McGeorge Law Review

Volume 31 | Issue 4 Article 6

1-1-2000

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In Vino Mortuus[1]

I. INTRODUCTION

Drinking and academia have long been viewed as complementary bedfellows. In Plato's *Symposium*, for example, a group of friends decided to exchange speeches exploring the virtues of Love after feasting together.[2] Following the meal, the party-goers "were about to commence drinking" when they encountered a problem—they were all terribly hungover from the previous night's festivities:

> Pausanias said, And now, my friends, how can we drink with least injury to ourselves? I can assure you that I feel severely the effect of yesterday's potations, and must have time to recover; and I suspect that most of you are in the same predicament, for you were of the party yesterday. Consider then: How can the drinking be made the easiest?

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1. The phrase "*In vino veritas*," literally translated as "In wine, truth," was used by Soren Kierkegaard in his 1845 work, *Stages on Life's Way*, to express the complementary nature of alcohol and discourse. Scholars view his *Stages* banquet scene as a modern counterpart to the banquet setting described in Plato's *Symposium*. *See* Part I (examining the *Symposium* banquet). Kierkegaard wrote:

> As the password for the occasion[, the host of the banquet] fixed upon *In vino veritas*, because, though speeches were to be allowed as well as conversation, no speeches might be made except *in vino*, and no truths were to be heard except such as are *in vino*, when wine vindicates the truth and the truth vindicates the wine.

IN VINO VERITAS: A RECOLLECTION, A KIERKEGAARD ANTHOLOGY 179 (Robert Bretall ed., Princeton Univ. Press 1946) (1845). Thus, the term "*In vino mortuus*," or "In wine, death," is an apropos label for the modern phenomenon of alcohol related hazing deaths.

2. Symposium, THE WORKS OF PLATO 333 (Irwin Edman ed. & Benjamin Jowett trans., The Modern Library 1956) (1928).

> I entirely agree, said Aristophanes, that we should, by all means, avoid hard drinking, for I was myself one of those who were yesterday drowned in drink.[3]

Following a brief discussion, the friends "all agreed that drinking [was] to be voluntary, and that there [was] to be no compulsion."[4] After a few brief speeches exploring the virtues of Love, a highly intoxicated visitor named Alcibiades arrived unexpectedly and sought to join in the celebration.[5] After he noticed that the group was but casually drinking, Alcibiades said:

> You seem, my friends, to be sober, which is a thing not to be endured; *you must drink*—for that was the agreement under which I was admitted—and I elect myself master of the feast until you are well drunk.[6]

By the end of the story, all of the participants were well inebriated.[7] Those who had not succumbed to the intoxicating effects of the wine stayed up for the remainder of the night, listening to further discourses by Socrates.[8] By the early morning, Socrates was the only one who remained awake.[9]

Under modern hazing statutes, Alcibiades' actions might be construed as hazing.[10] In Idaho, for example, the definition of "haze" includes "to require [or] encourage . . . that [a] person be subjected to . . . [c]ompelled ingestion of any substance."[11]

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3. *Id.* at 338.
4. *Id.* at 339.
5. *Id.* at 380.
6. *Id.* at 381 (emphasis added).
7. *Id.* at 392.
8. *Id.* at 392-93.
9. *Id.* at 393. In fact, Socrates was infamous for his ability to consume large amounts of wine and was the lone survivor of that evening's festivities. Said Alcibiades during the night: "[T]his ingenious trick of mine [filling a vessel with two quarts of wine for Socrates' consumption] will have no effect on Socrates, for he can drink any quantity of wine and not be at all nearer being drunk." *Id.* at 382.
10. *See infra* Part III.B (discussing state hazing statutes).
11. *See* IDAHO CODE § 18-917 (1997) (setting forth the definition for "hazing"). Section 18-917 reads, in relevant part:

> (1) No member of a fraternity, sorority or other living or social student organization . . . shall intentionally haze or conspire to haze any member, potential member or person pledged to be a member of the organization, as a condition or precondition of attaining membership in the organization or of attaining any office or status therein.
> (2) As used in this section, "haze" means to subject a person to bodily danger or physical harm or a likelihood of bodily danger or physical harm, or to require, encourage, authorize or permit that the person be subjected to any of the following:
> (a) Total or substantial nudity on the part of the person;
> (b) Compelled ingestion of any substance by the person;
> (c) Wearing or carrying of any obscene or physically burdensome article by the person;
> (d) Physical assaults upon or offensive physical contact with the person;
> (e) Participation by the person in boxing matches, excessive number of calisthenics, or other physical contests;

Unfortunately, however, modern examples of hazing are not nearly as mild as merely encouraging another to become intoxicated. At Louisiana State University, for example, a pledge of the Sigma Alpha Epsilon fraternity was pressured to continue drinking obscene amounts of liquor—including pitchers of beer, seven or eight Jell-O shots,[12] and fifteen or sixteen other types of shots—even after vomiting blood.[13] In 1993, a former University of Maryland student was beaten with a hammer, a horsehair whip, and a broken chair leg.[14] One 1997 pledge to the Delta Sigma Phi chapter at Western Carolina University woke up in a general store parking lot, covered in blood, and missing his shoes and shirt, after that fraternity's "midnight party."[15]

While the above examples are undeniably tragic, recent cases of fraternal hazing have assumed a more frightening face as some pledges have been forced to drink themselves to death. These deaths have posed new legal questions for courts deciding lawsuits brought by aggrieved family members.[16] Most of the fifty states have enacted hazing statutes in an attempt to punish this type of reckless behavior,[17] but their efficacy in preventing further such incidents has yet to be realized.

This Comment will begin with an overview of recent studies involving college students and alcohol consumption.[18] Next, the Comment will evaluate the phenomenon of hazing, noting the similarities and differences among various state hazing statutes.[19] The constitutionality of the these hazing statutes will likewise be

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(f) Transportation and abandonment of the person;
(g) Confinement of the person to unreasonably small, unventilated, unsanitary or unlighted areas;
(h) Sleep deprivation; or
(i) Assignment of pranks to be performed by the person.

...

(4) A member of a fraternity, sorority or other student organization, who personally violates any provision of this section shall be guilty of a misdemeanor.

12. "Jell-O shots" are pieces of flavored gelatin prepared with alcohol—usually vodka—that party-goers eat to become intoxicated.

13. *See A 20/20 Investigation Into Frat House Drinking: A Sea of Alcohol*, at 6 (ABC television broadcast transcript, Sept. 4, 1998) [hereinafter *Sea of Alcohol*] (detailing the experiences of a pledge who attended the Sigma Alpha Epsilon "bid-night" party held at an off-campus bar). The pledge reported that five plastic trash cans had been placed in the middle of the bar to serve as receptacles for sick pledges. *Id.* at 5-6. After telling a member of the fraternity that he had vomited blood, the pledge was told "[w]ho cares. You keep drinking now." *Id.* at 6.

14. *See* David S. Doty, *No More Hazing: Eradication Through Law and Education*, 10 Nov. UTAH B. J. 18, 18 (1997) (describing the beating endured by one pledge who was later awarded $375,000 after suing the fraternity).

15. *Sea of Alcohol*, *supra* note 13, at 3-5. This portion of the broadcast recounts the experience of another pledge who was forced to drink large quantities of beer and liquor as part of an initiation party. The pledge, who claimed that he "blacked out" after drinking and becoming sick, was later told that he was "jumped" by 10 or 15 people. *Id.*

16. *See infra* Part IV (discussing pledge deaths resulting in wrongful death actions).

17. *See infra* Part III.B (examining state hazing statutes).

18. *See infra* Part II (detailing college drinking trends and alcohol consumption among members of Greek organizations).

19. *See infra* Part III.B (examining state hazing statutes).

evaluated,[20] before the question of civil liability and its relationship to hazing statutes is examined, via various cases regarding fraternal hazing and alcohol-related deaths.[21]

II. BINGE DRINKING—GENERAL STATISTICS

At least one article reporting on collegiate drinking trends of the 1990s has suggested that the once infamous term "Party hearty" ought to be replaced by the more lamenting "Party hardly."[22] Others, however, have referred to the drinking habits of college students as "a self-fulfilling prophecy," because college students erroneously believe that drinking is more prevalent than it is and incorrectly try to "catch up."[23] In 1993, for example, University of Michigan students participating in a national study said "they believed [that] ninety-five percent of students drink at least once a week[; i]n reality, [however,] only sixty-four percent of males and 58 percent of females drank that often."[24] Regardless of the label chosen to characterize collegiate drinking habits, recent studies and statistics[25] clearly show that college students—especially members of Greek organizations—are consuming alcohol at alarming rates, often leading to injury[26] and even death.[27]

A. *Binge Drinking and the Harvard School of Public Health Study*

One of the biggest concerns surrounding collegiate alcohol consumption centers around the phenomenon of "binge drinking."[28] A 1995 Harvard School of Public Health study defined "binge drinking" for men "as having *five* or more drinks in a

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20. *See infra* Part III.C (exploring the constitutionality of two state hazing statutes).

21. *See infra* Part IV (discussing the question of civil liability in the context of fraternal hazing).

22. Lewis Lord, *From Party Hearty to Party Hardly? The Greek System, Mired in a Rush Recession, Gives Grades and Good Deeds the College Try*, U.S. NEWS & WORLD REPORT, Sept. 1, 1997, at 96-97. Lord's article suggests that the recent drop in the number of students who pledge and join fraternities and sororities marks a new era in collegiate drinking habits. *Id.* One reason for this purported slump "is that the wild drinking culture glorified in the movie *National Lampoon's Animal House* has fallen out of favor with career-minded students bent on making good grades and administrators determined to restore order." *Id.*

23. Ron French et al., *Colleges Gain in War on Drinking: Some Say Problem on State Campuses Not as Bad as Thought*, THE DETROIT NEWS, Oct. 26, 1998.

24. *Id.*

25. *See generally* HENRY WECSHLER, ET AL., Harvard School of Public Health, Binge Drinking on Campus: Results of a National Study (visited Nov. 24, 1998) <http://www.edc.org/hec/pubs/bihnge.htm> (copy on file with the *McGeorge Law Review*) (summarizing the findings of samples taken from 17,600 students enrolled in four-year colleges).

26. *See id.* at 5 (reporting that of all the respondents from the Harvard study who qualified as binge drinkers, 14% of women and 17% of men admitted to having sustained personal injuries one or more times as a result of drinking).

27. *See infra* Part IV.B (examining cases involving alcohol-related deaths).

28. *See supra* Part II (defining and discussing binge drinking)..

row, and for women as having *four* or more drinks in a row."[29] The study, which evaluated more than 17,000 student responses from four-year institutions, found that forty-four percent of all U.S. college students engaged in binge drinking during the two weeks prior to the study.[30] Half of those binge drinkers further qualified as "frequent" binge drinkers, or students who engaged in binge drinking three or more times in a two-week period.[31] Thus, one in every five students surveyed qualified as a frequent binge drinker. One student surveyed claimed: "I drank at least fifteen beers [in one night], and then I completely blacked out. This is not uncommon for me."[32]

The survey included a comprehensive profile of binge drinkers.[33] White college students were twice as likely to be binge drinkers than were students from other racial and ethnic groups.[34] Students who claimed that athletic participation was important to them were almost one-and-one-half times as likely to be binge drinkers, while residents of fraternities and sororities were four times as likely (the largest discrepancy in the study) to be binge drinkers compared to other students.[35]

B. Binge Drinking and Fraternities

"We bond. We are brothers. We drink."[36]

During the 1996-97 school year, six percent of the 12.5 million undergraduates at four-year schools were part of the Greek system--nearly four hundred-thousand men and just over three hundred-thousand women.[37] Although it is hard to determine exactly why drinking is commonly viewed as a condition precedent to fraternity membership, mottos, like the one set forth above, and fraternity songs,

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29. WECSHLER, *supra* note 25, at 2. For the purposes of the study, a "drink" was defined "as a 12-ounce can or bottle of beer, a 12-ounce can or bottle of wine cooler, a four-ounce glass of wine, or a shot of liquor, either straight or in a mixed drink." *Id.* at 2.

30. *Id.* at 2. The study showed that 50% of males and 39% of females qualified as binge drinkers. *Id.* at 3.

31. *Id.* at 3.

32. *Id.* at 4; *see also Sea of Alcohol*, *supra* note 13, at 3-4 (reporting the story of one fraternity pledge who claimed to drink five out of seven nights, sometimes consuming up to one case, or twenty-four cans, of beer).

33. WECSHLER, *supra* note 25, at 4.

34. *Id.* at 3.

35. *Id.*; *see also* French et al., *supra* note 23 (quoting one study which found that 10% of students drink nearly 75% of all the alcohol consumed). These numbers suggest that the members of Greek organizations consume a disproportionately high percentage of all liquor consumed by college students.

36. *See Sea of Alcohol*, *supra* note 13, at 7 (quoting an anonymous fraternity motto that illustrates the nexus between the tradition of alcohol and fraternities).

