Volume 23 | Issue 1 Article 5

4-1-2016

A Hazy Shade of Winter: The Chilling Issues Surrounding Hazing in School Sports and the Litigation That Follows

Nicholas Bittner

Comments

A HAZY SHADE OF WINTER: THE CHILLING ISSUES SURROUNDING HAZING IN SCHOOL SPORTS AND THE LITIGATION THAT FOLLOWS

Immediately after spinning Ms. Hunt in circles, the Player Defendants ordered Ms. Hunt out of the room and commanded her to sprint down the field while wearing a blindfold. Dizzy and disoriented, Ms. Hunt took off in a dead sprint running parallel to the field, but no one stopped her. Instead the Player Defendants shouted at her, commanding that she run faster. Ms. Hunt complied with the orders to run faster. Unaware of where she was running because of the blindfold, Ms. Hunt veered away from the field and sprinted directly – face first – into a brick wall.[1]

I. Initiation into a Lifetime of Pain

In September of 2014, Haley Ellen Hunt, a former soccer player at Clemson University, filed a lawsuit against the coach of the women's soccer team, the assistant coaches, and various university officials and students.[2] Hunt brought twelve claims, including civil rights violations, negligence, and intentional infliction of emotional distress, all stemming from the hazing incident noted above, as well as other conduct before and after the incident.[3] Aside from the emotional trauma, Hunt suffered a concussion, traumatic brain injury, a host of lacerations and bruises, and permanent damage to her vision.[4]

When thinking about hazing, it is easy to assume that this issue primarily exists within the context of fraternities and sororities; however, one of the common, legal definitions of hazing is far more inclusive, and fits all too comfortably with other areas of group

1. Complaint and Jury Demand at 49–51, Hunt v. Radwanski, No. 8:14-CV-03640 (D.S.C. Sep. 12, 2014) (hereinafter the "Complaint") (describing primary hazing event suffered by plaintiff).

2. *See id.* at 3–23 (providing list of all defendants in case).

3. *See id.* at 83–180 (detailing causes of action against named defendants). While not strictly the focus of the lawsuit, Ms. Hunt did provide a wealth of context for the actions of the head coach, Eddie Radwanski. *See id.* at 29–35 (detailing defendant's "verbal hazing tactics," such as threats to not play Ms. Hunt, to make her time miserable, insulting her talent, and asserting that Ms. Hunt will be crying on bench in two years).

4. *See id.* at 59–60, 81 (describing losses suffered by Ms. Hunt as result of hazing incident).

membership, such as sports.[5] While it is certainly true that much of the media attention surrounding hazing has focused on Greek life, there is a growing awareness of hazing in the context of school athletics.[6] However, despite this increased focus on hazing in school sports, there is still very little litigation—whether criminal or civil—in comparison with the sheer prevalence of the issue.[7]

The rarity of anti-hazing litigation can seem odd when looking at the frequency of hazing, particularly as most states have enacted laws that prohibit hazing to one degree or another.[8] Numerous authors have posited different modifications to the laws and litigation theories aimed to combat hazing, yet these do not appear to have made a significant difference.[9]

This Comment provides an overview on the issues underlying the litigation of hazing in school sports. Part II addresses the statistics and factual background surrounding hazing, along with the legal backdrop, including an overview of the state laws against hazing.

---

5. *See* BLACK'S LAW DICTIONARY 786 (9th ed. 2009) (defining hazing as "[t]he practice of physically or emotionally abusing newcomers to an organization as a means of initiation").

6. *See generally* Michael Winerip, *When a Hazing Goes Very Wrong*, N.Y. TIMES (Apr. 12, 2012), http://www.nytimes.com/2012/04/15/education/edlife/a-hazing-at-cornell.html?pagewanted=all&_r=2&; Bob Cook, *Despite Greater Awareness, Violent Hazing Still a Problem in School Sports*, FORBES (Sep. 9, 2013, 2:58 PM), http://www.forbes.com/sites/bobcook/2013/09/09/despite-greater-awareness-violent-hazing-still-a-problem-in-school-sports/ (discussing ongoing problem of hazing specifically in school athletics); *College Hazing Statistics*, INSIDE HAZING (2014), http://insidehazing.com/statistics_25_college.php (noting statistics of hazing in college athletics); Nicole Somers, Note, *College and University Liability for the Dangerous yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J.C. & U.L. 653 (2007) (discussing liability for hazing in context of both Greek life and sports).

7. *See generally Study: 80% of College Athletes Victims of Hazing*, CNN (Aug.30, 1999, 7:25 PM), http://www.cnn.com/US/9908/30/sports.hazing/index.html?eref=sitesearch (discussing results of comprehensive study on hazing); INSIDE HAZING, *supra* note 6 (noting extensive problem of hazing in college athletics); Brandon W. Chamberlin, Comment, *"Am I my Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925 (2014) (discussing problems contributing to rarity of successful litigation in hazing cases).

8. *See generally* Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377 (2002) (discussing scope and specifics of anti-hazing laws throughout nation); *States with Anti-Hazing Laws*, STOP HAZING, http://www.stophazing.org/university-college-policies/states-with-anti-hazing-laws/ (last visited Nov. 1, 2015) (listing each state with anti-hazing laws and providing text of relevant statutory provisions).

9. *See generally* William S. Friedlander, *Fight Hazing in Court*, TRIAL, Sept. 2014 (discussing strategies for successful litigation of hazing); Russell J. Davis & Anne E. Melley, *Liability Under Anti-Hazing Statute*, 52 OHIO JUR. 3D GOVERNMENT TORT LIABILITY § 84 (2004) (discussing liability for crime of hazing); Scott R. Rosner and R. Brian Crow, *Institutional Liability for Hazing in Interscholastic Sports*, 39 HOUS. L. REV. 275 (2002) (discussing ways to hold institutions liable for hazing).

Part III discusses the problems inherent within pursuing a claim of hazing in courts, particularly against schools and government employees. Part IV synthesizes the issues and discusses concerns and strategies for lawmakers and litigants to deal with these issues.

II. A WINK AND A NOD: THE IMPLICIT APPROVAL OF HAZING

Hazing, even when limited to the context of school athletics, is a vast topic. Accordingly, this Comment will provide as narrow a focus as possible. Below, Section A discusses the prevalence of hazing, while Section B touches on state attempts to statutorily prohibit and punish hazing.

A. Broken, Beat, and Scarred: The Prevalence of Hazing

Upon a cursory examination of hazing in school sports, it becomes immediately apparent that there are some disturbing statistics; for example, one study—from 1999—reports that "more than 250,000 students experienced some sort of hazing to join a college athletic team."[10] This hazing does not always begin in college. Forty-two percent of students who admitted to being hazed in college also reported that they were hazed in high school.[11] More recently, one study showed that seventy-four percent of students involved in varsity athletics were subjected to some form of hazing—meanwhile, seventy-three percent of students involved in a fraternity or sorority experienced hazing.[12]

In recent years, numerous incidents involving hazing have emerged, bringing some small degree of parity between media attention and the prevalence of this issue.[13] While logic might sug-

10. *See* INSIDE HAZING, *supra* note 6. This number is a projection from the results of a smaller group of individuals polled, in which 80% were the victims of "questionable or unacceptable activities as part of their initiation onto a collegiate athletics team." *How Many Athletes Are Hazed?*, ALFRED UNIV., http://www.alfred.edu/sports_hazing/howmanystudents.cfm (last visited Nov. 1, 2015).

11. *See* ALFRED UNIV., *supra* note 10 (discussing when student athletes first experienced hazing).

12. *See* Elizabeth J. Allan & Mary Madden, HAZING IN VIEW: COLLEGE STUDENTS AT RISK 16 (University of Maine, 2008), *available at* http://www.stophazing.org/wp-content/uploads/2014/06/hazing_in_view_web1.pdf (providing statistics for organizational hazing).

13. *See generally Sports Hazing Incidents*, ESPN (Jun. 3, 2002), https://espn.go.com/otl/hazing/list.html (listing famous instances of hazing in sports); Stephen Hudak, *Drum Major Robert Champion's Parents Settle with Bus Company, Driver in FAMU Hazing Lawsuit*, ORLANDO SENTINEL (Sep. 10, 2014, 5:42 PM), http://www.orlandosentinel.com/news/breaking-news/os-famu-hazing-robert-champion-settlement-20140910-story.html (discussing hazing lawsuit); Amanda Lee Myers, *Ohio Boy's Brain Injury Blamed on Football Hazing*, THE COLUMBUS DISPATCH (Feb. 5, 2014, 6:24 AM), http://www.dispatch.com/content/stories/local/2014/02/05/brain-in-

gest that increased awareness of the harms associated with hazing will instill caution in future athletes, one expert on hazing believes that recent litigation will have no appreciable impact on how often hazing occurs.[14] While this litigation will inevitably have strong results with the individuals being sued – in the manner of specific deterrence – it has weaker general deterrent capabilities.[15]

B. Paper Tigers Locked in a Cage: Anti-hazing Laws Across the Nation

At present, forty-four states have criminalized hazing to one extent or another.[16] One commentator summarized the general contents of anti-hazing laws as follows: "(1) a specified type of harm, (2) that is connected to certain organizations or perpetrated against a certain class of individuals (usually students), and (3) that is perpetrated in certain contexts related to membership in the organization."[17]

In South Carolina, where Haley Ellen Hunt filed suit, there is a generic prohibition against hazing as it relates to initiation into an organization, complete with typical definitions of the physical and psychological harm prohibited; however, a violation of this law only constitutes a misdemeanor.[18] South Carolina does, however, attach liability for failure to report hazing, and explicitly forbids the use of

---

jury-blamed-on-football-hazing.html (discussing hazing lawsuit); Vernal Coleman, *Alleged Victim in Sayreville H.S. Hazing Scandal Threatens to File $1.5m Lawsuit Against District*, NJ.COM (Jan. 20, 2015, 11:15 AM), http://www.nj.com/middlesex/index.ssf/2015/01/alleged_victim_in_sayreville_hazing_to_file_15m_la.html (discussing hazing lawsuit).

14. *See* Hank Nuwer, *Stopping Hazing in College and High School Athletics*, ATHLETIC BUSINESS (Jul. 2014), http://www.athleticbusiness.com/athlete-safety/stopping-hazing-in-college-and-high-school-athletics.html (discussing findings and conclusions of various studies and experts indicating poor prognosis for dissipation of hazing in near future).

15. *See id.* (noting poor likelihood of success in reducing future hazing incidents). David Westol, an expert on hazing, stated, "Undergraduates have a historical perspective of about six months. Combine that with the typical 'It won't happen to me/us/our team' mentality, plus other rationalizations, and we've barely moved the needle." *Id.*

16. *See* STOP HAZING, *supra* note 8 (listing states with anti-hazing laws).

17. Chamberlin, *supra* note 7, at 938 (listing three elements of hazing common between states). The commentator goes on to discuss the points where there is less unanimity: "(1) the severity of the sanction imposed for the crime of hazing, (2) whether the statute bars the defense that the victim consented to be hazed, and (3) whether there are criminal penalties for the failure to report hazing." *Id.* (listing three elements with different conclusions in various states).

18. *See* S.C. CODE ANN. § 16-3-510 (2015) (providing definition and prohibition of hazing); *see also* S.C. CODE ANN. § 16-3-530 (discussing classification and penalty for hazing).

consent as a defense.[19] Interestingly, South Carolina also has explicit provisions allowing a range of punishments, including expulsion, for any student who engages in hazing in a public school or a college – but limits hazing to actions taken by a "superior student" against a "subordinate student."[20]

South Carolina is not the only state to view failure to report as a distinct offense.[21] Prior to 2013, Illinois did not have a statutory duty to report hazing; however, after two incidents in 2012 brought national attention and an eventual acquittal of the perpetrating coach in one incident, the Illinois legislature responded by requiring school officials to report hazing.[22] The rule introduced criminal penalties that are often harsher than those felt by the perpetrators of hazing, as it allows for up to one year of incarceration and $5,000 in fines – increasing to three years and $25,000 if the incident results in significant injuries.[23]

By way of comparison, California likewise views hazing in general as a misdemeanor, unless it results in death or serious bodily injury, in which case it can be a felony.[24] While California does not statutorily prohibit the affirmative defense of consent, it does provide for a distinct civil action for hazing, and permits a claimant to file suit against any party involved in the hazing – students, school officials, directors, and even the organization itself.[25] Alternatively,

19. *See* S.C. CODE ANN. § 16-3-520 (criminalizing failure to report hazing); *see also* S.C. CODE ANN. § 16-3-540 (noting expressly that consent is not applicable defense to crime of hazing).

