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## "Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care

Brandon W. Chamberlin

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## **“AM I MY BROTHER’S KEEPER?”<sup>1</sup>: REFORMING CRIMINAL HAZING LAWS BASED ON ASSUMPTION OF CARE**

### ABSTRACT

*One hundred years ago, two states had criminal laws addressing collegiate hazing. Today, hazing is a crime in thirty-nine states. However, this flood of legislation has failed to stem the tide of hazing injuries and deaths. The current criminal law approach to hazing has failed because the claimed benefits of specialized hazing laws are illusory. Moreover, the rare cases in which hazing laws provide a benefit over general criminal statutes are the very cases in which the hazing laws are most vulnerable to legal challenge. The current approach also fails on policy grounds. A pure enforcement approach that does not engage with students’ values and beliefs about hazing may have the unintended effect of entrenching pro-hazing norms. The creation of sweeping criminal liability also increases the danger of hazing by driving it further underground.*

*This Comment argues for jettisoning the current, failed approach to hazing and instead imposing a duty of mutual aid on members of collegiate student groups. Under this Comment’s proposal, if a student becomes helpless as a result of a group activity and is unable to protect himself, other group members must protect him from injury until he is once again able to take care of himself. Criminal liability attaches when a member who knows of the other student’s helplessness breaches the duty and an injury results.*

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<sup>1</sup> Genesis 4:9.

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## INTRODUCTION

A car crash killed two sorority pledges.<sup>2</sup> The driver, a sleep-deprived fellow pledge, had been kept up most of the previous night by sorority activities and had been instructed by initiated sisters to drive to a group hair appointment.<sup>3</sup> She was the only person charged with a crime and plead guilty to two misdemeanors.<sup>4</sup>

A nineteen-year-old pre-med student died of alcohol poisoning after a mock kidnapping by three pledges in his fraternity.<sup>5</sup> Charged with first-degree hazing and unlawful dealings with a minor, the pledges were acquitted on all counts.<sup>6</sup>

Thirteen fraternity pledges were forced to do calisthenics and recite fraternity history while sitting in an ice bath.<sup>7</sup> The three fraternity brothers charged with criminal hazing were acquitted.<sup>8</sup> One juror remarked that the trial was “a waste of taxpayers’ money.”<sup>9</sup>

Over the past thirty years, there has been a dramatic increase in the number of criminal hazing statutes.<sup>10</sup> Unfortunately, the current criminal law approach, with its focus on prohibition, has failed to solve the problem of collegiate hazing.<sup>11</sup> Hazing deaths continue unabated, prosecutions are rarely successful, and there remains significant social acceptance of hazing among college students. This Comment argues that the current criminal law framework for collegiate hazing should be dismantled, and in its place, a duty should be imposed on members of student groups to protect other students from injury to the extent that they are unable to protect themselves. If injury results due to a student’s helpless state, criminal penalties should be imposed upon members whose actions contributed to the student’s helpless state, who knew the student

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<sup>2</sup> Anne Blythe, *Suit Says Sorority Hazing Led to ECU Student’s Fatal Crash*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 3, 2012, at 1B.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Ariel Kaminer, *Former Students Acquitted of Hazing in Cornell Death*, N.Y. TIMES, June 28, 2012, at A22.

<sup>6</sup> *Id.*

<sup>7</sup> Terry Vau Dell, *Three Found Not Guilty in Hazing Case*, OROVILLE MERCURY-REG., Aug. 26, 2009, [http://www.oroVILLEmr.com/ci\\_13205846](http://www.oroVILLEmr.com/ci_13205846).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* notes 69–70 and accompanying text.

<sup>11</sup> This Comment is limited to collegiate hazing. Very different considerations are raised by high school, workplace, and military hazing, and such practices are beyond the scope of this Comment.

was helpless, and who failed to take reasonable steps to protect the student from injury.

Part I of this Comment provides background on the problem of collegiate hazing: its scope, its causes, and attempts by organizations to combat it. Part II analyzes the criminal prohibition of hazing by examining different state statutes. Part III lays out the case against the current system of criminal hazing laws as duplicative, vulnerable to legal challenge, and unsound. Finally, Part IV explains this Comment's proposal and argues that it successfully addresses the identified shortcomings of the current criminal law framework.

## I. THE FACTUAL LANDSCAPE OF COLLEGIATE HAZING

This Part provides background on the practice of collegiate hazing. Section A reviews attempts to quantify the extent of collegiate hazing and reveals that the prevalence of hazing may be overestimated. Section B examines the ways in which students justify hazing and the academic literature on the causes of hazing. Section C looks at the unintended consequences of the decision of the National Pan-Hellenic Council, the umbrella group for black Greek-letter organizations, to eliminate pledging.

### A. *Scope of the Problem*

In order to sensibly discuss the problem of collegiate hazing, one should first attempt to quantify the problem. The available data suggests that collegiate hazing is extremely common—approximately half of all college students report experiencing behavior that may be considered hazing<sup>12</sup>—but perceptions of the number of hazing deaths are greatly inflated. Since 1970, on average, three hazing deaths occur each year in the United States.<sup>13</sup>

As with other types of criminal activity,<sup>14</sup> there are two approaches to measuring incidents of collegiate hazing: compiling reports of hazing incidents and surveying individuals about their experiences with hazing. Both

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<sup>12</sup> Elizabeth J. Allan & Mary Madden, *The Nature and Extent of College Student Hazing*, 24 INT'L J. ADOLESCENT MED. & HEALTH 83, 86 (2012).

<sup>13</sup> See *Hank Nuwer's List of Deaths by Hazing*, HANKNUWER.COM, <http://www.hanknuwer.com/hazingdeaths.html> (last updated Jan. 20, 2014) (listing the college students who have died due to hazing, initiation, and pledging-related activities since 1838).

<sup>14</sup> Robert M. O'Brien, *Police Productivity and Crime Rates: 1973–1992*, 34 CRIMINOLOGY 183, 183, 197–99 (1996) (describing the FBI's Uniform Crime Reports, compiled from data submitted by local law enforcement agencies, and the National Crime Victimization Survey, surveying crimes experienced by individual households).

approaches must contend with two primary problems: the lack of a generally accepted definition of hazing<sup>15</sup> and the fact that most hazing is shrouded in secrecy.<sup>16</sup>

### 1. *Compiled Hazing Reports*

There is no governmental or private organization that compiles statistics of hazing incidents, injuries, and deaths.<sup>17</sup> Instead, most of the literature on hazing relies on the work of journalism professor and anti-hazing activist Hank Nuwer,<sup>18</sup> who has compiled reports of collegiate deaths due to hazing since 1990.<sup>19</sup>

Despite popular perception to the contrary, there is little evidence of a significant increase in hazing deaths in recent decades. Nuwer reports that from 1838 to 1969 there were thirty-nine collegiate hazing deaths.<sup>20</sup> There were twenty-six deaths in the 1970s, twenty-nine in the 1980s, twenty-eight in the 1990s, and thirty-five in the 2000s.<sup>21</sup> To put deaths due to hazing in context, from 2005 to 2012 there were on average 19.25 murders each *year* at American colleges and universities.<sup>22</sup>

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<sup>15</sup> See, e.g., *People v. Lenti (Lenti I)*, 253 N.Y.S.2d 9, 13 (Nassau Cnty. Ct. 1964) (noting that “[h]azing” is a word[] [that] incorporates [everything from] treatment such as the wearing of a ‘beanie cap’ to the permanent disfigurement of the body”).

<sup>16</sup> See Susan VanDeventer Iverson & Elizabeth J. Allan, *Initiating Change: Transforming a Hazing Culture*, in *THE HAZING READER* 252, 253 (Hank Nuwer ed., 2004).

<sup>17</sup> See HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* 200 (1st paperback ed. 2001) (calling for the creation of a national tracking system for hazing incidents); Deborah L. Cohen, *Clearing Up Hazing: Opponents Are Pushing for Stricter Laws*, A.B.A. J., Oct. 2012, at 14, 15 (noting that the Clery Act, which mandates campus crime reporting, does not specifically address hazing). A bill to add hazing to Clery Act reporting requirements was introduced in the House of Representatives in 2003 but died in committee. See *Hazing Prohibition Act of 2003*, H.R. 1207, 108th Cong. (2003).

<sup>18</sup> Nuwer is cited more than any other author for reports of hazing deaths. See, e.g., sources cited *infra* notes 24–28.

<sup>19</sup> HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* 285–324 (1990); NUWER, *supra* note 17, at 237–74 (1999); *id.* at 237–80 (1st paperback ed. 2001); *Hank Nuwer’s List of Deaths by Hazing*, *supra* note 13.

<sup>20</sup> *Hank Nuwer’s List of Deaths by Hazing*, *supra* note 13.

<sup>21</sup> *Id.*

<sup>22</sup> See *Download Data Files*, U.S. DEP’T EDUC. OFF. POSTSECONDARY EDUC., <http://ope.ed.gov/security/GetDownloadFile.aspx> (follow “Aggregated Data for calendar years 2010–12,” “Aggregated Data for calendar years 2009–11,” “Aggregated Data for calendar years 2008–10,” “Aggregated Data for calendar years 2007–09,” “Aggregated Data for calendar years 2006–08,” and “Aggregated Data for calendar years 2005–07” links) (last visited Feb. 4, 2014) (aggregating data on campus safety and security for calendar years 2005–2012). The U.S. Department of Education statistics are released annually, and each release covers the previous three years. In some cases, data from earlier years is revised in subsequent releases. Yearly data was taken from the most

Unfortunately, Nuwer's work has been taken out of context by some commentators to support the proposition that the number of hazing deaths has increased exponentially since 1970. In his book *Wrongs of Passage*, Nuwer published a chronology of deaths due to "Hazing, Fraternal Alcohol Syndrome, Pledging, Fraternity-Related Accidents, and Other Miscellaneous Occurrences," which included many deaths not related to hazing, from causes such as falls, fires, automobile accidents, sports injuries, murders, and suicides.<sup>23</sup> Like in a game of telephone, Nuwer's data has been passed from author to author, losing key context at each step. For example, Barbara Hollmann uses Nuwer's data without disclosing that it includes a large number of deaths due to accidents and other "miscellaneous occurrences" not related to pledging, hazing, or alcohol use.<sup>24</sup> Stephen Owen then cites Hollmann but also omits that the data includes alcohol-related deaths not connected to hazing or initiation.<sup>25</sup> Other authors, by citing both Nuwer and secondary sources that can be traced back to Nuwer,<sup>26</sup> create the misleading impression that extensive evidence exists for a dramatic increase in hazing deaths, thereby contributing to the crisis atmosphere that surrounds hazing.

The result of this academic echo chamber is a false consensus that the number of hazing deaths has grown exponentially in recent decades.<sup>27</sup> Moreover, due to this inflated baseline, truly outlandish claims are less likely to stand out. For example, a list compiled by Nuwer of fraternity and sorority

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recent release (i.e., data for 2010–2012 from the 2010–2012 release, data for 2009 from the 2009–2011 release, data for 2008 from the 2008–2010 release, etc.). 19.25 murders per year includes murders committed on-campus and in "non-campus" buildings. Non-campus buildings include "[a]ny building . . . owned or controlled by a student organization that is officially recognized by the institution," such as off-campus Greek houses. 34 C.F.R. § 668.46(a) (2013). If "public property"—"[a]ll public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus," *id.*—is included the annual number of murders increases to 37.5, *Download Data Files, supra*.

<sup>23</sup> NUWER, *supra* note 17, 237–80.

<sup>24</sup> See Barbara B. Hollmann, *Hazing: Hidden Campus Crime*, NEW DIRECTIONS FOR STUDENT SERVS., Fall 2002, at 11, 11 (citing NUWER, *supra* note 17, at 237–80).

<sup>25</sup> See Stephen S. Owen et al., *Hazing in Student Organizations: Prevalence, Attitudes, and Solutions*, ORACLE: RES. J. ASS'N FRATERNITY ADVISORS, Mar. 2008, at 40, 40.

<sup>26</sup> Allan & Madden, *supra* note 12, at 83–84, 90 nn.14–15 (citing Nuwer's website and Hollmann, *supra* note 24 (citing Nuwer)); Gentry Russell McCreary, *The Impact of Moral Judgment and Moral Disengagement on Hazing Attitudes and Bystander Behavior in College Males 1* (2012) (unpublished Ph.D. dissertation, University of Alabama), [http://acumen.lib.ua.edu/content/u0015/0000001/0000929/u0015\\_0000001\\_0000929.pdf](http://acumen.lib.ua.edu/content/u0015/0000001/0000929/u0015_0000001_0000929.pdf) (citing NUWER, *supra* note 17 (1999); Hollmann, *supra* note 24 (citing Nuwer)).

<sup>27</sup> See, e.g., Allan & Madden, *supra* note 12, at 84 (explaining that the number of annual deaths increased from 5.5 in the 1980s to 18 in 2000); Hollmann, *supra* note 24, at 11 (asserting that more deaths were reported between 1990 and 2001 than at all times prior to 1990).

deaths from *all causes* (including, for instance, meningitis and softball accidents) has been used to claim that there were eighty-nine hazing deaths from 2000 to 2002.<sup>28</sup> That is nearly seven times more than the thirteen hazing deaths that Nuwer actually reports for that period.<sup>29</sup>

## 2. *Statistical Surveys of Hazing Behavior*

In the past decade, researchers have responded to the need for empirical surveys of hazing behavior.<sup>30</sup> Based on a nationwide survey, researchers estimated that 79% of NCAA athletes are hazed.<sup>31</sup> In a survey of undergraduate students at Cornell, 36% of respondents reported participating in hazing activities.<sup>32</sup> In a survey of undergraduate and graduate students at a “mid-sized, southern, comprehensive university,” 67% of respondents reported being subjected to “organizational harassment” and 35% to “harm to self and others.”<sup>33</sup> In a survey of undergraduate students at fifty-three colleges and universities, 55% of respondents reported experiencing hazing behavior.<sup>34</sup>

While there is significant variation in these headline results, each study defined hazing differently, which makes it impossible to directly compare the overall hazing rates. For example, the Cornell survey adopted Cornell's

<sup>28</sup> See Shelly Campo et al., *Prevalence and Profiling: Hazing Among College Students and Points of Intervention*, 29 AM. J. HEALTH BEHAV. 137, 137 (2005) (citing Hank Nuwer, UNOFFICIAL CLEARINGHOUSE FOR HAZING AND RELATED RISKS IN THE NEWS, <http://hazing.hanknuwer.com> (visited by Campo et al. Apr. 10, 2003), available at <http://web.archive.org/web/20021211022039/http://hazing.hanknuwer.com/hazingmain.html> (accessed by searching for Nuwer's website in the Internet Archive index) (archived Dec. 11, 2002)). Campo et al. break out these supposed hazing deaths by year (listing 23 in 2000, 24 in 2001, and 42 in 2002) and cite the homepage of Nuwer's website for this data. *Id.* at 137 & 148 n.1. However, in April 2003, the only part of Nuwer's website that listed those numbers of deaths for those years was the “Deaths of Collegiate Fraternal Group Members from All Causes Since 10/11/99” page, which appears to be a list of every death of a Greek college student known to Nuwer. See Hank Nuwer, *Deaths of Collegiate Fraternal Group Members from All Causes Since 10/11/99*, UNOFFICIAL CLEARINGHOUSE FOR HAZING AND RELATED RISKS IN THE NEWS, <http://web.archive.org/web/20030414063150/http://hazing.hanknuwer.com/nonhaze.html> (updated Jan. 24, 2003) (accessed by searching for Nuwer's website in the Internet Archive index) (archived Apr. 14, 2003).

<sup>29</sup> See Hank Nuwer's *List of Deaths by Hazing*, *supra* note 13.

<sup>30</sup> See NUWER, *supra* note 17, at 223 (calling for statistical surveys of hazing prevalence).

<sup>31</sup> Nadine C. Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams*, ALFRED U. 12 (Aug. 30, 1999), [http://www.alfred.edu/sports\\_hazing/docs/hazing.pdf](http://www.alfred.edu/sports_hazing/docs/hazing.pdf). The survey was conducted by mail in 1999 ( $n = 2,207$ , response rate = 20%–30%). *Id.* at 7.

<sup>32</sup> Campo et al., *supra* note 28, at 146. The survey was conducted online in 2002 ( $n = 736$ , response rate = 37%). *Id.* at 139, 143.

<sup>33</sup> See Owen et al., *supra* note 25, at 42, 46–48. The survey was conducted online ( $n = 440$ , response rate = 4.6%). See *id.* at 42, 44.

<sup>34</sup> Allan & Madden, *supra* note 12, at 86. The survey was conducted online in two rounds in 2007 ( $n = 11,482$ , response rate unreported, completion rate for those that accessed the survey was 67% in the first round and 73% in the second). *Id.*

definition of hazing, so certain behaviors that the other surveys considered to be hazing were not counted as hazing, including being yelled at, being subject to social isolation, and being pressured to eat unwanted food.<sup>35</sup> The southern university survey, led by Stephen Owen, also measured students' attitudes on whether certain behaviors constitute hazing, so it included several items under the rubric of "organizational harassment" that reflected an expansive view of hazing and generated high response rates.<sup>36</sup>

A better way to compare the results of the different surveys is to review reports of specific behaviors. Table 1 lists each activity that, on at least two of the surveys, 10% or more of students reported experiencing, as well as activities that are especially dangerous or likely to be illegal under hazing statutes.<sup>37</sup> While there remains significant variation in the results, two patterns emerge: physical hazing is rare compared with other hazing activities, and playing drinking games is the most common hazing activity.