37. Lord, *supra* note 22, at 9697; *see also* Susan Tifft, *Waging War on the Greek: Fraternities and Sororities Are Being Forced to Clean Up Their Acts*, TIME, Apr. 16, 1990, at 64, 64 (suggesting that in 1990 fraternity membership was experiencing "a nationwide renaissance"). In the 1970s, for example, fraternity membership reached a low point, with only 179,000 members nationwide; by 1990, that number had mushroomed to nearly 400,000 members. *Id.*

which emphasize pride vis-a-vis drinking,[38] illustrate the integral part that drinking plays within the Greek culture. One male college student commented: "[y]ou have to . . . drink as much as you can, especially around the time when you're trying to get into a fraternity."[39] Another said: "[w]ith eighty people standing around watching you, it's kind of hard just to say 'I can't drink anymore.'"[40]

Dr. Henry Wecshler, the principal investigator in the Harvard study, found that more than eighty percent of fraternity members qualified as binge drinkers.[41] Stories that detail fraternity traditions clearly seem to corroborate this finding: pledges of the Delta Sigma Phi fraternity at Western Carolina University, for example, claimed to drink an average of five nights a week after joining the fraternity.[42] Having established this nexus between the Greek life and binge drinking, certain fraternal initiation traditions which utilize alcohol—commonly referred to as "hazing"—have posed new legal questions involving civil liability.

III. HAZING

A. *The History of Hazing*

> *Hazing has existed in some form probably in every school since time immemorial. No code of laws or regulations . . . has ever eliminated it from the category of boyish pranks, and in the nature of things never will.*[43]

One theory defines the common thread behind all forms of hazing as a "formal introduction into some position or club . . . which [signifies] that the beginner has been given some new knowledge."[44] Although there is no universally accepted definition of "hazing," Illinois law in 1901 defined the practice as "any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions . . . whereby such pastime or

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38. *See* Ballou v. Sigma Nu Gen. Fraternity, 352 S.E.2d 488, 491 (S.C. Ct. App. 1986) (explaining that participants in a 1979 Sigma Nu pledge night party at the University of South Carolina had to drink from the "cup of truth" while singing a song entitled, "I drink to Sigma Nu" containing the refrain "Drink! Drink! Drink! Men brave and true! Drink! Drink! Drink! To our Sigma Nu").

39. *See CNN Newsroom Worldview* at 5 (CNN television broadcast transcript, Oct. 1, 1997) (explaining why some students feel compelled to drink when pledging fraternities).

40. *Sea of Alcohol*, *supra* note 13, at 4.

41. *Id.* at 3.

42. *See id.* (interviewing pledges who said they drank an average of six beers five out of seven nights a week after joining their fraternity).

43. Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 112 n.7 (1991) (quoting Benjamin, *Concerning "Hazing" at the United States Naval Academy*, 52 THE INDEP. 3099, 3100 (1900) (emphasis added)).

44. *Id.* at 113 (quoting Olmert, Points of Origin, SMITHSONIAN, Sept. 1983, at 150, 151.)

amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others."[45]

Hazing, however, is not unique to American culture. In the Middle Ages, for example, new students at European universities were required to work as servants for upperclassmen.[46] Throughout history, hazing in some form or another has been associated with organizations ranging from military groups to American Indian tribes.[47] The United States Congress passed the first hazing statute in 1874 to address hazing within the United States Naval Academy.[48]

Today, hazing practices have been observed in a wide variety of groups within American society—including oil rig workers,[49] school marching bands,[50] high school football teams,[51] the military,[52] and professional sports teams.[53] Despite its widespread appeal to various groups and organizations within American culture, hazing has become most closely associated with college fraternities. In the 1964 case of *New York v. Lenti* (*Lenti I*),[54] County Judge Albert A. Oppido commented that "[f]raternal organizations and associations have never suffered for ideas in

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45. 1901 Ill. Laws p. 145, §2.

46. Lewis, *supra* note 43, at 112 n.4.

47. *Id.* at 112 n.5 (citing Olmert, *Points of Origin*, SMITHSONIAN, Sept. 1983, at 150-51). In one California Indian tribe, for example, a puberty initiation rite included stinging young boys with nettles and ants before requiring them to fast. *Id.*

48. *See* Lewis, *supra* note 43, at 117 (explaining an 1874 Congressional statute which forbade "plebe bedevilment" within the Naval Academy).

49. *See* Vaughn v. Pool Offshore Co., 683 F.2d 922, 923-24 (5th Cir. 1982) (detailing the experiences of one new employee who was greased with oil, showered with ammonia and thrown into a cold shower as part of a ritual for oil rig workers).

50. *See University Checks Reports of Hazing*, SUN-SENTINEL, Nov. 6, 1998, at 6B (reporting on a Florida A&M University investigation into hazing practices in the "Marching 100," one of the nation's best known college marching bands). Eight new members of the band complained of hazing practices that included punching and paddling. *Id.*

51. *See* Anthony Thornton, *McAlester Parents Indignant at School's Lax Hazing Stance*[;] *'Idiotic Statements' May Prompt Suit*, THE DAILY OKLAHOMAN, Jan. 19, 1999, at 19 (detailing the story of one high school freshman who claimed that he was knocked to the ground and beaten by ten members of the football team as part of initiation onto the team).

52. *See* Tom Beyerlein, *Three Marines Held in Hazing*, DAYTON DAILY NEWS, Jan. 29, 1999, at 1B (describing how three Marines based in Okinawa subjected Private Aaron Lemon to an initiation right called the "Red Patch"). The rite involved binding the initiate's wrists and ankles with duct tape before ripping it loose; the resulting red marks were supposed to symbolize the red patches worn on the Marines uniforms. *Id.*; *see also* Eric L. Wee, *Judge Orders Community Service for Two Charged in VMI Hazing*, THE WASH. POST, Jan. 16, 1999, at B4 (noting that two former cadets at the Virginia Military Institute were ordered to serve 56 hours apiece of community service after being charged with beating VMI freshmen with a belt and coat hanger).

53. *See* Mary Foster, *Danish Sues Saints, Players Over Hazing Injury*, THE BATON ROUGE ADVOC., Oct. 22, 1998, at 2C (explaining how free-agent rookie Jeff Danish initiated a civil action against the New Orleans Saints after sustaining injuries in a training camp hazing incident). Danish broke a dormitory window when he crashed into it after running the "gauntlet," which consisted of veteran players lining the halls and hitting rookie players as they ran through. *Id.* Danish, who is suing the Saints for more than $650,000, required fourteen stitches in his left arm and sustained facial bruises. *Id.*

54. 253 N.Y.S.2d 9 (Nassau County Ct. 1964) [hereinafter *Lenti I*].

contriving new forms of hazing."[55] To combat the dynamic nature of hazing, state hazing statutes have taken on as many forms as the hazing practices themselves.

B. Hazing Statutes

At least forty states have enacted some form of statute addressing the problem of hazing.[56] The most common type of statute broadly defines the term "hazing." The Delaware Code, for example, defines "hazing" as:

> [A]ny action or situation which recklessly or intentionally endangers the mental or physical health or safety of a student or which wilfully destroys or removes public or private property for the purpose of initiation or admission into or affiliation with, or as a condition for continued membership in, any organization operating under the sanction of or recognized as an organization by an institution of higher learning. The term shall include, but not be limited to, any brutality of a physical nature, such as whipping, beating, branding, forced calisthenics, exposure to the elements, forced consumption of any food, liquor, drug or other substance, or any other forced physical activity which could adversely affect the physical health and safety of the individual, and shall include any activity which would subject the individual to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct which could result in embarrassment, or any other forced activity which could adversely affect the mental health or dignity of the individual, or any wilful destruction or removal of public or private property. For purposes of this definition, any activity as described in this definition upon which the

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55. *Id.* at 13.

56. ALA. CODE § 16-1-23 (1995); ARK. CODE ANN. § 6-5-201 (Michie 1993); CAL. EDUC. CODE §§ 32050 & 32051 (West 1994); COLO. REV. STAT. ANN. § 18-9-124 (West Supp. 1999); CONN. GEN. STAT. ANN. § 53-23a (West 1994); DEL. CODE ANN. tit. 14, §§ 9301-04 (1993); FLA. STAT. ANN. § 240.262 (West 1998); GA. CODE ANN. § 16-5-61 (1999); IDAHO CODE § 18-917 (1997); 720 ILL. COMP. STAT. ANN. 120/0.01, 120/5 & 120/10 (West 1993); IND. CODE ANN. § 32-42-2-2 (West 1998); IOWA CODE ANN. § 708.10 (West 1993); KAN. STAT. ANN. § 21-3434 (1995); KY. REV. STAT. ANN. § 164.375 (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 1801 (West 1982); ME. REV. STAT. ANN. tit. 20-A, § 10004 (West 1993); MD. ANN. CODE art. 27, § 268H (1996); MASS. GEN. LAWS ANN. ch. 269, §§ 17-19 (West 1990); MINN. STAT. ANN. §127.465 (West 1999); MISS. CODE ANN. §97-3-105 (1994); MO. ANN. STAT. §§ 578.360, 578.363 & 578.365 (West 1995); NEB. REV. STAT. §§ 28-311.06 & 28-311.07 (1995); NEV. REV. STAT. ANN. § 200.605 (Michie Supp. 2000); N.H. REV. STAT. ANN. § 631:7 (1996); N.J. STAT. ANN. §§ 2C:40-3 & 2C:40-4 (West 1995); N.Y. PENAL LAW §§ 120.16 & 120.17 (McKinney 1998); N.C. GEN. STAT. §§ 14-35, 14-36 & 14-38 (1993); N.D. CENT. CODE § 12.1-17-10 (1997); OHIO REV. CODE ANN. §§ 2307.44 & 2903.31 (West 1998); OKLA. STAT. ANN. tit. 21, § 1190 (West Supp. 1999); OR. REV. STAT. § 163.197 (1990); PA. STAT. ANN. tit. 24, §§ 5351-5354 (West 1992); R.I. GEN. LAWS §§ 11-21-1, 11-21-2 & 11-21-3 (1994); S.C. CODE ANN. §§ 16-3-510, 16-3-520, 16-3-530, 16-3-540 & 59-101-200 (Law. Co-op Supp. 1998); TEX. EDUC. CODE ANN. §§ 37.151-157 (West 1996); UTAH CODE ANN. § 76-5-107.5 (1999); VA. CODE ANN. § 18.2-56 (Michie 1996); WASH. REV. CODE ANN. §§ 28B.10.900-902 (West 1997); W. VA. CODE §§ 18-16-2, 18-16-3 & 18-16-4 (Supp. 1999); WIS. STAT. ANN. § 948.51 (West 1996).

> admission or initiation into or affiliation with or continued membership in an organization is directly or indirectly conditioned shall be presumed to be "forced" activity, the willingness of an individual to participate in such activity notwithstanding.[57]

As indicated by the Delaware statute, state legislatures have gone to great lengths to ensure that statutes prohibiting hazing cover every possible activity which might jeopardize the mental and physical health or safety of affected individuals.[58] Instead of providing a laundry list of activities that constitute hazing, some statutes paint with broader strokes and define "hazing" by focusing on the effects of prohibited acts rather than on the acts themselves, or on a combination thereof. Arkansas, for example, defines "hazing" as:

> (1) Any willful act on or off the property of any school, college, university, or other educational institution . . . by one (1) student alone or acting with others which is directed against any other student and done for the purpose of intimidating the student attacked by threatening him with social or other ostracism or of submitting such student to ignominy, shame, or disgrace among his fellow students, and acts calculated to produce such results; or
> (2) The playing of abusive or truculent tricks on or off the property of any school, college, university, or other educational institution . . . by one (1) student alone or acting with others, upon another student to frighten or scare him; or
> (3) Any willful act on or off the property of any school, college, university, or other educational institution . . . by one (1) student alone or acting with others which is directed against any other student and done for the purpose of humbling the pride, stifling the ambition, or impairing the courage of the student attacked or to discourage him from remaining in that school . . . or reasonably to cause him to leave the institution rather than submit to such acts; or
> (4) Any willful act on or off the property of any school, college, university or other educational institution . . . by one (1) student alone or acting with others in striking, beating, bruising, or maiming; or seriously offering, threatening, or attempting to strike, beat, bruise, or maim; or to do or seriously offer, threaten, or attempt to do physical violence to any student of any such educational institution; or any assault upon any such student made for the purpose of committing any of the acts, or producing any of the results, to such student as defined in this section.[59]

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57. DEL. CODE ANN. tit. 14, § 9302 (1993).
58. *Id.*
59. ARK. CODE ANN. § 6-5-201 (Lexis 1999).