20. *See* S.C. CODE ANN. § 59-101-200 (discussing penalties specific to institutions of higher education); S.C. CODE ANN. § 59-63-275 (discussing penalties specific to high schools).

21. *Compare* ALA. CODE § 16-1-23 (2015), ARK. CODE. ANN. §§ 6-5-201-204 (2015), FLA. STAT. § 1006.63, 135 (2015), 720 ILL. COMP. STAT. 5 / 12C-50.1 (2015), MASS. GEN. LAWS ch. 269, §§ 17-19 (2015), *and* N.H. REV. STAT. ANN. § 631:7 (2015), *with* S.C. CODE ANN. §§ 16-3-510–16-3-540, 59-63-275, 59-101-200 (criminalizing failure to report known instances of hazing).

22. *See* Mike Riopell, *Suburban Hazing Scandals Spawn New Criminal Offense*, DAILY HERALD (Aug. 16, 2013, 7:44 PM), http://www.dailyherald.com/article/20130816/news/708169714/ (discussing response to hazing incident by criminalizing failure to report). To be specific, the new legislation occurred before the coach was acquitted, even though one of the charges was that he failed to report the hazing incidents. *See* Jonathan Bullington and Lisa Black, *Maine West Coach Cleared in Case that Sparked Lawsuits, Anti-Hazing Law*, CHICAGO TRIBUNE (Jan. 16, 2014), http://articles.chicagotribune.com/2014-01-16/news/chi-maine-west-coach-hazing-20140115_1_verdict-maine-west-high-school-education-law (discussing case against coach in hazing incident).

23. *See* Riopell, *supra* note 22 (discussing specifics of new Illinois law for failure to report hazing).

24. *See* CAL. PENAL CODE § 245.6 (West 2015) (providing classification and penalties for crime of hazing).

25. *See id.* (providing explicit cause of action for civil hazing).

this organizational liability takes a slightly different twist in Texas, where an organization can be liable for hazing beyond the context of a civil suit, and can be ordered to pay fines ranging from five to ten thousand dollars.[26]

In addition to differing state approaches to punishing hazing, the definition of hazing varies significantly among states, despite many common trends.[27] Arkansas has one of the broader definitions, which includes the typical fare of assault and coercion, but goes further to include "the playing of abusive or truculent tricks . . . by one (1) student . . . alone or acting with others, upon another student to frighten or scare him or her."[28] This goes well beyond what many states define as hazing; instead, it is common for a state to require a minimum of reckless disregard for the health and safety of another.[29] Some states, such as Connecticut, use a variation of the reckless endangerment standard, but also include examples that might not ordinarily constitute disregard for health and safety.[30] In Oklahoma, the reckless endangerment standard includes not only physical safety, but also mental health and basic dignity.[31] By way of contrast, Ohio views hazing as a strict liability offense, and recognizes a different animus from similar crimes such as battery.[32] Lastly, the majority of states limit hazing to students,

26. *See* TEX. PENAL CODE ANN. § 37.153 (West 2015) (providing criminal penalties for organizations found guilty of hazing offense).

27. *Compare* ARK. CODE ANN. § 6-5-201 (2015) (defining hazing as including "The playing of abusive or truculent tricks on or off the property of any school, college, university, or other educational institution in Arkansas by one (1) student . . . alone or acting with others, upon another student to frighten or scare him or her"), *with* CONN. GEN. STAT. § 53-23a (2015) (providing examples of prohibited conduct, such as "Requiring indecent exposure of the body," "Requiring any activity that would subject the person to extreme mental stress, such as sleep deprivation or extended isolation from social contact," "Confinement of the person to unreasonably small, unventilated, unsanitary or unlighted areas," and others), *and* OKLA. STAT. tit. 21, § 1190 (2015) (defining hazing as "an activity which recklessly or intentionally endangers the mental health or physical health or safety of a student for the purpose of initiation or admission into or affiliation with any organization operating subject to the sanction of the public or private school or of any institution of higher education in this state").

28. ARK. CODE ANN. § 6-5-201.

29. *See, e.g.*, COLO. REV. STAT. § 18-9-124 (2015) (defining hazing as "any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual").

30. *See* CONN. GEN. STAT. § 53-23a (defining hazing as "[r]equiring indecent exposure of the body" and other examples).

31. *See* OKLA. STAT. tit. 21, § 1190 (providing inclusive definition of hazing).

32. *See* State v. Brown, 630 N.E.2d 397, 402 (Ohio Ct. App. 1993) (discussing implementation of state anti-hazing laws in practice in context of *mens rea* for crime).

while also construing hazing as occurring in reference to initiation or continued membership in a distinct organization.[33]

Aside from criminalizing active hazing, various jurisdictions have addressed the issue of third-party actors.[34] In Ohio, the courts noted that, "negligence, consent, and assumption of the risk by the plaintiff are not defenses."[35] As an extension of that, the courts also found that a school could not be liable under the state's anti-hazing statute by the mere fact of dealing with hazing in a "reactive" manner.[36] Other states, such as Oregon, have extended liability to individuals involved with the leadership of student organizations; in Oregon, coaches and advisers can be liable for hazing incidents that occur within their organizations, even if they did not participate directly in the hazing incident.[37]

The following table is a general summary of how the states approach the criminalization of hazing. However, this representation downplays the differences between the various states. While many states share similar wording or approaches, other states have significant limitations on their statutes, which the general categorization does not reflect.[38] Regardless, the tabular representation emphasizes the disparate approaches of states, and demonstrates the scarcity of things such as statutorily approved civil causes of action for hazing.[39] It is also worth noting that some jurisdictions only permit the prosecution of hazing incidents that occur in college, leaving no criminalization for hazing occurring in high school or outside of the scholastic setting.[40]

33. *See, e.g.*, CAL. PENAL CODE § 245.6 (West 2015) (limiting hazing liability to actions taken in connection with initiation into student organization), S.C. CODE ANN. § 16-3-510 (2015) (including initiation, admission, and affiliation with student organization), COLO. REV. STAT. § 18-9-124 (defining hazing as only occurring in context of student organizations).

34. *See generally* Duitch v. Canton City Schools, 809 N.E.2d 62 (Ohio Ct. App. 2004) (discussing liability of school actors when students perpetrated actual hazing actions).

35. *Id.* at 67 (explaining legislative choice to preclude defenses).

36. *See id.* (refusing to extend liability to state actors without some form of direct action contributing to issue).

37. *See* OR. REV. STAT. § 163.197 (2015) (providing explicit liability for actions taken by state actors in hazing incidents).

38. *See, e.g.* MD. CODE ANN., CRIM. LAW § 3-607 (West 2015), KAN. STAT. ANN. § 21-5418 (2015), MISS. CODE ANN. § 97-3-105 (2015).

39. *See* CAL. PENAL CODE § 245.6 (West 2015); OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j–570k (2015); VA. CODE ANN. § 18.2-56 (2015) (providing explicit civil cause of action for hazing).

40. *See* CONN. GEN. STAT. § 53-23a (2015); KY. REV. STAT. ANN. § 164.375 (West 2015); MO. REV. STAT. §§ 578.360–578.365 (2015); 24 PA. STAT. ANN. §§ 5351–5354 (West 2015); TENN. CODE ANN. § 49-7-123 (2015); WASH. REV. CODE § 28B-10-900-

State	Misdemeanor	Aggravated Result or Risk	Failure to Report	No Defense of Consent	Student Perpetrator Only	Third-Party Liable[41]	Civil Action	Inchoate Liability[42]	Mental or Social Harm	Reckless Risk of Harm	Higher Education Only
AL	✓		✓			✓		✓	✓		
AZ[43]				✓	✓	✓		✓	✓		
AR	✓		✓		✓	✓		✓	✓		
CA	✓	✓					✓	✓			
CO	✓							✓			
CT				✓				✓	✓		✓
DE	✓			✓				✓	✓		
FL	✓	✓	✓	✓				✓		✓	
GA	✓			✓				✓			
ID	✓				✓	✓		✓	✓		
IL	✓	✓	✓								
IN	✓	✓								✓	
IA	✓	✓		✓						✓	
KS	✓							✓		✓	
KY[44]								✓	✓	✓	✓
LA				✓		✓		✓	✓	✓	
ME									✓	✓	
MD	✓			✓						✓	
MA			✓	✓		✓		✓	✓	✓	

03 (2015); W. VA. CODE § 18-16-1-4 (2015) (defining hazing as only occurring in higher education).

41. For the purposes of this table, third party liability means that someone other than the individual who personally performed the act of hazing can be held liable for hazing or a related crime.

42. For the purposes of this table, inchoate liability includes any form of conspiracy, inducement, attempt, or the like.

43. This statute does not create criminal liability, and is instead a directive on school policy and procedure. *See* ARIZ. REV. STAT. ANN. § 15-2301 (2015).

44. This statute does not create criminal liability, and is instead a directive on school policy and procedure. *See* KY. REV. STAT. ANN. § 164.375 (West 2015).

MI	✓	✓		✓						✓	
MN[45]						✓		✓		✓	
MS	✓									✓	
MO	✓	✓		✓					✓	✓	✓
NE	✓			✓					✓	✓	
NV	✓	✓		✓						✓	
NH	✓		✓[46]	✓		✓		✓	✓	✓	
NJ		✓		✓		✓		✓		✓	
NY	✓	✓								✓	
NC	✓				✓	✓		✓			
ND	✓	✓							✓	✓	
OH	✓			✓		✓	✓		✓	✓	
OK	✓			✓					✓	✓	
OR	✓			✓	✓[47]					✓	
PA	✓			✓					✓	✓	✓
RI	✓	✓				✓		✓	✓	✓	
SC	✓		✓	✓		✓		✓		✓	
TN					✓				✓		✓
TX	✓			✓		✓		✓	✓	✓	
UT	✓	✓		✓[48]		✓		✓	✓	✓	
VT				✓	✓	✓	✓	✓	✓		
VA	✓			✓			✓			✓	
WA	✓					✓		✓	✓	✓	✓
WV	✓	✓		✓					✓	✓	✓

45. This statute does not create criminal liability, and is instead a directive on school policy and procedure. *See* MINN. STAT. §§ 121A.69, 135A.155 (2015).

46. New Hampshire criminalizes failure to report by the victim of hazing, provided that the victim knowingly submitted to the hazing, as well as anyone present for or who has knowledge of a hazing incident. *See* N.H. REV. STAT. ANN. § 631:7(II)(a)(2) (2015).

47. Oregon also permits liability for a student organization as a whole, including coaches and advisers; however, it does not permit liability for other actors, such as school boards, who exist outside of the organization. *See* OR. REV. STAT. § 163.197 (2015).

48. Under the plain language of the statute, consent is not a defense when the victim is under the age of twenty-one; the statute does not state whether it is or is not a defense when the victim is above that age. *See* UTAH CODE ANN. § 76-5-107.5 (West 2015).

State[49]	Misdemeanor	Aggravated Result or Risk	Failure to Report	No Defense of Consent	Student Perpetrator Only	Third-Party Liable	Civil Action	Inchoate Liability	Mental or Social Harm	Reckless Risk of Harm	Higher Education Only
WI	✓	✓		✓						✓	

III. WHEN THE PADDLE HITS THE SKIN: TAKING HAZING TO COURT

This section will focus on the scope of litigation and the school responses to such, while also discussing issues surrounding the average attempt to litigate hazing. Section A will provide a brief summary of notable hazing cases, while Section B provides examples of school responses. Section C introduces the problem of immunity, and Section D discusses the problems and concerns involved in federal § 1983 claims.

