

SEXUALLY EXPLOITATIVE HAZING AND THE LAW

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I. Introduction

In 2000, a first-year student at Sam Houston State University alleged that she was sexually hazed by her Chi Omega “sisters.”¹ The student described how on February 16, 2000, two sorority sisters gave her a drink containing a “date-rape” drug.² The two students then drove the woman to the apartment of a male friend, who had sex with her early the next morning.³ After the incident, the student filed a lawsuit in state court, calling her experience “a nightmare of the darkest magnitude.”⁴ Ultimately, a grand jury chose not to indict the male student because the woman acknowledged having consensual sex with the same man the following night.⁵ In addition, on February 16, the woman had consumed alcohol, for which there were no allegations of coercion.⁶

Eighteen years later a similar hazing incident occurred, which also failed to result in an indictment. New members of a Texas Christian University fraternity, Delta Tau Delta, were blindfolded, locked in a closet, and told to perform acts with sex toys.⁷ A few days after the incident occurred, one of the students told a campus administrator.⁸ The administrator notified campus police, and a criminal investigation began immediately.⁹ Police called thirty-two pledges to a meeting where they were interviewed by detectives.¹⁰ However, the alleged victims declined to pursue criminal charges, and the investigation closed a week later.¹¹ “Although the investigation did reveal criminal conduct, there were no cooperating witness,” a police report stated.¹²

Over the past thirty years, the number of criminal hazing statutes across the United States has increased markedly. Hazing is often dangerous and may even result in death; still, prosecutions for hazing are rarely successful, and many college students appear to accept hazing as part of the campus social experience. Sexually exploitative hazing on college campuses, notably in sororities and fraternities, particularly puts students and institutions at risk. The physical and psychological abuse of younger Greek life-affiliated students by more senior members both humiliates and endangers the victims. Indeed, some Greek organizations and members are charged with hazing crimes as a result. However, rarely is anyone found liable. The features of sexually exploitative hazing have all the earmarks of sexual harassment: older members use

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¹ Michelle C. Lyons, *Grand Jury Took No Action in Sorority Case*, SHSU’s Office of Public Relations, <https://perma.cc/RVL8-N4EL>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Scott Gordon, *TCU Fraternity Members Were Hazed, Burned: Police*, NBCDFW, <https://perma.cc/BVW6-GSVQ>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

sexual assaults to keep younger members subordinated by feminizing them or, in the case of men, challenging their ability to conform to a hegemonic masculine stereotype. Sorority and fraternity hazing's role in maintaining that hegemonic masculinity is often understood as "tradition" and therefore a "rationally" perceived as a rite of passage. However, sexual hazing is neither rational nor an initiation rite; it is a potent tool to subjugate another through fear and intimidation.

Little research on sexual hazing exists, and much of what has been written on the subject focuses on athletic team hazing. Understanding the cultural context of sexually exploitative hazing is critical. This paper aims to address the void by helping prosecutors understand how sexual hazing operates as well as barriers to successful sexual hazing prosecutions and strategies to overcome those barriers.

II. Background Information on Hazing and Fraternities

a. *History and Evolution of Hazing*

Despite decades of prevention efforts, hazing persists on college campuses.¹³ Evidence of hazing in educational settings dates back thousands of years, as does evidence of attempts to prevent it.¹⁴ Part of the challenge to prevention is understanding what behaviors constitute hazing and how to measure its harms.¹⁵ Contemporary hazing practices occupy a spectrum from the boring and tedious (e.g., memorization of needless information) to reckless and violent assaults that may result in death.¹⁶ While hazing is not exclusive to college fraternities, these campus groups remain the most closely associated with the practice.

In the United States, Greek letter secret societies, commonly known today as social fraternities, have a storied and notorious past.¹⁷ Following the American Revolutionary era, masculine ideals of individualism and self-determination gave way to communalism, or devotion to one's group; the communalist principle in turn informed the culture of the nation's first secret societies.¹⁸ This change, heralded by members of the groups, influenced masculine norms on campuses and in local communities as their chapters spread across the country.¹⁹ Beginning in the early 19th century, these groups took on Greek lettering in their names as an ode to the democratic values of Ancient Greece, which were idealized in post-revolution America.²⁰ Their creation was, in part, a

¹³ See generally Jay Mechling, *Paddling and the Repression of the Feminine in Male Hazing*, THYMOS JOURNAL OF BOYHOOD STUDIES, 45 (2009); see also HANK NUWER, HAZING: DESTROYING YOUNG LIVES (2018); CRISTOBAL SALINAS JR. & MICHELLE BOETTCHER, CRITICAL PERSPECTIVES ON HAZING IN COLLEGES AND UNIVERSITIES: A GUIDE TO DISRUPTING HAZING CULTURE (2018).

¹⁴ HANK NUWER, BROKEN PLEDGES: THE DEADLY RITE OF HAZING (1990); HANK NUWER, WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING AND BINGE DRINKING (2022).