Some statutes provide a much shorter definition of "hazing." Kansas, for example, defines "hazing" as

> [I]ntentionally, coercing, demanding or encouraging another person to perform as a condition of membership in a social or fraternal organization, any act which could reasonably be expected to result in great bodily harm, disfigurement or death or which is done in a manner whereby great bodily harm, disfigurement or death could be inflicted.[60]

Regardless of the exact language employed, statutes enacted to combat hazing generally prohibit any activity intended to cause—or which foreseeably may cause—physical harm, disfigurement or death.[61]

Most hazing violations are treated as misdemeanors and offenders are punished with monetary penalties[62] or a combination of jail time and monetary penalties.[63] Florida law requires each educational institution to adopt and enforce penalties for violations of hazing policies, and suggests that "[s]uch penalties may include the imposition of fines[,] the withholding of diplomas or transcripts pending compliance with the rules or pending payment of fines[,] and the imposition of probation, suspension, or dismissal."[64] Some statutes also include a type of provision stating that punishment under a hazing statute does not preclude or limit prosecution for another crime or pursuit of civil remedies.[65]

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60. KAN. STAT. ANN. § 21-3434(b) (1995); *see also* CAL. EDUC. CODE § 32050 (West 1994) (prohibiting "any pastime or amusement engaged in . . . which causes, or is likely to cause, bodily danger, physical harm, or personal degradation or disgrace resulting in physical or mental harm, to any student"); IND. CODE ANN. § 32-42-2-2(a)(1), (2) (West 1998) (stating, in part, that "'hazing' means forcing or requiring another person[,] with or without the consent of the other person[,] and as a condition of association with a group or organization[,] to perform an act that creates a substantial risk of bodily injury").

61. *See, e.g.*, KAN. STAT. ANN. § 21-3434(b) (1995) *supra* note 60 and accompanying text; OR. REV. STAT. § 163.197 (1990) ("'[H]aze' means to subject a person to bodily danger or physical harm or a likelihood of bodily danger or physical harm. . . .").

62. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-23a(c), (d) (West 1994) (punishing organizations found guilty of hazing with a fine of up to $1,500 and punishing individuals found guilty of the same with a fine of up to $1,000); OR. REV. STAT. § 163.197(4), (5) (1990) (imposing a penalty for organizations not to exceed $1,000; for individuals, $250); TEX. EDUC. CODE ANN. § 37.153(b)(1) (West 1996) (punishing organizations with "a fine of not less than $5,000 nor more than $10,000").

63. *See, e.g.*, CAL. EDUC. CODE § 32051 (West 1994) (providing that violations of California hazing law are misdemeanors, "punishable by a fine of not less than one hundred dollars ($100), nor more than five thousand dollars ($5,000), or imprisonment in the county jail for not more than one year, or both"); GA. CODE ANN. §§ 16-5-61, 17-10-4 (1999) (labeling a violation of the hazing statute "a misdemeanor of a high and aggravated nature" and punishing the offender with a fine of up to $5,000, up to twelve months in prison, or both).

64. FLA. STAT. ANN. § 240.262(2)(a)1 (West 1998).

65. *See, e.g.*, ALA. CODE § 16-1-23(f) (1995) ("Nothing in this [hazing law] shall be construed as in any manner affecting or repealing any law . . . respecting homicide, or murder, manslaughter, assault with intent to murder, or aggravated assault."); CONN. GEN. STAT. ANN. § 53-23a(e) (West 1994) ("This [hazing] section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy.").

C. The Constitutionality of Hazing Statutes

Given the broad prohibitions and sometimes subjective standards[66] employed in many of the states' hazing statutes, many statutes seem ripe for constitutional challenge. Some defendants charged with violating these statutes have challenged a statute's constitutionality by alleging that the statute is overbroad,[67] vague,[68] and in violation of the Fourteenth Amendment's Equal Protection Clause.[69]

An overbroad statute has been defined as "a statute that is written too broadly, or more broadly than necessary—[i.e.] one that is designed to burden or punish activities that are not constitutionally protected, but its flaw is that, as drafted, it also includes activities protected by the First Amendment."[70] As will be discussed below, defendants have argued that broadly drafted hazing statutes may potentially prohibit otherwise protected speech.[71]

The void for vagueness doctrine applies to all criminal laws and requires that "[a]ll such laws must provide fair notice to persons before making their activity criminal and also to restrict the authority of police officers to arrest persons for a violation of the law."[72] Given the variety of the different states' hazing statutes, some statutes are more prone to challenges for vagueness than are others.[73] The New York statute examined below, for example, defined "hazing" as including "treatment such as the wearing of a 'beanie cap' to the permanent disfigurement of the body."[74]

The Fourteenth Amendment's Equal Protection Clause requires that no person be denied equal protection of the law of any state.[75] This guarantee governs all state "actions which classify individuals for different benefits or burdens under the law."[76] Most hazing statutes are specifically drafted for application in the collegiate and university setting.[77] Thus, as will be seen below, defendants in at least one case

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66. *See, e.g.*, ARK. CODE ANN. § 6-5-201 (Michie 1993) (forbidding "[t]he playing of abusive or truculent tricks").

67. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8, at 996 (5th ed. 1995) (discussing the overbreadth doctrine).

68. *See id.* § 16.9, at 1001 (discussing the void-for-vagueness doctrine as applied to criminal statutes).

69. *See id.* § 14.2, at 597 (detailing the concept of equal protection under the Fourteenth Amendment).

70. *Id.* § 16.8, at 996.

71. *See infra* notes 104-15 and accompanying text (examining the defendants' overbreadth arguments in *Illinois v. Anderson*, 591 N.E.2d 461 (Ill. 1992)).

72. NOWAK & ROTUNDA, *supra* note 67, § 16.9, at 1001.

73. *See supra* note 66 and accompanying text (noting that Arkansas' hazing statute forbids "[t]he playing of abusive or truculent tricks").

74. *Lenti I*, 253 N.Y.S.2d at 13 (referencing New York State Penal Law section 1030).

75. *See* U.S. CONST. amend. XIV, § 1 (stating, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

76. NOWAK & ROTUNDA, *supra* note 67, § 14.1, at 595.

77. *See, e.g.*, ARK. CODE ANN. § 6-5-201 (Michie 1993) (limiting hazing to "[a]ny willful act on or off the property of any school, college, university, or other educational institution.").

have attempted to challenge a hazing statute as unfair to students of colleges and universities.[78]

Constitutional challenges based on the doctrines mentioned above are discussed in the following two cases.

1. New York v. Lenti

New York v. Lenti (*Lenti I*),[79] involved a group of young men in Nassau County, New York, planning an initiation ceremony for the purpose of inducting pledges into the Omega Gamma Delta fraternity.[80] During the event, dubbed the "Hell Night" initiation ceremony, five pledges were struck about their bodies and faces "with clenched fists, open hands, forearms and feet."[81] The four individual organizers were subsequently indicted for the crime of hazing under section 1030 of the New York State Penal Law.[82]

The defendants moved to dismiss the indictment, alleging that the hazing statute was unconstitutional, because the language of the statute was vague and indefinite.[83] The court first noted that "[a] thorough search has not revealed any decision concerning hazing rendered by either a Court of the State of New York, a Court of any of our sister states or a court of England."[84] To determine the validity of the challenged statute, the court applied the "pertinent and recognized principles of statutory construction."[85]

To survive a constitutional challenge of vagueness, "a criminal statute must be sufficiently explicit so that all those who are subject to" its penalties will know which acts to avoid.[86] In reaching this determination, the words in penal statutes are

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78. *See infra* notes 132-36 and accompanying text (discussing one Equal Protection challenge to a hazing statute).

79. *Lenti I*, 253 N.Y.S.2d 9.

80. *Id.* at 10-11 (describing the facts which gave rise to a constitutional challenge to New York's hazing statute).

81. *Id.* at 11.

82. *See id.* at 10 (setting forth the indictment against the defendants). The defendants were also charged with the crime of third degree assault in violation of Section 244 of the penal law. *Id.* at 11. Section 1030 of the penal law provided:

> It shall be unlawful for any person to engage in or aid or abet what is commonly called hazing, in or while attending any of the colleges, public schools or other institutions of learning in this state, and whoever participates in the same shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than one hundred dollars, or imprisonment not less than thirty days nor more than one year, or both at the discretion of the court. . . .

Id.

83. *Id.* With respect to the charges of third degree assault, the defendants asserted the defense of consent. *Id.* at 15. The court rejected this claim, however, stating that "[s]urely consent is not a carte blanche license to commit an unabridged assault." *Id.*

84. *Id.* at 12.

85. *Id.*

86. *Id.*

to be given their commonly accepted meaning in order that citizens will know exactly what is forbidden.[87] In order to define "hazing," the *Lenti I* court noted that the term previously had been defined as "striking, laying hands upon, treating with violence, or offering to do bodily harm to a new cadet with intent to punish or injure him; or other treatment of a tyrannical, abusive, shameful, insulting or humiliating nature."[88] The court added to its inquiry the language of section 1030, which included within the definition of hazing "treatment such as the wearing of a 'beanie cap' to the permanent disfigurement of the body."[89]

After noting that "[i]t would have been an impossible task if the legislature [had] attempted to define hazing specifically [because] [f]raternal organizations and associations have never suffered for ideas in contriving new forms of hazing," the court held that the statute was not unconstitutionally vague.[90] Pointing to the possibly limitless range of conduct that could be included between "the wearing of a 'beanie cap' and the permanent disfigurement of the human body," the court concluded that "it is impossible to draw an arbitrary line in advance defining what is obviously legal and illegal."[91]

When the *Lenti* case eventually went to trial the following year, all indictments were dismissed.[92] The *Lenti II* court found that because the pledges of the "Hell Night" ceremony "participated" in the ceremony, they were technically in violation of the hazing statute as accomplices.[93] As accomplices to the hazing, the pledges' testimony required corroboration.[94] Because this corroboration was lacking, the indictments had to be dismissed.[95]

The *Lenti II* court was obviously troubled by the findings of *Lenti I* regarding the constitutionality of section 1030 of the New York Penal Law. While the *Lenti I* court upheld the hazing statute against constitutional challenges for vagueness and ambiguity, the *Lenti II* court referred to the same statute as "not only vague, but also ambiguous."[96] Despite its obvious discontent, however, the *Lenti II* court was required to adhere to the findings of law reached in *Lenti I*.[97]

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87. *Id.*

88. *See id.* (borrowing the definition from BOUVIER'S LAW DICTIONARY 497 (1948), which took its definition from the case of *Kentucky Military Institute v. Bramblet*, 164 S.W. 808 (1914)). The court also cited WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1916, which defined hazing as "the subjecting (as a freshman or fraternity pledge) to treatment intended to put in ridiculous or disconcerting position." *Id.*

89. *Id.* at 13 (referencing New York State Penal Law section 1030).

90. *Id.* at 13-14.

91. *Id.*

92. New York v. Lenti, 260 N.Y.S.2d 284 (Nassau County Ct. 1965) [hereinafter *Lenti II*].

93. *See id.* at 286 (inquiring whether because the statute "refers to participants, which of necessity must include the pledges," the pledges themselves were in violation of the statute).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 286-87. The court stated:

[I]n a preliminary motion this Court passed upon the validity of the statute in question; it is [a] well established practice that the [*Lenti I*] decision established the law of the case, to be adhered to by

After first noting that "reservations in the thinking of the Court exist as to the validity and enforceability of the hazing statute," the *Lenti II* court stated that its decision was "in complete harmony with the [*Lenti I*] ruling."[98] This seeming lip-service to the *Lenti I* court was then followed by a lengthy recommendation to the New York Legislature.[99]

Two of the *Lenti II* court's recommendations are worth noting for present purposes. First, the court voiced its strong opinion that the consent of pledges to endure hazing should never serve as a bar to prosecution: "[I]ntelligent consent cannot be a defense when the pubic conscience and morals are shocked."[100] The court further recommended that participation by pledges in hazing activities does not make them accomplices.[101] To facilitate this result, the court stressed that only active planning and execution of the hazing activities ought to warrant indictment under the statute. To bolster this position, the court offered its own definitions of the terms "engage" and to "aid or abet":

> Engage—the word 'engage' as used in [section 1030 of the Penal Code] should mean and include . . . any member of a fraternity who actually participates in planning the hazing procedures, as well as those who physically execute the practices.
>
> Aid or Abet—Aiding or abetting as used in this statute should not refer to the 'pledges' or individuals upon whom the hazing practices are administered; they should not be deemed accomplices as a matter or law and their testimony should not require corroboration to establish a violation of the Section, but the violation itself must be established by other independent evidence.[102]

Despite these suggestions, the New York Legislature's 1968 and 1988 amendments to the hazing statute did not incorporate these provisions.[103]

Judges of co-ordinate jurisdiction. The rationale of the rule is to avoid protracted litigation, to promote harmony and to foster the exercise of comity and courtesy.

Id.

98. *Id.* at 287. Taking these statements together, it seems that the *Lenti II* court was trying to let the *Lenti I* court know—in the nicest possible way—that it had reached an incorrect decision.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 289.