A. Initiated into the Legal System

As noted above, Haley Ellen Hunt's pending litigation is a significant case involving serious injury, and it is only one of the latest

49. *See* ALA. CODE § 16-1-23 (2015), ARIZ. REV. STAT. ANN. § 15-2301 (2015), ARK. CODE. ANN. §§ 6-5-201–04 (2015), CAL. PENAL CODE § 245.6 (West 2015), COLO. REV. STAT. ANN. § 18-9-124 (2015), CONN. GEN. STAT. § 53-23a (2015), DEL. CODE ANN. TIT. 14, §§ 9301–04 (2015), FLA. STAT. §§ 1006.63, 135 (2015), GA. CODE ANN. § 16-5-61 (2015), 720 ILL. COMP. STAT. 5 / 12C-50.1 (2015), IND. CODE § 35-31.5-2-151 (2015), IOWA CODE § 708.10 (2015), KAN. STAT. ANN. § 21-5418 (2015), KY. REV. STAT. ANN. § 164.375 (West 2015), LA. REV. STAT. ANN. §§ 17:183, 1801 (2015), ME. REV. STAT. tit. 20-A, §§ 6553, 10004 (2015), MD. CODE ANN., CRIM. LAW § 3-607 (West 2015), MASS. GEN. LAWS ch. 269, §§ 17–19 (2015), MICH. COMP. LAWS § 750.441t (2015), MINN. STAT. §§ 121A.69, 135A.155 (2015), MISS. CODE ANN. § 97-3-105 (2015), MO. REV. STAT. §§ 578.360–65 (2015), NEB. REV. STAT. §§ 28-311.06–07 (2015), NEV. REV. STAT. § 200.605 (2015), N.H. REV. STAT. ANN. § 631:7 (2015), N.J. STAT. ANN. §§ 2C:40-3-4 (West 2015), N.Y. PENAL LAW §§ 120.16–17 (McKinney 2015), N.C. GEN. STAT. § 14-35 (2015), N.D. CENT. CODE § 12.1-17-10 (2015), OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015), OKLA. STAT. tit. 21, § 1190 (2015), OR. REV. STAT. § 163.197 (2015), 24 PA. STAT. ANN. §§ 5351–54 (West 2015), R.I. GEN. LAWS §§ 11-21-1–3 (2015), S.C. CODE ANN. §§ 16-3-510–40, 59-63-275, 59-101-200 (2015), TENN. CODE ANN. § 49-7-123 (2015), TEX. EDUC. CODE ANN. §§ 37.151-57 (West 2015), UTAH CODE ANN. §§ 53A-11a-102, 76-5-107.5 (West 2015), VT. STAT. ANN. tit. 16, §§ 570j–570k (2015), VA. CODE ANN. § 18.2-56 (2015), WASH. REV. CODE ANN. §§ 28B-10-900–03 (2015), W. VA. CODE ANN. §§ 18-16-1–4 (2015), WIS. STAT. § 948.51 (2015).

in a long string of lawsuits over the years involving hazing in school sports.[50] Hunt's case appears somewhat atypical given the extreme consequences and the extent of the alleged involvement of the coaching staff, as one might presume the typical hazing incident to occur with, at most, a wink of the eye from the staff.[51] In addition to the facts of the incident noted previously, Hunt alleges significant actions—and inactions—on the part of the team staff, including what could amount to violations of several duties of care for the coaches, assistant coaches, and trainers.[52]

Before Ms. Hunt filed her lawsuit, hazing was already in the news; multiple lawsuits began and ended that same year, and all involved varying degrees of hazing.[53] One recent lawsuit, taking place in Ohio, has a common thread with Ms. Hunt's allegations: the suit alleges permanent brain injury as a result of hazing.[54] Unlike the incident at Clemson, this case involved minors on a high school football team whose coach allegedly instructed some of the players to hit other players as a form of punishment for their performance on a drill.[55] When the victim named in the suit fell and hit his head, the coach and an athletic trainer failed to provide proper medical attention, despite observing signs of a concussion.[56] This lawsuit emerged after the coach avoided facing criminal charges, as a grand jury had declined to indict the coach.[57]

50. *See* Complaint, *supra* note 1, at 1 (summarizing allegations contained within Complaint); *see generally* Hudak, *supra* note 13 (discussing recent hazing incidents); ESPN, *supra* note 13 (discussing somewhat older cases involving hazing); Coleman, *supra* note 13 (discussing hazing litigation); Cook, *supra* note 6 (discussing hazing litigation).

51. *See* Complaint, *supra* note 1, at 114–62 (discussing significant injuries and direct involvement of staff). Specifically, Ms. Hunt alleges that Coach Radwanski not only knew and approved of the hazing incident, but that he gave the student defendants the keys to the field and its facilities, thus providing access to the place where the incident occurred. *See id.* at 40 (discussing allegations against coaching staff defendants).

52. *See id.* at 155–58, 169–71 (claiming that team staff were involved in incident and failed to protect Ms. Hunt). One of the more troubling allegations is the claim that, after the incident, the team staff failed to initiate a concussion protocol, despite the fact that Ms. Hunt was showing clear signs of a concussion. *See id.* at 117 (discussing actions and inactions of coaching staff following hazing incident).

53. For a discussion of hazing incidents occurring in 2014, see generally *infra* notes 54–64 and accompanying text.

54. *See* Myers, *supra* note 13 (discussing alleged medical consequences of hazing incident).

55. *See id.* (providing details of factual allegations pertaining to hazing incident).

56. *See id.* (discussing team staff's actions following hazing incident).

57. *See* Amulya Raghuveer, *Woodmore Schools, Football Coaches Sued After Alleged Hazing that led to Player's Brain Injury*, NBC 24 (Feb. 3, 2014, 4:23 PM), http://www

By way of contrast, prosecutors in Florida indicted multiple students who beat a fellow student to death during an alleged hazing incident, which had been part of the deceased student's initiation onto the college marching band.[58] Several students accepted plea agreements, with one sentenced to a year in jail, while others remain charged with such crimes as manslaughter over the incident.[59] The parents of the deceased young man recently settled with one party, while continuing their lawsuit against Florida A&M University.[60]

While brain injuries and deaths are serious consequences of hazing, they represent a single issue—namely, pronounced health consequences—within a broad range of severe problems. A recent California lawsuit raised allegations of sexual assaults occurring in the showers of a high school football team.[61] According to the complaint, there is "a long-lasting tradition of ritual hazing and sadomasochistic sexual beatings undertaken by students, against students, which is encouraged, tolerated and sanctioned by teachers, faculty, [and] coaches[.]"[62] In a separate incident, this time occurring in Massachusetts, prosecutors indicted three high school athletes on rape charges, concerning an incident that occurred at a sleepaway camp.[63] While the case ultimately became a juvenile matter, there has not been any civil legal action taken on the issue at this point.[64]

In addition to the cases occurring closer to when Ms. Hunt filed her lawsuit, there were also two significant prior incidents, both occurring in different Illinois high schools.[65] Of these two cases, one in particular – occurring at the Maine West High

.nbc24.com/news/story.aspx?id=1002364 (discussing results of grand jury investigation into coach's behavior).

58. *See* Hudak, *supra* note 13 (discussing specific hazing incident and corresponding litigation regarding incident at FAMU).

59. *See id.* (summarizing criminal consequences to date for participants in fatal hazing incident).

60. *See id.* (noting continued process of hazing lawsuit).

61. *See Lawsuit Claims High School Football Coaches Encouraged Hazing, Sexual Assault*, CBS LOS ANGELES (Aug. 21, 2014, 5:47 PM), http://losangeles.cbslocal.com/2014/08/21/lawsuit-claims-high-school-football-coaches-encouraged-hazing-sexual-assault/ (discussing significant hazing incident).

62. *Id.* (quoting allegations filed in discussed lawsuit).

63. *See* Cook, *supra* note 6 (noting criminal charges over hazing allegations).

64. *See Judge Rules Teen Sex Assault Case a Juvenile Matter*, WBUR NEWS (Apr. 8, 2014), http://www.wbur.org/2014/04/08/sports-camp-rape-juvenile-court (relaying proceedings of criminal case involving hazing incident).

65. *See* Cook, *supra* note 6 (discussing hazing incidents occurring in close proximity to each other in Illinois).

School—resulted in both civil and criminal actions.[66] According to the civil suit, multiple incidents of sexual assault, including sodomizing the victims with foreign objects, occurred under the supervision of the coach.[67] While the lawsuit emerged in 2012, the incidents in question happened as early as 2008, with the mother of one of the victims informing the school of what had allegedly transpired.[68] The coach was subsequently tried on charges related to the incident, including failure to report, and was acquitted of all counts in January of 2014.[69]

While there have been a number of hazing-related lawsuits prior to Ms. Hunt's action, she was not the last in this string of litigation. In September of 2014, a line of hazing incidents allegedly occurred at a Sayreville, New Jersey high school, gaining relatively significant media attention.[70] In a manner similar to the California high school incident, the lawsuit raised allegations of sexual assaults perpetrated by and against students in the locker room.[71] The students, who were all players on the high school football team, allegedly penetrated younger players with fingers, touched them in a sexual manner, and in one instance kicked one of the victims.[72] After the incident, the season was temporarily suspended, four members of the coaching staff were suspended with pay and subsequently reinstated, the head coach was no longer with the team, and seven players were charged as juveniles with various crimes.[73]

B. How to Lose your Team in Ten Days: School Responses to Hazing

While many hazing lawsuits include the school as a defendant, thus requiring various actions and compensation as a result, some

66. *See id.* (discussing consequences of hazing incidents).

67. *See* Madhu Krishnamurthy, *3 More Maine West Families Join Hazing Lawsuit*, DAILY HERALD (Nov. 29, 2012, 3:16 PM), http://www.dailyherald.com/article/20121128/news/711289766/ (discussing specific factual allegations of hazing incident).

68. *See id.* (conveying partial timeline of events).

69. *See* Bullington, *supra* note 22 (discussing basis of charges and results after criminal trial).

70. *See* Coleman, *supra* note 13 (discussing one of more prominent hazing cases at Sayreville High School).

71. *See id.* (noting severe context of case beyond simple hazing).

72. *See id.* (describing alleged actions occurring in hazing incidents).

73. *See* Greg Tufaro, *Sayreville Football Coach George Najjar Out After Scandal*, USA TODAY (Feb. 5, 2015), http://usatodayhss.com/2015/sayreville-football-coach-george-sayreville-out-after-scandal (noting school response to hazing allegations).

schools have taken steps to deal with hazing before the victims even have a chance to contact a lawyer, albeit to varying degrees of effectiveness.[74] Cornell University experienced this twice in quick succession. In 2011, a fraternity brother named George Desdunes died in a hazing incident, while in 2013 a far less physically serious incident of alcohol-related hazing occurred.[75] In response to the former incident, Cornell promised to end hazing; toward that end, they banned pledging, suspended several fraternities, and focused on anonymous reporting for students.[76] After the incident in 2013, the school cancelled the entire season for the lacrosse team, claiming that it was "a team wide penalty for a team wide incident."[77] Likewise, the school administration at Humboldt State University cancelled the men's soccer season, following allegations of a hazing party.[78]

While schools like Cornell and Humboldt have taken relatively strong steps to address hazing, other schools have done little more than pay lip service to the idea of prevention or punishment.[79] The hazing incident in a Massachusetts high school, which resulted in criminal charges of rape for the perpetrators, prompted nothing

74. *See generally* Complaint, *supra* note 1, at 38 (noting that school technically maintained anti-hazing policy but did not enforce it).

75. *See* Winerip, *supra* note 6 (discussing one incident occurring at Cornell University); Oliver Staley and Scott Soshnick, *Cornell Lacrosse Suspended by School After Hazing Incident*, BLOOMBERG BUSINESSWEEK (Sep. 20, 2013, 8:56 PM), http://www.bloomberg.com/news/articles/2013-09-20/cornell-men-s-lacrosse-suspended-by-school-after-hazing-case (discussing hazing at Cornell University). It is worth noting as an aside that the 2011 Cornell incident would not have met the definition of collegiate hazing used in South Carolina for the purposes of school sanctions, where hazing requires a senior student to perform the actions against a subordinate student. *See* S.C. CODE ANN. § 59-101-200 (2015) (providing definition of hazing). The incident in Cornell was thus unusual in that the pledges kidnapped the senior fraternity brothers and forced them to drink, rather than the other way around. *See* Winerip, *supra* note 6 (discussing specifics of hazing incident). As this happened in New York, three students were tried for hazing, and were subsequently acquitted; the school itself was also charged, and did not defend against the allegations. *See also* Ariel Kaminer, *Former Cornell Students Acquitted of Hazing in Death of Fraternity Member*, N.Y. TIMES (Jun. 27, 2012), http://www.nytimes.com/2012/06/28/nyregion/ex-cornell-students-acquitted-of-hazing-in-death-of-fraternity-member.html (discussing litigation posture surrounding hazing incident).

76. *See* Staley, *supra* note 75 (detailing school response to hazing incident).

77. *Id.*

78. *See* Dave O'Brien, *Numerous Hazing Incidents Emerge*, COLLEGE SPORTS BUSINESS NEWS (Sep. 17, 2012), http://collegesportsbusinessnews.com/issue/october-2012/article/numerous-hazing-incidents-emerge (describing school response after receiving reports of hazing incident).