Asking about participation in drinking games may systematically inflate the reported prevalence of hazing because the surveys did not distinguish between students who were compelled to play drinking games and those who chose to play drinking games.<sup>38</sup> But many students play drinking games regardless of whether they are participating in a group initiation. Depending upon the study, between 47% and 64% of students reported playing drinking games in the past month.<sup>39</sup> While the popularity of drinking games among students may be a cause for concern,<sup>40</sup> it is wholly separate from the problem of collegiate

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<sup>35</sup> See Campo et al., *supra* note 28, at 140.

<sup>36</sup> See Owen et al., *supra* note 25, at 46 (listing the following percentages of students as having experienced organizational harassment: 35.7% were required to wear unusual clothing, 30.7% were addressed with unsolicited nicknames, 42.7% were blindfolded, 29.5% were deceived about initiation, and 29.8% were required to participate in lineups).

<sup>37</sup> See *infra* Part II.A (describing behavior illegal under hazing statutes). While Allan and Madden's survey asked about more than thirty types of hazing behavior, responses were only reported for behaviors that at least 5% of participants experienced. Allan & Madden, *supra* note 12, at 85, 86 tbl.1.

<sup>38</sup> Allan & Madden, *supra* note 12, at 86 tbl.1; Campo et al., *supra* note 28, at 140 tbl.1; Hoover, *supra* note 31, at 8, 10 (defining hazing as "any activity expected of someone joining a group that humiliates, degrades, abuses or endangers, regardless of the person's willingness to participate" (emphasis added) (internal quotation mark omitted)).

<sup>39</sup> See Joel Grossbard et al., *Are Drinking Games Sports? College Athlete Participation in Drinking Games and Alcohol-Related Problems*, 68 J. STUD. ON ALCOHOL & DRUGS 97, 97 (2007); Eric R. Pedersen & Joseph W. LaBrie, *Normative Misperceptions of Drinking Among College Students: A Look at the Specific Contexts of Prepartying and Drinking Games*, 69 J. STUD. ON ALCOHOL & DRUGS 406, 407 (2008).

<sup>40</sup> Grossbard et al., *supra* note 39, at 100 ("suggest[ing] drinking game participation [is] a risk factor for excessive alcohol consumption and negative consequences").

hazing, and conflating the two is an impediment to determining the true extent of hazing.

TABLE 1. COMPARISON OF HAZING SURVEY RESULTS<sup>41</sup>

Behavior	Percentage of Students Experiencing Behavior			
	NCAA	Allan & Madden	Owen et al.	Cornell
Drinking Games	35	26	n/a	17.1
Sleep Deprivation 7 (and deprivation of food or hygiene)		11	12.9	14.9
Yell/Curse/Swear At	31	10	27.8 (yelled at) 19.6 (insulted)	9.6
Embarrassing Clothing	29	6	35.7 (unusual)	n/a
Calisthenics 13 (unrelated to sport)		n/a	24.3	n/a
Social Isolation	11	12	9.4	4
Drink Non-Alcoholic Beverage	n/a	10	17	n/a
Drink Alcohol	n/a	12 (to the point of getting sick)	27.8	n/a
Require to Remain Silent	n/a	n/a	12.3	13.2
Tattoo/Pierce/Brand 28 (and head shaving)		5	4.4	0.2
Destroy or Steal Property	7	n/a	5.6	3.8
Engage in or Simulate Sex Acts	6	6 (opposite sex)	1.5 (same sex) 3.5 (opposite sex) 2.3 (with object)	1.9
Restrain or Confine in Small Space	5	n/a	11.7	2.9
Physical Assault	3	n/a	7.0 (hit/kicked/slapped) 11.1 (paddled)	0.8
Kidnapping or Abandonment	3	6 (exposure to elements)	18.1 (unplanned trip)	5.4
Consume Unwanted Food	6	n/a	17.5 (unusual food)	4.9

### B. What Drives Hazing?

It is a mistake to write off hazing as senseless, incomprehensible, or an act of damaged individuals.<sup>42</sup> Hazing is a purposeful activity, full of meaning for the participants. Only by understanding and addressing the motivations for hazing is it possible to craft an approach that will successfully reduce the damage caused by hazing.

<sup>41</sup> Allan & Madden, *supra* note 12, at 86 tbl.1; Campo et al., *supra* note 28, at 140 tbl.1 (Cornell); Owen et al., *supra* note 25, at 46 tbl.1; Hoover, *supra* note 31, at 9–10 (NCAA).

<sup>42</sup> See Stephen Sweet, *Understanding Fraternity Hazing*, in THE HAZING READER, *supra* note 16, at 1, 1 (“[H]azing is not illogical, beyond reason, or the product of immaturity.”).

Individuals who participate in hazing claim it is beneficial in several ways. Hazing, it is asserted, creates deep and long-lasting bonds among those who endure it, instills the values of the group in new members, builds character, demonstrates commitment to the group, forges a connection with all members who had previously endured the experience, and inspires the respect of one's peers.<sup>43</sup>

Political scientist Ricky Jones has made the necessary connection between hazing and ritualism.<sup>44</sup> Initiation rituals have played an important role in human culture for millennia.<sup>45</sup> The allure of ritualism is evident from the popularity of secret societies in the eighteenth and nineteenth centuries and in present-day collegiate Greek organizations.<sup>46</sup> Historian Ray Raphael explored this allure in his work on male rites of passage in America:

The salient feature of primitive initiations, and the reason they continue to hold such appeal, is simply this: *They work*. An individual who goes through an initiation comes out the other side with a heightened feeling of self-worth, for his manly status has been affirmed both to himself and to the group. His individual confirmation goes hand-in-hand with social recognition: he sees himself as a man, the group treats him as a man, and this public support reinforces a personal sense of his own manliness. As obvious as this might seem, it is no small matter.<sup>47</sup>

Initiation rituals are designed to remake a stranger into a member by instilling the values of the organization, creating a point of commonality among

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<sup>43</sup> See Dwayne J. Scott, *Factors That Contribute to Hazing Practices by Collegiate Black Greek-Letter Fraternities During Membership Intake Activities*, in BLACK GREEK-LETTER ORGANIZATIONS 2.0: NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES 235, 238–45 (Matthew W. Hughey & Gregory S. Parks eds., 2011); see also Campo et al., *supra* note 28, at 144–45 & tbl.6 (finding that participation in hazing was positively correlated with the belief that hazing is fun and increases group cohesion); Hoover, *supra* note 31, at 13 (reporting that athletes acknowledged hazing is “part of team chemistry” and “tradition” (internal quotation marks omitted)).

<sup>44</sup> Ricky L. Jones, *The Historical Significance of Sacrificial Ritual: Understanding Violence in the Modern Black Fraternity Pledge Process*, 24 W.J. BLACK STUD. 112, 118 (2000).

<sup>45</sup> *Id.* at 113–15.

<sup>46</sup> *Id.* at 115–17. See generally Bobby Lawrence McMinn, A Content Analysis of the Esoteric Ritual Manuals of National College Social Fraternities for Men (Aug. 1979) (unpublished Ph.D. dissertation, University of Mississippi) (on file with University Microfilms International) (comparing the initiation rituals of twenty-two fraternities).

<sup>47</sup> RAY RAPHAEL, THE MEN FROM THE BOYS: RITES OF PASSAGE IN MALE AMERICA 12–13 (1988), quoted in Darryll M. Holcomb Lewis, *The Criminalization of Fraternity, Non-fraternity and Non-collegiate Hazing*, 61 MISS. L.J. 111, 112 n.7 (1991).

members, and most importantly, by creating a symbolic ordeal that the initiate will overcome and thereby prove his worth as a new member.<sup>48</sup>

“Modern hazing,” as Jones cogently explains it, “is the phenomenon of members taking tests out of the realm of symbolism and catapulting them into reality. Instead of the initiate being *threatened* with torture to prove his fraternal worth and manliness, he is actually tortured.”<sup>49</sup> It is important to realize that this phenomenon is not limited to organizations with formal rituals, like fraternities and sororities, but applies to groups with no ritualistic underpinning, such as athletic teams or the military.<sup>50</sup>

The idea of enduring a contrived physical ordeal in order to prove dedication to a cause should not seem foreign to anyone who has raised money for charity by running a 5K. The physical activity usually has little or no connection to the beneficiary. However, donors treat the physical commitment as a proxy for the fundraiser's personal dedication to the cause, just as the new members' willingness to endure hazing is a sign of their dedication to the group.

### C. *One Institutional Response to Hazing*

While all national Greek organizations have adopted anti-hazing policies,<sup>51</sup> the National Pan-Hellenic Council (NPHC), the umbrella group for black Greek-letter organizations (BGLOs),<sup>52</sup> has gone further than any other institution in attempting to eradicate hazing. NPHC's experience illustrates the dangers of overbroad responses to hazing, especially when student perspectives are not taken into account.

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<sup>48</sup> See Jones, *supra* note 44, at 113, 116–18; see also RAPHAEL, *supra* note 47, at 13 (noting that these ordeals are designed to be passed: “there are virtually no first-hand reports of individuals who have actually failed the initiation ritual required by their society”).

<sup>49</sup> Jones, *supra* note 44, at 118.

<sup>50</sup> See, e.g., Donna Winslow, *Rites of Passage and Group Bonding in the Canadian Airborne*, in THE HAZING READER, *supra* note 16, at 147, 158–60 (discussing the striking similarities between hazing practices in the Canadian Airborne Regiment and primitive initiation rituals).

<sup>51</sup> See William A. Bryan, *Contemporary Fraternity and Sorority Issues*, NEW DIRECTIONS FOR STUDENT SERVS., Winter 1987, at 37, 45.

<sup>52</sup> While historically, and still predominantly, African-American, there have been non-black members of BGLOs since at least 1946. See Matthew W. Hughey, “*I Did It for the Brotherhood*”: *Nonblack Members in Black Greek-Letter Organizations*, in BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY: OUR FIGHT HAS JUST BEGUN 313, 315 (Gregory S. Parks ed., 2008).

Pledging, or being “on line,” was traditionally a key component of the BGLO experience.<sup>53</sup> Pledge classes, or lines, would eat together, study together, dress alike, and walk together around campus, singing and “stepping” as they did so.<sup>54</sup> The pledge process was a highly visible part of campus culture, although some activities were conducted in private,<sup>55</sup> such as physical hazing, usually by paddling.<sup>56</sup>

In 1990, to combat hazing, NPHC officials decided to eliminate the entire pledge process.<sup>57</sup> In its place, new members are now inducted through the Membership Intake Program: a highly truncated process consisting of an interest meeting, a written application, an initiation ceremony, and several voluntary educational sessions.<sup>58</sup>

The decision to eliminate pledging was extremely controversial. A 1992 study found that more than three quarters of undergraduate members believed “the no-pledge policy would have a negative impact on maintaining the history and traditions of their organizations” and new members “would not experience a strong bonding with each other.”<sup>59</sup> Additionally, a majority of respondents felt they were not given an opportunity to provide input before the change in policy.<sup>60</sup>

More than two decades later, hazing injuries and deaths in BGLOs have continued unabated,<sup>61</sup> as the traditional pledging process has simply moved underground.<sup>62</sup> Following a high-profile hazing death, Jason DeSousa,

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<sup>53</sup> Jerryl Briggs, *The Continuing Presence of Hazing During the Fraternity Membership Intake Process Post 1990*, in *AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION* 477, 482, 484 (Tamara L. Brown et al. eds., 2d ed. 2012).

<sup>54</sup> *Id.* at 484. “Stepping is a percussive form of marching and dancing . . . practiced by all the NPHC organizations . . .” *Id.* at 484 n.40.

<sup>55</sup> *Id.* at 482–85.

<sup>56</sup> See *Pledging a Brother, Not Intaking a “Paper Brother,”* *BLACK ISSUES HIGHER EDUC.*, June 12, 1997, at 26.

<sup>57</sup> Briggs, *supra* note 53, at 479.

<sup>58</sup> RICKY L. JONES, *BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES* 74 (2004).

<sup>59</sup> John A. Williams, Sr., *Perceptions of the No-Pledge Policy for New Member Intake by Undergraduate Members of Predominantly Black Fraternities and Sororities* 98 (1992) (unpublished Ph.D. dissertation, Kansas State University) (on file with University Microfilms International).

<sup>60</sup> *Id.* at 71.

<sup>61</sup> Jones, *supra* note 44, at 112, 122 (describing hazing deaths since 1990).

<sup>62</sup> See WALTER M. KIMBROUGH, *BLACK GREEK 101: THE CULTURE, CUSTOMS, AND CHALLENGES OF BLACK FRATERNITIES AND SORORITIES* 81–83 (2003) (reporting a 1999 study ( $n = 185$ ) in which a majority of BGLO members admitted to participating in an illegal pledge program); *Pledging a Brother, Not Intaking a “Paper Brother,”* *supra* note 56 (providing a first-person account of underground pledging).

Assistant Vice-President for Student Affairs at Alabama State University and a member of an NPHC fraternity, expressed a widely held view: “Member[ship] Intake Process has been a failure. We just didn’t get enough students to buy into the new process at the chapter level. As a result, hazing has been driven underground where it becomes even more dangerous.”<sup>63</sup> Unfortunately, state criminal hazing laws, examined below in Part II, share many characteristics with the NPHC’s failed policy. They are generally broad prohibitions that have been imposed upon students without engaging with the traditions and values of student groups.

## II. CURRENT CRIMINAL HAZING LAWS

Legal efforts to prevent collegiate hazing date back more than 650 years to rules developed by European universities.<sup>64</sup> For example, in 1340, the University of Paris prohibited taking money from freshmen and required all members of the university community to report hazing.<sup>65</sup> While reports of hazing in North America date back to at least 1684 when a student at Harvard was suspended for “hitting first-year students and for requiring them to perform acts of servitude,”<sup>66</sup> there was no legislative response until 1874 when, reacting to the problem of “plebe bedevilment,” Congress passed a law forbidding hazing at the U.S. Naval Academy.<sup>67</sup> New York enacted the first state hazing law in 1894.<sup>68</sup> Over the next century, half of the states passed hazing laws.<sup>69</sup> The rate of adoption has increased since 1990, and today there are hazing statutes in forty-four states.<sup>70</sup>

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<sup>63</sup> Paul Ruffins, *Fratricide: Are African American Fraternities Beating Themselves to Death?* BLACK ISSUES HIGHER EDUC., June 12, 1997, at 18; *see also* Jones, *supra* note 44, at 122 (describing the “failure of the Membership Intake Program”).

<sup>64</sup> NUWER, *supra* note 17, at 97.

<sup>65</sup> *See* Decretum Universitatis Parisiensis super correctione detractorum bejaunorum [A Decree of the University of Paris Forbidding the Hazing of Freshmen] (Feb. 8, 1340), in 2 CHARTULARIUM UNIVERSITATIS PARIENSIS 494, 496 (Henricus Denifle & Aemilio Chatelain eds., Paris 1891), *translated in* Lynn Thorndike, *University Records and Life in the Middle Ages 192–93* (1944).

<sup>66</sup> NUWER, *supra* note 17, at 100.

<sup>67</sup> Lewis, *supra* note 47, at 117 (internal quotation marks omitted); *accord* Naval Acad.—Hazing, 18 OP. ATT’Y GEN. 292, 293 (1885) (noting that, prior to 1874, “the offense [of hazing was] unknown either to the common or statutory law of the land”); *see also* Act of June 23, 1874, ch. 453, 18 Stat. 203.

<sup>68</sup> *McKenzie v. State*, 748 A.2d 67, 70 n.3 (Md. Ct. Spec. App. 2000); *see also* Act of Apr. 4, 1894, ch. 265, § 1, 1894 N.Y. Laws 482.

<sup>69</sup> Lewis, *supra* note 47, at 120.

<sup>70</sup> *See infra* note 72 and Statutory Appendix. Federal law prohibits hazing at each of the three armed forces service academies. 10 U.S.C. § 4352 (2012) (Army); *id.* §§ 6964, 6965 (Navy and penalizing the failure to report hazing violations); *id.* § 9352 (Air Force).

Despite the ubiquity of hazing legislation, there is no model hazing law. Much as student groups “have never suffered for ideas in contriving new forms of hazing,”<sup>71</sup> state legislatures also have displayed remarkable creativity in crafting hazing laws. While five states have enacted hazing laws that merely require certain schools to implement hazing policies,<sup>72</sup> the other thirty-nine states with hazing laws have adopted criminal penalties for certain acts of hazing.<sup>73</sup>

Under most of these laws, the crime of hazing has three elements: (1) a specified type of harm, (2) that is connected to certain organizations or perpetrated against a certain class of individuals (usually students), and (3) that is perpetrated in certain contexts related to membership in the organization.<sup>74</sup> States vary with respect to three other aspects of their hazing laws: (1) the severity of the sanction imposed for the crime of hazing, (2) whether the statute bars the defense that the victim consented to be hazed, and (3) whether there are criminal penalties for the failure to report hazing.<sup>75</sup> The three common elements and the three points of divergence are examined below.