103. Lewis, *supra* note 43, at 129.

2. Illinois v. Anderson

A second challenge to the constitutionality of state hazing statutes was addressed in *Illinois v. Anderson* (*Anderson I*).[104] In *Anderson I*, members of the men's lacrosse team at Western Illinois University were charged with violating Illinois' hazing statute after one of the lacrosse team initiates died of alcohol poisoning.[105] The trial judge dismissed the charges, ruling that the hazing statute[106] was unconstitutionally overbroad and vague in violation of both the United States and Illinois Constitutions.[107] Upon the state's direct appeal to the Illinois Supreme Court, the defendants proposed three challenges to the constitutionality of the statute: overbreadth, vagueness, and equal protection.[108]

a. Overbreadth

The defendants first argued that the statute was unconstitutionally overbroad because it could potentially punish constitutionally protected speech.[109] This argument posited that:

> the hazing statute could prevent the ridiculing of groups like the Ku Klux Klan or Neo-Nazis; the criticism of court decisions or legal theories as part of the teaching process; ridiculing political figures in speeches on campus; or teaching works of authors such as Twain, Chaucer, or Shakespeare, which contain satire or ridicule of other persons.[110]

This argument, ultimately rejected by the court, was based on two separate misconceptions regarding the hazing statute. First, the defendants interpreted the statute as creating a strict liability offense, i.e. not requiring that a specific mens rea be possessed while committing the offense.[111] The court rejected this interpretation,

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104. 591 N.E.2d 461 (1992) [hereinafter *Anderson I*]. *See, e.g., infra* Part IV.B.3 (discussing the civil counterpart to this case).

105. *Id.* at 464.

106. *Id.* The statute read:

> [w]hoever shall engage in the practice of hazing in this state, whereby any one sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor.
>
> The term 'hazing' in this act shall be construed to mean any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others.

Id. at 464 (quoting from Ill. Rev. Stat. 1989, ch. 144, ¶¶ 221-22).

107. *Id.*

108. *Id.*

109. *Id.* at 465.

110. *Id.*

111. *Id.*

however, finding that where a statute does not specify a culpable mental state, the Illinois Criminal Code's default provision requires the state to prove intent, knowledge or recklessness.[112]

The second portion of the defendants' misinterpretation centered around the language of the statute which forbade "injury to [the victim's] person."[113] The defendants argued that this broad definition conceivably could include psychological injury, thus potentially invoking the statute "whenever a person's feelings are hurt by being ridiculed."[114] The court disagreed with this interpretation and held that the statute referred only to physical or bodily injury.[115]

b. Vagueness

The *Anderson I* defendants also argued that the Illinois hazing statute was unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.[116] When a charge of vagueness is asserted, two claims can be made: first, that the statute "fails to give a fair warning to innocent people to steer clear of its prohibitions"; or, second, that the statute "contains insufficiently clear standards for those who enforce it," thus inviting the possibility of "arbitrary enforcement."[117]

i. Failure to Give Fair Warning

When deciding whether or not a statute has given fair warning, the court noted that the central inquiry is whether "the statute [has given] a person of ordinary intelligence a reasonable opportunity to know what conduct is lawful and what conduct is unlawful."[118] The defendants first tried to argue that certain phrases of the statute were unconstitutionally vague.[119] For instance, the defendants argued that the phrases which forbade hazing committed by "other people in schools" and

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112. *See id.* (referring to Ill. Rev. Stat. 1989, ch. 38, ¶ 4-3(b), which provides that "[i]f [a] statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4 [intent], 4-5 [knowledge] or 4-6 [recklessness] is applicable").

113. *Id.* at 465.

114. *Id.* at 466.

115. *Id.* The defendants supported their interpretation by comparing the hazing statutes' "injury to his person" clause to the Illinois home invasion statute, which punished "any injury" to the victim. *Id.* The defendants argued that just as the "any injury" clause of the home invasion statute was interpreted to include psychological trauma in the case of *People v. Ehrich* [519 N.E.2d 1137 (1988)] so, too, ought the hazing statute be interpreted. *Id.* The court rejected this theory, finding that recent laws like the home invasion statute shed little light upon the hazing statute, which was written by the Illinois Legislature in 1901. *Id.*

116. *Id.* at 467.

117. *Id.*

118. *See id.* (quoting *People v. Bales*, 483 N.E.2d 517 (Ill. 1985)).

119. *Id.*

"people connected with any of the public institutions of [Illinois]" were vague.[120] Under Illinois law, however, a defendant may be prosecuted under a statute if his or her conduct clearly falls within the statute even if the statute may be vague as to other conduct.[121] Because the defendants were "students . . . in . . . universities," the court found that the statute applied to them.[122]

Next, the defendants challenged the phrases "pastime or amusement" and "holding up . . . to ridicule."[123] Because these terms were not defined within the statute, the court noted that it would "assume that statutory words have their ordinary and popularly understood meanings."[124] To ascertain the popular meaning of these terms, the court looked to Webster's Dictionary and held that requiring the decedent to drink dangerous amounts of alcohol clearly was done for the defendants' amusement.[125] The court also referred to the case of *Quinn v. Sigma Rho Chapter of Alpha Beta Theta Pi Fraternity*,[126] which held that fraternal activities that included excessive drinking clearly constituted "an illegal hazing activity" and that "the hazing statute was meant to apply to dangerous drinking activities such as those practiced by the fraternity."[127]

ii. Arbitrary or Discriminatory Enforcement

After deciding that the Illinois hazing statute was not vague for failing to give fair warning to people seeking to avoid prohibited conduct, the court further inquired whether the statute promoted arbitrary enforcement by lacking explicit standards.[128] While the court conceded that the definition of hazing is broad, it rejected the defendants' contention that the police may make arrests whenever someone is "held up to ridicule."[129] Referring back to its finding under the defendants' overbreadth challenge, the court noted that hazing charges may only be brought where one recklessly, knowingly, or intentionally engages in conduct that

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120. *Id.*

121. *Id.* at 467.

122. *Id.*

123. *Id.* The challenged language read, in relevant part: "[t]he term 'hazing' in this act shall be construed to mean any pastime or amusement . . . whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others." *Id.* at 464.

124. *Id.* at 467. The court further noted that "the English language cannot be expected to be mathematically precise" and the legislature was not required to specify every activity that could be considered a "pastime or amusement" in which one is held up to ridicule. *Id.*

125. *Id.* at 468. The court looked to the Webster's definitions of "pastime," "amusement," "hold up," and "ridicule." "Pastime" was defined as "something that assumes and serves to make time pass agreeably"; "amusement" was defined as "a means of . . . entertaining"; to "hold up" was defined as "to expose or call attention to" and "ridicule" was defined as "the arousing of laughter, mockery, or scorn." *Id.*

126. 507 N.E.2d 1193 (Ill. App. Ct. 1987). *See infra* Part IV.B.2 (discussing the *Quinn* case).

127. *Anderson I*, 591 N.E.2d at 468.

128. *Id.*

129. *Id.*

results in physical injury.[130] Thus, the physical injury requirement, when coupled with the other elements of the statute—i.e., activities engaged in by students or other persons as a pastime for the purpose of holding another to ridicule—precluded arbitrary enforcement.[131]

c. Equal Protection

Finally, the defendants argued that the hazing statute violated the Equal Protection Clause under the Fourteenth Amendment because it applied only to students and others in public institutions rather than the general public.[132] The court noted that the legislature has broad authority to make classifications for the general welfare and subjected the statute to a rational basis test.[133] After inquiring whether the classification had a rational relation to a legitimate state objective, the court found that the state had a legitimate interest in preventing physical injury.[134] The court further concluded that there was a rational basis for limiting the conduct to the named groups because "it is reasonable to assume that most hazing occurs in colleges, universities and other schools."[135] The court noted that: "[t]he legislature need not deal with all conceivable evils at once; it may proceed one step at a time."[136]

D. Summary of Hazing Practices and Statutes

Hazing practices have been observed for centuries within various cultures and within the various sub-cultures of the same.[137] In the modern era, however, hazing has become most closely associated with collegiate fraternities. Most of the fifty states have enacted hazing statutes[138] in an attempt to combat the rising number of injuries.

In the *Lenti* and *Anderson* cases discussed above, the hazing statutes at issue ultimately survived constitutional challenge.[139] While good arguments have been made that certain hazing statutes are vague and may potentially punish otherwise

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130. *Id.*
131. *Id.*
132. *Id.* at 468-69.
133. *Id.* at 469.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See supra* notes 47-53 and accompanying text (documenting hazing practices within the military, high school sports teams, college marching bands, professional sport teams, and others).
138. *See supra* note 56 and accompanying text (setting forth forty state hazing statutes).
139. The section of the New York penal law challenged in the *Lenti* cases was technically upheld, but the dicta of the *Lenti II* court suggest that this decision may have been erroneous. *See supra* notes 96-99 and accompanying text (discussing the *Lenti II* court's implied dissatisfaction with the conclusion reached by *Lenti I*).

protected speech, the courts largely have been unwilling to strike down the statutes as unconstitutional. These statutes and cases upholding the statutes indicate a strong public policy condemning the practice of hazing. As will be seen in the next Part, courts faced with plaintiffs seeking redress for injuries caused as a result of hazing activities have likewise sent a rather strong message that hazing practices will no longer be tolerated.

IV. THEORIES OF LIABILITY

Hazing victims (or, in wrongful death actions, the families of hazing victims) bringing civil actions have found relative success under various legal theories. There is no uniform way of approaching alcohol-related hazing lawsuits. Thus, this Part will summarize briefly the relevant concepts of negligence law and then analyze the cases one by one to examine how the various courts have imposed liability.[140]

A. *The Elements of Negligence and Related Concepts*

A plaintiff alleging negligence must prove each of the following six elements by a preponderance of the evidence: duty, standard of care, breach of duty, cause-in-fact, proximate cause, and damages.[141] The duty element has been central to cases examining fraternal liability for alcohol-related injuries and deaths and will be examined below.[142] The concepts of assumption of the risk and comparative negligence[143] and negligence per se[144] are also relevant to cases examining liability for hazing.

1. Duty

The duty element of negligence has been defined as "[a] duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks."[145] In determining

140. *See infra* at Part IV.A.1-3 (discussing negligence law and relevant concepts); *see infra* Part IV.B.1-5 (setting forth cases examining civil liability).

141. Keehn v. Town of Torrington, 138 P.2d 112, 115 (Wyo. 1992); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 3.01, at 45-46 (1996).

142. *See infra* Part IV.A.1 (examining the duty element).

143. *See infra* Part IV.A.2 (discussing the doctrines of assumption of the risk and comparative negligence).

144. *See infra* Part IV.A.3 (detailing the doctrine of negligence per se).

145. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

the existence of a duty, the law distinguishes between action, or "misfeasance," and inaction, or "nonfeasance."[146]

In cases of misfeasance, the defendant is said to have created an unreasonable risk of harm to the plaintiff through affirmative acts; in cases of nonfeasance, the defendant has made the plaintiff's situation no worse, and has "merely failed to benefit [the plaintiff] by interfering in his affairs."[147] While liability for cases of misfeasance may extend to any person harmed by the defendant's conduct, cases of nonfeasance require a showing to find some relation between the parties such that social policy justifies the imposition of a duty to act.[148] Thus, while a duty is almost automatic in cases involving misfeasance, duty is much harder to establish in cases of nonfeasance.

Elder fraternity members qua defendants in negligence actions generally argue that their failure to care for intoxicated pledges qualifies as nonfeasance and is therefore non-actionable.[149] This contention is firmly supported by the common law rule that a person does not have a duty to aid another.[150] In some scenarios, however, courts will nonetheless impose liability in cases involving nonfeasance.[151] Two exceptions to the "no duty for nonfeasance" rule include situations in which a special relationship exists between the parties and situations in which the defendant voluntarily undertakes to help an injured individual.[152]

Some courts have imposed a duty to rescue where a "special relationship" exists between the parties.[153] Traditionally, such "special relationships" applied only where a plaintiff had clearly entrusted his safety to the defendant.[154] Examples included the relationships created between common-carriers and passengers, innkeepers and guests, and ship captains and their seamen.[155]

Scholars note that in modern times, these special relationships are likely to include the relationships encompassed between employers and employees, and

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146. *See* Mesmer v. Maryland Auto. Ins. Fund, 725 A.2d 1053, 1059-60 (Md. 1999) (discussing the distinction between misfeasance and nonfeasance); PROSSER AND KEETON, *supra* note 145, § 56, at 373 (same).

147. PROSSER AND KEETON, *supra* note 145, § 56, at 373.

148. *Id.* at 374.

149. One might argue that the act of providing liquor to the pledges constitutes actionable misfeasance. Under common law principles, however, neither sellers of liquor nor social hosts were liable to those injured by defendants to whom the hosts provided liquor. *See, e.g.*, CAL. CIVIL CODE § 1714(c) (West 1998) (codifying the common law that "no social host who furnishes alcoholic beverage to any person shall be held legally accountable for damages by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages"). This common law rule presumably also applies to those who injure themselves while intoxicated.