79. *Compare* Staley, *supra* note 75 (discussing strong response to hazing made by Cornell University), *with* Hudak, *supra* note 13 (describing generally poor response to hazing made by Florida A&M University).

more than a statement that the school already had anti-hazing measures in place.[80] After the death of the Florida A&M student, that school asserted that it had preexisting policies against hazing and that the deceased student had signed a pledge to oppose hazing, yet had consented to the activity that resulted in his death.[81]

Despite the increased evidence of the prevalence and harmful nature of hazing, not every university has responded to allegations of hazing in even as positive a manner as discussed previously.[82] In 2013, an alleged hazing incident occurred at Xavier University, resulting in one of the students receiving a concussion. The purported negligence of the soccer team staff led to significant medical repercussions stemming from that incident, including memory and vision issues, yet the university claims to have investigated the incident and found no evidence of wrongdoing.[83] Later that year, the university suspended the victim's scholarship on the grounds of "performance issues."[84] Even more troubling is the alleged conduct of the Siegel High School girls' basketball team in Tennessee, which resulted in the removal of players from the team after those same students reported a hazing incident.[85] While the school asserts that the hazing incident was not sexual in nature, as claimed in the report, they do admit that the student responsible had been disciplined—and that the students kicked from the team were only removed because of repeated absences.[86]

C. Protecting the People Who Failed to Protect the Players

When Ms. Hunt filed her lawsuit, she included members of the coaching staff and the school administration, raising various theo-

80. *See* Cook, *supra* note 6 (discussing poor response to hazing incident).

81. *See* Hudak, *supra* note 13 (noting school had ultimately shifted blame of incident to victim).

82. *See National Survey of Sports Teams: Introduction*, ALFRED UNIV. (1999), http://www.alfred.edu/sports_hazing/introduction.cfm (discussing significant cooperation of NCAA and NCAA institutions to discover prevalence and severity of hazing).

83. *See* Eric Adelson, *Xavier Sued by Former Soccer Player Claiming Negligence After Concussion*, YAHOO! SPORTS (Mar. 14, 2014, 11:22 AM), http://sports.yahoo.com/news/xavier-sued-by-former-soccer-player-claiming-negligence-152231797.html (reporting consequences and allegations deriving from hazing incident).

84. *See id.* (discussing extremely poor response to hazing allegations, which included effectively penalizing player for consequences of injuries obtained during hazing incident).

85. *See* Michael Gaio, *Lawsuit: Girls Kicked off Team Over Hazing Complaints*, ATHLETIC BUSINESS (Sep. 2013), http://www.athleticbusiness.com/sportsmanship/lawsuit-girls-kicked-off-team-over-hazing-complaints.html (reporting allegations and response by school).

86. *See id.* (describing school justification for removing students from team).

ries of liability against each of them.[87] One of the hurdles that Ms. Hunt, and anyone else seeking to sue school officials, must overcome is the problem of sovereign immunity: the longstanding doctrine that an individual can only sue the government—and in many respects, the government's agents—when the government makes a statutory allowance for the given cause of action.[88] This has already emerged in the context of hazing; in *Pelham v. Board of Regents of Univ. Sys. Of Georgia*,[89] a student at Georgia Southern University and member of the football team brought a suit against the college for the actions of the football coach.[90] The plaintiff raised claims of negligence and *negligence per se* against the state university, utilizing Georgia's anti-hazing statute as the theory for the action.[91] The trial court dismissed the action on the grounds of sovereign immunity, and the appellate court affirmed the dismissal.[92] In upholding the dismissal, the court reasoned that the legislature did not intend to create civil liability with the criminal anti-hazing statute, and thus the statute did not act as a waiver of sovereign immunity.[93] The court further held that, because the underlying actions constituted assault and battery—and thus fell under one of the statutory exceptions precluding governmental liability—the plaintiff could not recover.[94]

Aside from proving civil liability, some jurisdictions permit plaintiffs to overcome sovereign immunity by demonstrating "actual malice" on the part of the defendant.[95] In *Caldwell v. Griffin Spalding County Bd. of Educ.*,[96] a plaintiff brought a suit against the school board, the coach of the football team, and other government employees over a hazing incident.[97] The court found that sovereign

87. *See* Complaint, *supra* note 1, at 114–62 (listing causes of action against coaching staff and administration).

88. *See* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, AND BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 466, 476 (3d ed. 2012) (describing general principles of sovereign immunity).

89. Pelham v. Bd. of Regents of Univ. Sys. of Georgia, 743 S.E.2d 469 (Ga. Ct. App. 2013).

90. *See id.* at 471 (describing context of lawsuit).

91. *See id.* (outlining plaintiff's claims against college).

92. *See id.* at 474 (discussing outcome of case).

93. *See id.* at 471–72 (justifying decision to grant summary judgment by looking to legislative intent).

94. *See id.* at 472–73 (discussing Georgia statute defining exceptions to waiver of sovereign immunity).

95. *See* Caldwell v. Griffin Spalding Cnty. Bd. of Educ., 503 S.E.2d 43, 44 (Ga. Ct. App. 1998) (noting potential avenues for overcoming protection of sovereign immunity in civil action).

96. 503 S.E.2d 43 (Ga. Ct. App. 1998).

97. *See id.* at 44 (discussing context of civil litigation).

immunity shielded the defendants because of their lack of knowledge of the underlying incident and because they acted with implied malice at the most, not the requisite actual malice to overcome their immunity.[98]

One subset or term for sovereign immunity is that of qualified immunity, in which government employees enjoy protection against claims made "for acts in the performance of discretionary functions that were objectively reasonable in light of clearly established law."[99] In *Travis v. Stockstill*,[100] the plaintiff filed a § 1983 claim against the coach and other officials of his high school, alleging that the defendants allowed other students to commit acts of hazing against the plaintiff.[101] Considering the issue of qualified immunity raised by the defendants, the court reasoned that the school—and by extension, its agents—had no affirmative duty to prevent an incident without notice of its occurrence, and thus qualified immunity existed.[102] In support of the defendants' lack of knowledge, the court stated, "[t]his single incident on January 29, 2011, is insufficient to establish a pattern, custom, or practice of Defendants ignoring hazing activity."[103]

While courts have applied various standards for permitting exceptions to sovereign immunity, legislature itself has also contributed to the creation and scope of this exception.[104] In *Vinicky v. Pristas*,[105] another lawsuit raised against government employees over a hazing incident, the defendants similarly attempted to claim sovereign immunity.[106] However, Ohio had previously enacted legislation that provided an exception to that immunity "when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code . . . ."[107] Accordingly, the court found that

98. *See id.* at 45 (justifying grant of summary judgment by engaging in analysis of actions allegedly creating liability for hazing incident).

99. Travis v. Stockstill, No. 1:12CV173 HSO-RHW, 2013 WL 5204669, at *1, *2 (S.D. Miss. Sep. 13, 2013).

100. No. 1:12CV173 HSO-RHW, 2013 WL 5204669 (S.D. Miss. Sep. 13, 2013).

101. *See id.* at *3 (discussing factual allegations underlying civil litigation).

102. *See id.* at *4 (discussing necessary elements for finding liability creating exception to qualified immunity).

103. *Id.*

104. *See* Vinicky v. Pristas, 839 N.E.2d 88, 91–92 (Ohio Ct. App. 2005) (noting clear provision for civil liability created by state legislature).

105. 839 N.E.2d 88 (Ohio Ct. App. 2005).

106. *See id.* at 90 (discussing background of case).

107. *Id.* at 93.

an exception existed, as Ohio's anti-hazing statute provided for explicit civil liability against educational institutions.[108]

D. The Spirit of § 1983

When filing a lawsuit against a governmental entity or employee, one of the common approaches is to look for a § 1983 claim.[109] In the context of hazing, a student can bring a § 1983 lawsuit against schools and school officials, as hazing violates a constitutional right to bodily integrity.[110] However, the ability to hold public officials liable for actions taken in the course of their official duties is not absolute, even without the issue of sovereign immunity.[111] There are two primary categories of incidents where a hazing victim might sue a school official: when the official was involved directly with the hazing incident and when the official failed to prevent the hazing incident.[112] Regardless of which option a plaintiff takes, "[t]here are two essential elements that must be explored in examining a § 1983 claim: '(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.'"[113]

In bringing suit against a state actor who was involved in the hazing incident as a participant, a plaintiff must prove the basic elements of a § 1983 claim, while also proving that "the supervisor personally participate[d] in the alleged constitutional violation."[114] The clearest way for an individual to participate in an incident is to demonstrate that they performed the prohibited acts themselves,

---

108. *See id.* at 93 (referencing Ohio statute to justify finding civil liability despite claim of sovereign immunity).

109. *See* Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1466 (1998) (noting frequency of § 1983 claims against government entities).

110. *See* Rosner, *supra* note 9, at 280–82 (discussing general theory behind § 1983 claims).

111. *See generally* Meeker v. Edmunson, 415 F.3d 317 (4th Cir. 2005) (discussing limitations on § 1983 claims); *see also* Alton v. Hopgood, 994 F. Supp. 827 (S.D. Tex. 1998) (discussing limitations on § 1983 claims).

112. *Compare Meeker*, 415 F.3d at 322 (extending direct involvement to include use of others to accomplish result), *with Alton*, 994 F. Supp. at 834 (discussing possible liability for failure to act).

113. Key v. Mott, No. 12-0614-KD-M, 2013 WL 1827253, at *3 (S.D. Ala. Apr. 4, 2013) (quoting Parratt v. Taylor, 451 U.S. 527, 535 (1981)) (establishing elements of § 1983 claim).

114. *See* Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990).

accomplishing a constitutional violation with their own hands.[115] Additionally, participation can occur when the actor authorizes others to perform the physical actions.[116] In *Meeker v. Edmunson*,[117] the Fourth Circuit analyzed the dismissal of a case brought against a school coach in the context of hazing incidents.[118] There, the Fourth Circuit accepted as true the plaintiff's contention that the coach "used students as his 'instruments' to abuse [the plaintiff]."[119] Accordingly, the court found that this was sufficient to constitute direct action on the part of the coach, and ruled that these facts permitted the plaintiff to succeed under § 1983.[120] The Sixth Circuit reached a similar conclusion when it stated that a "'plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.'"[121]

The other method of proving a violation is significantly more difficult, and has its own separate analysis and considerations.[122] From the outset, § 1983 does not permit vicarious liability, and thus any claim that does not involve direct action will be significantly more difficult to pursue.[123] It is equally true that liability of third parties, particularly in the context of school officials, is a matter that is closely related to the issue of qualified immunity.[124] Defend-

115. *See* Hall v. Tawney, 621 F.2d 607, 614 (4th Cir. 1980) (finding that direct application of force by state actor against victim constitutes personal violation of constitutional rights).

116. *See Meeker*, 415 F.3d at 322 (finding liability despite lack of direct action on part of defendant).

117. 415 F.3d 317 (4th Cir. 2005).

118. *See id.* at 319 (describing coach's alleged actions as "instituting and encouraging repeated beatings of the student by other members of the team").

119. *Id.* at 322.

120. *See id.* at 323 (finding claim of constitutional violation available for plaintiff). The Fourth Circuit reached its conclusion after interpreting *Hall*, and stated, "Hall thus teaches that even allegations that a school official 'authorized' (rather than instituted or encouraged) malicious corporal punishment suffice to state a claim against that official for a constitutional violation." *Id.* (citation omitted).

121. Doe v. Claiborne Cnty, 103 F.3d 495, 511 (6th Cir. 1996) (quoting Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984)). However, in this specific case, the Sixth Circuit found that the members of the school board did not have any particular supervisory authority over the teacher—and could not act independently regardless—and thus did not violate a duty to act. *See id.* (detailing outcome of case and underlying reasoning).

122. *See, e.g.*, Alton v. Hopgood, 994 F. Supp. 827, 835–37 (engaging in lengthy analysis of liability for failure to prevent hazing).

123. *See generally id.* at 835 (noting inapplicability of vicarious liability in § 1983 claims); *see also Doe*, 103 F.3d at 509 (engaging in analysis to determine if liability exists for failure to act).

124. *See generally Alton* 994 F. Supp. at 834–35 (analyzing qualified immunity of nonstudent defendants).

ing against the claim of a constitutional violation and that qualified immunity applies can share many of the same considerations.[125] In raising a defense, officials can argue that a reasonable individual in the shoes of the defendants "could have concluded that their actions, both collectively and individually, would prevent constitutional violations."[126] Liability is more likely to attach when the defendants had credible information of a substantial problem and then failed to act on that information.[127]

In the context of § 1983, the Third Circuit emphasized the Supreme Court's holding that third-party state actors can be liable for injuries caused by another when the "defendants, with deliberate indifference to the consequences, [establish] and [maintain] a policy, practice or custom which directly [causes a] constitutional harm."[128] Other courts have addressed this theory of inaction.[129] The Sixth Circuit listed the elements a plaintiff must prove to succeed on this theory:

> (1) the existence of a clear and persistent pattern of . . . abuse by school employees; (2) notice or constructive notice on the part of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the School Board's custom was the 'moving

125. *See generally id.* at 834–37 (analyzing issue of qualified immunity under context of § 1983 claim); for a discussion on qualified immunity, see *supra* notes 99–108 and accompanying text.