#### A. *The Element of Harm*

States prohibit behavior ranging from juvenile undertakings, like the “[a]ssignment of pranks to be performed by [a] person”<sup>76</sup> or “[t]he playing of abusive or truculent tricks . . . upon another student to frighten or scare him,”<sup>77</sup> to acts of lethal violence.<sup>78</sup> Each criminal hazing statute requires an actual injury, the creation of a defined risk, or the performance of an enumerated act. All states punish the infliction of physical harm.<sup>79</sup> Eighteen states additionally

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<sup>71</sup> *Lenti I*, 253 N.Y.S.2d 9, 13 (Nassau Cnty. Ct. 1964).

<sup>72</sup> ARIZ. REV. STAT. ANN. § 15-2301 (2009) (public schools, both K–12 and post-secondary); KY. REV. STAT. ANN. § 164.375 (West 2006) (University of Kentucky and University of Louisville); ME. REV. STAT. ANN. tit. 20-A, §§ 6553, 10004 (2008) (all post-secondary schools and public K–12 schools); MINN. STAT. ANN. §§ 121A.69, 135A.155 (West 2008) (public K–12 schools and the Minnesota State Colleges and Universities; University of Minnesota is “requested” to comply); TENN. CODE ANN. §§ 49-2-120, -7-123 (2013) (all post-secondary schools and public K–12 schools).

<sup>73</sup> See *infra* Statutory Appendix. Although three of these states define hazing as a violation and not a crime, their hazing laws are otherwise similar to those in states where hazing is a crime.

<sup>74</sup> See *infra* Statutory Appendix.

<sup>75</sup> See *infra* Statutory Appendix.

<sup>76</sup> IDAHO CODE ANN. § 18-917(2)(i) (West 2006).

<sup>77</sup> ARK. CODE ANN. § 6-5-201(a)(2) (West Supp. 2012).

<sup>78</sup> See, e.g., WIS. STAT. ANN. § 948.51(3)(c) (West 2005) (punishing those who commit acts that “result[] in the death of another”).

<sup>79</sup> See *infra* Statutory Appendix.

punish the infliction of mental or psychological harm.<sup>80</sup> Seven states also punish the destruction of property<sup>81</sup> or directing of another person to commit a crime.<sup>82</sup>

Only four states require an actual injury to satisfy the harm element.<sup>83</sup> However, in thirteen states where injury is not a required element, it is an aggravating factor that may increase the penalty for hazing.<sup>84</sup> Where actual injury is not required, the harm element is satisfied by the creation of a certain risk or the performance of an enumerated act.<sup>85</sup> Most states define the criminal degree of risk as endangering the physical (or, under statutes that target psychological harm, mental) health or safety of an individual.<sup>86</sup> Some states require a greater likelihood of injury or a risk of more serious injury in order for criminal liability to attach. For example, New York's statute refers to "a *substantial* risk of physical injury,"<sup>87</sup> Maryland's statute refers to a "risk of *serious* bodily injury,"<sup>88</sup> and Kansas's statute refers to "any act which could reasonably be expected to result in *great* bodily harm, disfigurement or death."<sup>89</sup> In practice, the degree of risk created by a given activity is highly fact specific.<sup>90</sup>

In twenty-one states, the harm element is satisfied by the performance of specifically enumerated acts or the creation of certain situations.<sup>91</sup> Oregon's

<sup>80</sup> See *infra* Statutory Appendix.

<sup>81</sup> DEL. CODE ANN. tit. 14, § 302 (West 2011); 24 PA. CONS. STAT. ANN. § 5352 (West 2006); W. VA. CODE ANN. § 18-16-2 (West 2002).

<sup>82</sup> MICH. COMP. LAWS ANN. § 750.411t(7)(b)(iv) (West 2004); MO. ANN. STAT. § 578.360(2)(c) (West 2011); OR. REV. STAT. ANN. § 163.197(4)(a)(D) (West Supp. 2013); TEX. EDUC. CODE ANN. § 37.151(6)(E) (West 2012).

<sup>83</sup> See *infra* Statutory Appendix.

<sup>84</sup> See *infra* Statutory Appendix.

<sup>85</sup> See *infra* Statutory Appendix.

<sup>86</sup> See, e.g., R.I. GEN. LAWS ANN. § 11-21-1(b) (West 2006) ("Hazing" as used in this chapter, means any conduct or method of initiation into any student organization . . . which willfully or recklessly endangers the physical or mental health of any student or other person.')

<sup>87</sup> N.Y. PENAL LAW §§ 120.16–17 (McKinney 2009) (emphasis added); see also IND. CODE ANN. § 35-42-2-2(a)(2) (West 2012) (defining hazing as "forcing or requiring another person . . . to perform an act that creates a substantial risk of bodily injury"). Indiana's hazing law was enacted as an amendment to its criminal recklessness statute. Act of Apr. 27, 1987, Pub. L. No. 323-1987, 1987 Ind. Acts 3029.

<sup>88</sup> MD. CODE ANN., CRIM. LAW § 3-607 (West Supp. 2013) (emphasis added).

<sup>89</sup> KAN. STAT. ANN. § 21-5418 (West 2012) (emphasis added).

<sup>90</sup> See *Yost v. Wabash Coll.*, 976 N.E.2d 724, 734 (Ind. Ct. App. 2012) ("[C]ommon sense tells us that there is a substantial *risk* of bodily injury whenever a person is thrown into a potentially slick shower or a rocky creek.'). *vacated*, No. 54S01-1303-CT-161, 2014 WL 575955 (Ind. Feb. 13, 2014).

<sup>91</sup> See *infra* Statutory Appendix.

statute is representative of statutes focused on physical harm.<sup>92</sup> It describes three general categories of physical hazing: violence, stress, and forced consumption.<sup>93</sup> The examples given are

(A) To subject an individual to whipping, beating, striking, branding or electronic shocking, to place a harmful substance on an individual's body . . .

(B) To subject an individual to sleep deprivation, exposure to the elements, confinement in a small space . . . [and]

(C) To compel an individual to consume food, liquid, alcohol, controlled substances or other substances that [risk endangering] the individual . . . .<sup>94</sup>

Some states, like Oklahoma, whose statutes encompass mental harm, also enumerate mentally injurious actions:

“Endanger the mental health” shall include any activity . . . which would subject the individual to extreme mental stress, such as prolonged sleep deprivation, forced prolonged exclusion from social contact, forced conduct which could result in extreme embarrassment, or any other forced activity which could adversely affect the mental health or dignity of the individual.<sup>95</sup>

Addressing mental harm is one of the most significant ways in which some state hazing laws differ in scope from general criminal laws.<sup>96</sup> Recently, however, several states that had protected against mental harm amended their hazing statutes to only cover physical harm.<sup>97</sup>

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<sup>92</sup> See OR. REV. STAT. ANN. § 163.197 (West Supp. 2013).

<sup>93</sup> See *id.* § 163.197(4)(a)(A)–(C).

<sup>94</sup> *Id.*

<sup>95</sup> OKLA. STAT. tit. 21, § 1190(F)(3) (2011). Arkansas goes further than any other state in protecting against mental harm. Its statute prohibits discouraging a student from remaining in school as well as any act “done for the purpose of humbling the pride, stifling the ambition, or impairing the courage of the student attacked.” ARK. CODE ANN. § 6-5-201(a)(3) (West Supp. 2012).

<sup>96</sup> See *infra* Part III.A, B.1.

<sup>97</sup> Act of July 4, 2003, No. 299, sec. 1, 2003 N.C. Sess. Laws 838 (codified as amended at N.C. GEN. STAT. § 14-35 (2013)) (removing from the definition of hazing “to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity”); David Villalba, Review of Selected 2007 California Legislation, *Matt’s Law: Chapter 601 Targets the Epidemic of Hazing in California Educational Institutions*, 38 MCGEORGE L. REV. 94, 104–05 (2007); see also Chad Meredith Act, ch. 2005-146, sec. 3, 2005 Fla. Laws 1329–30 (codified as amended at FLA. STAT. ANN. § 1006.63 (West 2013)) (amending existing statute that provided educational penalties for physical and mental hazing to add criminal penalties but only for physical hazing).

### B. *Types of Organizations and Individuals Subject to Liability*

All hazing statutes require the action to be connected to a specific group.<sup>98</sup> Simply being a member of the student body is not enough,<sup>99</sup> despite the historical prevalence of hazing based on class year instead of group membership.<sup>100</sup> Only eight states' statutes do not require any educational connection and so apply to groups such as the Freemasons and adult bowling leagues.<sup>101</sup> All other hazing statutes are limited in application to student groups or to actions taken against students.<sup>102</sup> Seven states limit their hazing laws to colleges and universities, while twenty-four states apply hazing laws to all schools (or at least high schools in addition to colleges and universities).<sup>103</sup> In six states, the hazing statute only applies to groups "operating under the sanction of" a school.<sup>104</sup> Under most statutes that are limited to the school context, nonstudents may still be prosecuted if they take part in hazing a student.<sup>105</sup> However, some statutes require that a nonstudent defendant have a connection to the student group or school, such as by being an alumnus, advisor, or school employee.<sup>106</sup>

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<sup>98</sup> See *infra* Statutory Appendix.

<sup>99</sup> See *Dutch v. Canton City Sch.*, 157 Ohio App. 3d 80, 2004-Ohio-2173, 809 N.E.2d 62, at ¶ 31 ("The concept of a student organization, in this context, does not mean simply attending a given high school and therefore being a member of the student body.").

<sup>100</sup> See NUWER, *supra* note 17, at 100–11.

<sup>101</sup> See *infra* Statutory Appendix; see also Op. Kan. Att'y Gen. No. 86-106 (July 18, 1986), available at <http://ksag.washburnlaw.edu/opinions/1986/1986-106.pdf> (opining that the Kansas statute is applicable to nonstudent fraternal groups such as the Shrine and Elks Lodge), summarized in 5 Kan. Reg. 1086 (July 31, 1986).

<sup>102</sup> See *infra* Statutory Appendix.

<sup>103</sup> See *infra* Statutory Appendix.

<sup>104</sup> See DEL. CODE ANN. tit. 14, § 9302 (West 2011); FLA. STAT. ANN. § 1006.63(1) (West 2013); MO. ANN. STAT. § 578.360(2) (West 2011); NEB. REV. STAT. ANN. § 28-311.06(1)(b) (West 2009); 24 PA. CONS. STAT. ANN. § 5352 (West 2006); W. VA. CODE ANN. § 18-16-2(a) (West 2002). The reasoning behind exempting unauthorized groups from hazing laws is elusive. See NUWER, *supra* note 17, at 241, 244, 246–47, 262, 267, for examples of deaths connected to unrecognized groups. In contrast, California explicitly covers any "student organization or student body, whether or not [it] is officially recognized by an educational institution." CAL. PENAL CODE § 245.6(b) (West Supp. 2013).

<sup>105</sup> See, e.g., COLO. REV. STAT. ANN. § 18-9-124 (West 2013) (applying to any person). *But see, e.g.,* N.C. GEN. STAT. § 14-35 (2013) (applying only to students); WASH. REV. CODE ANN. § 28B.10.901 (West 2009) (only students may be prosecuted). Under the Arkansas and Vermont statutes, only a student can initiate hazing, but any person can be guilty of hazing by permitting, aiding, or encouraging hazing by a student. ARK. CODE ANN. § 6-5-202 (West Supp. 2012); VT. STAT. ANN. tit. 16, § 140b (West 2007) (redesignated as VT. STAT. ANN. tit. 16, § 570j in February 2014).

<sup>106</sup> IDAHO CODE ANN. § 18-917 (West 2006) (any organization member may be prosecuted); MICH. COMP. LAWS ANN. § 750.411t (West Supp. 2012) (only students and school employees and volunteers may be prosecuted).

### C. *Applicable Context*

Hazing statutes also require the action to take place in a certain context. Hazing is a purposeful activity,<sup>107</sup> and bullying or violence that is not related to an individual's status within a group generally falls outside the scope of hazing statutes.<sup>108</sup> Only five states' statutes are written so broadly as to encompass any activity connected with a group.<sup>109</sup> All other statutes are limited to certain contexts, such as initiation or situations endured as a condition of continued membership.

The primary distinction is whether a statute applies only to actions taken against individuals in the process of joining an organization or whether it also applies to actions taken against individuals who are already full members of an organization. About half of the states fall into each category.<sup>110</sup>

States also differ on whether hazing laws apply only to actions that are *conditions* of becoming or remaining a member, or more broadly to activities that, while not mandatory, are for the purpose of or connected to becoming or remaining a member.<sup>111</sup> For example, Indiana's statute only applies to acts that are "condition[s] of association,"<sup>112</sup> so the Indiana Court of Appeals found it was not applicable to injuries sustained by a fraternity pledge during horseplay that was not part of mandatory "pledge training" and did not affect his standing

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<sup>107</sup> See *supra* Part I.B.

<sup>108</sup> See *Golden v. Milford Exempted Vill. Sch. Dist. Bd. of Educ.*, No. CA2010-11-092, 2011-Ohio-5355, 2011 WL 4916588, at ¶¶ 23–28 (Ohio Ct. App. Oct. 17, 2011) (holding hazing statutes to be inapplicable because acts "were not designed to initiate the boys into the basketball team, or any other student organization, but instead were habitual acts of aggression toward other boys marked by [one player]'s abusive behavior").

<sup>109</sup> See *infra* Statutory Appendix.

<sup>110</sup> See *infra* Statutory Appendix. This Comment interprets the terms "initiation," "induction," "pledging," "admission," "affiliation," and "membership" as referring to becoming a member, and "maintaining membership" and "continued membership" as referring to remaining a member. "Affiliation" and "membership" are particularly ambiguous. However, "affiliation" is often used together with the unambiguous terms "initiation" and "admission" and set off from similarly unambiguous terms such as "continued membership." See, e.g., DEL. CODE ANN. tit. 14, § 9302 (West 2011) (defining hazing as an action "for the purpose of initiation or admission into or affiliation with, or as a condition for continued membership"). Moreover, "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). However, at least one case has been brought under New York's "initiation or affiliation" statute for the hazing of a fully initiated member, but the defendants were acquitted, rendering the statutory interpretation question moot. See *Kaminer*, *supra* note 5. See generally N.Y. PENAL LAW § 120.16 (McKinney 2009).

<sup>111</sup> See *infra* Statutory Appendix.

<sup>112</sup> IND. CODE ANN. § 35-42-2-2(a)(2) (West 2012).

in the fraternity.<sup>113</sup> Commentators have questioned whether statutes that only apply to the process of joining a group are applicable to varsity athletics because adult coaches, not players, control membership, so hazing is generally perpetrated against students who have already attained full membership on the team.<sup>114</sup>

Some states apply the “purpose” standard to one category of acts (most often joining a group) and the “condition” standard to another (most often continued membership).<sup>115</sup> For example, Connecticut’s statute covers acts done “for the *purpose* of initiation, admission into or affiliation with, or as a *condition* for continued membership in a student organization.”<sup>116</sup> A few states’ statutes also apply to the context of obtaining an office or, broadly and vaguely, any “status” in an organization.<sup>117</sup>

#### D. Severity of Offense

In twenty-five states, hazing is a misdemeanor.<sup>118</sup> In ten states, depending on the severity of the act and the resulting harm, hazing is either a misdemeanor or a felony.<sup>119</sup> In three states, it is a noncriminal violation punishable by a fine.<sup>120</sup> New York is unique; under its law, hazing is either a violation or a misdemeanor, depending on whether there is an injury.<sup>121</sup>

#### E. Consent Not Available as a Defense

Twenty states’ statutes explicitly bar the defense that the victim consented to being hazed.<sup>122</sup> Four other states’ statutes provide that any action that is a condition of membership is considered nonconsensual.<sup>123</sup> However, even

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<sup>113</sup> See *Yost v. Wabash Coll.*, 976 N.E.2d 724, 734–35 (Ind. Ct. App. 2012), *vacated*, No. 54S01-1303-CT-161, 2014 WL 575955 (Ind. Feb. 13, 2014). The Indiana Supreme Court did not address the question of what activities the statute applies to. *Yost*, 2014 WL 575955.

<sup>114</sup> See Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 *CARDOZO L. REV.* 1421, 1441–42 (2003).

<sup>115</sup> See *infra* Statutory Appendix.

<sup>116</sup> CONN. GEN. STAT. ANN. § 53-23a(a)(1) (West 2012) (emphasis added).

<sup>117</sup> See *infra* Statutory Appendix.

<sup>118</sup> See *infra* Statutory Appendix.

<sup>119</sup> See *infra* Statutory Appendix.

<sup>120</sup> See *infra* Statutory Appendix.

<sup>121</sup> See N.Y. PENAL LAW §§ 120.16–.17 (McKinney 2009).

<sup>122</sup> See *infra* Statutory Appendix.

<sup>123</sup> See *infra* Statutory Appendix.

without specific statutory language, some courts have rejected consent as a defense.<sup>124</sup>

### F. Criminal Liability for Failing to Report Hazing

One of the challenges of prosecuting hazing violations is that hazing is conducted in secret.<sup>125</sup> Organizations quickly close ranks during investigations,<sup>126</sup> and neither the perpetrators nor the victims are likely to cooperate with authorities. To pierce this veil of secrecy, five states have made the failure to report hazing a crime.<sup>127</sup> The type of knowledge that triggers the reporting requirement varies among statutes, with the three standards being (1) “direct” or “firsthand” knowledge,<sup>128</sup> (2) *any* knowledge of specific incidents of criminal hazing,<sup>129</sup> and (3) “any reasonable information” about “the presence and practice of hazing in [the particular] state.”<sup>130</sup> In New Hampshire, criminal liability for failing to report hazing even extends to victims of hazing.<sup>131</sup> A student who does not report being hazed and the student who hazed him have each committed a class B misdemeanor.<sup>132</sup>

## III. THE CASE AGAINST CURRENT CRIMINAL HAZING LAWS

Despite this panoply of hazing laws, collegiate hazing in the United States continues unabated.<sup>133</sup> This Part lays out the case against the current system of criminal hazing laws. Section A argues that the supposed benefits of specialized hazing laws compared to generally applicable criminal laws are illusory. Section B notes that the rare cases in which hazing laws provide a

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<sup>124</sup> *In re Khalil H.*, 910 N.Y.S.2d 553, 558–59 (App. Div. 2010); *State v. Brown*, 630 N.E.2d 397, 404 (Ohio Ct. App. 1993). *But see Ex parte Barran*, 730 So. 2d 203, 206–08 (Ala. 1998) (finding in a civil case that a fraternity pledge knowingly and voluntarily assumed the risk of the hazing and was therefore barred from recovery).