150. *See* Handiboe v. McCarthy, 151 S.E.2d 905, 907 (Ga. 1966) (holding defendant had no duty to rescue where minor child fell into defendant's pool, while playing with defendant's child).

151. DIAMOND ET AL., *supra* note 141, § 8.02[A], at 115.

152. *Id.*

153. *Id.* § 8.02[A][2], at 118.

154. *Id.*

155. *Id.*

schools and their students.[156] In *Easler v. Hejaz Temple of Greenville*,[157] a court held that fraternal organizations owed a duty of care to their initiates not to cause them injury in the initiation process.[158] Thus, at least one court has found a duty of care towards initiates for fraternal organizations.[159]

Another avenue through which a court may create a duty to care for an injured individual exists where someone voluntarily undertakes to help someone in need.[160] Under the traditional view of this exception, a person who voluntarily undertakes to help an injured individual must not leave the victim in a worse position.[161] Under the modern approach, however, a voluntary rescuer is obligated to act reasonably in conducting rescue efforts.[162]

As will be discussed more fully below,[163] a fraternity member who might otherwise not owe a duty of care to an intoxicated pledge may be found to have undertaken a duty of reasonable care by helping the pledge. Under this theory, a court might find that the simple act of moving an unconscious pledge to a bed or a couch or placing a bucket near the pledge's head might trigger the undertaking to care for exception.[164]

Courts have also created a duty between fraternity members and pledges by focusing on the requirement of drinking as a condition of acceptance into a fraternity.[165] A court adopting this rationale may start by observing that young persons attach great social value to fraternity membership.[166] From this starting point, a court then may note that participating in an initiation ceremony is required in order to become a fraternity member.[167] Because drinking is central to such ceremonies, pledges may be found to have been pressured and coerced into

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156. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 314A, cmt b. (1965) (stating that the "law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relationship of dependence or of mutual dependence").

157. 329 S.E.2d 753 (S.C. 1985). *See infra* notes 201-02 and accompanying text (examining the *Easler* rationale).

158. *Easler*, 329 S.E.2d at 755.

159. *Id.*

160. Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977); DIAMOND ET AL., *supra* note 141, § 8.02[A][3], at 118-20.

161. DIAMOND ET AL., *supra* note 141, § 8.02[A][3], at 118.

162. *Id.*

163. *See infra* notes 295-96 and accompanying text (detailing the "undertaking to care" doctrine in the context of injured pledges).

164. *See infra* note 296 and accompanying text (discussing the possibility of finding liability from undertaking to help an intoxicated pledge).

165. *See infra* notes 216-17 and accompanying text (noting a court decision which found that requiring pledges to drink in order to become members constitutes coercion and creates a duty to care for the pledges).

166. *See infra* note 219 and accompanying text (explaining one court's articulation of the social value placed upon fraternity membership).

167. *See infra* note 256 and accompanying text (noting that pressure to drink in order to gain membership into an organization may overbear a pledge's will to freely choose to drink).

drinking.[168] Thus, because pledges are vulnerable during this quest for social acceptance, a court may allow a jury to find a duty based on this theory of coercion.[169]

2. *Assumption of the Risk and Comparative Negligence*

The doctrine of assumption of the risk has been viewed traditionally as a complete defense to allegations of negligence.[170] The Restatement of Torts defines assumption of the risk by stating that "a plaintiff who fully understands a risk of harm to himself . . . by the defendant's conduct . . . and who nevertheless voluntarily chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover."[171] Thus, a defendant asserting the defense of assumption of the risk must prove three separate elements: that the plaintiff (1) knew of the particular risk involved and (2) voluntarily (3) assumed it.[172]

Fraternity members accused of negligence might argue that pledges voluntarily assume the risk of injury to themselves by participating in initiation ceremonies because they know the nature of the ceremonies and the inevitable involvement of alcohol. While this argument is not without merit, it certainly is open to attack. Regarding the first element, knowledge of risk, it is doubtful that pledges who agree to participate in initiation ceremonies are fully aware of the specific risks involved.[173] While most pledges probably anticipate having a severe hangover the next day, it is unlikely that the pledges know that severe injury—possibly even death—can result from pledging a fraternity.

Regarding the second element, voluntariness, a question exists as to whether a pledge truly volunteers to participate in the initiation ceremony.[174] As was discussed above[175] and will be more fully examined below,[176] courts have found that because pledges are required to drink in order to become members of fraternities, their participation in such ceremonies is not truly voluntary.[177]

Related to the defense of assumption of the risk is the doctrine of comparative negligence. Under this doctrine, a plaintiff is partially barred from recovery to the

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168. *See infra* note 240 and accompanying text (explaining that the requirement of drinking may force a student into drinking against his or her will).

169. *See infra* note 286 and accompanying text (quoting one court's synopsis of this theory).

170. DIAMOND ET AL., *supra* note 141, § 15.04[A], at 254.

171. RESTATEMENT (SECOND) OF TORTS § 496C (1965).

172. DIAMOND ET AL., *supra* note 141, § 15.04[A], at 254.

173. *See supra* notes 13-15 and accompanying text (examining some of the injuries which have resulted from hazing).

174. *See infra* notes 257, 283 and accompanying text (addressing the issue of whether or not pledges truly volunteer to be hazed).

175. *See supra* Part IV.A.1 (discussing the coercion theory as it applies to the duty element of negligence).

176. *See infra* notes 256, 285 and accompanying text (examining the issue of voluntariness).

177. *See infra* notes 256, 285 and accompanying text (quoting one court's view of this coercion theory).

extent that his or her conduct "falls below the standard to which he [or she] should conform to for his [or her] own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[178] Viewing these doctrines together, a court may order a jury to determine the extent to which a pledge assumed a risk of injury and reduce his recovery in accordance with their findings.[179] As will be seen below,[180] this solution has been adopted by many of the courts faced with the issue of injured pledges seeking recovery and is most likely the trend of the future.

3. *Negligence Per Se*

Under the doctrine of negligence per se, a criminal statute may be used to set the standard of care in a negligence action.[181] However, not every criminal statute automatically creates a civil standard of care; rather, judges must examine each statute in order to determine whether or not that statute provides guidance appropriate for use in a civil case.[182] Two inquiries relevant to the judge's determination include asking whether the statute was designed to protect against the type of harm suffered by the plaintiff; and, secondly, whether the plaintiff is part of the class of persons which the statute was intended to protect.[183]

At first glance, it seems that the above requirements clearly are met in cases involving pledges who are injured or killed by hazing rituals involving alcohol. Most hazing statutes are rather specific as to the types of harms prohibited.[184] It is equally apparent that hazing statutes are primarily designed to protect students attending colleges and universities.[185] Despite this seeming fulfillment of the negligence per se doctrine, courts have been hesitant to apply categorically the principle of negligence per se when evaluating hazing related injuries.[186] This phenomenon and the concepts related above will be examined more fully in the discussion of the cases below.[187]

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178. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

179. *See infra* note 223 and accompanying text (explaining how a jury may consider a pledge's own culpability under the theory of comparative negligence).

180. *See infra* note 293 and accompanying text (noting the use of comparative fault principles).

181. *See, e.g.*, Martin v. Herzog, 126 N.E. 814 (N.Y. 1920) (determining that a criminal ordinance requiring vehicles to use lights after dusk could establish the standard of care in this negligence case).

182. DIAMOND ET AL., *supra* note 141, § 6.02, at 89-90.

183. *Id.*

184. *See supra* note 57 and accompanying text (setting forth the Delaware hazing statute and the specific types of harm sought to be prevented by this statute).

185. *See supra* note 59 and accompanying text (setting forth Arkansas' hazing statute, which limits hazing to "[a]ny willful act on or off the property of any school, college, university, or other educational institution . . .").

186. *See infra* note 265 and accompanying text (illustrating one court's hesitancy in applying the doctrine of negligence per se).

187. *See infra* at Part IV.B.1-5 (discussing cases examining the issue of civil liability).

B. *Hazing Case Law*

1. Ballou v. Sigma Nu General Fraternity

In *Ballou v. Sigma Nu General Fraternity*,[188] 20-year-old Barry Ballou pledged the local chapter of Sigma Nu during the 1979 fall semester at University of South Carolina.[189] The fraternity scheduled an initiation "Hell Night" party and made attendance mandatory for all pledges.[190] Ballou and another pledge arrived at the house sometime between eight and nine in the evening.[191] The pledges were then required to participate in various drinking activities and were ridiculed if their abilities did not match up to the expectations of their elder fraternity members.[192] By ten-thirty that night—not even three hours after the initiation began—Ballou and three other pledges had passed out.[193]

Ballou was left on a couch in the fraternity lounge until shortly before midnight, when his "pale color and lack of responsesiveness" concerned the elder fraternity members.[194] After discussing the possibility of taking Ballou to the campus infirmary, four of the fraternity members left him lying face down on the couch.[195] Ballou was discovered dead the next morning; his subsequent autopsy revealed a blood-alcohol level of .46%.[196]

Ballou's father filed a wrongful death action against Sigma Nu, alleging that his son "was forced by harassment and psychological manipulation to consume enormous quantities of alcoholic beverages."[197] At trial, the jury returned a verdict against the fraternity in the amount of $200,000 actual and $50,000 punitive damages.[198] The fraternity appealed this decision on questions of duty, proximate cause, and assumption of the risk.[199]

The court began its duty analysis by noting that "[t]he duty of exercising care to protect another person against injury may be created by contract or by operation of law."[200] Under the latter of these two avenues, the court followed the Supreme

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188. 352 S.E.2d 488 (S.C. Ct. App. 1986).

189. *Id.* at 491.

190. *Id.* According to one pledge, the pledges were well aware that they "'would be pretty much expected to do a good bit of drinking.'" *Id.*

191. *Id.*

192. *See id.* (reporting that when one pledge only drank a small amount from the fraternity's "cup of truth," the brothers "ridiculed" and "'poked fun' at him").

193. *Id.* at 492.

194. *Id.*

195. *See id.* (stating that a pledge who lived in the fraternity house placed Ballou in the "face down" position because he feared that if left on his back, Ballou might suffocate on his vomit).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 492.

200. *Id.*

Court of South Carolina's decision in *Easler v. Hejaz Temple of Greenville*,[201] which held that fraternal organizations owe a duty of care to their initiates not to cause them injury in the initiation process.[202]

In addition to the *Easler* rationale, the *Ballou* court went on to find other grounds in support of imposing a duty. One of these grounds was premised on the fact that the fraternity brothers created a hazardous condition by requiring the pledges to consume dangerous quantities of alcoholic liquors over a short period of time.[203] In support of this contention, the court cited *Ibach v. Jackson*,[204] which had held that the administration of alcohol by one person to another "in such quantities as to cause death, is a breach of duty and a tortious act."[205]

2. Quinn v. Sigma Rho

In *Quinn v. Sigma Rho*,[206] the Illinois Court of Appeals found that a duty existed to the injured plaintiff because he was required to drink dangerous amounts of alcohol and because the state's hazing statute created an automatic duty of care.[207]

Quinn, an eighteen-year-old pledge of the Sigma Rho Chapter of Beta Theta Pi Fraternity, brought a negligence action against the fraternity after he sustained permanent injuries at the defendant's "Pledge Dad Night" initiation ceremony.[208] During the ceremony, plaintiff was required to drink a forty-ounce pitcher of beer, whiskey, and other liquors purchased by fraternity members.[209] After losing consciousness that evening and sleeping until 2:30 the following afternoon, plaintiff was taken to the hospital when he awoke—still in an intoxicated condition—and could not properly use his hands or arms.[210]

Quinn alleged that he "suffered neurological damage to his arms and hands necessitating the attention of a hospital, doctor, and physical therapist and causing partial disability."[211] After the Circuit Court dismissed the case for plaintiff's failure to state a cause of action upon which relief could be granted, Quinn appealed.[212]

The appellate court framed the issue as "whether the fraternity owed a duty to [Quinn] with respect to requiring the commission of very dangerous acts, including the highly excessive consumption of intoxicants, as part of the initiation

201. 329 S.E.2d 753 (1985).
202. *Ballou*, 352 S.E.2d at 492.
203. *Id.* at 493.
204. 35 P.2d 672 (Or. 1934).
205. *See Ballou*, 352 S.E.2d 493 (citing Ibach v. Jackson, 35 P.2d at 680).
206. 507 N.E.2d 1193 (Ill. App. Ct. 1987).
207. *Id.* at 1198.
208. *Id.* at 1195.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 1194.

ceremony."[213] After first noting that Illinois has traditionally denied recovery in causes of action alleging the negligent sale and furnishment of alcohol,[214] the court distinguished the facts before them by noting that Quinn "was required to drink to intoxication in order to become a member of the fraternity."[215] Said the court:

> We cannot close our eyes to the fact that the abuse illustrated in the present case could have resulted in the termination of life and that plaintiff was coerced into being his own executioner. Therefore, we hold that a legal duty was created and [plaintiff's] complaint states a cause of action in negligence.[216]

Specifically, the court held that a cause of action existed because of two factors. First, the court noted that "the fact that plaintiff was required to drink to intoxication" distinguished the case from the social host or guest situation because "[t]he social pressure that exists once a college . . . student has pledged into a fraternal organization is so great that compliance with initiation requirements places him or her in a position of acting in a coerced manner."[217] Second, the court noted that the state legislature's enactment of a hazing statute[218] "indicates . . . a social policy against embarrassing or endangering our youth through thoughtless and meaningless activity."[219] Applying the principles of negligence per se,[220] the court found that Quinn was in the class of persons the hazing statute was designed to protect and that he suffered a type of harm the statute was designed to prevent.[221] The court reversed the lower court's dismissal of Quinn's complaint and remanded the matter for further proceedings.[222] The court noted, however, that "[t]o the extent that plaintiff acted willingly, liability can be transferred to him under principles of comparative negligence."[223]

Thus, the *Quinn* court justified its imposition of a duty on the fraternity because of the presence of two special factors. Like the *Ballou* court, the *Quinn* court noted that requiring a pledge to drink dangerous amounts of alcohol was central to its

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213. *Id.* at 1195.