126. *Alton*, 994 F. Supp. at 836.

127. *See id.* at 837 (analyzing knowledge and actions of third-party actors in hazing incident and concluding that, "There is simply insufficient evidence in this case which reveals that the nonstudent Defendants learned of facts or a pattern of inappropriate behavior that would lead a reasonable official to conclude that Plaintiff's constitutional rights would be, or were being, violated."); *see also Doe*, 103 F.3d at 507 (finding liability must attach to school board when it fails to address custom that leads to abuse).

128. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989); *see also* Chisler v. Johnston, No. 09-1282, 2010 WL 1257458, at *10 (W.D. Pa. Mar. 29, 2010) (discussing in context of analysis for supervisory liability). "At a minimum, such liability attaches 'only where there are both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate.'" *Chisler*, 2010 WL 1257458, at *10 (quoting Colburn v. Upper Darby Twp., 838 F.2d 663, 673 (3d Cir. 1988)).

129. *See, e.g.*, *Doe*, 103 F.3d at 508 (engaging in analysis of liability for failure to act).

> force' or direct causal link in the constitutional deprivation.[130]

1. *Living La Vida in Loco Parentis*

In some instances, plaintiffs have attempted to use the general status of schools as operating *in loco parentis* to create a special relationship, which thus requires action to prevent harm perpetrated by another.[131] This argument notably fails when attempting to hold school officials liable for actions occurring at a university or other advanced education facility.[132] Some jurisdictions, such as the Fifth Circuit, have explicitly held that this relationship does not exist between schools and students, even in K-12 settings.[133] The strength of the *in loco parentis* theory of liability suffered a critical blow when the Supreme Court decided *DeShaney v. Winnebago County Dept. of Social Services*,[134] holding that states cannot be liable for third-party injuries unless the state placed the individual in harm's way and removed their ability to protect themselves.[135]

After *DeShaney*, states that had previously recognized the theory of *in loco parentis* as creating liability for schools began to shy away from that determination.[136] Regardless of any hesitancy, the Third Circuit attempted to distinguish *DeShaney* on the facts and the Supreme Court's own words by emphasizing the liability that attaches when a state actor, rather than a private individual, deprives a plaintiff of their constitutional rights.[137] This reasoning is not universal

130. *Id.*

131. *See generally* J.D. v. Picayune Sch. Dist., No. 1:11 CV514-LG-JMR, 2013 WL 2145734, at *5 (S.D. Miss. May 15, 2013) (attempting to utilize theory of *in loco parentis* to create liability for school).

132. *See generally* Bradshaw v. Rawlings, 612 F.2d 135, 139–40 (3rd Cir. 1979) (giving lengthy recounting of movement away from *in loco parentis* standard for higher education).

133. *See id.* (declining to utilize *in loco parentis* to justify theory of liability for schools).

134. 489 U.S. 189 (1989).

135. *See id.* at 198–99 (discussing extent of state liability). The Supreme Court recognized only two instances where this sort of relationship existed and mandated care—incarceration and involuntary commitment to a mental institution—while leaving open the possibility of extending it to children placed in foster care. *See id.* (limiting application of relationship to specific instances).

136. *See generally* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 723–24 (3d Cir. 1989) (noting previous ruling of special relationship while expressing concern over its reasonableness after *DeShaney*).

137. *See id.* at 724–25; *see also* Brown v. Sch. Dist. of Phila., 456 Fed. App'x 88 (3d Cir. 2011) (finding no liability for school officials when individuals who committed assault were private actors).

by any means.[138] In *Doe v. Claiborne County.*,[139] the Sixth Circuit heard a case in which a teacher allegedly raped and sexually assaulted a student.[140] The court declined to extend *DeShaney* to hold the school district liable, reasoning that "[t]he Due Process Clause does not impose an affirmative constitutional duty on the School Board to assume the responsibility of protecting its students against the unconstitutional acts of its employees."[141]

The Ninth Circuit also engaged in an analysis of state liability for failure to protect a school student.[142] In *Patel v. Kent School District*,[143] the Ninth Circuit noted that a plaintiff can prevail against a state actor for failure to prevent injury when the special relationship exception exists, but limited that exception to circumstances where the state actively deprived the plaintiff of liberty.[144] That court rejected the plaintiff's assertion that mandatory school attendance and the theory of *in loco parentis* created a special relationship.[145] It is also worth noting that, unlike the incident examined by the Third Circuit, a private actor caused the harm in *Patel*, and that the state's alleged liability stemmed from inadequate measures taken to protect the victim.[146]

2. *State-created Danger Zones*

The other exception raised by plaintiffs is the theory of the state-created danger.[147] The Ninth Circuit established the elements of that claim as applying "only where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger' . . . [and] only where the state acts with 'deliberate indifference' to a 'known

138. *See generally* Doe v. Claiborne Cnty, 103 F.3d 495 (6th Cir. 1996) (discussing alternative reasoning for holding state actor liable).

139. 103 F.3d 495 (6th Cir. 1996).

140. *See id.* at 500 (discussing factual allegations in case).

141. *Id.* at 510.

142. *See* Patel v. Kent Sch. Dist., 648 F.3d 965, 972–74 (9th Cir. 2011) (analyzing failure-to-act case in context of *in loco parentis*).

143. 648 F.3d 965 (9th Cir. 2011).

144. *See id.* at 972 (discussing special relationship considerations under context of DeShaney v. Winnebago Cnty Dept. of Soc. Serv., 489 U.S. 189 (1989)).

145. *See id.* at 972–73 (discussing plaintiff's theory and noting that "[a]t least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship exception."). The court continued by stating that "most of these circuits have expressly held that combining in loco parentis duties with compulsory school attendance still does not create a 'special relationship.'" *Id.* at 973 (citation omitted).

146. *See id.* at 970 (recounting factual allegations of case and noting that student committed acts in question, while principal allegedly failed to protect victim).

147. *See generally Patel*, 648 F.3d. at 974 (discussing case in context of "state-created danger" theory).

or obvious danger.'"[148] Under Ninth Circuit jurisprudence, this is a steep standard, as it "is even higher than gross negligence—deliberate indifference requires a culpable mental state."[149] Furthermore, while deliberate indifference relies upon the facts, it is not strictly a jury question.[150] The Ninth Circuit is not alone in viewing the state-created danger exception as a significant hurdle.[151] In the Third Circuit, the elements of proving a state-created danger are even stronger and more fact-intensive than in the Ninth Circuit.[152] The standard used in the Third Circuit also precludes omissions or failures to act, and instead requires some affirmative action taken by a state actor before liability can attach.[153]

Strict requirements and affirmative action are not the only interpretations of the state-created danger exception.[154] The Second Circuit has forcefully distinguished itself from other circuits, and noted that they do not conflate state-created dangers with special relationships, and instead find that "liability arises from the relationship between the state and the private assailant."[155] Despite this attempt to approach state-created danger in a distinct manner, the Second Circuit does not regard a failure to step in and protect an

148. *Id.* (citation omitted) (quoting and synthesizing Munger v. Glasgow Police Dept., 227 F.3d 1082, 1086 (9th Cir. 2000) and L.W. v. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996)).

149. *Id.*

150. *See id.* at 975 (discussing previous instances where deliberate indifference theory proceeded to trial and distinguishing them to justify summary judgment in instant case).

151. *See generally* Bright v. Westmoreland Cnty, 443 F.3d 276, 281 (3d Cir. 2006) (analyzing strict requirements of state-created dangers).

152. *Compare, e.g.*, *Patel*, 648 F.3d 965, *with Bright*, 443 F.3d 276, 281 (listing elements of state-created danger exception). Specifically, the Third Circuit requires a plaintiff to prove that:

> (1) 'the harm ultimately caused was foreseeable and fairly direct;' (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that 'the plaintiff was a foreseeable victim of the defendant's acts,' or a 'member of a discrete class of persons subjected to the potential harm brought about by the state's actions,' as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. (citations omitted).

153. *See id.* at 282 (noting with particularity that plaintiff must prove overt action, rather than inaction, to meet elements of state-created danger).

154. *See generally* Pena v. DePrisco, 432 F.3d 98 (2d Cir. 2005). The Second Circuit notably deviated from stricter levels of culpability by permitting a showing of "deliberate indifference" when state actors have time to consider the implications of their actions, or lack thereof, and decide upon the proper course of action. *Id.* at 114 (discussing culpability element of state-created danger exception).

155. *Id.* at 109.

individual as sufficient for meeting the burden of proof.[156] However, it does recognize that liability can attach when a supervisor encourages or gives active permission to the state actor to engage in a course of conduct that would lead to creating a dangerous situation or environment.[157] Other jurisdictions have been even more reluctant to adopt the full strength of the state-created danger exception, to the point that the Fifth Circuit refuses to consider it an actual exception.[158] Aside from refusing to permit a § 1983 claim under that theory, the Fifth Circuit has also stated that it cannot be the basis for overriding otherwise valid sovereign immunity.[159]

IV. HAZED AND THEN SUED: RESTORING DIGNITY IN A COURT OF LAW

Hazing litigation currently encompasses a vast array of strengths and weaknesses. Some states employ laws and jurisprudence that make it easier to hold individuals and schools accountable, while other states have built a bulwark of immunity and reduced liability around school officials.[160] Given the extreme prevalence and severity of this issue, states need to address their laws as they relate to both students and school officials, while also focusing on aspects that are common between them.[161] This section will discuss each of these areas, and will include information on where current practices can succeed, what must be done to increase the likelihood of success, and where the challenges remain.[162]

A. Flightless Birds of a Feather

If nothing else, the forty-four states with hazing laws all have one thing in common: they all use the word "hazing" to describe

156. *See id.* at 109–10 (discussing when state-created danger does not apply).

157. *See id.* at 110–11 (discussing when state-created danger exists under context of supervision of state actors).

158. *See, e.g.*, Saenz v. City of McAllen, 396 Fed. App'x 173, 177 (5th Cir. 2010) (refusing to adopt explicit exception and noting multiple opportunities where Fifth Circuit could have, but did not, adopt exception).

159. *See id.* at 178 (finding insufficient support for state-created danger exception to overcome claim of immunity).

160. For further discussion of anti-hazing laws and immunity, see *supra* notes 16–49, 87–108 and accompanying text.

161. For a discussion on common hazing activities, see *supra* notes 10–15 and accompanying text (explaining prevalence of hazing).

162. For a discussion on the general nature of anti-hazing laws, see *supra* notes 16–49 and accompanying text.

the prohibited conduct.[163] Sadly, that is the extent of their similarities.[164] Of course, there are commonalities between a number of states; however, as this Comment discusses below, it is rare for even half of the states to enjoy surface similarities, let alone substantive likenesses.

1. *"Sticks and Stones Can Break my Bones," but Words Can Avoid Criminal Penalties*

Regardless of who the perpetrator, facilitator, or instigator of a hazing incident might be, there is one necessary component before any criminal or civil liability can attach: harm.[165] In the case of Ms. Hunt, her experiences with hazing resulted in significant and permanent physical damage, emotional harm, and the loss of many activities that she had once enjoyed.[166] Under South Carolina's anti-hazing statute, however, the defendants in that case could only face criminal liability for the physical injuries, as hazing only includes "acts which have a foreseeable potential for causing physical harm to a person."[167] This is true for any of the defendants in Ms. Hunt's case, whether they are students or school officials, as every form of liability—including failure to report—flows from that narrow definition of hazing as risking physical harm.[168] South Carolina is not alone in this regard; by way of example, Maryland only recognizes an act as hazing when it "subjects a student to the risk of serious bodily injury," without any regard for non-serious injury or non-physical injury at all.[169]

The definition of hazing as being limited to physical injury is misinformed, and likely stems from the stereotypes surrounding Hollywood depictions of hazing.[170] Instead, hazing involves a range of mental, emotional, and social harms, in addition to the risk of physical harm.[171] According to a comprehensive study on hazing,

163. *See generally supra* note 49 (listing all states with anti-hazing statutes).

164. *See id.*

165. *See* Chamberlin, *supra* note 7, at 938 (noting element of harm as common factor between anti-hazing statutes).