<sup>125</sup> See Iverson & Allan, *supra* note 16, at 253; Hoover, *supra* note 31, at 15.

<sup>126</sup> See, e.g., Michael Winerip, *The Hazing*, N.Y. TIMES, Apr. 15, 2012, at ED24 (“Within hours of the death, according to the police, Mr. Mann ‘informed us that he had received a text from the Fraternity, that the Fraternity had retained a lawyer and that no one should talk to the police without counsel.’”).

<sup>127</sup> See *infra* Statutory Appendix. In Massachusetts, failure to report hazing is a noncriminal violation, punishable by a fine of up to \$1,000. MASS. GEN. LAWS ANN. ch. 269, § 18 (West 2008).

<sup>128</sup> MASS. GEN. LAWS ANN. ch. 269, § 18 (requiring “[w]hoever . . . is at the scene of such crime” to report it); N.H. REV. STAT. ANN. § 631:7(II)(a)(2)–(3) (2007); TEX. EDUC. CODE ANN. § 37.152(a)(4) (West 2012) (including “firsthand knowledge of the planning of a specific hazing incident”).

<sup>129</sup> S.C. CODE ANN. § 16-3-520 (2003).

<sup>130</sup> ALA. CODE § 16-1-23(c) (2012); ARK. CODE ANN. § 6-5-202(b)(1) (West Supp. 2012).

<sup>131</sup> N.H. REV. STAT. ANN. § 631:7(II)(a)(2).

<sup>132</sup> *Id.* § 631:7(II)(a).

<sup>133</sup> See *supra* Part I.A.

benefit over general criminal statutes are the very cases in which hazing laws are most vulnerable to legal challenge. Section C explores policy considerations that lawmakers have overlooked when enacting hazing prohibitions, which cast doubt on the effectiveness of the current criminal law approach to the problem of collegiate hazing.

*A. General Criminal Statutes Already Address Injurious Hazing*

General criminal laws are already available to punish injurious hazing. Dangerous hazing activities have always been illegal. Assault is a crime. Providing alcohol to minors or forcing the consumption of alcohol is a crime. Manslaughter is a crime. False imprisonment, kidnapping, reckless endangerment, and instructing others to steal or vandalize property are all crimes. In the quest to build a better hazing law, there has been little discussion about why specialized criminal hazing statutes are necessary at all.

When hazing laws have been justified, two contradictory arguments have been made. The first is that, similar to hate crime laws, crimes committed for the purpose of hazing deserve special condemnation.<sup>134</sup> In other words, hazing laws may change punishment or procedure, but they do not create new classes of illegal actions.<sup>135</sup> The second justification is that hazing laws do, in fact, address harmful conduct that is not already prohibited by criminal statutes.<sup>136</sup> Secondary benefits of specialized hazing laws purportedly include the removal of procedural hurdles that have impeded prosecuting hazing injuries and increased awareness of the dangers of hazing.<sup>137</sup> However, these claimed advantages do not withstand careful analysis.

Consider first the rationale that hazing laws further condemn already illegal actions. One Maryland court was forthright in describing the limited nature of that state's hazing statute:

[T]he statute reaches only conduct that is already proscribed under other Maryland criminal statutes. In fact, its real effect is to bar a narrow band of actors from using the defense of consent for such criminal conduct. . . .

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<sup>134</sup> See *McKenzie v. State*, 748 A.2d 67, 78 (Md. Ct. Spec. App. 2000) (comparing hazing statute to hate crime laws).

<sup>135</sup> See *id.* at 72.

<sup>136</sup> See *infra* notes 150–51 and accompanying text.

<sup>137</sup> Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey's Anti-hazing Act*, 26 QUINNIPIAC L. REV. 305, 331–35 (2008) (arguing that one benefit of revising New Jersey's hazing statute would be increased attention to the problem of hazing).

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Our anti-hazing statute . . . functions more like hate crime[] statutes[] . . . to deter *even further* conduct that is *otherwise* prohibited . . . .<sup>138</sup>

Despite the rhetorical comparison to hate crime laws, the analogy is not appropriate. Unlike conviction for a hate crime violation, conviction under the Maryland hazing statute results in a *lesser* penalty than if the same conduct were prosecuted under a generally applicable criminal law. In Maryland, hazing and reckless endangerment both entail recklessly creating a risk of serious physical injury.<sup>139</sup> However, the maximum penalty for reckless endangerment is five years imprisonment and a \$5,000 fine,<sup>140</sup> while the maximum penalty for hazing is only six months imprisonment and a \$500 fine.<sup>141</sup> In addition, securing a hazing conviction is more difficult because it requires proving two additional elements: (1) the victim was a student and (2) the victim was exposed to the risk of serious bodily injury “for the purpose of initiation into a student organization.”<sup>142</sup>

Continuing to examine the Maryland hazing law, it is apparent that the “no-consent” provision<sup>143</sup> is unlikely to have much practical effect. Maryland’s criminal law prohibits invoking the consent of the victim as a defense for conduct that threatens serious injury or breach of the peace because such conduct is “treated as a crime against the public generally.”<sup>144</sup> So compared to reckless endangerment, hazing carries a lesser penalty, is more difficult to prosecute, is no broader in scope, and possesses a consent provision of little practical value.

Maryland is not unique in this regard. Hazing statutes often carry a lower punishment than generally applicable criminal laws and, as examined in Part II, require proving additional elements unique to the crime of hazing. Moreover, Maryland’s position on consent—that consent is only a defense

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<sup>138</sup> *McKenzie*, 748 A.2d at 72, 78 (first emphasis added) (citations omitted); *see also* MD. CODE ANN., CRIM. LAW § 3-607 (West Supp. 2013).

<sup>139</sup> Compare CRIM. LAW § 3-607(a) (hazing), with *id.* § 3-204(a)(1) (reckless endangerment). The hazing statute uses the analogous term “serious bodily injury.” *McKenzie*, 748 A.2d at 76 (internal quotation marks omitted).

<sup>140</sup> CRIM. LAW § 3-204(b).

<sup>141</sup> *Id.* § 3-607(b).

<sup>142</sup> *Id.* § 3-607(a).

<sup>143</sup> *Id.* § 3-607(c).

<sup>144</sup> *Taylor v. State*, 133 A.2d 414, 415 (Md. 1957).

when serious injury is not threatened, or the lack of consent is a specific element of the crime—is generally followed by other states,<sup>145</sup> making no-consent provisions superfluous. Yet ironically, even when the perpetrators of hazing are successfully prosecuted under a generally applicable criminal law, there is often an outcry to broaden the hazing law in order to facilitate future prosecutions.<sup>146</sup>

Now consider the rationale that specialized hazing laws are needed because certain types of hazing may not otherwise be crimes. Courts and commentators have often noted the great variety of hazing practices and the creativity of perpetrators in devising new methods of abuse.<sup>147</sup> Indeed, the media seems to take great delight in chronicling the most exotic and baffling hazing practices.<sup>148</sup> However, the reality of criminal hazing cases is more banal than popular portrayal would suggest. In every published opinion in prosecutions under hazing laws the victim either was beaten and sustained physical injury, or died from alcohol poisoning,<sup>149</sup> circumstances that are tragic, but far from inventive or exotic.

New York and Colorado are examples of states whose hazing laws were designed to fill gaps in the general criminal law. In New York, the legislature “attempted to fill a theoretical void between misdemeanor assault and reckless endangerment. In the absence of a specific intent to cause physical injury, an intentional misdemeanor assault would be inapplicable. In the absence of a

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<sup>145</sup> See 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 46, at 302–06 (15th ed. 1993 & Supp. 2009–2010).

<sup>146</sup> HEATHER HOPKINS, CAL. ASSEMBLY COMM. ON PUB. SAFETY, BILL ANALYSIS: SB 1454, at 5 (2006) (analyzing a bill amending hazing laws following a hazing death despite successful manslaughter prosecutions). The bill under review is now enacted at CAL. PENAL CODE § 245.6 (West Supp. 2013). For analysis of the change to the California hazing law, see Villalba, *supra* note 97.

<sup>147</sup> E.g., *Lenti I*, 253 N.Y.S.2d 9, 13 (Nassau Cnty. Ct. 1964) (“[Groups] have never suffered for ideas in contriving new forms of hazing.”).

<sup>148</sup> Janet Reitman, *Confessions of an Ivy League Frat Boy*, ROLLING STONE, Apr. 12, 2012, at 44, 50 (describing the practice of making fraternity pledges consume a vomit egg concoction known as vomlet); Hayes Hickman, *UT Student ‘Livid’ at ‘Erroneous’ Alcohol Enema Report*, KNOXNEWS.COM (Sept. 25, 2012), <http://www.knoxnews.com/news/2012/sep/25/dad-disputes-erroneous-information-released-by/>.

<sup>149</sup> As of February 28, 2014, there is no case available on Westlaw reporting a criminal prosecution under any of the hazing statutes listed in the Statutory Appendix, *infra*, that did not involve either physical assault and injury or a death from alcohol poisoning. A review of news reports of hazing prosecutions does not reveal any significant difference between the allegations in cases that generate published opinions and those in cases that do not. However, for an example of a rare hazing prosecution involving neither physical violence nor alcohol consumption, see Dell, *supra* note 7 (“[Defendants] were accused of subjecting pledges to strenuous calisthenics and immersion into an icy bath tub as part of an initiation rite . . .”).

substantial risk of serious physical injury, reckless endangerment would be inapplicable.”<sup>150</sup>

Likewise, the Colorado General Assembly stated that its intent in passing a hazing statute was not “to change the penalty for any activity that is covered by any other criminal statute” but rather “to define hazing activities not covered by any other criminal statute.”<sup>151</sup> While Colorado’s reckless endangerment statute only addressed reckless conduct that “creates a substantial risk of serious bodily injury,”<sup>152</sup> the hazing statute prohibited activity that “recklessly endangers the health or safety of [an individual] or causes a risk of bodily injury.”<sup>153</sup> The General Assembly justified lowering the threshold for liability under the theory that less egregious forms of hazing, “if not stopped early enough, may escalate into serious injury.”<sup>154</sup> Colorado Governor Bill Owens evidently disagreed with this escalation theory, stating that “[a]dding redundant laws will not necessarily deter hazing behavior, but only add pages to the statute books.”<sup>155</sup> He neither signed nor vetoed the hazing bill, and it became law without his signature.<sup>156</sup>

Expanding the scope of hazing laws to cover more noninjurious hazing is less useful than it might appear. Because hazing is conducted covertly,<sup>157</sup> there is rarely any evidence unless a student is hospitalized or killed. Even when hazing is an open secret, it is extremely difficult to obtain proof sufficient to support a criminal conviction. As one coach interviewed in the NCAA study noted, “The problem is that we know hazing occurs but we have no proof. No one will come forward so it is not punished. You cannot enforce a rule based on hearsay.”<sup>158</sup> Even when students are injured by their groups, they are reluctant to cooperate with prosecutors. Students who do not sustain injury are even less likely to speak out.<sup>159</sup> In one study, 60% of students said they would

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<sup>150</sup> N.Y. PENAL LAW § 120.16 note (McKinney 2009) (Practice Commentary) (citation omitted).

<sup>151</sup> COLO. REV. STAT. ANN. § 18-9-124(1)(b) (West 2013).

<sup>152</sup> *Id.* § 18-3-208.

<sup>153</sup> *Id.* § 18-9-124(2)(a).

<sup>154</sup> *Id.* § 18-9-124(1)(a).

<sup>155</sup> Message from Bill Owens, Governor, Colo., to Colo. Senate (Apr. 16, 1999), in *S. JOURNAL*, 62d Gen. Assemb., 1st Sess. (Colo. Apr. 19, 1999).

<sup>156</sup> *Id.*

<sup>157</sup> See Iverson & Allan, *supra* note 16, at 253; Hoover, *supra* note 31, at 15.

<sup>158</sup> See Hoover, *supra* note 31, at 15 (internal quotation marks omitted).

<sup>159</sup> See *id.* at 13 (“If no one is hurt to the point where they need medical attention, just leave it alone. All the kids get accepted when it’s over . . . 90 percent of the time, it’s a one-time deal and it’s over. Leave it alone.” (alteration in original) (internal quotation marks omitted)).

not report hazing to their school.<sup>160</sup> Moreover, there is a significant disconnect “between student experiences of hazing and their willingness to label those experiences as hazing.”<sup>161</sup> Students who do not believe they have been hazed will obviously not report it, and even among students who acknowledge being hazed, only one in twenty reported it to the school.<sup>162</sup>

### *B. Legal Vulnerabilities*

Although most injurious hazing is illegal under general criminal law, the existence of thirty-nine different statutory approaches demonstrates the enthusiasm of states to experiment with different criminal hazing policies. This section looks at two innovations to show that hazing laws are especially vulnerable to legal challenge when they attempt to address behavior or harms beyond the scope of general criminal laws.

First, in response to sensational incidents of particularly exotic hazing practices,<sup>163</sup> many hazing statutes have been written to cover the widest range of hazing practices. In prosecutions that take advantage of the broad statutory language, such as those for mentally injurious hazing without physical injury, a vagueness challenge is likely to succeed.

Second, several states, in order to combat the problem of secrecy surrounding hazing, have made the failure to report hazing a crime.<sup>164</sup> Precisely because of the secretive nature of hazing, an individual with knowledge of a hazing incident is likely to be culpable for that incident. In that case, a prosecution for failure to report would violate the individual's right against self-incrimination.

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<sup>160</sup> See *id.* at 15.

<sup>161</sup> Allan & Madden, *supra* note 12, at 89; *accord id.* at 88 (“Of students who reported experiencing behaviors that meet the definition of hazing, 9 out of 10 did not consider themselves to have been hazed.”); Campo et al., *supra* note 28, at 143.

<sup>162</sup> See Allan & Madden, *supra* note 12, at 87 (“Of those [students] who labeled their experience as hazing (after reading the survey definition), 95% said they did not report it to campus officials.”).

<sup>163</sup> See, e.g., Acquaviva, *supra* note 137, at 318–19 (citing Assemb. 546, 200th Leg., at 1 (N.J. 1980) (Statement of Assembly Judiciary, Law, Public Safety and Defense Committee)) (noting that New Jersey's hazing law was prompted in part by an incident where a pledge died when a grave he was ordered to dig and lie in caved in and he suffocated).

<sup>164</sup> See *supra* Part II.F.

### 1. *Vagueness*

It is a violation of due process to enforce a criminal statute if its prohibitions are not clearly defined.<sup>165</sup> The void-for-vagueness doctrine serves two primary purposes: it ensures that individuals are given fair notice of what conduct is prohibited by criminal statutes,<sup>166</sup> and it protects against the arbitrary and discriminatory application of criminal laws by requiring clear enforcement standards.<sup>167</sup>

In cases involving physical injury, courts have uniformly found hazing statutes not to be vague.<sup>168</sup> According to the Supreme Court, the Due Process Clause requires “a criminal statute . . . to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”<sup>169</sup> This is easily satisfied when a hazing statute speaks of physical injury, a well-defined concept in most states’ laws.<sup>170</sup> Even in cases where the specific degree of harm in the hazing statute was undefined, courts have made comparisons to degrees of harm that are defined elsewhere in the state’s law<sup>171</sup> or employed the common definition of words<sup>172</sup> to find that a person of ordinary intelligence had been given fair notice of what harm the hazing statute prohibits.

Vagueness challenges are also unlikely to succeed when a court suspects that the alleged ambiguity is mere pretext for knowingly unlawful behavior.<sup>173</sup>

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<sup>165</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”).

<sup>166</sup> See *United States v. Harriss*, 347 U.S. 612, 617 (1954) (noting that due process requires that a statute give “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden”).

<sup>167</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (finding a vagrancy ordinance unconstitutionally vague because “there are no standards governing the exercise of the discretion granted by the ordinance, [so] the scheme permits and encourages an arbitrary and discriminatory enforcement of the law”).

<sup>168</sup> See *Morton v. State*, 988 So. 2d 698, 701–02 (Fla. Dist. Ct. App. 2008); *People v. Anderson*, 591 N.E.2d 461, 464, 467–68 (Ill. 1992); *McKenzie v. State*, 748 A.2d 67, 69, 73 (Md. Ct. Spec. App. 2000); *State v. Allen*, 905 S.W.2d 874, 875, 877 (Mo. 1995); *Lenti I*, 253 N.Y.S.2d 9, 11–14 (Nassau Cnty. Ct. 1964).

<sup>169</sup> *Harriss*, 347 U.S. at 617.