214. *Id.* at 1196. The court noted that the Illinois Dramshop Act (found at ILL. REV. STAT. 1985, ch. 43, ¶¶ 94-195) preempted claims against all furnishers of alcohol, including social hosts who provide intoxicating liquors. *Id.*

215. *Id.* at 1197.

216. *Id.*

217. *Id.* at 1198.

218. *Id.* at 1196-97. The court referred to ILL. REV. STAT. 1985, ch. 144, ¶¶ 221-222. *Id.* at 1196-97.

219. *Id.* at 1198.

220. The court noted that "[t]he violation of a statute . . . designed for the protection of human life or property is *prima facie evidence* of negligence." *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1197.

decision.[224] Furthermore, the court found that Illinois' hazing statute created a cause of action under the doctrine of negligence per se.[225] However, the *Quinn* court reached its decision because *both* factors were present; thus, the *Quinn* case impliedly held that the presence of the hazing statute without more was insufficient to state a cause of action in Illinois.[226] Also important was the court's instruction to apply principles of comparative fault in determining the extent to which the plaintiff acted willingly in the initiation ceremony.[227]

3. Haben v. Anderson

Haben v. Anderson (*Anderson II*)[228] recognized the *Quinn* rule that the requirement of drinking during an initiation ceremony creates a duty of care toward pledges. Dale E. Haben, an eighteen-year-old freshman at Western Illinois University, was a rookie on that school's lacrosse team.[229] During an initiation ceremony held by veteran members of the lacrosse team, Haben and other rookies were "required to engage in various strenuous physical activities, and submit to acts intended to ridicule and degrade them."[230] The initiation ceremony, described by the court as "a tradition of, and a de facto requirement for, membership in the [Lacrosse] Club," also required the rookies to consume large quantities of various intoxicating beverages.[231]

Haben became "highly intoxicated and lost consciousness" during the "ceremony."[232] Haben was carried by Kolovitz—one of the named defendants—to Kolovitz's dorm room, where he was laid on the floor and then left alone.[233] When Kolovitz later checked on Haben, he recalled hearing "gurgling" sounds.[234] Haben was discovered dead the following morning, with a blood alcohol level of .34%.[235]

Relying on *Quinn*, the trial court found that the plaintiff (decedent's father) failed to plead that Haben was required to drink to be initiated into the lacrosse club.[236] Haben's father did allege that by taking Haben into his room, Kolovitz had assumed a duty to care for the decedent.[237] The trial court, however, found that

224. *Id.*
225. *Id.* at 1198.
226. This conclusion is supported by the *Anderson II* trial court's holding, discussed *infra* at Part IV.B.3.
227. *Quinn*, 507 N.E.2d at 1197.
228. 597 N.E.2d 655 (Ill. App. 1992).
229. *Id.* at 656.
230. *Id.* In addition to other "traditions," the rookies "had their bodies, faces and hair smeared with various foods and other materials." *Id.*
231. *Id.* at 657.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*

plaintiff had failed to allege facts establishing that Kolovitz had voluntarily assumed a duty.[238] Based on these findings, the trial court dismissed plaintiff's complaint.[239]

On appeal, the Appellate Court of Illinois found that Haben's "will to drink or not drink may have been overcome by the requirement to achieve the much valued status [of joining the lacrosse team] and by the pressure that he was receiving."[240] Based on this conclusion, the court remanded the issue back to the trier of fact to resolve whether drinking was, in fact, a requirement for membership on the team and whether the decedent's "will to make a conscious decision about the amount of alcohol he consumed was actually overborne."[241]

The plaintiff also appealed the trial court's finding that he failed to establish that defendant Kolovitz voluntarily assumed a duty of care for decedent by removing the unconscious Haben to Kolovitz's room.[242] The court agreed with the plaintiff and held that the trier of fact could reasonably conclude that Kolovitz assumed a duty of care by placing Haben in his room and that Kolovitz acted unreasonably by not taking action after hearing "gurgling" noises later that evening.[243]

The *Anderson II* case is thus significant for two reasons. First, it re-affirms the holding of *Quinn* that a duty may be created where a plaintiff can show that a pledge is required to drink dangerous amounts of alcohol to gain membership into a club or fraternity. Second, the *Anderson II* case suggests that undertaking to help a pledge, once he or she falls ill or unconscious, may provide an alternate ground of establishing liability.

4. Nisbet v. Bucher

A conclusion similar to that of *Anderson II* was reached by the Missouri Court of Appeals in *Nisbet v. Butcher*.[244] Michael Nisbet, who was a freshman at the University of Missouri at Rolla, was invited to become a member of that school's Saint Pat's Board.[245] The Saint Pat's Board was a campus organization responsible for organizing the annual Saint Patrick's Day festivities at the university.[246] To become a member, Nisbet was "required to participate in an initiation" ceremony.[247]

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238. *Id.*
239. *Id.*
240. *Id.* at 659.
241. *Id.*
242. *Id.* at 660.
243. *Id.*
244. 949 S.W.2d 111 (Mo. Ct. App. 1997).
245. *Id.* at 113.
246. *Id.*
247. *Id.*

In their complaint, the plaintiff's, the parents of Michael Nisbet, alleged that during this ceremony, Nisbet was forced to consume various intoxicants, including a "heated preparation of grain alcohol and green peas."[248] Nisbet was coerced to consume this concoction until he became intoxicated and lapsed into unconsciousness.[249] When Nisbet fell unconscious, members of the Board placed him face down on the ground and left him unattended, despite the fact that Nisbet was "secreting green fluid from his nose and mouth."[250] Nisbet died the next day from acute alcohol intoxication.[251]

The plaintiffs brought a wrongful death action against the Saint Pat's Board, alleging that they engaged in "negligent, careless and/or reckless" conduct towards their son.[252] The plaintiffs also alleged that the defendants permitted the hazing activities in violation of the applicable Missouri hazing statute.[253] The trial court dismissed the plaintiffs' complaint on the ground that "a violation of the [Missouri] hazing statute does not give rise to a private cause of action . . . as a matter of law."[254]

The court of appeals addressed the sole issue of whether the plaintiffs could proceed under a claim of common law negligence.[255] Citing *Quinn*, *Ballou*, and *Anderson II*, the court found that because Nisbet's "will to drink or not drink may have been overborne by the requirements to achieve membership on the St. Pat's Board and by the pressure he was receiving from defendants," the case should be remanded to a jury to determine that particular issue.[256] The court also noted, consistent with *Quinn* and its progeny, that the trier of fact should apply the principles of comparative negligence in determining Nisbet's willingness to participate in the initiation ceremony.[257]

The court further noted that the plaintiffs sufficiently pleaded that the defendants' abandonment of Nisbet might give rise to an alternate theory of liability, stating that "[o]ne who acts gratuitously or otherwise is liable for the negligent performance of an act, even though there was no duty to act originally."[258]

The court refused to address the issue of whether the defendants' violation of the state hazing statute constituted negligence per se.[259] The court said, "[a]ll of the

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248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 114.
253. *Id.* at 113. The statute defined hazing as including "[a]ny activity which recklessly endangers the physical health or safety of the . . . prospective member . . . including . . . forced consumption of . . . liquor." *Id.* at n.1 (quoting MO. REV. STAT. § 578.360).
254. *Id.* at 114.
255. *Id.* at 115.
256. *Id.* at 116.
257. *Id.*
258. *Id.*
259. *Id.* at 117.

acts proscribed by the hazing statute are also actionable at common law."[260] The court further noted that the presence of the statute "merely evinces a public policy that certain activities directed against prospective members of an organization . . . will not be tolerated."[261]

The *Nisbet* decision thus further solidifies the principles established by *Ballou, Quinn* and their progeny: requiring an individual to drink as a condition precedent to gaining membership in a club may give rise to a cause of action;[262] principles of comparative fault may be applied by the jury in determining the level of a defendant's culpability;[263] and helping an incapacitated individual might provide an alternate theory of establishing liability.[264] Also, the *Nisbet* opinion shows the courts' apprehension towards deciding the issue of whether the presence of a hazing statute, standing alone, is enough to create a cause of action under the doctrine of negligence per se.[265]

5. *The* Oja v. Grand Chapter of Theta Chi Fraternity *Trilogy*

A 1998 initiation ceremony at Clarkstown University in Potsdam, New York, gave rise to a trilogy of cases after a pledge died from choking on his own vomit.[266] The *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.* (*Oja I*)[267] case addressed the initial wrongful death actions brought by decedent Oja's parents against members of the fraternity.[268] The case of *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, (*Oja II*)[269] addressed a specific claim brought by the plaintiffs against defendant, Delta Sigma of the Theta Chi Alumni Corporation, an issue beyond the scope of this Comment.[270] The *Oja v. Grand Chapter of Theta Chi*

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260. *Id.*

261. *Id.*

262. *Id.* at 116.

263. *Id.*

264. *Id.*

265. *See id.* (indicating that "it is not necessary to decide whether defendant's violation of the hazing statute . . . constituted negligence per se" to decide the issue before the court).

266. Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 680 N.Y.S.2d 277, 278 (App. Div. 1998). *See infra* notes 267-69 and accompanying text (discussing the cases resulting from the death of Binaya Oja).

267. 680 N.Y.S.2d 277.

268. 667 N.Y.S.2d 650 (S. Ct. 1997).

269. 680 N.Y.S.2d 277 (S. Ct. 1997).

270. The *Oja II* opinion addressed a motion to dismiss by defendant Delta Sigma of Theta Chi Alumni Corporation, which owned the house in which the party was held. *Id.* at 278. The Alumni Corporation challenged the plaintiffs' allegation that the corporation "negligently and recklessly failed to control, investigate, supervise or monitor the activities taking place on its premises." *Id.* The defendant corporation primarily relied on established case law recognizing that a fraternity does not ordinarily have a duty to supervise affirmatively those present in a fraternity house and prevent them from engaging in potentially harmful conduct. *Id.* While the *Oja II* court noted this principle, it upheld the denial of the corporation's motion to dismiss because the plaintiffs had put on sufficient facts from which the trier of fact could conclude that the corporation had actual or constructive knowledge of dangerous activities taking place on its property. *Id.* at 278-79. Thus, the *Oja II* court held that the "plaintiffs' allegations fit within a cognizable theory of negligence" and could proceed to trial. *Id.* at 279.

Fraternity, Inc., (Oja III)[271] decision considered the individual fraternity members' appeal from the *Oja I* decision.