166. *See* Complaint, *supra* note 1, at 82 (describing injuries suffered due to hazing incident).

167. S.C. CODE ANN. § 16-3-510 (2015).

168. *See id.* (providing strict definition of hazing).

169. MD. CODE ANN., CRIM. LAW § 3-607 (West 2015).

170. *See* Allan, *supra* note 12, at 14 (noting that "students often associate hazing with Greek-letter organizations explaining that hazing is [sic] '. . . things I have seen on TV with fraternities and sororities and paddling and stuff.'").

171. *See id.* (defining hazing as "any activity . . . that humiliates, degrades, abuses, or endangers" a student).

the most prevalent act involves consumption of alcohol; while this certainly presents risk of physical harm, it is not the only hazing act that occurs in schools.[172] The second most common act involves singing or chanting at a time and place that is unrelated to a group-specific event, such as a game—an act that has virtually no risk of physical injury, yet depending upon the circumstances and the content, can produce any manner of embarrassment or emotional harm.[173] Other common hazing acts include limitations on the ability to associate, sleep deprivation, verbal abuse, sudden interruption of sleep, sex acts, and the like, all of which can potentially occur without physical harm.[174]

Out of the forty-four states that have enacted anti-hazing laws, just over half recognize that hazing can constitute more than actual or potential physical harm.[175] Arkansas is rare in the fact that it not only recognizes the possibility of non-physical harm, but also distinguishes between different types of harm altogether in a manner that is inclusive of the broad spectrum of hazing.[176] Unfortunately, not every state is as enlightened as Arkansas when it comes to haz-

172. *See id.* at 17 (listing twelve most common hazing acts between all respondents and noting frequency of drinking games as twenty-six percent).

173. *See id.* (noting prevalence of singing requirement as seventeen percent).

174. *See id.* (listing other common hazing acts).

175. *See* ALA. CODE § 16-1-23 (2015); ARIZ. REV. STAT. ANN. § 15-2301 (2015); ARK. CODE. ANN. §§ 6-5-201–6-5-204 (2015); CONN. GEN. STAT. § 53-23a (2015); DEL. CODE ANN. tit. 14, §§9301–04 (2015); IDAHO CODE ANN. § 18-917 (2015); KY. REV. STAT. ANN. § 164.375 (West 2015); LA. REV. STAT. ANN. §§ 17:183, 17:1801 (2015); ME. REV. STAT. tit. 20, §§ 6553, 10004 (2015); MASS. GEN. LAWS ch. 269, §§ 17–19 (2015); MO. REV. STAT. §§ 578.360–578.365 (2015); NEB. REV. STAT. §§ 28-311.06–28-311.07 (2015); N.H. REV. STAT. ANN. § 631:7 (2015); N.D. CENT. CODE § 12.1-17-10 (2015); OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015); OKLA. STAT. tit. 21, § 1190 (2015); 24 PA. STAT. ANN. §§ 5351–5354 (West 2015); R.I. GEN. LAWS §§ 11-21-1–11-21-3 (2015); TENN. CODE ANN. § 49-7-123 (2015); TEX. EDUC. CODE ANN. §§ 37.151-57 (West 2015); UTAH CODE ANN. §§ 53A-11a-102, 76-5-107.5 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j-570k (2015); WASH. REV. CODE §§ 28B.10.900–28B.10.903 (2015); W. VA. CODE §§ 18-16-1–18-16-1 (2015) (providing liability for non-physical harms, such as mental or emotional harm).

176. *See* ARK. CODE. ANN. § 6-5-201 (defining what constitutes hazing). Specifically, Arkansas separates hazing acts and consequences by paragraph; the first paragraph includes "intimidating the student attacked by threatening him or her with social or other ostracism or of submitting such student to ignominy, shame, or disgrace among his or her fellow students, and acts calculated to produce such results." *Id.* The second paragraph states that hazing can involve "[t]he playing of abusive or truculent tricks on or off the property of any school, college, university, or other educational institution in Arkansas by one (1) student . . . alone or acting with others, upon another student to frighten or scare him or her." *Id.* Third, hazing includes:

> [Acts] done for the purpose of humbling the pride, stifling the ambition, or impairing the courage of the student attacked or to discourage him or her from remaining in that school, college, university, or other educa-

ing. Utah's definition includes any act that "would subject the individual to extreme mental stress, such as sleep deprivation, extended isolation from social contact, or conduct that subjects another to extreme embarrassment, shame, or humiliation."[177] Utah does not appear to recognize any act of hazing that would produce only moderate or even substantial mental, emotional, or social harm, preferring instead to criminalize "extreme" harm.[178]

2. *A Hazy Environment*

While the issue of harm is clearly relevant when analyzing the results of a hazing incident, it is also relevant in determining the intended consequences of the act, thus creating meaningful inchoate liability.[179] Inchoate liability is a longstanding tradition in criminal law, and can encompass actions taken across a greater period of time, rather than focusing on the specific instances where action resulted in harm.[180] The actions that create liability are not those that create the harm directly, but instead attempt to bring about the harm in one manner or another.[181]

In the context of hazing, not every individual will hold the paddle, give the command to drink, or yell at the victim.[182] In the case of Ms. Hunt, an unknown number of senior students kidnapped her and other freshmen, drove them around, spun her in circles,

tional institution, or reasonably to cause him or her to leave the institution rather than submit to such acts.

Id. Fourth and finally, Arkansas includes physical harm:

[S]triking, 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.

Id.

177. UTAH CODE ANN. § 76-5-107.5 (providing definition of hazing).

178. *See id.* (limiting harm to that which is "extreme" in nature).

179. *See* Manuel A. Utset, *Inchoate Crimes Revisited: A Behavioral Economics Approach*, 47 U. RICH. L. REV. 1205 (2013) (describing inchoate liability as intending and acting to create harm but failing to do so).

180. *See id.* (describing philosophical considerations of inchoate liability, including greater leeway and length of time for liability to attach).

181. *See id.* at 1207 (describing inchoate liability as encompassing solicitation, attempt, and conspiracy).

182. *See generally* Pelham v. Bd. of Regents of Univ. Sys. of Georgia, 743 S.E.2d 469 (Ga. Ct. App. 2013) (finding it likely that defendant probably liable for hazing but ultimately upholding sovereign immunity to bar claim); *see also* Meeker v. Edmunson, 415 F.3d 317 (4th Cir. 2005) (finding defendant potentially liable for hazing due to use of students as "instrumentality" of crime).

and ordered her to run.[183] Because of the nature of the event, it is highly unlikely for Ms. Hunt to know who blindfolded her, who drove the car, and who yelled the orders.[184] Under a strict reading of liability, only the person or persons who did those things to Ms. Hunt directly would be liable, as the other students did not touch Ms. Hunt, give her orders, or otherwise interact with her.[185]

Under a theory of inchoate liability, however, the students—and in this case, the coach—can all be held liable for the actions of their confederates.[186] There, the coach likely solicited the hazing incident by "delegat[ing] its execution to a second party," which creates liability for solicitation.[187] If any of the student defendants assisted in procuring the vehicles, the blindfolds, the keys to the field, or other elements used in the hazing incident, then they could be liable for attempt, as they took substantial steps toward committing the crime.[188] Lastly, the mere agreement to carry out the hazing incident would be sufficient to create liability under a theory of conspiracy, as criminal liability attaches upon the creation of a common criminal plan.[189]

There is nothing to state that an individual cannot be found guilty of conspiracy to commit hazing under the ordinary criminal laws of the jurisdiction.[190] The very nature of inchoate liability holds individuals accountable for their actions that would be criminal if successful, and does not require explicit statutory allowances for inchoate liability.[191] Instead, the problem arises from the fact that inchoate liability has its own standards and requirements, which may or may not reflect the realities of hazing in an adequate and accurate manner—particularly given the abstract nature of hazing and its associated culture.[192]

Likewise, civil conspiracy—the joint and several liability of co-conspirators with varying degrees of fault—is not a standalone

183. *See* Complaint, *supra* note 1, at 42–50 (describing hazing event).

184. *See id.* (describing disorientation and confusion surrounding hazing event).

185. *See id.* (noting presence of other victims and senior students).

186. *See id.* (discussing hazing incident).

187. *See* Utset, *supra* note 179, at 1211 (discussing crime of solicitation).

188. *See id.* at 1212–14 (discussing crime of attempt).

189. *See id.* at 1213–14 (discussing crime of conspiracy).

190. *See generally* In re Khalil H., 910 N.Y.S.2d 553 (N.Y. App. Div. 2010) (upholding juvenile adjudication for conspiracy and attempted hazing).

191. *See generally* Utset, *supra* note 179, at 1209 (discussing inchoate liability in modern criminal law).

192. *See generally* Nuwer, *supra* note 14 (discussing culture surrounding hazing).

claim, and requires the completion of a tort before a plaintiff can win using it as a theory of liability.[193] When basing a claim on a theory such as *negligence per se* through the violation of an anti-hazing statute, this can be problematic when the anti-hazing statute is so deficient as to preclude the specific type of harm suffered.[194] Other elements of the state's tort law could be deficient, which would leave the victim with no redress if the statute does not provide express inchoate liability.[195]

Interestingly, the number of states that do not recognize inchoate liability in the explicit context of hazing is equal to the number of states that do not recognize emotional harm—however, the states themselves are different, meaning that there is little deficiency in any given state.[196]

3. *Instrumentalities of an Initiation Master*

The issue of third-party liability is closely related to inchoate liability, as it often manifests in the form of accomplice liability—the theory that an individual is liable for the actions of another that occur as part of a common scheme or because the accomplice aided the principal.[197] While there are numerous approaches to holding an individual liable for the harm caused by another, the one adopted by the Model Penal Code requires a purpose of perpetuating the act, and actions such as soliciting, aiding, or failing to

193. *See* Norman L. Greene, *Civil Conspiracy and the Rule of Law: A Proposal for Reappraisal and Reform*, 64 ARK. L. REV. 301, 331–32 (2011) (discussing general requirements of civil conspiracy).

194. For further discussion of *negligence per se* in the context of hazing, see *infra* notes 212–21 and accompanying text.

195. *See* Greene, *supra* note 193, at 331–32 (noting requirement of independent tort in majority of jurisdictions before civil conspiracy liability attaches).

196. *See* ALA. CODE § 16-1-23 (2015); ARIZ. REV. STAT. ANN. §§ 15–2301 (2015); ARK. CODE. ANN. §§ 6-5-201–204 (2015); CAL. PENAL CODE § 245.6 (West 2015); COLO. REV. STAT. § 18-9-124 (2015); CONN. GEN. STAT. § 53-23a (2015); DEL. CODE ANN. tit. 14, §§ 9301–9304 (2015); FLA. STAT. §§ 1006.63, 1006.135 (2015); GA. CODE ANN. § 16-5-61 (2015); IDAHO CODE ANN. § 18-917 (2015); KAN. STAT. ANN. § 21-5418 (2015); KY. REV. STAT. ANN. § 164.375 (West 2015); LA. REV. STAT. ANN. §§ 17.183, 17.1801 (2015); MASS. GEN. LAWS ch. 269, §§ 17–19 (2015); MINN. STAT. §§ 121A.69, 135A.155 (2015); N.H. REV. STAT. ANN. § 631:7 (2015); N.J. STAT. ANN. §§ 2C:40-3–2C:404 (West 2015); N.C. GEN. STAT. § 14-35 (2015); R.I. GEN. LAWS §§ 11-21-1–11-21-3 (2015); S.C. CODE ANN. §§ 16-3-510–16-3-540, 59-63-275, 59-101-200 (2015); TEX. EDUC. CODE ANN. §§ 37.151–37.157 (West 2015); UTAH CODE ANN. §§ 53A-11a-102, 76-5-107.5 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j–570k (2015); WASH. REV. CODE §§ 28B-10-900–28B-1–903 (2015) (finding some form of inchoate liability for hazing).

197. *See generally* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C.L. REV. 237, 245 (2008) (describing general accomplice liability).

attempt to prevent the act.[198] This encompasses a critical part of anti-hazing laws, as the failure to act in prevention of hazing is an issue that this Comment will address in Part IV-c.