¹⁵ Aldo Cimino, *Defining hazing: Why popular definitions are misleading and counterproductive*, JOURNAL OF HIGHER EDUCATION MANAGEMENT, 31(1), 135–148 (2017).

¹⁶ See *id.*; HANK NUWER, WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING AND BINGE DRINKING (2022).

¹⁷ NICK SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES (2011).

¹⁸ E. ANTHONY ROTUNDO, AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA (1993).

¹⁹ NICK SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES (2011).

²⁰ CAROLINE WINTERER, THE CULTURE OF CLASSICISM (2002).

reaction against the expectation that college men were to be pious and studious.²¹ As such, the groups were initially prohibited on campuses, and for the members, secrecy, along with a sense of rebellion, was part of the appeal.²² Over time, the groups came to be known as fraternities due to the loyalty and familial bonds shared by their members.²³ Two centuries after their formation, however, fraternities have become known as much for risk taking as for loyalty and brotherhood; in fact, these values are intertwined.²⁴

Hazing is in fact is an ancient practice.²⁵ For centuries, it has been used by groups to enhance their identities. It has been practiced within cultural and ethnic groups; among professional organizations such as military units, police, and fire departments; and in numerous academic settings such as extracurricular clubs, marching bands, spirit groups, athletic teams, and student organizations including Greek letter sororities and fraternities.²⁶

b. Definition of Hazing

Legally, socially, and academically, hazing has been defined and conceptualized in numerous ways.²⁷ Among the limited scholarship in this area, Brian Crow examines how student-athletes, coaches, and administrators view hazing in athletics.²⁸ Crow found that in order for any hazing or initiation to exist, four characteristics of a group must be met: 1) a common goal achievable only through joint action, 2) interaction among members, 3) a stable structure that survives as members come and go, and 4) member recognition of the group, other members, and their roles.²⁹ Crow collected qualitative data from two groups, athletes and coaches/administrators, on what was acceptable in team initiation and bonding and what constituted hazing.³⁰ The most commonly used definition of hazing was “any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person's willingness to participate.”³¹ This did not include activities such as rookies carrying the balls, team parties that included group games, or going out with teammates, unless these activities were accompanied by acts meant to humiliate or degrade.³² Ultimately, Crow defined hazing as “any potentially

²¹ NICK SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES* (2011).

²² *Id.*

²³ RAIMOND BAIRD, *AMERICAN COLLEGE FRATERNITIES* (1898); NICK SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES* (2011).

²⁴ HANK NUWER, *HAZING: DESTROYING YOUNG LIVES* (2018)

²⁵ ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (1960).

²⁶ ELIZABETH J. ALLAN & MARY MADDEN, *HAZING IN VIEW: COLLEGE STUDENTS AT RISK: INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING* (2008); J. Bryshun & Kevin Young, *Sport-related hazing: An inquiry into male and female involvement*, *SPORT AND GENDER IN CANADA*, 269–292 (2022); Linhares de Albuquerque & Paes-Machado, *The shaping of Brazilian military police recruits*, *POLICING AND SOCIETY* 14(2), 175-192. (2004); HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* (1990); HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING AND BINGE DRINKING* (2022); Donna Winslow, *Rites of passage and group bonding in the Canadian Airborne*, *Armed Forces and Society* 25(3), 429-457 (2022).

²⁷ *See generally* GREGORY SCOTT PARKS, *MAKING SENSE OF UNITED STATES ANTI-HAZING STATUTES – STATE BY STATE* (2018).

²⁸ R. Brian Crow, & Eric W. Macintosh, *Conceptualizing a Meaningful Definition of Hazing in Sport*, 9 *EUR. SPORT MGMT Q.* 433 (2009).

²⁹ *Id.*

³⁰ *Id.* at 441.

³¹ *Id.* at 437.

³² *Id.* at 448.

humiliating, degrading, abusive, or dangerous activity expected of a junior-ranking athlete by a more senior team-mate, which does not contribute to either athlete's positive development, but is required to be accepted as part of a team, regardless of the junior-ranking athlete's willingness to participate.”³³

Other hazing research complements Crow’s work. Chad Ellsworth's study on hazing focuses on five different groups: marching band members, fraternity members, sorority members, Reserve Officer Training Corps members, and student athletes.³⁴ Participants were asked whether they viewed forty-two different activities as hazing.³⁵ For the entire sample, respondents agreed that ten of the forty-two activities constituted hazing: forced consumption of excessive amounts of alcoholic beverages; being struck by an object, such as a ball, baton, fist, or paddle; being handcuffed or tied to a building or structure; receiving a brand or tattoo; drinking or eating substances not intended for normal consumption; being deprived of beverages or food by others; performing sexual acts; participating in streaking or other activities while naked; being deprived of sleep by others; and stealing an item.³⁶

Several panhellenic organizations have also released definitions of hazing. For instance, in 2003, the sorority organization National Panhellenic Conference, Inc. (“NPHC”) defined hazing as “any action taken or situation created that involves or results in abusive, physical contact or mutual harassment of a prospective Fraternity or Sorority member . . . and that hazing has also been described to include any action that results in excessive mutual or physical discomfort, embarrassment or harassment . . .”³⁷ In sum, Americans have idiosyncratic definitions of hazing typically influenced by several factors, including organizational context, race, gender, and one's own hazing experience. Thus, in practice, prosecutors can specifically define hazing based on the facts of each case.