<sup>170</sup> See *e.g.*, N.Y. PENAL LAW § 10.00(9)–(10) (McKinney 2009) (defining “physical injury” and “serious physical injury”).

<sup>171</sup> See, *e.g.*, *McKenzie*, 748 A.2d at 76 (“The term ‘serious bodily injury,’ for example, which is undefined in the anti-hazing statute, is analogous to ‘serious physical injury,’ which is expressly defined by Maryland’s assault statute.”).

<sup>172</sup> See, *e.g.*, *Morton*, 988 So. 2d at 702–03 (“A person of ordinary intelligence would reasonably expect to incur criminal sanctions under the hazing statute if he or she helped inflict such injuries, which a reasonable person would regard as serious in the run of commonly accepted definitions of the term.”).

<sup>173</sup> I WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3(b), at 147–48 & n.32 (2d ed. 2003) (citing cases in which the Supreme Court considered whether a vagueness argument was pretextual).

Some courts have been transparently disdainful of defendants who argue that the criminal hazing statute failed to give notice that paddling new members or forcing them to drink large amounts of alcohol—the most stereotypical acts of hazing—is prohibited.<sup>174</sup> Even when a statute's language is poorly drafted, courts will find that it provides sufficient notice as to these clear-cut instances of hazing.<sup>175</sup> A “person of ordinary intelligence” is given fair notice of this prohibition, not through analysis of the statutory text but by superficial knowledge of the statute's very existence.<sup>176</sup>

For example, in *People v. Anderson*, the Supreme Court of Illinois upheld the statute's definition of hazing as “any pastime or amusement[] engaged in by students . . . for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others” that intentionally, knowingly, or recklessly causes bodily injury.<sup>177</sup> At issue was the death of Nick Haben from alcohol poisoning following a club lacrosse team's initiation.<sup>178</sup> During the initiation, rookies were stripped to their underwear, paddled, forced to perform calisthenics, and encouraged to consume a large amount of liquor.<sup>179</sup> The court held that the statute provided fair notice to the lacrosse team members because the initiation ceremony fell within the popular definition of a “pastime” and the “defendants' actions could be fairly interpreted as holding the underclassmen up to ridicule.”<sup>180</sup>

Even in the extreme case of a statute in which “hazing” was completely undefined, a vagueness challenge failed as applied to physical hazing.<sup>181</sup> In

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<sup>174</sup> See, e.g., *McKenzie*, 748 A.2d at 73 (“Overbreadth is, then, but one constitutional catch phrase or conclusion that appellant hurls toward the instant case in the hope that something will stick.”); *State v. Allen*, 905 S.W.2d 874, 876 (Mo. 1995) (“Allen's brief is, unfortunately, little more than a casserole of constitutional catch phrases and conclusions, unadorned by legal analysis.”).

<sup>175</sup> See, e.g., *People v. Anderson*, 591 N.E.2d 461, 464, 469 (Ill. 1992) (holding that a statute was not unconstitutionally vague despite containing “an inartful definition of hazing”).

<sup>176</sup> Cf. Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 5 (1997) (noting that the notice provided by statutory language is almost entirely fictitious as ordinary citizens never read statutes).

<sup>177</sup> *Anderson*, 591 N.E.2d at 464–65, 467–68 (quoting ILL. REV. STAT. 1989, ch. 144, para. 222 (codified at 720 ILL. COMP. STAT. 120/2) (repealed 1995)) (internal quotation mark omitted). Perhaps responding to the court's comment on the statute's “inartful definition of hazing,” *id.* at 464, in 1995, the Illinois legislature amended the definition of hazing to any act required for admission into a student group that is not authorized by the school and results in physical injury, Act of Aug. 11, 1995, No. 89-0292, 1995 Ill. Laws 3348 (codified as amended at 720 ILL. COMP. STAT. ANN. 5/12C-50 (West Supp. 2013)).

<sup>178</sup> *Anderson*, 591 N.E.2d at 464.

<sup>179</sup> HANK NUWER, HIGH SCHOOL HAZING: WHEN RITES BECOME WRONGS 85–87 (2000).

<sup>180</sup> *Anderson*, 591 N.E.2d at 468.

<sup>181</sup> *Lenti I*, 253 N.Y.S.2d 9, 11–14 (Nassau Cnty. Ct. 1964) (considering a statute prohibiting “any person to engage in or aid or abet what is commonly called hazing”). The charges were later dismissed due to other

*People v. Lenti*, the New York statute that simply prohibited “any person to engage in or aid or abet what is commonly called hazing” was held to not be vague as applied to an initiation ritual that consisted of “striking [initiates] about the body and face with clenched fists, open hands, forearms and feet.”<sup>182</sup>

Statutes that prohibit physical hazing also provide a clear enforcement standard because “police have little discretion in deciding what is and is not physical injury.”<sup>183</sup> Laws forbidding physical hazing that do not require actual injury but prohibit creating a risk of physical injury often borrow language from reckless endangerment statutes.<sup>184</sup> Reckless endangerment is a familiar concept to law enforcement and is a clear enforcement standard.

However, whether hazing statutes survive vagueness challenges as applied to physical hazing is ultimately somewhat unimportant, because in the absence of hazing laws, those prosecutions could generally be brought under other criminal statutes.<sup>185</sup> More significant is that when applied to mental harm, the arguments for finding hazing statutes unconstitutionally vague are much more persuasive, particularly if the statute does not include examples of prohibited mentally injurious behavior.

*Carpetta v. Pi Kappa Alpha Fraternity*<sup>186</sup> illustrates the vulnerability of hazing laws that address mental harm to vagueness challenges. In the fall of 1995, Charles Carpetta pledged the University of Toledo chapter of Pi Kappa Alpha.<sup>187</sup> During the pledge process, fraternity brothers subjected Carpetta to numerous indignities, including verbally abusing him, requiring him to perform humiliating acts (including simulated sex with a fellow pledge), forcing him to consume alcohol, and dousing him with various vile substances (such as rat blood, urine, beer, and chewing tobacco spit).<sup>188</sup> Carpetta

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concerns about the statute’s language. *People v. Lenti (Lenti II)*, 260 N.Y.S.2d 284, 286 (Nassau Cnty. Ct. 1965). The statute prohibited any person from “participating” in hazing. *Id.* The court held that as a matter of law the initiates, who had participated in the hazing by consenting to the initiation, were accomplices so their testimony required corroboration, which the State was unable to provide. *Id.*

<sup>182</sup> *Lenti I*, 253 N.Y.S.2d at 11, 14, 16 (citing N.Y. PENAL LAW § 1030 (codified as amended at N.Y. PENAL LAW § 240.25(4) (McKinney 1967) (repealed 1988))).

<sup>183</sup> *Anderson*, 591 N.E.2d at 468; *McKenzie v. State*, 748 A.2d 67, 76 (Md. Ct. Spec. App. 2000) (quoting *Anderson*, 591 N.E.2d at 468).

<sup>184</sup> See *supra* note 139 and accompanying text.

<sup>185</sup> See *supra* Part III.A.

<sup>186</sup> 100 Ohio Misc. 2d 42 (Ct. Com. Pl. 1998).

<sup>187</sup> *Id.* at 47–48.

<sup>188</sup> *Id.* at 48.

eventually quit the fraternity and dropped out of school.<sup>189</sup> He then sued the fraternity and several individual members under an Ohio statute that provided a civil remedy for victims of hazing, with the definition of hazing supplied by the criminal hazing statute.<sup>190</sup>

The *Carpetta* court held that the hazing statute was unconstitutionally vague as applied to an act of hazing causing mental harm.<sup>191</sup> The statute defined hazing as “any act of initiation . . . that causes or creates a substantial risk of causing mental or physical harm to any person.”<sup>192</sup> The court found that the phrase “mental harm” was too imprecise to either give fair notice of prohibited conduct or provide clear enforcement standards.<sup>193</sup> Unlike physical harm, mental harm is not defined in the statutes or case law of Ohio (or of many other states).<sup>194</sup> The court noted that, although mental illness “requir[ing] hospitalization or prolonged psychiatric treatment” is precise enough to be included in the statutory definition of “serious *physical* harm,” any “milder mental disturbances cannot be pinpointed with sufficient precision for use in the criminal law.”<sup>195</sup> Moreover, there is no popular consensus of what constitutes mental harm.

Some statutes that prohibit mental harm list examples of mentally harmful behavior, like forced sleep deprivation.<sup>196</sup> These statutes are more likely to withstand vagueness challenges because they provide more effective notice of what conduct is prohibited and more concrete enforcement standards for law enforcement. Statutes that define mental harm by the emotion induced in the victim, such as “shame” or “extreme embarrassment,”<sup>197</sup> provide more guidance than those that do not define mental harm; however, they may still be vulnerable to challenge because of the highly subjective nature of emotions.

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<sup>189</sup> *Id.* at 49.

<sup>190</sup> *Id.* at 49 & n.2 (quoting OHIO REV. CODE ANN. § 2307.44 (West 2004)).

<sup>191</sup> *Id.* at 57–58.

<sup>192</sup> OHIO REV. CODE ANN. § 2903.31 (West 2006).

<sup>193</sup> *Carpetta*, 100 Ohio Misc. 2d at 57–58.

<sup>194</sup> *See id.* at 56–57. *But see* Acquaviva, *supra* note 137, at 327–30 (proposing amending New Jersey’s hazing statute to cover “incapacitating mental anguish,” a degree of mental harm defined in New Jersey penal law in connection with sex crimes and upheld in the courts (internal quotation marks omitted)).

<sup>195</sup> *Carpetta*, 100 Ohio Misc. 2d at 57 (emphasis added) (quoting OHIO REV. CODE ANN. § 2901.01(A)(5)(a) (West 2006); *id.* § 2901.01 note (Legislative Service Commission)) (internal quotation marks omitted).

<sup>196</sup> *See, e.g., supra* text accompanying note 95 (quoting OKLA. STAT. tit. 21, § 1190(F)(3) (2011)); *see also infra* Statutory Appendix.

<sup>197</sup> *E.g.,* UTAH CODE ANN. § 76-5-107.5(1)(a)(iv) (West Supp. 2013).

## 2. Failure-to-Report Provisions and the Right Against Self-Incrimination

The ability to prosecute the failure to report hazing is undoubtedly a useful tool for prosecutors in states with such provisions.<sup>198</sup> However, prosecuting individuals for failing to report an act of hazing for which they themselves could be prosecuted raises a significant conflict with the Fifth Amendment's right against compelled self-incrimination.

To survive a Fifth Amendment challenge, a statute with a "failure-to-report" provision must automatically grant immunity to individuals who report hazing.<sup>199</sup> For example, in Texas, an individual commits misdemeanor hazing if he "has firsthand knowledge of the planning of a specific hazing incident . . . , or has firsthand knowledge that a specific hazing incident has occurred, and knowingly fails to report that knowledge in writing to the dean of students or other appropriate official of the institution."<sup>200</sup> Without automatic immunity, that provision would violate the Fifth Amendment if it were applied to a student who had participated in hazing.<sup>201</sup> Under such circumstances, reporting the hazing would "provide a significant link in a chain of evidence tending to establish [the student's] guilt," creating a "real and appreciable risk of self-incrimination."<sup>202</sup>

Of the five states where the failure to report hazing is a crime, only Texas provides automatic immunity to individuals who report hazing.<sup>203</sup> In the other four states, prosecutions of individuals for failure to report hazing in which they themselves are implicated would violate the Fifth Amendment.<sup>204</sup>

However, while providing automatic immunity would insulate the failure-to-report provision from challenge on Fifth Amendment grounds, to do so could seriously complicate the ability to prosecute hazing injuries. The Supreme Court has held that, when testimony is compelled from an individual,

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<sup>198</sup> See *supra* Part II.F.

<sup>199</sup> See *State v. Boyd*, 38 S.W.3d 155, 156–57 (Tex. Crim. App. 2001) (citing *Kastigar v. United States*, 406 U.S. 441, 442–44, 453 (1972)).

<sup>200</sup> TEX. EDUC. CODE ANN. § 37.152(a)(4), (b) (West 2012).

<sup>201</sup> See *Boyd*, 38 S.W.3d at 156.

<sup>202</sup> See *id.* (quoting *State v. Boyd*, 2 S.W.3d 752, 755 (Tex. App. 1999) (citing *Marchetti v. United States*, 390 U.S. 39, 48 (1968))).

<sup>203</sup> See *infra* Statutory Appendix (the other four states are Alabama, Arkansas, New Hampshire, and South Carolina); see also TEX. EDUC. CODE ANN. § 37.155 ("Any person reporting a specific hazing incident . . . to [an appropriate school official] is immune from civil or criminal liability that might otherwise be incurred or imposed as a result of the report. Immunity extends to participation in any judicial proceeding resulting from the report.").

<sup>204</sup> See *Boyd*, 38 S.W.3d at 156; see also *Marchetti*, 390 U.S. at 48–49.

the Fifth Amendment is satisfied by a grant of use and derivative use immunity.<sup>205</sup> Use and derivative use immunity covers both the compelled testimony itself and “any information directly or indirectly derived from such testimony or other [compelled] information.”<sup>206</sup> While use and derivative use immunity does not entirely prohibit subsequent prosecution as transactional immunity would,<sup>207</sup> it makes a successful prosecution much more difficult. For example, if group members seriously injured a student but then promptly called for aid and reported the incident in accordance with the mandatory reporting law, they would receive the benefit of immunity. In a prosecution for the injury, the State would have the difficult burden of proving that its evidence was “derived from a legitimate source wholly independent of the compelled [report].”<sup>208</sup> Ultimately, the attempt to strengthen the hazing statute could make it much more difficult to prosecute individuals for hazing under any statute.

### C. Policy Critiques

There is little reason to believe that the current criminal law approach has reduced instances of collegiate hazing. Most empirical studies of hazing have been conducted in the years since 1999,<sup>209</sup> so there is no reliable time series data about the effect of the changing legal climate on collegiate hazing rates. However, reports of hazing deaths have remained consistent over the past forty years despite the dramatic increase in the number of states that have enacted criminal hazing laws.<sup>210</sup>

This section argues that the current criminal law approach to hazing is counterproductive and unjust because of three policy reasons: (1) enforcement of criminal prohibitions can entrench conflicting social norms, (2) criminalization drives hazing underground, which makes it more dangerous, and (3) many of the considerations that cast doubt on students’

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<sup>205</sup> *Kastigar v. United States*, 406 U.S. 441, 453 (1972). The Texas Court of Criminal Appeals held that the Texas statute granted use and derivative use immunity. *Boyd*, 38 S.W.3d at 157.

<sup>206</sup> *Kastigar*, 406 U.S. at 453.

<sup>207</sup> *See id.*

<sup>208</sup> *See id.* at 460.

<sup>209</sup> *See* NUWER, *supra* note 17, at 223 (calling for statistical data to replace anecdotal evidence, and praising the January 1999 announcement of Alfred University’s NCAA hazing survey as a positive step); *see also supra* Part I.A.2.

<sup>210</sup> *See supra* text accompanying notes 20–21 (reports of hazing deaths); *supra* Part II (passage of hazing laws).

capacity to consent to being hazed apply with equal force against finding students fully culpable for hazing.

*1. Students' Social Norms Are More Powerful than Enforcement Strategies*

The criminal enforcement approach to hazing is likely to fail because it stands in opposition to students' social norms, and social science scholarship cautions that social norms are often more powerful than legal prohibitions.<sup>211</sup>

For example, a 2011 study examined the interaction between deterrence and countervailing norms by testing the effect of the recording industry's copyright litigation campaign on college students' attitudes toward music piracy.<sup>212</sup> "The results suggest[ed] that when normative positions conflict with legal rules, enforcement is a double-edged sword."<sup>213</sup> The study found that copyright enforcement regimes involving higher probabilities of punishment and stronger sanctions generated higher degrees of anti-copyright norms in students who illegally download music.<sup>214</sup> While enforcement does have some deterrent effect, it can also create a backlash that reinforces anti-copyright norms and, once students believe the threat of detection has subsided, increase their propensity to illegally download music.<sup>215</sup> Moreover, this backlash is most pronounced in the students that pirate the most music.<sup>216</sup>

The power of social norms over legal prohibitions is also evident when one looks at the effect that raising the minimum legal drinking age (MLDA) to twenty-one had on college students. College students have always drunk more than their noncollegiate peers,<sup>217</sup> and alcohol has always played an outsized role in the college experience. Following the repeal of Prohibition, most states set their MLDA at twenty-one.<sup>218</sup> However, some states set it lower, and in the early 1970s, many other states lowered their MLDA to eighteen, nineteen, or

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<sup>211</sup> See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 45–56 (1990); James Alm et al., *Changing the Social Norm of Tax Compliance by Voting*, 52 KYKLOS 141, 141, 163 (1999); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 609–12 (1998).

<sup>212</sup> Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1271–72 (2011).

<sup>213</sup> *Id.* at 1257.

<sup>214</sup> *Id.* at 1277–78.

<sup>215</sup> *Id.* at 1272–73.

<sup>216</sup> *Id.* at 1272.

<sup>217</sup> Patrick M. O'Malley & Lloyd D. Johnston, *Epidemiology of Alcohol and Other Drug Use Among American College Students*, J. STUD. ON ALCOHOL (SUPPLEMENT 14) 23, 29 (2002).