Binaya Oja was a freshman pledge of the Delta Sigma Chapter of the Theta Chi Fraternity.[272] During the fraternity's initiation ceremony, the pledges were assembled together and commanded to drink from various bottles of liquor.[273] A number of garbage cans were placed within the immediate vicinity of the pledges to "contain the inevitable regurgitations induced by [the initiation ceremony]."[274] Oja threw up repeatedly as a result of the alcohol, became unconscious, and was left unattended in that condition.[275] Oja eventually died after he choked on his vomit.[276] Plaintiffs, parents of the decedent, alleged that, after their son had become visibly intoxicated, members of the fraternity took him to the third floor of the fraternity house, laid him face down on a couch, and placed a bucket underneath his head.[277]

In *Oja I*, the Tompkins County Supreme Court addressed the fraternity member defendants' motions to dismiss two of the plaintiffs' causes of action.[278] Specifically, the defendants challenged the first cause of action, which alleged that their negligence and recklessness caused the decedent's intoxication and that they failed to provide medical assistance to him.[279] The defendants also challenged the plaintiffs' allegations that a private cause of action was created under New York's hazing statute.[280]

The defendants primarily relied on *Sheeny v. Big Flats Community Day, Inc.*,[281] which held that Penal Law section 260.20(4),which penalized the sale or provision of alcohol to a child under the age of nineteen, did not create a private cause of action against those who provided alcohol to minors.[282] The *Oja I* court first noted that the purpose of the statute at issue in *Sheeny* was not "to reward those who, often by misrepresenting their ages and identities, obtain and abuse alcohol and suffer the consequences of their own folly."[283] The court proceeded to note, however, that the hazing statute at issue in this case was "based upon [policy]

271. 684 N.Y.S.2d 344 (App. Div. 1999).
272. *Id.* at 345.
273. *Oja I*, 667 N.Y.S.2d at 651.
274. *Id.*
275. *Id.*
276. *Oja II*, 680 N.Y.S.2d at 278.
277. *Oja III*, 684 N.Y.S.2d at 345-46.
278. *Oja I*, 667 N.Y.S.2d at 651.
279. *Id.*
280. *See id* (setting forth the plaintiffs' allegation that New York Penal Law section 120.16 created a private cause of action by making it a misdemeanor for a person to intentionally or recklessly engage in conduct that causes an injury to a "pledge" during the course of an initiation).
281. 543 N.Y.S.2d 18 (Ct. App. 1989).
282. *Oja I*, 667 N.Y.S.2d at 651. In *Sheeny*, an underage girl who had obtained alcohol by using a falsified driver's license was hit by a car and killed after she was expelled from an American Legion beer tent. *Id.*
283. *Id.* at 652.

considerations . . . vastly different from those which concerned the court in *Sheeny*."[284] The court explained:

> The *Sheeny* ruling, to be blunt, reflects an unspoken moral revulsion against rewarding youthful drunks for their own recklessness and self-indulgence. No such revulsion seems justified in relation to the injuries and deaths sustained by adolescents who, however unwisely, trade their insecurities and free will for the promise of acceptance, and prestige, that fraternity membership appears to confer. A jury might find that the stoic acceptance of pain and discomfort by a pledge, as the price of admission to the fraternal mysteries, is not truly voluntary. In any event, we cannot conclude, as a matter of law, that the policy considerations which precluded a civil action in favor of the plaintiff in *Sheeny* are operative here.[285]

The *Oja I* court then favorably cited *Anderson II* and *Quinn* for the proposition that the "coercive effect of the initiation ritual, and related issues of culpable conduct, are questions for the trier of fact to resolve."[286] The court did not analyze separately the plaintiffs' allegations of actions based on common law negligence principles and the theory of negligence per se: "[W]hile the plaintiff has asserted [his] claim under two different rubrics in the complaint, we see no practical need to differentiate the two when both allege the same wrong which would merit the same relief."[287]

The defendants' appeal of this decision was addressed by the Appellate Division in *Oja III*.[288] The *Oja III* opinion affirmed the *Oja I* court's conclusions and even hinted at a third possible avenue through which the plaintiffs could recover:

> Not only have plaintiffs alleged facts that could lead a trier of fact to conclude that decedent's intoxication was not entirely voluntary [per *Anderson* and *Quinn*], they have also cited other purportedly careless acts by defendants—beyond the mere furnishing of intoxicants—upon which a finding of negligence could be grounded. Specifically, it is alleged that after decedent had become visibly intoxicated, unable to stand and incapable of aiding or protecting himself, fraternity members took him to a third floor of the house, laid him face down on a couch with a bucket underneath his head, and left him unattended in an unconscious state. If it is found that this conduct contributed to decedent's death, it could warrant

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284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 652-53.
288. 684 N.Y.S.2d 344 (App. Div. 1999).

a finding of liability without regard to the defendants' earlier act of simply making the alcohol available.[289]

C. *Summary of Civil Hazing Cases*

The *Oja* trilogy is instructive as a summary of how various courts have treated negligence actions arising from alcohol-related hazing injuries and deaths. The first possible avenue of recovery is the "required drinking" or "coercion" theory first enunciated in *Ballou* and fleshed out in *Quinn* and subsequent cases.[290] Under this theory, a plaintiff may proceed to the jury on the issue of whether drinking to intoxication was required to become a member of a particular organization.[291] If a jury feels sympathetic to the plight of young individuals seeking social acceptance in the security of a fraternity, it may find coercion and attach liability.[292] Of course, the cases also make clear that the jury is free to apply principles of comparative fault in determining to what extent, if any, the victim acted willingly.[293]

The second possible avenue for plaintiffs seeking recovery is to allege that, independent of the furnishment of alcohol and subsequent creation of a dangerous situation, defendants may be liable under the "undertaking to help" theory of negligence.[294] Under this theory, a person who might otherwise be free from a legal obligation to help assumes a duty of reasonable care by offering relief or assistance to an injured or helpless person.[295] In the context of hazing and intoxicated pledges, anyone who moves a pledge to a couch or bed or who otherwise takes any step indicative of helping that individual may be found to have assumed a duty of reasonable care.[296] In *Anderson II*, for example, defendant Kolovitz carried the intoxicated pledge to Kolovitz's room and laid the pledge on the floor, and during a subsequent check, the pledge was heard "gurgling."[297] One could conclude that Kolovitz's failure to investigate further or call for medical help was unreasonable and thus negligent. The *Nisbet* case presented a similar situation. The intoxicated pledge was placed faced down on the ground and left unattended after he became

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289. *Oja III*, 684 N.Y.S.2d at 345-46.

290. *See supra* notes 203-05, and 215-17 and accompanying text (setting forth the courts' treatment of required drinking as coercive).

291. *See supra* note 241 and accompanying text (illustrating the *Anderson II* court's decision to remand the case to the trier of fact to determine whether drinking was a condition precedent to membership).

292. *See supra* note 287 and accompanying text (setting forth the description of the jury's task in such cases).

293. *See, e.g.*, Quinn v. Sigma Rho, 507 N.E.2d 1193, 1197 (Ill. App. Ct. 1987) (stating that "[t]o the extent that [a] plaintiff acted willingly, liability can be transferred to him under principles of comparative negligence").

294. *See, e.g.*, 65 C.J.S. § 63 (107), at 859 (1966) (stating that "[o]ne who undertakes to care for an ill or injured person is bound to use reasonable or ordinary care").

295. *Id.*

296. *Anderson II*, 597 N.E.2d at 657.

297. *Id.*

unconscious.[298] Using the "undertaking to help" theory of negligence, the act of moving the pledge could be viewed as voluntarily assuming a duty of care; the subsequent failure to take further action could be found "unreasonable."[299]

The third possible approach for hazing victims is to proceed under the theory of negligence per se[300] and to argue that the violation of a state hazing statute automatically creates a private cause of action. As the case law indicates, however, courts have been hesitant to declare that the violation of a hazing statute, without more, creates a private cause of action.[301] In the absence of a judicial opinion categorically creating a private cause of action based solely on a hazing statute, the prudent plaintiff should therefore allege all of the above theories as avenues for recovery.

Overall, the courts have been willing to extend the traditional concepts of tort law to accommodate aggrieved victims, and victims' family members, seeking damages for their loss. This trend reflects the growing public opinion that hazing practices involving dangerous amounts of alcohol within colleges and universities are not to be tolerated and should be abolished altogether. But just how far is the law willing to go to punish individuals guilty of hazing? The Scot Krueger incident discussed below raises the issue of whether a fraternity may be held criminally liable for charges of manslaughter.

V. THE POSSIBILITY OF CRIMINAL LIABILITY FOR HAZING

While the above cases establish possible theories under which injured pledges or their estates may recover civil damages for the reckless conduct associated with initiation ceremonies, the Scot Krueger incident described below asks whether a fraternity may be held criminally responsible for manslaughter.

298. *Nisbet*, 949 S.W.2d at 113.

299. *Id.* at 117.

300. *See generally* PROSSER & KEETON, *supra* note 145, § 36, at 220-34 (setting forth when and how the standard of care required by a reasonable person may be prescribed by legislative enactment).

301. *See supra* text accompanying notes 225-26, and 259-61 (discussing the courts' varied treatment of negligence per se).

A. *Facts of the Scot Krueger Incident*

On September 26, 1997, the Phi Gamma Delta[302] fraternity at Massachusetts Institute of Technology (MIT) hosted an "Animal House Night" initiation party for its new pledges.[303] Present at the party was eighteen-year-old freshman pledge Scot Krueger form Orchard Park, New York.[304] Krueger, along with eleven other pledges, began their initiation by watching *National Lampoon's Animal House*, the infamous film depicting college life in a fraternity house.[305] After the movie was over, the pledges were taken to a room by the "pledge-master" where they were instructed to drink a prescribed amount of alcohol—beer and Jack Daniel's Whiskey—while singing a fraternity song.[306] Although it is unclear exactly how much Krueger drank throughout the course of the evening, stories indicate that Krueger was also given a bottle of Bacardi Spiced Rum at some point by his "big brother."[307]

Later in the evening, Krueger complained of nausea and began to lose consciousness after lying down on a couch.[308] Two of the fraternity's "big brothers" carried Krueger to his bedroom, placed a trash can near his head, and left him lying on his abdomen.[309] Approximately ten minutes later, Krueger was discovered unconscious and covered in vomit.[310] A concerned fraternity member called the MIT campus police, who directed the call to 911 emergency operators.[311]

By the time emergency personnel arrived, Krueger's face had turned blue and he was choking on his own vomit.[312] Krueger was rushed to a nearby Boston hospital where he remained in a coma for approximately forty hours before he was

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302. *See* Gene Warner, *MIT Fraternity Faulted for History of Binge Drinking*, BUFFALO NEWS, Sept. 26, 1998, at C1 (reporting that, according to the legal papers filed in the Krueger case, the Phi Gamma Delta chapter at MIT was infamous for alcohol-related problems). In the five years preceding the incident, for example, Boston police officers, MIT police officers, and various medical personnel had been called to the fraternity house on at least fifteen different occasions. *Id.* These calls were spurred by complaints of drinking, loud parties, and fighting; additionally, some of the calls were for students requiring medical attention for binge drinking. *Id.* The Boston Licensing Board had disciplined the fraternity twice for drinking-related violations in 1996 and 1997. *Id.* Despite these incidents, however, the fraternity never took steps to curb the serious alcohol-related problems. *Id.*

303. *See* John Ellement, *Court Date, But Not Defendant, Is Set in MIT Frat Death Case*, THE BOSTON GLOBE, Sept. 22, 1998, at B2 (detailing the circumstances surrounding the death of Scot Krueger).

304. *Id.*; *see also* Warner, *supra* note 302, at C1 (explaining that Krueger pledged the fraternity four days after arriving at MIT and moved into a basement room at the fraternity house). Krueger, who allegedly had limited drinking experience, expressed anxiety about the "Animal House" party to his sister and fellow pledges. *Id.*

305. Warner, *supra* note 302, at C1.

306. *Id.* The pledges were actually lined up, and they sang a drinking song that ended with the words "drink her down, drink her down, drink her down, down, down." *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

ultimately pronounced dead.[313] His blood alcohol level was .401, more than five times the legal limit under Massachusetts's DUI law.[314]

B. The Criminal Action

The Boston Police immediately launched a criminal investigation.[315] In September of 1998, a Suffolk County grand jury indicted the fraternity on one count of misdemeanor hazing[316] and another count of criminal manslaughter[317] under Massachusetts law.[318] This indictment marked the first time ever in the history of the United States that a fraternity was charged with the criminal death of an individual.[319]

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313. *See id.* (listing the cause of Krueger's death as acute alcohol intoxication and aspiration).

314. *See Today* (NBC television broadcast, Oct. 3, 1997) (reporting that Krueger's blood alcohol level was equivalent to drinking twenty shots of alcohol within one hour).

315. *See CBS This Morning* (CBS television broadcast, Oct. 1, 1997) (noting that members of the fraternity had obtained legal counsel after the criminal investigation had begun). Only days after the incident, investigating officials commented that manslaughter charges might be filed if it was discovered that Krueger had been forced to drink. *Id.*

316. *See* MASS. GEN. LAWS. ANN. ch. 269, § 17 (West Supp. 2000) (setting forth the definition and punishment for hazing under Massachusetts law). Section 17 reads, in pertinent part:

> Hazing; organizing or participating; hazing defined
>
> Whoever is a principal organizer or participant in the crime of hazing . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment in a house of correction for not more than one year, or both such fine and imprisonment.
>
> The term "hazing" . . . shall mean any conduct or method of initiation into any student organization . . . which wilfully or recklessly endangers the physical or mental health of any student or other person. Such conduct shall include . . . *forced consumption of any . . . liquor, beverage, drug, or other substance* . . . . [emphasis added].
>
> Notwithstanding any other provision of this section to the contrary, consent shall not be available as a defense to any prosecution under this action.