III. Sexual Hazing

a. What is “Sexual Hazing”?

Over time, sexual hazing was rarely differentiated from other hazing behaviors. Recently, however, sexual hazing has received increased attention from the media as well as legal scholars.³⁸ A 1992 study defined sexual hazing as “activities specifically designed to harass and abuse rookies by sexualizing them, diminishing their masculinity (for males) or femininity (for females) or their sexual identity, and/or by targeting them in sexually harassing and sexually abusive activities”.³⁹ In some cases this definition applies specifically to student-athletes, but it could certainly apply to potential or new members of other college organizations.

³³ *Id.* at 449.

³⁴ Chad William Ellsworth, *Definitions of Hazing: Differences Among Selected Student Organizations*, DIGITAL REPOSITORY AT THE U. OF MD. 42 (2004).

³⁵ *Id.*

³⁶ *Id.* at 69.

³⁷ Council of Presidents, *Joint Position Statement against Hazing*, <https://perma.cc/QRC9-A25F>.

³⁸ A. DeMartini, *Sexual hazing or harassment is a title IX violation*, JOURNAL OF PHYSICAL EDUCATION, RECREATION, & DANCE 87(4), 53-55 (2016); Hoyt, Rielage, & Williams, 2011

³⁹ K. T. Berill, *Anti-gay violence and victimization in the United States: An overview*, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 22 (1992).

Sexual hazing examples are plentiful. They include forcing potential initiates to undress⁴⁰ or cross-dress⁴¹; homophobic, sexist, or body-shaming insults⁴²; forced viewing of pornography⁴³; forced sexualized games or scavenger hunts⁴⁴; forced disclosure of sexual history or other sexual information⁴⁵; the threat of sexual hazing through fraternity lore⁴⁶; forced sexualized drinking (e.g., “body shots,” “butt luge,” “butt chugging,”)⁴⁷; forced simulated sexual behaviors⁴⁸; paddling⁴⁹; forced removal of pubic or body hair (Johnson, 2011); forced sexualized contact or acts such as “elephant walks”⁵⁰; contact with or ingestion of semen or excrement (e.g., “soggy biscuit,” “ookie cookie,”)⁵¹; and penetrative sexual assault.⁵²

b. Harms to the Individual and Society

Some observers blame hazing on a “few bad apples” whose bad behavior is exceptional. The research demonstrates, however, that hazing is both systemic and meaningful for the participants and organization. Only by understanding and addressing the motivations for hazing is it possible to craft an approach that will successfully reduce its damaging effects. Specifically, sexual

⁴⁰ Waldron, Lynn, & Krane, *Duct tape, icy hot & paddles: Narratives of initiation onto US male sports teams*, SPORT, EDUCATION, AND SOCIETY 16(1), 111- 125 (2011).

⁴¹ NICK SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES* (2011).

⁴² Anderson, McCormack, & Lee, *Male team sport hazing initiations in a culture of decreasing homophobia*, JOURNAL OF ADOLESCENT RESEARCH 27(4), 427-448 (2012); HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING AND BINGE DRINKING* (2022).

⁴³ NICK SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES* (2011).

⁴⁴ J. Johnson, *Through the liminal: A comparative analysis of communities and rites of passage in sport hazing and initiations*, CANADIAN JOURNAL OF SOCIOLOGY, 36(3), 199-227 (2011).

⁴⁵ Keating, Pomerantz, Pommer, et al., *Going to college and unpacking hazing: A functional approach to decrypting initiation practices among undergraduates*, GROUP DYNAMICS: THEORY, RESEARCH AND PRACTICE 9(2), 104-126 (2005); HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING AND BINGE DRINKING* (2022).

⁴⁶ A. DeSantis, *Inside Greek U.: Fraternities, Sororities, and the Pursuit of Pleasure, Power and Prestige* (2007).

⁴⁷ Anderson, McCormack, & Lee, *Male team sport hazing initiations in a culture of decreasing homophobia*, JOURNAL OF ADOLESCENT RESEARCH 27(4), 427-448 (2012); Waldron & Kowalski, *Crossing the line: Rites of passage, team aspects, and ambiguity of hazing*, RESEARCH QUARTERLY FOR EXERCISE AND SPORT 80(2), 291-302 (2009).

⁴⁸ Mann, Feddes, Doosje, & Fischer, *Withdraw or affiliate? The role of humiliation during initiation rituals*, COGNITION & EMOTION 30(1), 80-100 (2016); Donna Winslow, *Rites of passage and group bonding in the Canadian Airborne*, Armed Forces and Society, 25(3), 429-457 (2022).