Under a plain reading of the various anti-hazing statutes, excluding a duty to report, only seventeen states recognize third-party liability for hazing.[199] As with everything else, this liability has incredible variation within the statutory language of the different states. Massachusetts only recognizes third-party liability for "principal organizers," while Rhode Island includes both organizers and participants—without defining who constitutes a participant.[200] Texas, which has found its anti-hazing statute unconstitutional for personal liability of a coach in failing to prevent hazing, permits third-party liability for the organization when "the organization condones or encourages hazing or if an officer or any combination of members, pledges, or alumni of the organization commits or assists in the commission of hazing."[201]

Some states take the failure to permit third-party liability a step further in the wrong direction, and require the perpetrator to be a student—thus precluding all criminal liability from non-student actors, regardless of their level of involvement.[202] This requirement of a student actor has the potential for ambiguity in some states, particularly in the context of sports; by way of example, Idaho defines hazing as actions or conspiracies perpetrated by a "student or member of a . . . student organization."[203] There is no indication as to whether a coach, athletic director, trainer, or other school official constitutes a member of such an organization, and thus while

198. *See id.* (listing Model Penal Code requirements for accomplice liability).

199. *See* ALA. CODE § 16-1-23; ARIZ. REV. STAT. ANN. § 15-2301; ARK. CODE. ANN. §§ 6-5-201–6-5-204; IDAHO CODE ANN. § 18-917; LA. REV. STAT. ANN. §§ 17.183, 17.1801; MASS. GEN. LAWS ch. 269, §§ 17–19; MINN. STAT. §§ 121A.69, 135A.155; N.H. REV. STAT. ANN. § 631:7; N.J. STAT. ANN. §§ 2C:40-3–2C:40-4; N.C. GEN. STAT. § 14-35; OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015); R.I. GEN. LAWS §§ 11-21-1–11-21-3; S.C. CODE ANN. §§ 16-3-510–16-3-540, 59-63-275, 59-101-200; TEX. EDUC. CODE ANN. §§ 37.151–37.157; UTAH CODE ANN. §§ 53A-11a-102, 76-5-107.5; VT. STAT. ANN. tit. 16, §§ 570j–570k; WASH. REV. CODE §§ 28B-10-900–28B-10-903 (providing some form of third-party liability for hazing).

200. *Compare* MASS. GEN. LAWS ch. 269, § 17 (defining third-party liability), *with* R.I. GEN. LAWS § 11-21-1 (defining third-party liability).

201. TEX. EDUC. CODE ANN. § 37.153 (describing organizational liability); *see* Texas v. Zascavage, 216 S.W.3d 495 (Tex. Ct. App. 2007) (finding personal liability statute unconstitutional on face and as applied in regard to high school wrestling coach).

202. *See* ARIZ. REV. STAT. ANN. § 15-2301; ARK. CODE. ANN. §§ 6-5-201–6-5-204; IDAHO CODE ANN. § 18-917; N.C. GEN. STAT. § 14-35; OR. REV. STAT. § 163.197 (2015); TENN. CODE ANN. § 49-7-123 (2015); VT. STAT. ANN. tit. 16, §§ 570j–570k (requiring perpetrator of hazing to be student).

203. *See* IDAHO CODE ANN. § 18-917(4) (defining who is liable for hazing).

Idaho permits general third-party liability, they could limit that liability to third-party student actors only.[204]

4. *The Punchline to the Bad Joke of Anti-Hazing Laws*

The comprehensive reports that have emerged regarding the prevalence of hazing demonstrate that this is a national issue. It does not matter where the student lives; hazing on sports teams can occur anywhere.[205] Students regularly cross state and county lines to attend colleges, which means that even someone who might know the laws and culture of their own state could find themselves in an unexpectedly difficult situation once they research their destination—something that happened to Ms. Hunt, albeit to a lesser degree.[206] Aside from the obvious issues of states with inferior anti-hazing laws, which limit whatever effectiveness they might have in dealing with the problem, the need for uniformity in the adequacy of such laws is paramount.[207]

This need is so great that one commentator advocated the creation of a federal anti-hazing statute, which would track ideal language cherry-picked from across the country and provide a comprehensive standard for hazing.[208] This proposed model would condition the receipt of federal funds for schools on enforcement of its provisions, thus requiring compliance from virtually every college and university.[209] While the author of that proposal did not discuss this concept in the context of a § 1983 claim, such a statute could easily include an express provision that any act falling under the statute's definition of liability for hazing, when perpetrated by a government employee, would expose the school and the employee to federal civil rights liability.[210]

204. *See id.* (giving definition that does not explain who qualifies as members of student organizations).

205. *See generally* Allan, *supra* note 12, at 8–11 (discussing national prevalence of hazing).

206. *See* Complaint, *supra* note 1, at 26–27 (describing Ms. Hunt's offers from universities across the country and her ultimate decision to attend Clemson).

207. *See* Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1480–82 (2003) (discussing need for national uniformity in anti-hazing laws).

208. *See id.* at 1482–88 (detailing proposed federal anti-hazing law).

209. *See id.* at 1488 (discussing connection between funding and enforcement of proposed legislation).

210. For further discussion of the difficulties surrounding § 1983 claims against school officials, see *supra* notes 109–59 and accompanying text.

B. Students, Sue Thy Peers

As noted previously, some states only recognize students as liable for acts of hazing, which creates a host of issues for both criminal and civil litigation on this issue.[211] Regardless of the direct applicability of a state's anti-hazing statute, there are certain considerations that are only or primarily relevant to students when examining hazing in school sports, whether because of the issues of relationships, immunity, or otherwise, as discussed below.

1. *Hazing per se Is Negligence per se*

When holding students accountable for hazing, one of the possible options involves *negligence per se*—the theory of liability that uses violation of an established duty or prohibition, such as a criminal statute, to impart civil liability for the same or similar conduct.[212] Civil liability flows from criminal statutes in two distinct ways: it can establish strong evidence of liability and/or provide an accepted framework for proving the violation of a breach of a duty of care.[213]

It is a matter of no controversy that criminal actions involve stricter protections for defendants and a higher burden of proof than their civil counterparts do, even when the underlying facts are identical.[214] Accordingly, once an individual has been found guilty of hazing, that conviction is admissible in many jurisdictions as evidence of the underlying facts, even if it does not rise to the level of estoppel.[215] By focusing on criminal prosecutions for hazing, states can shoulder the greater weight of the burden and allow private citizens to benefit without added expense; this seems justified, as the peculiar nature of school sports lends itself to some form of quasi-parental liability on the part of the government.[216]

211. For further discussion of the theory *negligence per se* as it pertains to hazing, see *supra* notes 197–204 and accompanying text.

212. *See* Friedlander, *supra* note 9, at 24 (describing use of *negligence per se* in context of hazing).

213. *See generally* W.E. Shipley, Annotation, *Convictions or Acquittal as Evidence of the Facts on Which it was Based in Civil Action*, 18 A.L.R.2d 1287 (2015) (noting growing use of criminal conviction as admissible evidence for underlying facts in civil context); GOLDBERG, *supra* note 88, at 365 (discussing use of *negligence per se* to satisfy breach element of common law negligence).

214. *See* Shipley, *supra* note 213 (noting relative level of burdens between criminal and civil cases).

215. *See id.* (describing use of criminal convictions in civil context).

216. *Cf.* Chamberlin, *supra* note 7 (arguing for revision of criminal anti-hazing statutes to reflect theory of assumption of care). While this article references assumption of care on the part of students involved in hazing, the same philosophical rationale—abandonment or violation of a voluntarily assumed trust—applies

Even when a state chooses not to increase prosecution for hazing violations, the existence of a strong, inclusive anti-hazing statute will still benefit civil litigation.[217] *Negligence per se* allows a "plaintiff to satisfy the breach element of her cause of action by proving that the defendant violated a certain kind of statutory rule of conduct[.]"[218] This eliminates the need to provide general proof of breach under typical negligence requirements, and instead creates a particularized standard that is inherently applicable to the cause of action in question.[219] The related value of *negligence per se* is that it allows a plaintiff to sidestep the problem of a state failing to create a distinct civil cause of action for hazing, as the underlying facts giving rise to a general negligence claim will likely mirror the standard in the criminal statute.[220] While there are other requirements for utilizing a theory of *negligence per se*, these are also easily dealt with when the criminal statute is adequate and addresses the reality of hazing.[221]

2. *Immunizing the "Eye" in "Team"*

The issue of reporting involves three intertwining issues: secrecy, protection for reporting, and criminal penalties for not reporting.[222] By its very nature, hazing involves a strict code of silence and veil of secrecy; rituals often occur at night, in secluded locations, and with little to no adult supervision.[223] Before litigation can happen, someone needs to blow the whistle on the hazing; before a court can find liability, there must be sufficient evidence to support that conclusion.[224] In an effort to increase reporting, seven states have enacted criminal penalties for knowing about a hazing

to an even greater degree when placing the weight of that duty on schools, coaches, and other responsible adults. *See id.* at 963–64 (describing rationale behind proposed reform of criminal anti-hazing statutes).

217. *See* GOLDBERG, *supra* note 88, at 365 (discussing use of *negligence per se* to satisfy breach element of common law negligence).

218. *Id.* at 375.

219. *See id.* (describing use and value of *negligence per se* in civil actions).

220. *See id.* at 377 (describing application of *negligence per se*).

221. *See id.* (noting other requirements for *negligence per se*, such as statute intended to prevent harm and that plaintiff is in class of individuals intended to benefit from statute).

222. *See generally* Pelletier, *supra* note 8, at 381–83 (discussing issues surrounding reporting of hazing incidents).

223. *See generally* Chamberlin, *supra* note 7, at 958 (describing underground nature of hazing).

224. *See* Pelletier, *supra* note 8, at 381–83 (discussing problem of secrecy as barrier to criminal prosecution for hazing).

incident but failing to report it to the proper authorities.[225] While this has potential value, some commentators believe that such a statute is at best useless and at worst will only work to "drive hazing underground."[226]

Despite the valid concerns surrounding reporting requirements, there is a genuine need for a strong mechanism to induce reporting—even if the mechanism only succeeds in encouraging the worst of the victims or the least involved member of the organization to speak out, it will still succeed in shedding light on a grossly underreported phenomenon.[227] The creation of anonymous reporting systems is one way to remove the potential stigma of reporting; by allowing information to come forward without a name—and any testimony that followed would be in the same context of a subpoena, identical for reporters and non-reporters alike.[228]

Another potential approach, which no state has adopted thus far and no commentators appear to have considered, would be to institute mandatory reporting only against leaders, instigators, and/or the responsible adults. Instead of requiring a student athlete to sell out his or her fellows wholesale, this limited reporting requirement could at a minimum require students to inform schools of the actions of the coaches and athletic directors.[229] While there is inevitably a sense of loyalty between the two, there are certainly situations where the victims of coach-directed hazing would be more willing to speak out against the adult tormentor than one of their fellow students.[230]

---

225. *See* ALA. CODE § 16-1-23 (2015); ARK. CODE. ANN. §§ 6-5-201–6-5-204 (2015); FLA. STAT. §§ 1006.63, 1006.135 (2015); 720 ILL. COMP. STAT. 5 / 12C-50; 12C-50.1 (2015); MASS. GEN. LAWS ch. 269, §§ 17-19 (2015); N.H. REV. STAT. ANN. § 631:7 (2015); S.C. CODE ANN. §§ 16-3-510–40, 59-63-275, 59-101-200 (2015) (criminalizing failure to report known instances of hazing).

226. *See*, Chamberlin, *supra* note 7, at 958 (discussing risks associated with increased criminal liability surrounding hazing); *see also* Pelletier, *supra* note 8, at 381–83 (noting that mandatory reporting 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").

227. *See* Somers, *supra* note 6, at 673–75 (discussing sheer prevalence of underreporting of hazing in school sports).

228. *See* Rosner, *supra* note 9, at 298 (emphasizing need for anonymous reporting systems in schools).

229. *See* Complaint, *supra* note 1, at 73 (noting that school officials only became involved because Ms. Hunt's parents contacted them; she did not report incident herself). It is unclear from the Complaint how much Ms. Hunt knew about the law and the school policies surrounding hazing and reporting hazing; however, it is at least possible that, had Ms. Hunt known that she had a duty to report the coach, but not her fellow players, she would have done so.

230. *Cf.* Complaint, *supra* note 1, at 31–35 (detailing longevity and severity of cruelty on part of coach against plaintiff).