<sup>218</sup> Alexander C. Wagenaar & Traci L. Toomey, *Effects of Minimum Drinking Age Laws: Review and Analyses of the Literature from 1960 to 2000*, J. STUD. ON ALCOHOL (SUPPLEMENT 14) 206, 206 (2002).

twenty.<sup>219</sup> This trend was short-lived, and by 1988, every state with a lower MLDA had raised it to twenty-one.<sup>220</sup> This temporary divergence in state laws created a natural experiment that many researchers took advantage of, conducting over 130 studies on the effect of changing the MLDA on the drinking habits of young adults.<sup>221</sup> A 2002 analysis of this body of literature found that, while raising the MLDA reduced both alcohol consumption and related negative consequences in the general youth population, evidence of a corresponding change in the drinking habits of college students was statistically weak to nonexistent.<sup>222</sup>

Thus, with respect to both music piracy and drinking, college students are disinclined to modify their behavior to conform to legal prohibitions. If this phenomenon carries over to hazing, it is doubtful that criminal laws will succeed in reducing hazing. Moreover, fraternity and sorority members, the group within the college population that reports the highest rate of hazing,<sup>223</sup> also are the most willing to risk legal troubles when it comes to alcohol. Fraternity and sorority members report using fake IDs to purchase alcohol at almost three times the rate of nonaffiliated students.<sup>224</sup>

While hazing laws are currently sparingly enforced, this research also raises the possibility that increased enforcement could reinforce pro-hazing social norms and even increase instances of hazing, especially among groups where the danger of hazing is already the highest.

## 2. *Hazing Laws Increase Hazards by Driving Hazing Underground*

A second policy problem ignored by the proponents of criminal hazing prohibitions is that broadly defined hazing laws will drive hazing underground. This will make it hard for schools to monitor and intervene, make it less likely that needed medical attention will be sought when hazing results in injury, and decrease student organizations' willingness to be candid with schools in working to reduce instances of hazing for fear of criminal liability.

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 212–13, 218–19.

<sup>223</sup> Allan & Madden, *supra* note 12, at 87 (reporting that, along with varsity athletes, students affiliated with social fraternities and sororities were most likely to experience hazing); Owen et al., *supra* note 25, at 48 & tbl.2.

<sup>224</sup> See William R. Molasso, *Fake-ID Use Among Fraternity/Sorority Members*, ORACLE: RES. J. ASS'N FRATERNITY ADVISORS, Feb. 2006, at 1, 4.

Hazing statutes that create criminal liability in the absence of physical injury have been justified on the theory that they are necessary to deter “low level hazing,” which, if unaddressed, could escalate and result in injury or even death.<sup>225</sup> Despite this worthwhile goal, instead of deterring hazing, it is more likely that sweeping hazing laws will drive even innocuous initiation activities further underground, making it more difficult for schools and national organizations to monitor the activities of students. Schools walk a fine line in dealing with troublesome groups. The threat of revoking a group’s official recognition may deter misbehavior. However, if a school follows through and bans a group, it relinquishes any remaining control over the group, and the group often moves off campus to continue whatever activities led to its expulsion.<sup>226</sup>

This danger is evident in the experiences of black Greek-letter organizations following the NPHC’s 1990 ban on pledging.<sup>227</sup> Despite the ban, a majority of new members are initiated through an underground, illegal pledge process.<sup>228</sup> By definition, the underground pledge process is not supervised by schools or national organizations. Unsurprisingly, reports of hazing incidents in BGLOs have increased since the pledging ban went into effect.<sup>229</sup> While the national organizations threaten to expel any member who is caught participating in underground pledging,<sup>230</sup> they have lost control of the process.

Broadly written statutes also increase risk by providing a disincentive for seeking aid for individuals injured in initiation activities. Under a statute where creating a risk of injury is a crime, the crime is likely to have been committed well before the point that an individual is injured or otherwise needs medical attention. For example, in a case of alcohol poisoning, criminal liability would

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<sup>225</sup> See COLO. REV. STAT. ANN. § 18-9-124(1) (West 2013).

<sup>226</sup> See Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 704–06 (2001). See generally NUWER, *supra* note 17, at 241, 244, 246–47, 262, 267 (1999) (listing examples of deaths connected to unrecognized groups).

<sup>227</sup> See *supra* Part I.C.

<sup>228</sup> KIMBROUGH, *supra* note 62, at 82–83 (reporting a 1999 study ( $n = 185$ ) in which a majority of BGLO members admitted to participating in an illegal pledge program).

<sup>229</sup> Gregory S. Parks & Tamara L. Brown, “In the Fell Clutch of Circumstance”: Pledging and the Black Greek Experience, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 53, at 437, 444–45 (2005).

<sup>230</sup> See, e.g., Robert L. Harris, *Executive Order Three*, KAPPA ALPHA PSI FRATERNITY INCORPORATED (Mar. 28, 1994), <http://web.archive.org/web/20110718113347/http://www.kappaalphapsi1911.com/fraternity/exo3.asp> (accessed via the Internet Archive).

attach when the student is provided with or encouraged to drink a dangerous amount. By the time the student passes out, other group members may be dissuaded from seeking needed medical attention by the knowledge they have already committed a crime and the fear of discovery and punishment. Instead, the intoxicated student may be left to “sleep it off,” with potentially tragic results.<sup>231</sup>

### 3. *Consent of Victims and Culpability of Perpetrators Is a Two-Way Street*

Twenty-five states specifically prohibit consent as a defense to hazing.<sup>232</sup> As previously noted, consent of the victim is generally not a defense to criminal conduct, unless the lack of consent is a specific element of the offense.<sup>233</sup> When consent is a viable defense, it must be given intelligently, by a person who is free from coercion.<sup>234</sup> Given these basic principles of criminal law, no-consent provisions should only have an effect when consent was in fact intelligently given, free from coercion.

No-consent provisions are justified by the belief that hazing is so inherently coercive that consent can never be freely and intelligently given<sup>235</sup> or that hazing is so injurious to society that participating in it should be criminally sanctioned regardless of the consent of the victim.<sup>236</sup> However, these purported justifications are not equally persuasive. If true consent to hazing is impossible, then any attempt to offer the victim's purported consent as an affirmative defense will necessarily fail, and a no-consent provision is unnecessary. The second justification deserves more consideration. The offense of hazing is a relatively recent addition to criminal law, but most conduct prohibited by hazing statutes is already prohibited by generally applicable criminal statutes.<sup>237</sup> However, hazing is unique in one respect: the frequency with which the victim's alleged consent is raised. To many commentators and lawmakers,

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<sup>231</sup> See generally Marylynn Uricchio, *Dead Drunk: Alcohol Poisoning Has Tragic Consequences*, PITTSBURGH POST-GAZETTE, Nov. 3, 2009, at C1 (describing a pledge-related incident in which an intoxicated initiate was left in a fraternity house to “sleep it off” and was found dead the next morning).

<sup>232</sup> See *infra* Statutory Appendix.

<sup>233</sup> *State v. Brown*, 630 N.E.2d 397, 404 (Ohio Ct. App. 1993); Torcia, *supra* note 145, § 46, at 302–03.

<sup>234</sup> Torcia, *supra* note 145, § 46, at 304.

<sup>235</sup> See Nuwer, *supra* note 17, at 170 (“In many hazing incidents in which a hazer said that consent was given, it turns out that the pledge's will had been eroded by sleep deprivation, fear of being blackballed, pressure, or alcohol . . .”).

<sup>236</sup> See *Lenti II*, 260 N.Y.S.2d 284, 287 (Nassau Cnty. Ct. 1965) (citing *Bartell v. State*, 82 N.W. 142, 143 (Wis. 1900)) (“Consent of the pledges certainly should not be a bar to prosecution; intelligent consent cannot be a defense when the public conscience and morals are shocked.”).

<sup>237</sup> See *supra* Part III.A.

the “problem” of consent is neatly solved by amending hazing statutes to prohibit consent defenses.<sup>238</sup> Rarely do proponents of stricter hazing laws grapple with why an assault against a pledge who consented to the treatment should be singled out for *greater* criminal condemnation than the same assault committed against a wholly innocent stranger.

Looking at hazing solely from the perspective of the victim, the justification for prohibiting the consent of the victim as a defense to criminal charges may appear persuasive. Hazing victims are often deceived when joining organizations about the full extent of abuse they will have to endure,<sup>239</sup> and victims feel great pressure from themselves, their organization, and oftentimes the wider community to endure whatever is necessary in order to reap the rewards of membership.<sup>240</sup> However, looking at hazing solely from the perspective of the victim to the exclusion of the perpetrator results in a simplified and inaccurate view of the complexities and ambiguities of hazing dynamics. Taking an evenhanded view of hazing, many factors that seem to demonstrate the impossibility of consenting to hazing also mitigate the perpetrators’ culpability for engaging in hazing.

The case of Robert Champion is an example of the troubling interplay between a victim’s consent and the perpetrators’ culpability. Champion was a member of Florida A&M’s elite Marching 100 band who died following a brutal initiation ritual.<sup>241</sup> At the time of his death, Champion was twenty-six years old and was already a band leader.<sup>242</sup> He knew that hazing was dangerous and illegal; three months earlier, he had signed an agreement

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<sup>238</sup> See Lewis, *supra* note 47, at 145–49 (proposing a model hazing statute with a no-consent provision); Amie Pelletier, Note, *Regulation of Rites: The Effect and Enforcement of Current Anti-hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 411–12 (2002) (citing with approval UTAH CODE ANN. § 76-5-107.5(2) (2000) (consent is no defense if victim is under twenty-one)); see also *supra* Part I.E; *infra* Statutory Appendix.

<sup>239</sup> James C. Arnold, *Hazing and Alcohol in a College Fraternity*, in THE HAZING READER, *supra* note 16, at 51, 68 (describing pledges caught off guard by the true intensity of the pledge process); Owen et al., *supra* note 25, at 46 (reporting that 29.5% of survey respondents were deceived about initiation).

<sup>240</sup> See *Jones v. Kappa Alpha Order, Inc.*, 730 So. 2d 197, 200 (Ala. Civ. App. 1997) (“[N]umerous college students are confronted with the great pressures associated with fraternity life and that compliance with the initiation requirements places the students in a position of functioning in what may be construed as a coercive environment.”), *rev’d in part sub nom. Ex parte Barran*, 730 So. 2d 203 (Ala. 1998); Briggs, *supra* note 53, at 483 (describing non-Greek students encouraging pledges to continue with the pledge process).

<sup>241</sup> Lizette Alvarez & Robbie Brown, *Student’s Death Turns Spotlight on Hazing*, N.Y. TIMES, Dec. 1, 2011, at A22.

<sup>242</sup> Ben Montgomery, *A Rite Gone Horribly Wrong*, TAMPA BAY TIMES, Nov. 11, 2012, at 1A.

acknowledging just that.<sup>243</sup> He also acknowledged that, if he participated in hazing “either as a hazer or hazee,” he would be expelled from the band.<sup>244</sup> Nevertheless, in order to gain respect from the band, he chose to take part in an initiation ritual known as “Crossing Bus C,” which consisted of walking the length of a charter bus while being punched, kicked, and assaulted with various objects.<sup>245</sup>

The night Champion decided to “cross over,” two other band members crossed before him, and Champion was able to observe their ordeal.<sup>246</sup> One of them was Keon Hollis, a friend of Champion’s, and they had made the decision to cross together.<sup>247</sup>

[Hollis] was punched and kicked and smacked with a drum strap and beaten with drum mallets. He fell and a swarm of bodies collapsed on top of him. Someone hit him with a yellow CAUTION WET FLOOR cone. “Roof him,” he heard someone say, instructions to lift him to the roof and drop him on the floor.<sup>248</sup>

When Champion went, it took him more than five minutes to slowly fight his way to the back of the bus.<sup>249</sup> Afterwards, he complained of difficulty breathing and then passed out.<sup>250</sup> Someone pulled him off the bus and attempted to perform CPR, and an ambulance was called.<sup>251</sup> Later that night, Champion “died from hemorrhagic shock due to internal bleeding from blunt force trauma.”<sup>252</sup> Thirteen of Champion’s fellow band members were charged with felony hazing and manslaughter.<sup>253</sup> All charged were younger than Champion, and two were only nineteen years old.<sup>254</sup>

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<sup>243</sup> Defendant FAMU’s Motion for Summary Final Judgment at 4–5, *Champion ex rel Estate of Champion v. A Ray Land Productions Co.*, No. 2012-CA-002346-O (Fla. Cir. Ct. Sept. 10, 2012).

<sup>244</sup> *See id.* While FAMU has a great interest in how these events are presented, it is enough for this discussion to consider what the policy implications would be if FAMU’s version were accurate.

<sup>245</sup> *Montgomery*, *supra* note 242.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Robbie Brown, *13 Are Charged in Deadly Hazing at Florida A&M*, N.Y. TIMES, May 3, 2012, at A18; Stephen Hudak & Denise-Marie Ordway, *Manslaughter Charges Filed in Band Death*, ORLANDO SENTINEL, Mar. 5, 2013, at A1.

<sup>254</sup> *See* Hudak & Ordway, *supra* note 253; *see also Suspects to be Arraigned in Champion Hazing Death*, WCTV (May 6, 2012, 3:35 PM), [http://www.wctv.tv/home/headlines/State\\_Attorney\\_to\\_Release\\_Findings\\_In\\_Champion\\_Hazing\\_Case\\_149711095.html](http://www.wctv.tv/home/headlines/State_Attorney_to_Release_Findings_In_Champion_Hazing_Case_149711095.html).

The death of Robert Champion illustrates that hazing continues through a victim-to-perpetrator cycle in which the previous year's victims become the next year's hazers.<sup>255</sup> Only students who had previously "crossed over" themselves took part in the hazing of Champion.<sup>256</sup> In order to justify having been hazed, students convince themselves that not only is membership worth that price but that the hazing was itself beneficial and resulted in a more meaningful membership experience.<sup>257</sup> There is a positive correlation between the degree of hazing experienced by an individual and the degree to which that individual then engages in hazing others.<sup>258</sup> Members feel strongly that new members should go through the same process that they did.<sup>259</sup> Often members who have most recently been hazed take the lead in hazing the newest initiates.<sup>260</sup>

Just as new members feel pressured to submit to hazing, existing members can feel pressure from alumni and even the new members to engage in hazing. One study found that alumni were physically present during 25% of hazing experiences.<sup>261</sup> This empirical evidence is supported by many anecdotal reports of alumni taking part in hazing.<sup>262</sup> Even when alumni do not participate directly, undergraduate members will often interpret the behavior of alumni as supporting or encouraging hazing. While publicly denouncing hazing, in private alumni often reverse their positions or tell war stories glorifying their own hazing experiences.<sup>263</sup> Some alumni appear supportive of hazing even in

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<sup>255</sup> See Richard J. Reddick et al., *The Harms and Hazards of Hazing: Medical, Sociocultural, and Legal Perspectives*, in *ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE* 279, 280, 282 (Gregory S. Parks & Stefan M. Bradley eds., 2012).

<sup>256</sup> See Defendant FAMU's Motion for Summary Final Judgment, *supra* note 243, at 7.

<sup>257</sup> See Owen et al., *supra* note 25, at 49–50 (being hazed is positively correlated with the belief that hazing makes probationary members stronger and allows them to bond and is negatively correlated with the belief that hazing is a serious problem).

<sup>258</sup> *Id.* at 50.

<sup>259</sup> Hank Nuwer, *Cult-like Hazing*, in *THE HAZING READER*, *supra* note 16, at 27, 37 (“[M]any, many brothers really wanted you to be there. Hazing was something you really, really had to go through, because they went through it too.”).

<sup>260</sup> Arnold, *supra* note 239, at 65.

<sup>261</sup> Allan & Madden, *supra* note 12, at 87.

<sup>262</sup> *E.g.*, Nuwer, *supra* note 259, at 33–34.

<sup>263</sup> Scott, *supra* note 43, at 239–40, 246–47 (“[P]ressure from chapter alumni typically occurs in the following manners: (1) Alumni openly voice displeasure with the current method of accepting members by referring to the process as easy by comparison to their own initiation process . . . (2) Storytelling of hazing experiences by alumni influences the continuation of hazing. In particular, collegiate members interpret the stories as a rationale to continue hazing.”).

public, like the Georgia state legislator who attempted to amend an anti-hazing bill to specifically exclude his fraternity.<sup>264</sup>

Some new members will actively seek to be hazed because they believe that “it legitimizes their commitment and allegiance to the organization.”<sup>265</sup> In black Greek-letter organizations, a majority of new members choose to participate in hazing as part of an illegal pledge process<sup>266</sup> rather than be branded a “paper brother” by choosing the official member intake process.<sup>267</sup>

#### IV. OMISSION LIABILITY AS AN ALTERNATE FRAMEWORK

Hazing injuries and deaths are different from other crimes, but commentators and policymakers struggle to articulate the exact nature of this difference. It is not the senselessness,<sup>268</sup> stupidity,<sup>269</sup> or brutality,<sup>270</sup> because what violent crime is not senseless, stupid, and brutal? Certainly the perpetrators of hazing do not fit the stereotype of the class of people who we think of as violent criminals, but attending college does not prevent someone from committing assault or manslaughter. Moreover, one’s level of education should not change the criminal justice process.<sup>271</sup>

What sets hazing injuries and deaths apart from most other violent crimes is that they represent a profound breach of trust. Trust is the cornerstone of the initiation process. Describing fraternity initiation processes (but in terms

<sup>264</sup> 1 H. JOURNAL, Reg. Sess. 1264 (Ga. 1988); Amy Wallace, *Georgia House Passes Measure to Outlaw Hazing*, ATLANTA J. CONST., Feb. 20, 1988, at A1.