⁴⁹ Jay Mechling, *Paddling and the Repression of the Feminine in Male Hazing*, THYMOS JOURNAL OF BOYHOOD STUDIES, 45 (2009); Waldron, Lynn, & Krane, *Duct tape, icy hot & paddles: Narratives of initiation onto US male sports teams*, SPORT, EDUCATION, AND SOCIETY 16(1), 111- 125 (2011).

⁵⁰ B. C. Crow & S. R. Rosner, *Institutional and organizational liability for hazing in intercollegiate and professional team sports*, ST JOHN'S LAW REVIEW 76(1), 87- 114 (2012); Waldron, *Predictors of mild hazing, severe hazing, and positive initiation rituals in sport*, INTERNATIONAL JOURNAL OF SPORTS SCIENCE & COACHING, 10(6), 1089- 1101 (2015).

Waldron & Kowalski, *Crossing the line: Rites of passage, team aspects, and ambiguity of hazing*, RESEARCH QUARTERLY FOR EXERCISE AND SPORT 80(2), 291-302 (2009); M. KIMMEL, *GUYLAND* (2008).

⁵² Finley & Finley, *They're just as sadistic as any group of boys! A content analysis of news coverage of sport-related hazing incidents in high schools*, JOURNAL OF CRIMINAL JUSTICE AND POPULAR CULTURE 14, 197-219. (2007).

hazing humiliates new members and makes them feel inferior.⁵³ It may include violent acts that are homophobic and misogynistic.⁵⁴ Hazing aims to affirm prospective members' commitment to a group or organization.⁵⁵ While college administrators see hazing as dangerous and harmful, the organization's members view it as the behavioral price to pay for membership to an exclusive group, a traditional rite of passage.⁵⁶ They need to believe the price was worth it; otherwise, they would be "fools" for choosing to endure it, and belonging to a group that would harm them.⁵⁷ For instance, Allan et al. (2019) found that hazed students reported positive outcomes such as feeling more a part of a team or group (62.8%); feeling a sense of accomplishment (54%); and feeling stronger (35.7%).⁵⁸ But in the same study, 48 percent of students also reported feeling stressed, depressed, humiliated, and degraded by hazing.⁵⁹ Almost 30 percent reported hazing-related academic problems or sleep difficulties.⁶⁰ And of course, some students "die" to belong; in the United States, at least one college student hazing death occurs every year.⁶¹

Additionally, sexual hazing perpetuates rape culture. The *Dartmouth Radical* publication explains, "Hazing rituals often reinforce toxic masculinity, asking men to prove themselves by withstanding pain or discomfort. Other acts involve the dehumanization of women as sex objects when members must produce proof of their conquests or interactions with women in order to receive validation."⁶² Those who have experienced abusive hazing often continue the cycle of violence. In order to cope with their own degradation, individuals may inflict harm on others in order to regain their own sense of empowerment.

IV. Barriers to Prosecution: Weaknesses and Problems with Current Anti-Hazing Regulations

The law intersects with hazing in both the criminal and civil domains. Individual hazers may be arrested, criminally indicted, and convicted for their conduct. A host of individuals and entities—including fraternity and sorority national organizations, individual chapters, host institutions, and even university presidents—may be civilly sanctioned for hazing. However, in this paper, I will only be discussing criminal liability against hazers.

⁵³ T.T. Apgar & R. Szabo, *What we don't know can hurt us most: The hidden harms of hazing*, Rev. Paper. The National Hazing Prevention Week Resource Guide (2008).

⁵⁴ Ryan McKee, *Sexual Hazing Among Fraternity Men: A Qualitative Study*, Widener University ProQuest Dissertations Publishing (2022).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Shawn M. Burn, *Hazing: When Rites of Passage Are Harmful Practices*, *Psychology Today* (September 30, 2019).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Beyond the basement: Understanding the relationship between hazing and sexual violence*, THE DARTMOUTH RADICAL (2018), <https://perma.cc/53DW-MYZZ>.

Many states have codified statutes that punish hazing.⁶³ Although hazing offenses apply to the initiation or affiliation rites of any organization, state legislatures recognized the need to protect pledging youths who can, all too easily, be bullied or humiliated into engaging in risky or life-threatening conduct in return for social acceptance.⁶⁴ As such, many state and local courts now have mechanisms to impose criminal liability on the individual fraternity and sorority members as well as fraternal organizations. Still, many weaknesses within current anti-hazing regulations exist. Prosecutors face numerous barriers when attempting to charge a member or organization of sexual hazing, which is why so little cases are actually prosecuted.

a. *Secrecy, the Desire to be Accepted, and Criminal Consequences*

Inherent in hazing is the concept that a person being hazed is a new member of the group and is subject to initiation.⁶⁵ It is assumed that the new member wants to be part of the group and wants to be accepted. Loyalty to their organization prevents many hazing victims or witnesses from coming forward.⁶⁶ Among the reasons given for engaging in hazing are excitement, solidifying friendships, revenge for having been hazed, or a fear of saying “no.”⁶⁷ For example, a pledge of the Kappa Alpha fraternity who brought suit against a number of members testified in his deposition that “he repeatedly helped KA cover up the hazing by lying about its occurrence to school officials, his doctor, and even his own family.”⁶⁸ Another contributing factor in the failure to report hazing incidents is the fear of being implicated in illegal hazing behavior.

