, particular conduct by local chapters during parties and initiation activities could be considered regular fraternity business depending on the purposes and goals of fraternities and the national organization’s constitution and bylaws.³²³ For example, in *Marshall*, the court found the party hosted by a local Kappa Alpha chapter could be considered regular fraternity business because it could support a fraternity’s goal of “promot[ing] fellowship among men.”³²⁴ Also, in *Marshall*, the court stated that Sigma Nu’s attendance at the party could constitute regular fraternity business because it may further the purpose of the fraternal organization—to “encourage the development of relationships of fellowship and friendship among its members.”³²⁵ Courts have also found conduct by local chapter members during initiation activities to be regular fraternity business. For example, in *Ballou*, the required “hell night” before initiation was considered regular business of Sigma Nu because adding new members accomplished the purpose and was the business of the fraternity.³²⁶ Additionally, the Sigma Nu national bylaws did not prohibit the local chapter from requiring additional initiation activities.³²⁷ Accordingly, when a court

³¹⁸ See DELTA TAU DELTA, *supra* note 220, at 42 (discussing that joint dues are set by the Arch Chapter and Undergraduate Council); *id.* at 47 (discussing the payment of fines and penalties); *id.* at 5 (discussing candidates paying dues before initiation).

³¹⁹ See *Murray's Case*, 154 A. at 354.

³²⁰ *Id.*

³²¹ See DELTA TAU DELTA, *supra* note 220, at 1, 33.

³²² Cf. *Sunshine*, *supra* note 64, at 132–33 (discussing the distinctions between “detours” and “frolics”).

³²³ See *supra* notes 115–16, 124–25 and accompanying text.

³²⁴ *Marshall v. Univ. of Del.*, 1986 WL 11566, at *10 (Del. Super. Ct. Oct. 8, 1986).

³²⁵ *Id.* at *8.

³²⁶ *Ballou v. Sigma Nu Gen. Fraternity*, 352 S.E.2d 488, 496 (S.C. Ct. App. 1986).

³²⁷ *Id.*

applies this factor to a fraternity, the conduct may be regular fraternity business depending on the local chapter's conduct, the national organization's constitution and bylaws, and the fraternity relationship.

Applying Maine's franchise framework to Delta Tau Delta indicates it may have the requisite control and relationship with its local chapters needed under a franchise model. While the *Rainey* court did not provide express guidance as to how to balance the factors, it did indicate control was important.³²⁸ The *Murray's Case* factors, when applied to Delta Tau Delta, may weigh in favor of liability and indicate control. The *Brown* court stated, "[t]hrough its comprehensive articles and clearly defined power structure, [Delta Tau Delta] expressly reaches into the day-to-day affairs of its local chapters and creates a close, mutually beneficial relationship with its individual members."³²⁹ Consequently, the findings in *Brown* and the application of the *Murray's Case* factors to Delta Tau Delta highlight that imposing vicarious liability to Delta Tau Delta under a franchise model may be appropriate because of the extensive control and developed relationship it has with its chapters and members.³³⁰ A franchise model provides a consistent, ready-made framework for evaluating fraternities. Because it takes into consideration the variation of control among fraternities and imposes liability when the necessary control and relationship are evident, a franchise model imposes liability on the national organization when it is appropriate.

CONCLUSION

Fraternities are founded on values like leadership, scholarship, and philanthropy, and provide benefits to members like lifelong friendship, community service, and leadership experience.³³¹ However, modern fraternity culture and recent headlines reveal that there can also be a dark side to fraternities.³³² While national organizations disclose the positive statistics and

³²⁸ *Rainey v. Langen*, 998 A.2d 342, 350 (Me. 2015); *Legassie v. Bangor Publ'g Co.*, 741 A.2d 442, 444 (Me. 1999).

³²⁹ *Brown v. Delta Tau Delta*, 118 A.3d 789, 795 (Me. 2015).

³³⁰ The *Brown* court dismissed the vicarious liability claim but held Delta Tau Delta could be liable under a negligence theory, specifically premises liability. *Id.* at 791, 795.

³³¹ See *supra* notes 1–5 and accompanying text; see also Max Abelson & Zeke Faux, *Secret Handshakes Greet Frat Brothers on Wall Street*, BLOOMBERG (Dec. 23, 2013, 12:00 AM), <http://www.bloomberg.com/news/articles/2013-12-23/secret-handshakes-greet-frat-brothers-on-wall-street> (discussing the fraternity connection that helps students obtain internships and jobs on Wall Street).