<sup>265</sup> Reddick et al., *supra* note 255, at 282.

<sup>266</sup> See KIMBROUGH, *supra* note 62, at 82–83 (reporting a 1999 study ( $n = 185$ ) in which a majority of BGLO members admitted to participating in an illegal pledge program).

<sup>267</sup> Briggs, *supra* note 53, at 480 (“[B]eing called a paper member by a fully pledge brother is roughly the equivalent of being called the ‘N word’ by a white person.”); Scott, *supra* note 43, at 243.

<sup>268</sup> See R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN’S L. REV. 87, 114 (2002) (speaking out against “senseless initiation rites”); Iverson & Allan, *supra* note 16, at 252 (noting that “senseless group practices that have resulted in scores of student deaths”).

<sup>269</sup> See Nuwer, *supra* note 259, at 49 (describing “stupid” actions of fraternities where there were deaths).

<sup>270</sup> See Michelle A. Finkel, *Traumatic Injuries Caused by Hazing Practices*, 20 AM. J. EMERGENCY MED. 228 (2002) (chronicling hazing injuries).

<sup>271</sup> Reality falls short of this ideal as studies have found that level of education impacts bail and sentencing outcomes. See Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 892 (2009) (“[H]aving some college or a college degree reduced the odds of pretrial detention.”); U.S. Sentencing Comm’n, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis*, 22 FED. SENT’G REP. 323, 324 (2010) (“Offenders with some college education received shorter sentences than offenders with no college education.”).

applicable to other types of student groups), Ricky Jones has written, “The pledge must submit to the violence, but never with full knowledge of the process’s outcome. Because much of fraternity life is esoteric, the pledge knows what he is losing, but can only conceptualize a vague silhouette of what he will gain.”<sup>272</sup> The details of the initiation process often are the group’s greatest mystery. Not knowing in full what will befall him, the new member places his faith in the group. The members controlling the initiation process are the physical embodiment of a promise: “I went through this too. I am okay. You will be okay. And I am still here, so it must be worth it.” Hazing injuries and deaths are a breach of the promise to the new member that he will be guided safely through the initiation process, even if it is arduous, and will emerge intact as a full member of the group. This Part argues that the criminal law should enforce that promise by invoking criminal omission liability to authorize punishment for failing to take reasonable steps to protect a helpless student from injury.

Section A provides an overview of situations that create a duty to act under criminal law to show that hazing merits similar treatment. Section B presents this Comment’s proposal to replace the current criminal hazing framework with a framework that imposes a duty to protect a student who is rendered helpless by a group activity. Section C demonstrates how this proposal addresses the limitations of current hazing laws. Finally, section D addresses limitations of this proposal.

#### A. *Hazing Fits Within Existing Law on Criminal Omission Liability*

Hazing is the type of activity that should give rise to omission liability under criminal law. While crimes are generally committed by affirmative conduct,<sup>273</sup> under an omission liability theory, the failure to act while under a duty to do so is considered a substitute for the conduct element of a given offense.<sup>274</sup> The duty must be “a legal duty and not simply a moral duty,”<sup>275</sup> and any additional elements of the crime must also be proven.<sup>276</sup> For example,

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<sup>272</sup> Jones, *supra* note 44, at 119.

<sup>273</sup> LAFAVE, *supra* note 173, § 6.2, at 434.

<sup>274</sup> *Id.* at 434–36 (2d ed. 2003 & Supp. 2012–2013); Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101, 105–06, 111 (1984).

<sup>275</sup> *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (quoting LAFAVE, *supra* note 173, § 6.2; Robinson, *supra* note 274, at 107).

<sup>276</sup> Robinson, *supra* note 274, at 106–07.

while in general one may turn his back on a drowning man,<sup>277</sup> a lifeguard may have a contractual duty to aid a distressed swimmer.<sup>278</sup> If the swimmer dies due to the lifeguard's failure to act, the lifeguard could be charged with homicide,<sup>279</sup> but it must be proven that he had the proper mens rea.<sup>280</sup> If the lifeguard had intended for the swimmer to die, he is as guilty of murder as if he had held the swimmer underwater.<sup>281</sup>

While any legal duty may give rise to omission liability,<sup>282</sup> duties based upon certain relationships, the voluntary assumption of care, and the creation of the peril are especially relevant to hazing. In some circumstances, the duty of a landlord also may be implicated. Each of these four duties will be discussed in turn.

Turning first to duties arising from relationships, a central purpose of group initiation processes is to create intimacy and dependency, which are two of the characteristics of relationships that create a duty to aid and which may give rise to omission liability. Parent–child,<sup>283</sup> husband–wife,<sup>284</sup> ship captain–passenger,<sup>285</sup> and master–servant<sup>286</sup> relationships all create a duty to aid. The

<sup>277</sup> RESTATEMENT (SECOND) OF TORTS § 314 cmt. e, illus. 4 (1965) (“A, a strong swimmer, sees B, against whom he entertains an unreasonable hatred, floundering in deep water and obviously unable to swim. Knowing B’s identity, he turns away. A is not liable to B.”).

<sup>278</sup> LAFAVE, *supra* note 173, § 6.2(a)(3), at 439 (explaining that a duty may arise by contract).

<sup>279</sup> *Id.*; see also *State v. Benton*, 187 A. 609, 615–16 (Del. Ct. Oyer & Terminer 1936) (holding that a railroad gateman was properly convicted of manslaughter when his reckless disregard of his duty lead to the death of a motorist).

<sup>280</sup> See *State v. Tankersley*, 90 S.E. 781, 783 (N.C. 1916) (overturning manslaughter conviction because the defendant could not reasonably have expected his omission would result in a death, and therefore the element of intent was not proven).

<sup>281</sup> See *Harrington v. State*, 547 S.W.2d 616, 619 (Tex. Crim. App. 1977) (“The omission or neglect to perform a duty resulting in death . . . may constitute murder where the omission was willful and there was a deliberate intent to cause death.”).

<sup>282</sup> For examples of such duties, see LAFAVE, *supra* note 173, § 6.2(a), 436–42 (2d ed. 2003 & Supp. 2012–2013), and *Robinson*, *supra* note 274, at 111–18.

<sup>283</sup> *State v. Jones*, 99-2207, pp. 3–4 (La. 1/29/01); 778 So. 2d 1131, 1133; *Commonwealth v. Konz*, 450 A.2d 638, 641–42 (Pa. 1982); *State v. Collins*, 986 S.W.2d 13, 18 (Tenn. Crim. App. 1998); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659, 662, 666–71, 673–76.

<sup>284</sup> *State v. Mally*, 366 P.2d 868, 871–72 (Mont. 1961); *Konz*, 450 A.2d at 641–42 (describing the duty to a helpless or incompetent spouse); *State v. Morgan*, 936 P.2d 20, 23 (Wash. Ct. App. 1997).

<sup>285</sup> *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 142 (5th Cir. 1980); *Kiesel v. Am. Trading & Prod. Corp.*, 347 F. Supp. 673, 679 (D. Md. 1972); *United States v. Knowles*, 26 F. Cas. 800, 802 (N.D. Cal. 1864) (No. 15,540) (“[E]very person at sea, whether passenger or seamen, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if followed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter . . .”).

initiation process is consciously designed so that the group becomes a replacement family for the new member.<sup>287</sup> New members may be assigned a “pledge mom” or “pledge dad” within the group.<sup>288</sup> Because the group becomes the new member’s primary social and intimate network,<sup>289</sup> the new member’s brothers, sisters, or teammates should be charged with the duty to aid the new member if he or she becomes imperiled by the initiation process.

Second, the duty based upon voluntary assumption of care is also present in the hazing context. One who voluntarily assumes responsibility for a helpless person has a duty to protect his charge from harm.<sup>290</sup> Group members conducting the initiation process take absolute control over the new member. By voluntarily assuming that control, the group should also assume responsibility for the care of the new member because the new member, who is asked to put his well-being in the hands of the group, is placed in a helpless position. Because the new member is ignorant as to the details of the initiation process,<sup>291</sup> he is unable to evaluate the risks and take steps to protect himself.

Third, one who creates a danger has a duty to safeguard others from that danger.<sup>292</sup> Because the group controls the initiation process, any resulting peril is, in most cases, the group’s creation. Usually the group will be at fault

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<sup>286</sup> R v. Smith, (1837) 173 Eng. Rep. 438 (Cent. Crim. Ct.) 439; 8 Car. & P. 153; R v. Self, (1776) 168 Eng. Rep. 170; 1 Leach 137.

<sup>287</sup> Nuwer, *supra* note 259, at 28 (“Some Greek groups order pledges to limit or suspend communication and intimacy with parents, classmates, and others outside the chapter. . . . Members of hazing fraternities and sororities, like those of some cults, emphasize the notion of ‘family.’”); Sweet, *supra* note 42, at 6 (“Fraternities deliberately and systematically limit the social relations of their pledges, forcing them to form tight groups with intimate contact.”).

<sup>288</sup> ALEXANDRA ROBBINS, PLEDGED: THE SECRET LIFE OF SORORITIES 36 (2004) (describing pledge “families” within sororities); Arnold, *supra* note 239, at 80; *see also* Yost v. Wabash Coll., No. 54S01-1303-CT-161, 2014 WL 575955, at \*9 & n.6 (Ind. Feb. 13, 2014).

<sup>289</sup> Sweet, *supra* note 42, at 6 (describing Greek groups as “greedy organizations” that “set up strong boundaries between members and nonmembers and assert exclusivity” (internal quotation marks omitted)).

<sup>290</sup> Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962) (“One can be held criminally liable . . . where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.”).

<sup>291</sup> *See supra* note 272 and accompanying text.

<sup>292</sup> *See* United States v. Hatatley, 130 F.3d 1399, 1406 (10th Cir. 1997) (“When a person puts another in a position of danger, he creates for himself a duty to safeguard or rescue the person from that danger. Thus, when a person places another in danger, fails to safeguard or rescue him and he dies, such omission is sufficient to support criminal liability.” (citation omitted)); *see also* People v. Oliver, 258 Cal. Rptr. 138, 144 (Ct. App. 1989) (concluding that the defendant created an unreasonable risk of harm by allowing the deceased to inject heroin while in the defendant’s home); State v. Morgan, 936 P.2d 20, 23 (Wash. Ct. App. 1997) (citing *Oliver*, 258 Cal. Rptr. at 143).

because it knowingly or recklessly created the peril. However, some courts have found a duty to protect others even from innocently created peril.<sup>293</sup>

Lastly, when the group acts as a landlord, there is additional justification to impose upon it a duty to protect members on the premises. Greek organizations may own houses where new members are expected to live during the initiation process.<sup>294</sup> Other groups may have unofficial clubhouses, such as off-campus houses or apartments where several group members live and that are used for group activities.<sup>295</sup> Landlords may have a duty to protect tenants from reasonably foreseeable criminal acts of others.<sup>296</sup> One justification for this duty is that the tenant gives up certain control of the physical environment to the landlord, making it reasonable to expect the landlord to use that control to protect the tenant.<sup>297</sup> Hazing is a foreseeable criminal act: most injurious hazing violates general criminal laws,<sup>298</sup> and although kept secret from outsiders, hazing and initiation activities often involve much planning within the group.<sup>299</sup> Moreover, when forced to live in the group's house, the new member not only lacks control over the physical condition of the premises but, unlike the common tenant, did not choose to reside there.

### *B. The Proposal*

Student groups, whether fraternities, sororities, sports teams, or theater troupes, claim to care deeply about their members. This Comment proposes to hold them to their purported commitment. Under this proposal, if, as a result of a group activity, a student is unable to provide for his own safety, it is the duty

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<sup>293</sup> See *State ex rel. Kuntz v. Mont. Thirteenth Judicial Dist. Court*, 2000 MT 22, ¶¶ 29–30, 298 Mont 146, 995 P.2d 951 (holding that one who justifiably uses force in self-defense nevertheless has a legal duty to summon aid for the wounded attacker); cf. *Commonwealth v. Cali*, 141 N.E. 510, 511 (Mass. 1923) (holding that an arson conviction is proper if the defendant innocently set the fire but then allowed it to burn in order to collect insurance proceeds).

<sup>294</sup> See, e.g., Arnold, *supra* note 239, at 60, 71.

<sup>295</sup> See *UNBSJ Teams Review Hazing Policy After Incident at Dal*, TELEGRAPH-J. (N.B.), Jan. 8, 2013, at B5 (reporting that a women's hockey team was suspended after a hazing incident at an off-campus residence).

<sup>296</sup> *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970); *In re* September 11 Prop. Damage & Bus. Loss Litig., 468 F. Supp. 2d 508, 525 (S.D.N.Y. 2006); *Madhani v. Cooper*, 130 Cal. Rptr. 2d 778, 780–81 (Ct. App. 2003).

<sup>297</sup> See *Kline*, 439 F.2d at 483 (“[S]ince the ability of one of the parties [the tenant] to provide for his own protection has been limited in some way by his submission to the control of the other [the landlord], a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one . . .”).

<sup>298</sup> See *supra* Part II.A.

<sup>299</sup> See, e.g., Arnold, *supra* note 239, at 84–85 (describing a fraternity house transformed into an elaborate “haunted house” for “hell week”).

of all other members whose actions contributed to the student's helpless state to take care of him until he can take care of himself again. If the helpless student is injured, any responsible member who knew of his helplessness and failed to act on this duty should be subject to criminal liability.

### *1. A Helpless Student*

The duty arises when certain activities of a student group render a student helpless. A "student group" is any organization whose membership is composed primarily of students at a college or university. Examples of student groups include athletic teams, fraternities and sororities, clubs, a cappella groups, and theater troupes. The group does not need to be formally recognized by the school.

Activities covered by this proposal are initiations, rituals, and other esoteric group traditions; any activities that are part of a process intended to incorporate new members into a group; and any activities that are conditions of becoming or remaining a member.

A student is helpless when he is unable to provide for his own safety. This could be because he is unconscious, physically restrained or confined, severely intoxicated or sleep-deprived, abandoned in unfamiliar or dangerous terrain, or exposed to the elements without appropriate clothing or protective gear.<sup>300</sup>

The duty also arises if the group's activity compounds the helplessness of a student who is already in a helpless state—for example, if a student arrives to a group activity dangerously intoxicated and then proceeds to drink even more during the course of the activity.

### *2. A Responsible Member*

The duty is imposed on group members who are responsible for and know of the student's helpless state. A member is responsible if he supervised the activity or if his participation in the activity directly contributed to the student's helpless state.

"Group members" should be broadly construed to include alumni, advisors, and coaches. Here, the most relevant consideration is not whether a person appears on a membership list (some groups might not even have a formal

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<sup>300</sup> These examples are not intended to be an exhaustive list of circumstances that could render a student helpless.

roster) but whether he is treated as part of the group by the members and takes part in group activities on similar footing with other members. For example, a fraternity brother's girlfriend who practically lives at the fraternity house and takes part in every activity should be considered a member despite not meeting the gender requirement for formal membership. So should a "ghost member" in a BGLO who went through the underground pledge process but never formally initiated.<sup>301</sup> In the case of organizations with chapters at multiple schools (primarily fraternities and sororities), a member of any chapter is considered a member of the student group.<sup>302</sup> Pledges, probationary members, and individuals considering an offer to join the group or in the process of qualifying for membership are all considered members under this proposal.<sup>303</sup>

### 3. *Extent of the Duty*

All responsible members must take reasonable steps to protect a student they know to be helpless from injury until the student is no longer helpless. For example, if the student is helpless because he has been tied up, the responsible member must safeguard him until the restraints are removed. If the helplessness is due to sleep deprivation or intoxication, the duty lasts until the student has slept for a sufficient amount of time to have become alert or is no longer intoxicated. If the student has been left in a snowstorm in his underwear, the responsibility continues until the student reaches shelter or obtains appropriate clothing.

When the student is helpless because of an injury, the responsible member must ensure that the injury is not compounded due to the student's inability to seek aid for himself. For example, if the student fell from a height, breaking his leg and losing consciousness, a responsible member must obtain medical attention for the student so that the broken leg is not exacerbated by a delay in treatment while the student is unconscious.

### 4. *The Crime*

Criminal liability should attach when the helpless student is physically injured (or an injury is compounded) and the responsible member failed to take

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<sup>301</sup> See generally Oscar Holmes IV, *Hazing and Pledging in Alpha Phi Alpha: An Organizational Behavior Perspective*, in ALPHA PHI ALPHA, *supra* note 255, at 313, 320 (discussing ghost members).

<sup>302</sup> See generally *Pledging a Brother, Not Intaking a "Paper Brother," supra* note 56 (describing pledges being taken to be hazed by brothers at another chapter).

<sup>303</sup> See generally Kaminer, *supra* note 5 (noting the death of a fraternity brother after allegedly being hazed by three pledges).

reasonable steps to protect the student, despite knowing of the student's helpless state. Breach of the responsible member's duty should be imputed if he leaves the helpless student unattended despite knowing of the student's helpless state.