Several states that have enacted anti-hazing legislation recognize victims’ concern about their own culpability in the process.⁶⁹ North Carolina has addressed the problem by protecting the witness in a hazing trial:

In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony.⁷⁰

Indiana's anti-hazing statute contains a similar clause that allows a person to report hazing and participate in the adjudication of the hazing claim in good faith, while avoiding civil and criminal

⁶³ Amie Pelletier, Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 383 (2002).

⁶⁴ See *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997).

⁶⁵ See generally Dr. Nadine C. Hoover, National Survey: Initiation Rites and Athletics for NCAA Sports Teams, Alfred University, (August 30, 2022) available at <https://perma.cc/JE2Q-XLZW>.

⁶⁶ *Ex parte Barran*, 730 So. 2d 203, 206 (Ala. 2022).

⁶⁷ See High School Survey, *supra* note 44, at [http://www.alfred.edulnews/whyl why.html](http://www.alfred.edulnews/whyl%20why.html).

⁶⁸ *Ex parte Barran*, 730 So. 2d 203, 206 (Ala. 2022); see also High School Survey, *supra* note 44. Forty percent of high school students surveyed in the Alfred University survey indicated that they would not report hazing for the following reasons: thirty-six percent because there is no one to tell, twenty-eight percent said because “it is not a problem, [s]ometimes accidents happen,” twenty-seven percent because “adults wouldn't know how to handle it right,” twenty four percent because “other kids would make my life miserable,” and sixteen percent just would not tell on their friends under any circumstances. High School Survey, *supra* note 44.

⁶⁹ See IND. CODE ANN. § 35-42-2-2 (Michie 2017); N.C. GEN. STAT. § 14-38 (2022), UTAH CODE ANN. § 76-5-107.5(4) (2022).

⁷⁰ N.C. GEN. STAT. §14-38 (2022).

liability.⁷¹ This provision recognizes that few witnesses will come forward where there would be an additional risk of being implicated in the hazing by testifying.

Conversely, other jurisdictions uniformly criminalize failure to report hazing.⁷² For example, in Arkansas, a person's failure "to report promptly his knowledge or any reasonable information within his knowledge of the presence and practice of hazing in th[e] state to an appropriate administrative official of the school, college, university, or other educational institution in Arkansas . . . shall be deemed hazing."⁷³ These statutes operate under the assumption that the person seeking membership in the group is concerned only about civil or criminal liability. The statute fails to address the most probable reason for failure to report: that the hazing victim does not want to "rock the boat," become a whistle blower, or jeopardize their membership. In addition, the victim often does not see the behavior as dangerous or problematic but simply what one has to do to belong.

b. Education Based Statutes

Many states recognize the dangers of hazing and have codified regulations that punish this behavior. A substantial number of these anti-hazing statutes, however, are based in education codes and carry only educationally related penalties, such as suspension or expulsion from the educational institution.⁷⁴ In Florida, Kentucky, and Maine the legislature requires schools and universities to adopt regulations on hazing but have yet to criminalize it.⁷⁵ While it is common to associate hazing solely with the initiation of a student into an organization or sports team, these statutes do not punish a non-student who engages in hazing.⁷⁶ For example, Massachusetts codified hazing as a "Crime Against Public Peace," but defines it as "any conduct or method of initiation into any *student organization*, whether on public or private property, which willfully or recklessly endangers the physical or mental health of any *student* or other person."⁷⁷

This statutory language eliminates prosecution in instances of hazing in the military, in the workplace, or on a professional athletic team. To incorporate protection for non-student victims of hazing, the Massachusetts statute need only eliminate the word "student" in order to be all

⁷¹ See IND. CODE ANN. § 35-42-2-2 (Michie 2022); see also UTAH CODE ANN. § 76-5-107.5(4) (2022) ("A person who in good faith reports or participates in reporting of an alleged hazing is not subject to any civil or criminal liability regarding the reporting.").

⁷² See ARK. CODE ANN. § 6-5-202(b) (Michie 2022); MASS GEN. LAWS ANN. ch. 269, § 18 (West 2022); N.H. REV. STAT. ANN. § 631:7II(a)-(b) (1996); S.C. CODE ANN. § 16-3-520 (Law. Co-op. 1985); TEX. EDUC. CODE ANN. § 37.152(a)(4) (Vernon 1996).

⁷³ ARK. CODE ANN. § 6-5-202(b) (Michie 2022).

⁷⁴ Fourteen states codify anti-hazing regulations as part of their education code. See generally ALA. CODE § 16-1-23 (2022); ARK. CODE ANN. § 6-5-202 (Michie 2022); CAL. EDUC. CODE § 32051 (West 2023); DEL. CODE ANN. tit. 14, § 9303 (2022); FLA. STAT. ANN. § 240.1325 (West 2022); KY. REV. STAT. ANN. § 164.375 (Banks-Baldwin 2022); LA. REV. STAT. ANN. 17.1801 (West 2022); ME. REV. STAT. ANN. tit. 20A, § 6553 (West 2019); MINN. STAT. § 121A.69 (2022); TENN. CODE ANN. § 49-7-123 (2020); TEX. EDUC. CODE ANN. § 37.152 (Vernon 2017); WASH. REV. CODE ANN. § 28B.10.901 (West 2022); W. VA. CODE ANN. § 18-2-33 (Michie 2022).