³³² See *supra* notes 6–9 and accompanying text; see also Peter Jacobs, *A Misguided Fraternity Movement Is Revealing the Worst Aspects of Frat Boy Culture*, BUS. INSIDER (Aug. 7, 2014, 5:05 PM),

benefits of fraternities,³³³ national organizations are less transparent about the measures they take to prevent liability.³³⁴ A fraternity attorney expressed to national organizations that “most state courts won’t hold them liable if they’re ‘predominantly passive’ in their supervision of affiliates’ ‘daily activities.’”³³⁵ The dark side of fraternities will continue until courts view fraternities and their national organizations differently.³³⁶

The franchise model provides an alternative way to view fraternities and challenges, as described by one attorney, the perception of fraternities dodging responsibility rather than accepting responsibility.³³⁷ A franchise model provides a consistent framework to view fraternities and considers fraternity structure and operation. Under the traditional right to control test, the franchise model considers the relationship between the national organization and local chapter and the overall control a national organization exercises over a local chapter’s day-to-day operations. Consequently, it imposes liability when the required relationship and control elements are satisfied and prevents liability

<http://www.businessinsider.com/tfm-fraternity-movement-worst-frat-boy-culture-2014-8> (highlighting Total Frat Move’s “why we need frat” social media campaign). Total Frat Move (TFM) is a website that publishes articles and videos pertaining to fraternities and fraternity life. See TFM: TOTAL FRAT MOVE, <http://totalfratmove.com> (last visited Feb. 10, 2017). While TFM videos are satirical and are made for entertainment and to be posted online, videos of real fraternity incidents that expose a dark side to fraternities are also online. See, e.g., Gabrielle Russon, *UCF’s Sigma Nu Suspended After Video Shows Frat Member Chanting ‘Rape’*, ORLANDO SENTINEL (Aug. 14, 2015, 7:11 PM), <http://www.orlandosentinel.com/news/breaking-news/os-ucf-sigma-nu-frat-rape-chant-video-20150814-story.html> (discussing the university’s suspension of the Sigma Nu chapter after a video surfaces of members promoting rape); Ray Sanchez, *Indiana ATO Frat Shut Down After Sexually Explicit Video Surfaces*, CNN (Oct. 10, 2015, 6:04 PM), <http://www.cnn.com/2015/10/08/us/indiana-university-fraternity-suspended/> (discussing the video that surfaced of fraternity members encouraging a “brother involved in a sexually explicit act with a woman” and the national organization’s “swift” action of shutting the chapter down and revoking its charter); ABC News, *Oklahoma SAE Frat: Two Students Expelled Over Racist Chants*, YOUTUBE, (Mar. 11, 2015), <https://www.youtube.com/watch?v=nU-ZbjB00k8> (discussing the racist chant by Sigma Alpha Epsilon fraternity members and the university’s and the national organization’s response).

³³³ See *supra* notes 2–5 and accompanying text.

³³⁴ See Flanagan, *supra* note 3, at 82. To prevent liability, fraternities have placed insurance with the national organization, developed procedures and policies to transfer liability to outside parties, found creative ways to protect their assets from juries, and found ways to indemnify the national and local organizations for undergraduate member’s conduct. *Id.*; see also *supra* notes 23–28 and accompanying text. *But see* Flanagan, *supra* note 3, at 85 (“[N]either the fraternities nor the insurance company are hiding their warnings that a member could lose his coverage if he does anything outside of the policy.”).

³³⁵ *National Fraternities Face More Legal Risk After Court Ruling*, *supra* note 27 (quoting a lawyer who represents fraternities).

³³⁶ See *id.* (noting that “[i]f every court in the country” ruled “that a national fraternity must face a trial for injury or death at a chapter house,” some lawyers believe “it would change the structure of fraternities”); *supra* notes 6–9 and accompanying text.

³³⁷ Kennerly, *supra* note 24 (“I suppose we shouldn’t be surprised that the national fraternities responded to a serious issue with fratboy logic: better to dodge responsibility than to be responsible.”).

when the required relationship and control elements are not satisfied. However, national organization liability ultimately relies on the franchise test adopted by a state and a national organization's relationship with and control over its local chapters.³³⁸ A franchise model may make it difficult for fraternities to take the "middle-of-the-road approach" of partial supervision and partial nonsupervision.³³⁹ If examined under a franchise model, national organizations may have to decide to supervise local chapters and members fully, which, presumably, would always give them control of day-to-day operations of a local chapter; or not to supervise at all.³⁴⁰ Additionally, a franchise model may encourage fraternities to use arbitration agreements in the future.³⁴¹ In conclusion, by adopting a franchise model for fraternities, courts can hold national organizations liable for their local chapters' actions when it is appropriate using a model that accounts for a fraternity's structure and operation, which may shine a brighter light on the potential dark side of fraternities.

CASSANDRA COOLIDGE*

³³⁸ This Comment applied the franchise model to fraternities using cases in which third parties were injured by a fraternity member and a franchisee employee. This Comment did not explore the application of the franchise model to fraternities in situations where fraternity members are injured and seek to hold the national organization vicariously liable as compared to when franchisee employees are injured and seek to hold the franchisor vicariously liable. Thus, this Comment acknowledges that the application of the franchise model to such situations and other aspects of fraternity life still need to be further explored and considered. This Comment also acknowledges that a more thorough examination of the policy implications of applying a franchise model to fraternities may be necessary.

³³⁹ See *National Fraternities Face More Legal Risk After Court Ruling*, *supra* note 27.

³⁴⁰ *Id.* If national organizations chose not to supervise local chapters at all, then members would be supervised at the local level. *Id.*

³⁴¹ *Cf.* Terrell, *supra* note 60, at 516 (arguing fraternities should use arbitration agreements to settle disputes).

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