*C. The Proposal Addresses the Defects in Current Hazing Laws*

This section demonstrates how the proposal set forth above addresses the identified weaknesses of the current criminal law framework. This proposal should withstand a vagueness challenge. By focusing on physical injury, this proposal avoids the vulnerability of statutes that criminalize mental hazing.<sup>304</sup> Using the Model Penal Code's definition of negligence<sup>305</sup> to determine whether reasonable steps have been taken could also insulate this proposal from a vagueness challenge because the Code's definition has been upheld against such vagueness challenges.<sup>306</sup>

Unlike prosecutions under failure-to-report provisions,<sup>307</sup> this proposal does not implicate the Fifth Amendment's right against self-incrimination. The Fifth Amendment only protects against being compelled to give incriminating testimony.<sup>308</sup> The duty to protect a helpless student is not testimonial. Even when the duty would require the group member to summon medical aid, the act of summing aid would not be testimonial. The closest analogs are laws that require drivers in car accidents to remain at the scene and report the accident. While "compliance with this requirement might ultimately lead to prosecution for some contemporaneous criminal violation of the motor vehicle code if one occurred," the Supreme Court has held that any disclosure is nontestimonial and does not raise Fifth Amendment concerns.<sup>309</sup>

Unlike the current framework, which stands in opposition to the social norms of student groups, this proposal is compatible with students' social norms and group values and is therefore more likely to change behavior. The pushback against the current framework does not stem from an opposition to preventing student injuries and deaths. Groups that haze generally care deeply

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<sup>304</sup> See *supra* Part III.B.1.

<sup>305</sup> See MODEL PENAL CODE § 2.02(2)(d) (Official Draft 1962).

<sup>306</sup> See LAFAVE, *supra* note 173, § 5.4, 373 n.26 (citing *Panther v. Hames*, 991 F.2d 576, 579–80 (9th Cir. 1993); *State v. Wilchinski*, 700 A.2d 1, 9–12 (Conn. 1997); *State v. Foster*, 589 P.2d 789, 795 (Wash. 1979)).

<sup>307</sup> See *supra* Part III.B.2.

<sup>308</sup> Charles E. Moylan, Jr. & John Sonsteng, *The Privilege Against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 287–90 (1990).

<sup>309</sup> *California v. Byers*, 402 U.S. 424, 431–32 (1971) (plurality opinion).

about their members and do not believe that their activities will be injurious or deadly.<sup>310</sup> However, current laws may be viewed as an attack on the initiation practices of groups—practices that are believed to transmit the groups' most important traditions and values.<sup>311</sup> This proposal, instead of prohibiting any specific acts or attempting to regulate the risk of such practices, charges groups to live out their values<sup>312</sup> by keeping each other safe.

Finally, recall that the current framework ignores both the agency of students who willingly submit to hazing and the victim–perpetrator cycle that perpetuates hazing activity, both of which discourage a finding of culpability.<sup>313</sup> Under this Comment's proposal, there only can be criminal liability if the initiate has lost his power to safeguard his own welfare. Because the *ability* to protect the initiate has been transferred from him to other group members during the activity, transferring the *duty* to protect the initiate to the group respects the agency of both parties. While the current framework insists that all instances of hazing are inherently coercive, this proposal is flexible enough to apply to the great range of power dynamics that occurs across different hazing incidents. By imposing liability despite the consent of the person being hazed, the current framework necessarily infantilizes the consenting student. This proposal increases the power of the student being initiated by allowing him to choose to put his wellbeing in the hands of the group and then enforcing the implicit promise that the group will keep him safe.

#### *D. Limitations*

This proposal does not address hazing that causes purely mental injuries. However, that is a general limitation of criminal law and a weakness of the existing framework in some states. And, as the *Carpetta* court correctly noted, non-debilitating “mental disturbances cannot be pinpointed with sufficient precision for use in the criminal law.”<sup>314</sup>

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<sup>310</sup> See Sweet, *supra* note 42, at 4.

<sup>311</sup> Cf. Jones, *supra* note 44, at 118 (“Most criticisms of these groups do not center on the intended ends of the pledge process, but its means. That is, the methods involved in the pledge journey are considered abhorrent. But, the methods endure because just as they are horribly sick to some—they are sacred to others.”).

<sup>312</sup> See McMinn, *supra* note 46, at 204 (finding that all twenty-two fraternity rituals reviewed included an oath to “[c]ultivate [a] spirit of kindness and goodwill toward members”).

<sup>313</sup> See *supra* Part III.C.3.

<sup>314</sup> See *Carpetta v. Pi Kappa Alpha Fraternity*, 100 Ohio Misc. 2d 42, 57 (Ct. Com. Pl. 1998) (quoting OHIO REV. CODE ANN. § 2901.01(A)(5)(a) (West 2006); *id.* § 2901.01 note (Legislative Service Commission)).

Moreover, the remedy provided by current statutes that purport to address purely mental injuries is illusory. There are no published opinions of cases in which a prosecution has been brought, successfully or not, for purely mental hazing,<sup>315</sup> and if such a case were brought, the defendant would have a very strong challenge to the statute on vagueness grounds.<sup>316</sup> States may be starting to recognize the limitations of mental hazing statutes, as several states that had such statutes have recently amended them to only address physical harm.<sup>317</sup>

This is not to say there is no recourse for mental hazing. A victim could pursue civil remedies for the torts of negligent<sup>318</sup> or intentional<sup>319</sup> infliction of emotional distress. School disciplinary and grievance systems, which focus on learning instead of retribution, are also better equipped than the criminal law to deal with the vagaries of mental hazing.<sup>320</sup>

This proposal also does not create criminal liability for activities that create a risk of harm but no physical injury. This Comment's proposal is based on the belief that the sole purpose of specialized criminal hazing laws should be to prevent injuries and deaths, and that the best way to achieve that purpose is to incentivize protecting fellow group members and rendering aid as needed. A hazing statute that imposes liability based on risk alone will undermine that purpose. As previously noted, if criminal liability attaches before an injury occurs, fear of prosecution will discourage seeking aid for an endangered student.<sup>321</sup> In addition, turning to criminal law comes at a high price. Arrest and prosecution will significantly impede if not derail a student's education.<sup>322</sup> This is not to say that prosecution is never appropriate in situations where there is no injury, but that general criminal laws, such as reckless endangerment, are sufficient for those purposes.

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<sup>315</sup> See *supra* note 149 and accompanying text.

<sup>316</sup> See *supra* Part III.B.1.

<sup>317</sup> See *supra* note 97.

<sup>318</sup> 4 J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 32:13 (2d ed. 2008), available at Westlaw MTLLE (last updated June 2013).

<sup>319</sup> *Id.* § 32:3; 5 *id.* § 44:40.

<sup>320</sup> See Michael Dannells, *From Discipline to Development: Rethinking Student Conduct in Higher Education*, 25 ASHE-EIRC HIGHER EDUC. REP., no. 2, 1997, at 1, 79; Edward N. Stoner II & Sheldon E. Steinbach, *The Truth About College Discipline*, CHRON. HIGHER EDUC. (D.C.), Dec. 13, 1996, at A56.

<sup>321</sup> See *supra* Part III.C.2.

<sup>322</sup> Cf. David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 47 (2013) (noting the negative impact of a juvenile arrest on high school completion and college enrollment).

## CONCLUSION

Collegiate hazing is a significant problem. Every year there are student deaths as a result of hazing. Other students are injured, and many more endure abuse and unpleasant experiences. The current criminal law approach to hazing solves no part of the hazing dilemma. The only measure by which it has been successful is the number of states that have passed statutes—statutes which have had no determinable impact on the number or severity of hazing incidents.

The current approach fails because it ignores the purposes and complexity of centuries-old hazing traditions: the human desire to find meaning in ritual, the drive to prove oneself and gain respect, the fear and shame of having been taken advantage of, and the deep need to justify experiences that may be unjustifiable. Current criminal hazing laws are grounded in a strategy of blanket prohibition that (1) in most cases duplicates existing criminal laws but presents unique obstacles that make successful prosecutions harder to obtain, (2) in many cases targets mostly innocuous behavior, and (3) in some cases is unconstitutional. Far from benign, the current approach may increase instances of hazing by entrenching pro-hazing social norms and increasing the danger of hazing by driving it further underground, making it harder for schools to monitor and less likely that an imperiled student will receive aid.

This Comment proposes a different approach. Instead of focusing on criminalizing students' behavior, it insists that they have a duty to take care of one another and truly become their brothers' keepers. It draws from criminal omission liability to create a duty where, if a student is helpless as a result of a group activity and is unable to protect himself, other group members who know of his helplessness must protect him from injury until he is once again able to take care of himself. Hazing has existed for hundreds of years and is likely a permanent fixture in American colleges and universities. The practice certainly will not be eradicated through current criminal hazing laws. This Comment's proposal is a step toward a more modest, but more important, goal: eliminating injuries and deaths due to hazing.

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## STATUTORY APPENDIX

STATUTE	Severity <sup>323</sup>	Type of Harm <sup>324</sup>	Injury Required <sup>325</sup>	Enumerated Examples	Orgs <sup>326</sup>	Context <sup>327</sup>	No Consent <sup>328</sup>	Failure to Report
ALA. CODE § 16-1-23 (2001)	M	PM	No	No	AnyS	<b>I</b>		X
ARK. CODE ANN. §§ 6-5-201 to -204 (West 2009 & Supp. 2012)	M	PM	No	Yes	AnyS	<b>I</b>		X
CAL. PENAL CODE § 245.6 (West Supp. 2014)	MF	P	E	No	AnyS	<b>I</b>		
COLO. REV. STAT. ANN. § 18-9-124 (West 2013)	M	P	No	Yes	AnyS	<b>I</b>		
CONN. GEN. STAT. ANN. § 53-23a (West 2012)	V <sup>329</sup>	PM	No	Yes	C	<b>Ic</b>	X	
DEL. CODE ANN. tit. 14, §§ 9301–9304 (West 2011)	M	PMC	No	Yes	C	<b>Ic</b>	Cond	
FLA. STAT. ANN. §§ 1006.63, .135 (West 2013)	MF	P	E	Yes	HS/C	All	X	
GA. CODE ANN. § 16-5-61 (2011)	M	P	No	No	AnyS	All	X	
IDAHO CODE ANN. § 18-917 (West 2006)	M	PM	No	Yes	AnyS	<i>ios</i>		
720 ILL. COMP. STAT. ANN. 5/12C-50 (West Supp. 2013)	MF	P	Yes	No	AnyS	<b>I</b>		

<sup>323</sup> V = Violation; M = Misdemeanor; F = Felony.

<sup>324</sup> P = Physical; M = Mental; C = Requiring a person to commit a crime.

<sup>325</sup> E = Injury is not required but enhances penalties.

<sup>326</sup> AnyS = Any student organization; HS = High school student organization; C = Collegiate student organization; All = Applies to both student and nonstudent organizations.

<sup>327</sup> I = Initiation into or becoming a member of an organization; C = Continuing to be a member; O = Holding office; S = Obtaining any status; **BOLD** = action is taken for the purpose of . . . ; *italics* = action or situation is a condition of . . . . See *supra* note 110.

<sup>328</sup> Cond = Consent defense is barred if membership or continued membership is conditional on hazing.

<sup>329</sup> See CONN. GEN. STAT. ANN. § 53a-27(a) (West 2012) (“An offense, for which the only sentence authorized is a fine, is a violation unless expressly designated an infraction.”).

STATUTE	Severity <sup>323</sup>	Type of Harm <sup>324</sup>	Injury Required <sup>325</sup>	Enumerated Examples	Orgs <sup>326</sup>	Context <sup>327</sup>	No Consent <sup>328</sup>	Failure to Report
IND. CODE ANN. § 35-42-2-2 (West 2012) <sup>330</sup>	MF	P	E	No	All	<i>i</i>	X	
IOWA CODE ANN. § 708.10 (West 2003)	M	P	E	Yes	AnyS	<i>i</i>	X	
KAN. STAT. ANN. § 21-5418 (West 2012)	M	P	No	No	All	<i>i</i>		
LA. REV. STAT. ANN. § 17:1801 (2013)	M	P	No	No	AnyS	All		
MD. CODE ANN., CRIM. LAW § 3-607 (West 2002)	M	P	No	No	AnyS	<b>I</b>	X	
MASS. GEN. LAWS ANN. ch. 269, §§ 17–19 (West 2008)	M	PM	No	Yes	AnyS	<b>I</b>	X	X <sup>331</sup>
MICH. COMP. LAWS ANN. § 750.411t (West Supp. 2012)	MF	PC	Yes	Yes	AnyS	All	X	
MISS. CODE ANN. § 97-3-105 (West 2011)	M	P	E	No	All	<b>I</b>		
MO. ANN. STAT. §§ 578.360–.365 (West 2011)	MF	PMC	No	Yes	C	<b>IC</b>	X	
NEB. REV. STAT. ANN. §§ 28-311.06 to .07 (West 2009)	M	PM	No	Yes	C	<b>IC</b>	X	
NEV. REV. STAT. ANN. § 200.605 (West 2000)	M	P	E	Yes	HS/C	<b>I</b>	X	
N.H. REV. STAT. ANN. § 631:7 (2007)	M	PM	No	No	AnyS	<i>ic</i>	X	X

<sup>330</sup> On July 1, 2014, as part of a revision of the state's penal law, Indiana's hazing law will be split off from its criminal recklessness law and moved to a new code section, but there will be no substantive changes. See IND. CODE ANN. § 35-42-2-2.5 (West, Westlaw though 2013 legislation) (effective July 1, 2014).

<sup>331</sup> Failure to report is a noncriminal violation, punishable only with a fine. MASS. GEN. LAWS ANN. ch. 269, § 18 (West 2008).

STATUTE	Severity <sup>323</sup>	Type of Harm <sup>324</sup>	Injury Required <sup>325</sup>	Enumerated Examples	Orgs <sup>326</sup>	Context <sup>327</sup>	No Consent <sup>328</sup>	Failure to Report
N.J. STAT. ANN. §§ 2C:40-3 to -5 (West 2005)	MF <sup>332</sup>	P	E	No	All	<b>I</b>	X	
N.Y. PENAL LAW §§ 120.16-.17 (McKinney 2009)	VM	P	E	No	All	<b>I</b>		
N.C. GEN. STAT. ANN. §§ 14-35, -38 (2013)	M	P	Yes	No	AnyS	<b>I</b>		
N.D. CENT. CODE ANN. § 12.1-17-10 (West 2008)	M	P	E	Yes	All	<b>I</b>		
OHIO REV. CODE ANN. § 2903.31 (West 2006)	M	PM	No	No	All	<b>I</b>		
OKLA. STAT. tit. 21, § 1190 (2011)	M	PM	No	Yes	AnyS	<b>I</b>	Cond	
OR. REV. STAT. ANN. § 163.197 (West Supp. 2013)	V	PC	No	Yes	AnyS	<i>ios</i>	X	
24 PA. CONS. STAT. ANN. §§ 5351-5354 (West 2006)	M	PMC	No	Yes	C	<b>Ic</b>	Cond	
R.I. GEN. LAWS ANN. §§ 11-21-1 to -3 (West 2006)	M	PM	No	Yes	AnyS	<b>I</b>		
S.C. CODE ANN. §§ 16-3-510 to -540 (2003 & Supp. 2013)	M	P	No	No	AnyS	<b>I</b>	X	X
TEX. EDUC. CODE ANN. §§ 37.151-157, 51.936 (West 2012) <sup>333</sup>	MF	PMC	E	Yes	HS/C	<b>IOC</b>	X	X

<sup>332</sup> New Jersey law does not define offenses as misdemeanors or felonies but uses the terms “disorderly persons offense” and “crime.” See N.J. STAT. ANN. § 2C:1-4 (West 2005). These terms are analogous to misdemeanor and felony, respectively. A *disorderly persons offense* can result in incarceration for up to six months, *id.* § 2C:43-8, and the lowest level of *crime* is punishable by incarceration for up to eighteen months, *id.* § 2C:43-6(a)(4).

<sup>333</sup> Section 37.152(a)(3), which prohibited “recklessly permit[ting] hazing to occur,” was declared unconstitutionally vague in *State v. Zascavage*, 216 S.W.3d 495 (Tex. Ct. App. 2007).

STATUTE	Severity <sup>323</sup>	Type of Harm <sup>324</sup>	Injury Required <sup>325</sup>	Enumerated Examples	Orgs <sup>326</sup>	Context <sup>327</sup>	No Consent <sup>328</sup>	Failure to Report
UTAH CODE ANN. § 76-5-107.5 (West Supp. 2013)	MF	PM	E	Yes	All	All <sup>334</sup>	X <sup>335</sup>	
VT. STAT. ANN. tit. 16, §§ 140a–140d (West 2007) <sup>336</sup>	V	PM	No	No	AnyS	<b>IOC</b>	X	
VA. CODE ANN. § 18.2-56 (West 2012)	M	P	Yes	No	AnyS	<b>Ic</b>	X	
WASH. REV. CODE ANN. §§ 28B.10.900–.903 (West 2009)	M	PM	No	No	C	All		
W. VA. CODE ANN. §§ 18-16-1 to -4 (West 2002)	M	PMC	No	Yes	C	<b>Ic</b>	X	
WIS. STAT. ANN. § 948.51 (West 2005)	MF	P	E	Yes	AnyS	<b>I</b>	Cond	

<sup>334</sup> The Utah statute applies to all contexts pertaining to student organizations; within other organizations it applies to acts that are “for the purpose of initiation, admission into, affiliation with, holding office in, or as a condition for continued membership in any organization.” UTAH CODE ANN. § 76-5-107.5(1)(b) (West Supp. 2013).

<sup>335</sup> A consent defense is only prohibited when the victim is under twenty-one. *Id.* § 76-5-107.5(2).

<sup>336</sup> In February 2014, the Vermont hazing law was redesigned VT. STAT. ANN. tit. 16, §§ 570i–570l.