⁷⁵ See generally FLA. STAT. ANN. § 240.262 (West 2022); KY. REV. STAT. ANN. § 164.375 (Banks-Baldwin 2022); ME. REV. STAT. ANN. tit. 20-A, § 6553 (West 2019).

⁷⁶ See MASS. GEN. LAWS ANN. ch. 269, § 17 (West 2022).

⁷⁷ *Id.*

encompassing. Those not covered under the state anti-hazing statute due to this restrictive language, however, may face prosecution for criminal assault and battery.⁷⁸

c. *Consent Defenses*

i. **The Development of the Consent Defense in the Hazing Context**

Inherent in the act of hazing is the need for secrecy in order to confine the rite of passage to the group.⁷⁹ Beyond secrecy, victim consent is yet another obstacle to prosecution. In *People v. Lenti*,⁸⁰ [hereinafter *Lenti I*] a New York Court addressed, among other things, the issue of victim consent.⁸¹ In *Lenti I*, the defendants were charged under New York's criminal hazing statute⁸² for “willfully, wrongfully, and knowingly” assaulting the victims “by striking them about the body and face with clenched fists, open hands, forearms and feet.”⁸³ The defendants argued that the victims’ consent was a defense to the charges.⁸⁴ The *Lenti I* court discussed the defense of consent in general, noting:

[i]t is true that as a rule the consent of the prosecutor, if intelligently given, is a good defense in assault ... [o]n the other hand, if the fight has anything of character of illegality, or if the assault be of a nature injurious to the public as well as to the party assaulted, this reasoning does not apply.⁸⁵

In order for consent to be a successful defense, there must have been an affirmative act by the alleged victim that was not induced through either fraud or deceit.⁸⁶ The act performed should not exceed the extent of the terms of consent.⁸⁷ The court based its reasoning on this very principle:

certainly. . . the boys who submitted to the physical pounding could not consent to the perpetration of those acts . . . [T]hey were warned that there would be physical abuse. But did . . . the extent of the physical harm exceed the terms of any consent? Surely consent is not a carte blanche license to commit an unabridged assault.⁸⁸

Lenti I held that, “[u]nder the circumstances, the defense of consent [was] not available to the defendants.”⁸⁹

⁷⁸ See generally Model Penal Code §§ 211.1-211.2 (defining “Simple Assault” as “purposely, knowingly, or recklessly caus[ing] bodily injury to another,” and defining “Recklessly Endangering Another Person” as “engag[ing] in conduct which places or may place another person in danger of death or serious bodily injury.”).

⁷⁹ See e.g., High School Survey, *supra* note 44, at <https://perma.cc/99GT-7D2R>.

⁸⁰ 253 N.Y.S.2d 9 (1964).

⁸¹ See *id.* at 15.

⁸² See N.Y. PENAL LAW § 1030 (1964) (codified at N.Y. PENAL LAW § 120.16 (McKinney 1990)).

⁸³ *Lenti I*, 253 N.Y.S.2d at 11.

⁸⁴ See *id.* at 15.

⁸⁵ *Id.* at 15 (quoting *People v. Steinberg*, 190 Misc. 413, 416-17 (N.Y. 1947), citing Francis Wharton, WHARTON’S CRIMINAL LAW 1122 § 835 (12th ed. 1932)).

⁸⁶ See *Lenti I*, 253 N.Y.S.2d at 15.

⁸⁷ See *id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

However, the impact of this decision on the issue of consent was limited in *People v. Lenti*⁹⁰ [hereinafter *Lenti II*], which dismissed all counts against the defendants by holding that the hazing statute was unconstitutionally vague.⁹¹ Importantly, the *Lenti II* court highlighted that “[c]onsent of the pledges certainly should not be a bar to prosecution” and consent should not be an allowable defense “when the public conscience and morals are shocked.”⁹² Significantly, the *Lenti II* court explicitly recommended that the legislature incorporate language in the statute which would allow it to pass constitutional muster.⁹³ The affirmance of *Lenti I* sent the message to the legislature that consent should be statutorily prevented as a defense.⁹⁴ It was a clear indication that the consent defense would not be recognized in violent hazing cases in New York.⁹⁵