317. *See id.* ch. 265, § 13 (West 1990) (stating, in part, that "[w]hoever commits manslaughter shall . . . be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years"). Under Massachusetts law, manslaughter has been defined as an unlawful killing without malice. Commonwealth v. Vizcarrondo, 693 N.E.2d 677, 681 (Mass. 1998). The *Vizcarrondo* court explained the difference between an unlawful death with malice and involuntary manslaughter by noting that:

> [t]he difference between the elements of the third prong of malice and wanton and reckless conduct amounting to involuntary manslaughter lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew. The risk for the purposes of the third prong of malice is that there was a plain and strong likelihood of death . . . . The risk that will satisfy the standard for wilful and wanton conduct amounting to involuntary manslaughter involves a high degree of likelihood that substantial harm will result to another.

693 N.E.2d at 681. This distinction, however, raises an interesting question: as more and more deaths result from the forced consumption of alcohol in fraternity initiation ceremonies, will the "reasonable person" standard eventually recognize that death is, in fact, a highly likely consequence of such activities?

318. *See* Lauren Beckham Falcone, *Booze Still Rules at Some Frat Houses–Crackdown Hasn't Quenched Student's Thirst to Party*, BOSTON HERALD, Sept. 21, 1998, at 3 (detailing the Krueger incident and criminal investigation).

319. *Id.*

A five page statement issued by Suffolk County District Attorney Ralph C. Martin II charged, in part, that

> [T]he cause of Krueger's death—in real terms—was the wanton and reckless conduct on the part of the Phi Gamma Delta fraternity, its officers and its members in promoting and orchestrating the Animal House drinking event, supplying an inherently dangerous amount of alcohol and then abandoning Scott Krueger when he was in dire need of medical treatment.[320]

The grand jury's indictment, which was issued against the local fraternity, carried fines totaling four thousand dollars.[321] When asked why no charges were sought against individual members of the fraternity, a spokesperson for the District Attorney's office stated that "[i]n this case, we felt that it was the traditions and actions of the fraternity as a whole that were responsible for [Krueger's death][322] . . . The individuals claimed to be acting more as a group in following the spirit and traditions of the fraternity house."[323]

Despite these charges, the indictment failed to name a specific individual defendant responsible for appearing at trial.[324] Because the Boston chapter of the fraternity was legally identified as a voluntary unincorporated association under Massachusetts law, anyone who may have served as an officer at the time of the incident was not obligated to respond to the summons.[325] When asked who would appear in court to face the charges, a spokesman for the District Attorney's office stated that "[t]he fraternity has been indicted, and we're confident that an appropriate representative of the fraternity will appear in court."[326]

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320. Warner, *supra* note 302, at C1.

321. *Id.*

322. *Id.*

323. *Id.*

324. Ellement, *supra* note 303, at B2.

325. *See id.* (stating that, unlike a corporation, which has "easily identified corporate officers who have a legal obligation to assign a corporate officer to represent the company when charges are filed against it," the fraternity was under no such legal obligation).

326. *Id.* A summons was issued to attorney Michael O'Malley, who represented an insurance company connected with the fraternity; however, because O'Malley did not represent the fraternity itself, he questioned his legal responsibility to appear in court. *Id.*

C. Conclusion of the Scot Krueger Incident?

A day after the indictment against the fraternity was filed, the Phi Gamma Delta chapter at MIT officially disbanded.[327] When the court date arrived, no one showed up in defense of the fraternity.[328] A warrant was later issued against the fraternity and "filed away" in case the Phi Gamma Delta fraternity ever tries to reorganize at MIT.[329] A spokesman for the Krueger family opined that "[t]he criminal justice system has failed."[330]

Despite cynical responses from some members of the legal community,[331] a spokesperson for the Suffolk County District Attorney's Office commented that "[o]ur aim was to do the right thing in this case. Just because we . . . can't guarantee[] a perfect solution doesn't mean we should have strayed from doing the right thing, which is indicting the fraternity."[332]

VI. CONCLUSION

For centuries, hazing has been around in one form or another. In the 1990s, however, the term "hazing" has become nearly synonymous with collegiate Greek initiation proceedings involving dangerous amounts of alcohol and freshman pledges seeking social acceptance.[333] Despite the efforts of state legislatures seeking

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327. *See Manslaughter Case vs. Frat Stymied*, MASS. LAWYERS WEEKLY, Vol. 27, no. 9 (Nov. 2, 1998) (quoting a lawyer for the Krueger family as asking "[d]oes it strike anyone as odd that it was not until September 15, the day after the indictment, that the [Phi Gamma Delta] house was disbanded?"); *see also Indictment Against Fraternity Unraveling–Nobody to Prosecute in Student's Death*, CHI. TRIB., Oct. 24, 1998, at 16 [hereinafter *Indictment*] (reporting that MIT severed ties with the fraternity until 2002).

328. *See* John Ellement, *MIT Frat Death Case Seems a Lost Cause—No Defendant Appears in Court*, THE BOSTON GLOBE, Oct. 23, 1998, at A1 (explaining that the Suffolk County District Attorney's year-long investigation into the Krueger death ended in a "no-show"); *see also Indictment*, *supra* note 327, at 16 (noting that William Kettlewell, a lawyer for the national Phi Gamma Delta corporation, sent a letter to the Suffolk County Superior Court saying he was not authorized by the national organization to represent the local fraternity in the action).

329. *See Lacking a Defendant, Fraternity Alcohol Death Case Dissolves*, CHI. TRIB., Oct. 27, 1998, at 14 (noting that the fraternity may face penalties if it ever tries to reorganize at MIT).

330. *Manslaughter Case vs. Frat Stymied*, MASS. LAWYERS WEEKLY, Vol. 27, no. 9 (Nov. 2, 1998).

331. *See Indictment*, *supra* note 327, at 16 (quoting Boston criminal defense lawyer J. Albert Johnson as calling the entire criminal case "just plain silly" because a fraternity is only "an association of people with no legal standing in criminal law"). Attorney Randy Chapman, a former prosecutor and chairman of the Massachusetts Bar Association's criminal justice section, explained the result by saying that "[I]t's like if you have a party and someone gets hurt, then everybody goes home and they indict the party"). *Id.*

332. *Id.*

333. *See supra* notes 36-42 and accompanying text (noting the close relationship between fraternities and drinking).

to curb the traditions of hazing via prohibitory statutes,[334] injuries and deaths have occurred at an alarming rate.[335]

Civil actions arising from hazing-induced injuries and deaths have posed new questions for the courts. While the presence of state hazing statutes have been helpful to the courts' analyses,[336] jurisdictions with hazing statutes have been nonetheless hesitant to apply principles of negligence per se in solving the problem.[337]

Despite this hesitancy, judicial opinions justifying the imposition of liability have made it clear that alcohol-related hazing deaths will not be tolerated.[338] However, because most pledges voluntarily agree to subject themselves to these humiliating and dangerous rituals, courts have adopted principles of comparative fault in solving the problem of how to allocate the blame when injuries occur.[339] The ultimate question presented by these cases is how to balance the need for social acceptance against the price that young individuals are willing to pay for it, a question which a jury may be best suited to answer. The rationale of the *Oja I* court is worth reiterating: "No such revulsion ['against rewarding youthful drunks for their own recklessness and self-indulgence'] seems justified in relation to the injuries and deaths sustained by adolescents who, however unwisely, trade their insecurities and free will for the promise of acceptance, and prestige, that fraternity membership appears to confer."[340] Thus, "[a] jury might find that the stoic acceptance of pain and discomfort by a pledge, as the price of admission to the fraternal mysteries, is not truly voluntary."[341] This analysis describes the ultimate issue confronting courts asked to impose liability for hazing related injuries—is one's decision to pledge a fraternity and participate in initiation ceremonies truly voluntary?

At a basic level, individuals initially volunteer to join fraternities and other collegiate organizations. After all, no one forces freshman college students to "rush" fraternities and seek acceptance therein. But at what point do initiates lose their autonomy and subject themselves to the whim of senior fraternity members? Initiation ceremonies are notorious for involving the consumption of alcohol and

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334. State hazing statutes are detailed at *supra* Part III.B.

335. Injuries resulting from hazing activities are set forth at *supra* notes 12-15. Civil actions seeking to redress deaths caused by hazing activities are discussed at *supra* Part IV.B.1-5.

336. *See supra* text accompanying notes 259-61 (noting that statutes are indicative of a strong public sentiment against the practice of hazing).

337. *See supra* text accompanying notes 225-26 (showing that the mere presence of a hazing statute is insufficient to impose liability).

338. *See, e.g., Oja I*, 667 N.Y.S.2d 650, 652 (S. Ct. 1997) (arguing that liability in cases of fraternal hazing is appropriate because insecure pledges jeopardize their safety in exchange for acceptance by their fraternity).

339. *See supra* notes 223, 257, and accompanying text (illustrating the courts' use of comparative fault in hazing incidents).

340. *Oja I*, 667 N.Y.S.2d at 652.

341. *Id.*

other "tests" of one's character.[342] Agreeing to participate in a ceremony, however, should not give the senior members carte blanche to do anything they wish to the pledges.

Courts addressing the issue of liability have thus far done a good job of sorting out the tangle of legal issues presented to them. Applying the principles of comparative fault[343] seems to be the soundest avenue of approach because it allows the jury to work with a sliding scale in determining liability. If a jury determines that a pledge "knew what he was getting into," the jury may reduce the pledge's recovery or bar or it altogether. Conversely, fraternities that exhibit particularly egregious conduct may be penalized by juries and forced to pay large damage awards for their mistreatment of pledges.

Courts have been hesitant to apply the doctrine of negligence per se and categorically create a cause of action based upon an underlying criminal hazing statute.[344] At first blush, these courts' decisions might not make sense. After all, state hazing statutes are specifically designed to combat hazing practices within educational institutions by punishing potential offenders with jail time and/or monetary fines.

Upon closer examination, however, one possible explanation might lie in the nature of the statutes themselves. As indicated above,[345] many statutes paint with broad strokes and include within their definition of "hazing" any activity which might injure the physical or mental health of potential pledges.[346] But what does this mean? A colorful argument could be made that referring to initiates with harassing names like "maggot" or treating them in any demeaning fashion could injure the "mental health" of pledges. Because such broad definitions have been adopted by state legislatures, courts might fear that creating an automatic duty of care might open the floodgates of litigation and bury otherwise worthy cases. Furthermore, given the apparent efficacy of the alternate avenues of recovery established by the courts,[347] it is unnecessary to create a per se rule imposing liability based upon seemingly arbitrary statutes.

While courts have been willing to accommodate civil complaints alleging negligence in the context of hazing related injuries, resolving the criminal issue

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342. *See* Warner, *supra* note 302 (reporting that MIT initiate Scot Krueger expressed anxiety to his fellow pledges about participating in the ceremony that ended in his death).

343. *See supra* notes 223, 257 and accompanying text (illustrating the courts' use of comparative fault in hazing incidents).

344. *See supra* notes 259-61 and accompanying text (showing the courts' apprehension of applying the doctrine of negligence per se).

345. The variety and form of state hazing statutes is discussed at *supra* Part III.B.

346. *See, e.g.*, FLA. STAT. ANN. § 240.262 (West 1998) ("[H]azing means any action or situation which recklessly or intentionally endangers the mental or physical health or safety of a student for the purpose of initiation . . . into . . . any organization.").

347. The "coercion" theory of recovery is discussed at *supra* notes 215-17 and accompanying text. The "undertaking to help" approach is discussed at *supra* notes 294-99 and accompanying text.

presented in the Scot Krueger case[348] is a separate matter and beyond the specific scope of this Comment.[349] Despite the complexities of the criminal issue, however, a possible lesson can be discerned from the civil treatment of hazing cases. As noted above, courts usually charge a jury with the task of allocating blame between the victims and the defendants by using principles of comparative fault.[350] This trend, however, implies that hazing victims may be, or in fact are, at least partially responsible for their fate. This fact alone raises the possibility of a reasonable doubt and suggests that the higher burden of proof required in criminal matters may never be met by prosecutors in a hazing case.[351]

In the end, victims of hazing and, in wrongful death actions, victims' family members, have succeeded in obtaining monetary justice within civil courts of law. Setting aside the question of criminal liability, this trend clearly seems justified when one compares the price paid—sometimes even one's life—for admission into something as trivial as a collegiate fraternity. When the phrase "dying to get in" to a fraternity has achieved a literal meaning, someone, somewhere, did something wrong and should stand to answer in court for his or her conduct.

348. The Scot Krueger incident and the question of criminal liability is discussed at *supra* Part V.B.

349. The issue of criminal liability raises numerous problems of proximate and legal cause, the analyses of which are beyond the scope of this Comment.

350. *See supra* notes 223, 257 and accompanying text (illustrating the courts' use of comparative fault in hazing incidents).

351. Of course, the possibility of charging a defendant with another criminal offense—battery, for example—is certainly present should the facts warrant such a charge. The decision in the Krueger case to seek charges of manslaughter, however, may have been too ambitious.