Other cases have dealt with the consent issue in a similar fashion and have adopted the same rationale.⁹⁶ *Jones v. Kappa Alpha Order*,⁹⁷ a fraternity hazing case, was decided on a theory of civil negligence *per se*.⁹⁸ The court recognized that participation in hazing activities by a pledge may not be voluntary, even though the concept is not captured in the criminal antihazing statute.⁹⁹ In deciding a summary judgment motion against fraternity members, the court reasoned: “we believe that fair-minded persons in the exercise of impartial judgment could reasonably infer that Jones's decision to remain a pledge, under the circumstances, was, in fact, not voluntary.”¹⁰⁰ Due to Jones's continued participation and repeated submission to the hazing activities, the trial court decision was reversed on appeal and summary judgment was granted in favor of the defendants.¹⁰¹ The court held that “[t]he trial court correctly determined that reasonable people could reach no conclusion other than that Jones voluntarily exposed himself to hazing.”¹⁰²

In a case brought by parents of a fraternity pledge who died from alcohol poisoning as a result of hazing, the court rejected the defendant's motion to dismiss, holding, “[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.”¹⁰³ When there is no explicit statutory language governing the use of consent as a defense, the outcome depends heavily on the facts and whether the jury finds that the victim participated voluntarily.

⁹⁰ 260 N.Y.S.2d 284 (1965).

⁹¹ *See id.* at 287.

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See Lenti II*, 260 N.Y.S.2d at 287.

⁹⁶ *See Jones v. Kappa Alpha Order*, 730 So. 2d 197 (Ala. Civ. App. 1997); *see also Oja v. Grand Chapter of Theta Chi Fraternity*, 667 N.Y.S.2d 650 (1997).

⁹⁷ 730 So. 2d 197.

⁹⁸ *See id.* at 200. “[T]he violation of a statute creates an action of negligence *per se* as long as the doctrine's requirements are met. There is no requirement that the legislature expressly create a civil cause of action for negligence *per se* to apply.” *Id.* at 200 n.1.

⁹⁹ *See* ALA. CODE § 16-1-23 (2019); *see also Jones*, 730 So. 2d at 200.

¹⁰⁰ *Jones*, 730 So. 2d at 200.

¹⁰¹ *See id.* at 201.

¹⁰² *Ex parte Barran*, 730 So. 2d 203, 208 (Ala. 2022).

¹⁰³ *Oja*, 667 N.Y.S.2d at 652.

Some courts have distinguished the application of the consent defense in criminal and civil law.¹⁰⁴ This is an important factor to be considered when determining whether to prosecute criminally or to sue under a tort cause of action¹⁰⁵ in order to anticipate a defendant's likely defenses and chance of success.

ii. The Incorporation of “Consent Notwithstanding” Provisions

Currently, sixteen state legislatures have provisions addressing the consent problem in their anti-hazing statutes.¹⁰⁶ The language is included in both statutes that are codified under education¹⁰⁷ and criminal codes.¹⁰⁸ Addressing the issue of consent, Pennsylvania's anti-hazing law states that “any activity as described in this definition upon which the initiation or admission 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.”¹⁰⁹ Utah's prohibition of hazing specifically protects persons under the age of twenty-one by assuming they are more vulnerable to peer pressure and barring their acquiescence as a defense to hazing.¹¹⁰ Nevada differentiates between hazing in general and hazing as a student initiation rite: “[c]onsent of a victim of hazing is not a valid defense to a prosecution conducted pursuant to this section . . . [compared with] an activity shall be deemed ‘forced’ if initiation into or affiliation with a student organization, academic association, or athletic team is directly or indirectly conditioned upon participation . . .”¹¹¹ Indiana's anti-hazing statute consent clause provides the greatest protection for a victim by eliminating a student requirement.¹¹² It states: “‘having’ means forcing or requiring another person; (1) *with or without consent* of the other person, and (2) as a condition of association with a group or organization; to perform an act that creates a substantial risk of bodily injury.”¹¹³ This type of language is necessary in order to avoid consent issues that impede prosecution under anti-hazing statutes.

V. Strategies to Overcome the Prosecutorial Barriers

¹⁰⁴ See Lewis, Dr. Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 Miss. L.J. 111, 136 n.111 (1991).

Criminal law is designed to protect the interests of society as a whole, the civil law is concerned with enforcing the rights of each individual within society . . . while consent of the victim may relieve [a] defendant of liability in tort, the same consent has been irrelevant in a criminal prosecution
Id. at 137.

¹⁰⁵ See *id.* If a suit is brought in tort, the consent defenses are assumption of the risk and contributory negligence.

¹⁰⁶ See DEL. CODE ANN. tit. 14, § 9302 (2022); GA. CODE ANN. §16-5-61 (2022); IND. CODE ANN. § 35- 42-2-2, (Michie 2022); IOWA CODE ANN. § 708.10 (West 1993); MD. CODE ANN. art. 27, § 268H (1996); MASS. GEN. LAWS ANN. ch. 269, § 17 (West 2022); MO. REV. STAT. § 578.365 (Supp. 2022); NEV. REV. STAT. ANN. 200.605 (Michie 2022); N.H. REV. STAT. ANN. § 631.7 (1996); OHIO REV. CODE ANN. § 2307.44 (West 1994); OKLA. STAT. tit. 21, § 1190 (Supp. 2002); PA. STAT ANN. tit. 24, § 5352 (West 1992); UTAH CODE ANN. § 76-5-107.5 (2022); VT. STAT. ANN. tit. 16, §-140b (Supp. 2022); W. VA. CODE § 18-16-2 (2022); WIS. STAT. § 948.51 (2022).

¹⁰⁷ See PA. STAT. ANN. tit. 24, § 5352 (West 1992).

¹⁰⁸ See UTAH CODE ANN. § 76-5-107.5 (2022).

¹⁰⁹ PA. STAT. ANN. tit. 24, § 5352 (West 1992); see also, DEL. CODE ANN. tit. 14, § 9302 (2022).

¹¹⁰ See UTAH CODE ANN. § 76-5-107.5(2) (2022).

¹¹¹ NEV. REV. STAT. ANN. 200.605(2)-(3) (Michie 2022).

¹¹² See IND. CODE ANN. § 35-42-2-2 (Michie 2022).

¹¹³ *Id.*

Although significant barriers to prosecuting sexual hazing exist, prosecutors may employ several strategies to successfully convict a member and/or organization of sexual hazing. First, prosecutors may reframe the consent defense with an offender focus.¹¹⁴ The defense will likely attempt to discredit the victim in multiple ways. For example, the defense may call into question the victim's memory or perception of events, especially if alcohol or drugs had been involved.¹¹⁵ The defense may also challenge the victim's credibility directly by asserting a motive to lie or by portraying the victim as later regretting a voluntary act.¹¹⁶ A victim's expressions of self-blame may be highlighted as evidence that the offender was not responsible, or that the incident was consensual.¹¹⁷ In response, a well-prepared argument should demonstrate that the only reasonable basis for the victim's disclosure is because of a non-consensual act.¹¹⁸ When preparing for the case, prosecutors should recount each step the victim had to endure for the case to be presented to the jury and remind jurors how long the victim had persisted in the quest for justice.¹¹⁹ For instance, prosecutors can argue that although hazing might technically be able to utter the word "no," the pressure of actual or perceived social consequences prevented them from genuinely having the freedom to opt out when placed in an uncomfortable or unsafe situation.

Prosecutors also should highlight the evidence inconsistent with consent. Such evidence may consist of the victim's unresponsiveness or incoherence when date rape drugs or alcohol is involved; physical evidence of injury; the context or setting of the act; and evidence of coercion, manipulation, or exploitation on the offender's part.¹²⁰ Prosecutors must continuously highlight that sexual hazing is meant to humiliate vulnerable victims through sexual degradation or homophobic and misogynistic practices, and thus, hazing is a coercive, nonconsensual behavior.

Many sexual hazing incidents are violent and may involve assault, battery, kidnapping, sexual assault, manslaughter, false imprisonment, and other like crimes.¹²¹ Therefore, another prosecutorial strategy is bringing forth charges in addition to hazing. The benefit of charging participants under non-hazing criminal statutes is that they can reach non-students who participate in the wrongful acts.¹²² These types of charges target members individually based on their conduct in the incident at issue.¹²³

Lastly, gender-based violence or harassment is a potential violation of Title IX protections on college campuses. If prosecutors cannot criminally charge the perpetrator or the perpetrator's organization, then they could work with campus authorities in bringing forward a civil charge. Title IX of the Education Amendments of 1972 "protects people from discrimination based on sex in education programs or activities that receive federal financial assistance."¹²⁴ Sexual hazing

¹¹⁴ Patti Powers, *Overcoming the Consent Defense: Prosecuting Known Offenders*, AEQUITAS RESOURCES (May 29, 2020), <https://perma.cc/4K8T-K9G9>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Christopher Keith Ellis, *The Examination of Hazing Case Law as Applied Between 1980–2013* at 157 (Apr. 23, 2018) (unpublished Ph.D. dissertation, University of Kentucky) (on file with University of Kentucky).

¹²² *See id.*

¹²³ *Id.*

¹²⁴ Title IX and Sex Discrimination, U.S. Dep't of Educ. (August 2021).

-- including rape, fondling, other forms of molestation, lewd remarks and acts, sexually oriented touching, and even challenges to masculine gender roles – may derail a victim’s education, therefore denying his or her Title IX rights.¹²⁵ A student must be able to “show that the behavior denied him access to educational benefits, which may include either exclusion from an activity or an adverse psychological reaction.”¹²⁶ As such, sexual hazing has the potential to be classified as a reportable Title IX violation.¹²⁷

VI. Conclusion

For generations of college students and administrators, hazing has proven disruptive and even dangerous. Lives have been lost, and many more have been tragically harmed. Few have been prosecuted. Despite significant barriers, the law provides the state and aggrieved individuals the tools to seek redress. This paper attempts to help prosecutors understand how sexual hazing operates, the barriers to successful sexual hazing prosecutions, and strategies to overcome those barriers. This knowledge will lead to safer college communities and strengthen the educational mission for which institutions have been designed.

¹²⁵ Ryan McKee, *Sexual Hazing Among Fraternity Men: A Qualitative Study*, Widener University ProQuest Dissertations Publishing (2022).

¹²⁶ *Id.*

¹²⁷ *Id.*