While reporting requirements are useful for gaining the requisite information to succeed in anti-hazing litigation, they have a more practical value for litigants: incentive to cooperate and testify once the information has already been reported.[231] Once a deposition or trial testimony reveals that the student knew about the hazing and failed to report it, then that individual could face criminal penalties, and at a minimum could face punishment from the school; however, the possibility of waiver or immunity should remain an option.[232] Grants of immunity or refusals to prosecute are some of the most common tools used by prosecutors to secure cooperation from criminal defendants, and they are equally valuable in the civil context by dropping a party from a suit in exchange for information.[233]

C. I'm Hazed for Teacher

As a team-based cultural phenomenon, hazing exists as a means to create an apparent atmosphere of trust and camaraderie, often at the expense of safety or personal dignity.[234] According to one leading commentator, true camaraderie is the product of interaction with previous generations, which benefits from the accumulated wisdom and experience of such individuals.[235] Accordingly, it appears logical that the rehabilitation of the hazing culture will not focus on the students themselves—particularly given their short memories—but on the coaches, directors, and former players.[236] Likewise, the existence of a code of silence surrounding nearly any incident of hazing makes it less likely that a student, whether a victim or a perpetrator, will voluntarily come forward to discuss the issue.[237]

231. *See* Rosner, *supra* note 9, at 298 (theorizing that students would be more cooperative if they did not risk penalties of their own).

232. *See* Chamberlin, *supra* note 7, at 954–55 (discussing immunity in context of criminalized failure to report hazing).

233. *See* Ian Weinstein, Note, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 569–70 (1999) (discussing prevalence and value of providing assistance to prosecutors in exchange for more favorable outcomes on criminal charges).

234. *See* Nuwer, *supra* note 14 (describing hazing as "giv[ing] athletes a quick-fix bonding," where "the drawbacks often outweigh the perks").

235. *See id.* (discussing and quoting opinion of Norm Pollard, coauthor of Alfred University hazing study).

236. *See id.* (quoting hazing consultant David Westol that undergraduate students "have a historical perspective of about six months" and noting importance of staff and senior alums in creating healthy culture).

237. *See* Susan Lipkins, PREVENTING HAZING: HOW PARENTS, TEACHERS, AND COACHES CAN STOP THE VIOLENCE, HARASSMENT, AND HUMILIATION 86 (2006) (noting and discussing difficulty for victims in breaking "code of silence" around hazing incidents).

As noted previously, out of the forty-four states with anti-hazing laws, six require the perpetrator to be students.[238] Only eighteen states permit liability for third-party actors, such as those who encourage or facilitate hazing.[239] This leaves twenty-six states with criminal statutes forbidding hazing and no direct means of enforcing them against the coaching staff, athletic directors, or other leaders of sports team unless those individuals personally raised their hand to perpetrate an act of hazing.[240] While the direction of hazing is sufficient to meet the definition of action under a § 1983 claim, there is no guarantee as to how any given state would view direction when their own statutes only reference direct action taken to accomplish an act of hazing.[241]

1. *Mandated Reporting and What to Do with the Reports*

Given the position of trust bestowed upon coaches and other adults on sports teams, the requirement to report hazing is critical; however, only seven states criminalize the failure to report hazing on the part of team staff.[242] As noted previously, there are genuine concerns involved in requiring a student to report hazing—very few of which exist or have adequate justification when looking at this problem on the part of school employees.[243] Particularly in the

238. *See* ARIZ. REV. STAT. ANN. § 15-2301 (2015); ARK. CODE. ANN. § 6-5-201 (West 2015); IDAHO CODE ANN. § 18-917 (West 2015); N.C. GEN. STAT. ANN. § 14-35 (West 2015); TENN. CODE ANN. § 49-7-123 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j–570k (West 2015) (defining individual liable for hazing as student actor).

239. *See* ALA. CODE § 16-1-23 (2015); ARIZ. REV. STAT. ANN. § 15-2301; ARK. CODE. ANN. §§ 6-5-201–6-5-204 (West 2015); IDAHO CODE ANN. § 18-917; LA. REV. STAT. ANN. §§ 17:183, 17:1801 (2015); MASS. GEN. LAWS ch. 269, §§ 17–19 (2015); MINN. STAT. §§ 121A.69, 135A.155 (2015); N.H. REV. STAT. ANN. § 631:7 (2015); N.J. STAT. ANN. §§ 2C:40-3–2C:40-4 (West 2015); N.C. GEN. STAT. § 14-35; OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015); R.I. GEN. LAWS §§ 11-21-1–11-21-3 (2015); S.C. CODE ANN. §§ 16-3-510–16-3-40, 59-63-275, 59-101-200 (2015); TEX. EDUC. CODE ANN. §§ 37.151–37.157 (West 2015); UTAH CODE ANN. §§ 53A-11a-102, 76-5-107.5 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j–570k; WASH. REV. CODE §§ 28B-10-900 – 28B-10-903 (2015) (extending some form of liability to actors not directly involved in hazing incident).

240. *See generally* IND. CODE § 35-31.5-2-151 (2015) (utilizing definition of criminal recklessness for definition of hazing and not permitting liability for anyone but direct actor).

241. *See* Meeker v. Edmunson, 415 F.3d 317, 322 (4th Cir. 2005) (finding liability when coach used others as "instruments" of crime).

242. *See* ALA. CODE § 16-1-23; ARK. CODE. ANN. §§ 6-5-201–6-5-204; FLA. STAT. § 1006.63 (2015); 720 ILL. COMP. STAT. 5 / 12C-50; 50.1 (2015); MASS. GEN. LAWS ch. 269, § 17-19; N.H. REV. STAT. ANN. § 631:7; S.C. CODE ANN. §§ 16-3-510–3-510-40, 59-63-275, 59-101-200 (criminalizing failure to report known instances of hazing).

243. For further discussion on requiring students to report hazing, see *supra* notes 211–21 and accompanying text.

wake of Jerry Sandusky and the Penn State scandal, there is little question that governments must require school officials to report acts of abuse, particularly when they involve minors.[244] Penn State left the nation scrambling to reform its reporting requirements for child sexual abuse, which is certainly an admirable goal, but it is not the only thing that deserves mandatory reporting.[245] Regardless of whether a state recognizes the doctrine of *in loco parentis* or the state-created danger to permit civil liability for failing to prevent hazing, both of those rationales should at a minimum serve to justify mandated reporting of any credible belief of hazing that occurs in the context of school sports.[246]

Criminalizing and creating civil liability for failing to report hazing is only one side of the problem; the other is that there must be an applicable standard of care for investigating and dealing with reports of hazing.[247] In the case of Ms. Hunt, a substantial portion of her allegations involved what happened after the hazing incident, particularly in regard to how the school dealt with the reports—and lack thereof—that it had received.[248] After learning of Ms. Hunt's significant injuries, the athletic department at Clemson began an investigation, which included meeting with the coaching staff of the soccer team.[249] According to the Complaint, "[t]he Clemson Administrator Defendants ultimately concluded, despite receiving reports that the Clemson Coach Defendants authorized the hazing ritual and tried to cover up their involvement, that no penalties would be imposed . . . as a result of the incident."[250]

Ms. Hunt's allegations did not end there. As per the Complaint, the Clemson Office of Community and Ethical Standards ("OCES") began an investigation following pressure by Ms. Hunt's parents.[251] OCES made a number of findings, including determining that the coaching staff had authorized the hazing incident, and

244. *See* Erica M. Kelly, Note, *The Jerry Sandusky Effect: Child Abuse Reporting Laws Should no Longer be "Don't Ask, Don't Tell"*, 75 U. PITT. L. REV. 209, 210 (2013) (discussing rapid reevaluation of reporting laws following Sandusky scandal).

245. *See id.* at 214–15 (discussing national response to Jerry Sandusky child abuse scandal, including vast attempts to reform mandatory reporting laws).

246. For further discussion of *in loco parentis* and the state-created danger rule in the context of hazing, see *supra* notes 131–159 and accompanying text.

247. *See* Rosner, *supra* note 9, at 297 (emphasizing need for schools to investigate reports of hazing).

248. *See* Complaint, *supra* note 1, at 69–78 (detailing factual allegations pertaining to school's actions and inactions following hazing incident).

249. *See id.* at 70–71 (relaying sequence of events following hazing incident).

250. *Id.* at 72.

251. *See id.* at 73–74 (noting events following school's refusal to administer penalties for hazing incident).

that members of the team had violated Clemson's policies against hazing.[252] Despite this finding, the response by OCES was minimal: it placed the team on probation, required attendance at an anti-hazing workshop, and did not notify Ms. Hunt of the results of their investigation.[253] Regardless of any problems with the sufficiency of the OCES response to the hazing incident, the differences between its findings and actions and those taken by the school administration underscore the need for uniformity in necessary standards of care.[254]

Even putting aside the fact that some employee of the university should have reported even his or her suspicions of hazing, the school's response fell well below any reasonable standard of care.[255] Borrowing from the philosophical underpinnings of the special relationship exception, once a school is on notice that there is a problem, it has a far greater duty to act to mitigate the damage and prevent it from happening again.[256] The existence of an implicit policy condoning the improper activity can be enough to open the door to liability in some jurisdictions. The existence of such a policy only finds support when a school knows about a problem, has credible accusations of misconduct, and then fails to do anything about it.[257]

2. *Legal Ramifications for Non-Student Ritual Masters*

It is not enough for educational facilities to regulate student organizations; there must be legal responsibility placed on coaches and schools for what occurs in sports teams, or else there will be little motivation for positive change.[258] While official policy is naturally going to disavow any knowledge of hazing, except for those rare cases where disciplinary action followed soon after, the reality is that roughly one-quarter of hazing incidents occur with the

252. *See id.* at 74–75 (discussing results of OCES investigation).

253. *See id.* at 76–78 (discussing OCES responses pertaining to findings of investigation).

254. *See id.* at 69–78 (discussing different approaches taken by school administration and OCES following hazing incident).

255. *See id.* at 72 (noting school's refusal to sanction those involved in hazing incident, including school employees).

256. *See generally* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 728–29 (3d Cir. 1989) (noting with disapproval school district's failure to reprimand teachers accused of sexual misconduct with students across period of years).

257. *See id.* (finding school board's failure to act on complaints both troubling and indicative of a policy of permitting improper behavior).

258. *See* Friedlander, *supra* note 9, at 23 (noting that colleges typically disclaim legal responsibility for hazing).

knowledge of coaches and other adult leaders.[259] In some of the cases discussed previously, coaches not only knew about the hazing incidents that were occurring in the context of the team, but had ordered or orchestrated that hazing.[260] In other cases, the coaches were arguably uninvolved, but either failed to prevent the incident or did little to nothing after the fact to deal with the problem.[261]

For all of the reasons discussed previously, criminal liability for coaches is unlikely in all but the most egregious of circumstances, at which point prosecutors will likely charge something other than hazing.[262] Instead of criminal liability, the way to hold coaches accountable is through civil action—however, once more, this has significant problems. Unlike students, who have little to no protection against tort claims beyond whatever defenses may be relevant to their case, coaches can hide behind the governmental immunity of the school to preclude liability.[263] Various methods of inchoate and third-party liability may or may not be sufficient to overcome immunity, as they have diverse standards that a plaintiff must meet to succeed.[264]

As per the general trend of inadequate anti-hazing statutes, only four states have an explicit civil cause of action for hazing.[265] However, even this number is misleading, as the specific causes of action tend to be limited in nature.[266] In Virginia, civil liability for hazing only attaches when bodily injury occurs; this tracks the criminal liability, of course, as Virginia does not recognize emotional or social harm in their statute.[267] By way of contrast, Ohio has an ideal

259. *See* Allan, *supra* note 12, at 25 (discussing belief by students that coaches were aware of hazing incidents).

260. *See generally* Complaint, *supra* note 1, at 40 (discussing alleged active involvement of coaching staff in hazing incident).

261. *See generally* Travis v. Stockstill, No. 1:12CV173, 2013 WL 5204669 (S.D. Miss. Sep. 13, 2013) (discussing allegations of hazing for permitting students to haze victim); Alton v. Hopgood, 994 F. Supp. 827 (S.D. Tex. 1998) (discussing alleged liability for failure to prevent hazing incidents).

262. *See* Pelletier, *supra* note 8, at 409 (discussing minimal criminal penalties for hazing and resulting ineffectiveness of such laws in criminal context).

263. For a discussion on sovereign immunity in the context of hazing, see *supra* notes 87–108 and accompanying text.

264. For further discussion on the hurdles inherent within sovereign immunity, see *supra* notes 87–108 and accompanying text.

265. *See* CAL. PENAL CODE § 245.6 (West 2015); OHIO REV. CODE ANN. §§ 2307.44, 2903.31 (West 2015); VT. STAT. ANN. tit. 16, §§ 570j–570k (2015); VA. CODE ANN. § 18.2-56 (2015) (providing explicit civil cause of action for hazing).

266. *See* CAL. PENAL CODE § 245.6 (West 2015); OHIO REV. CODE ANN. §§ 2307.44, 2903.31; VT. STAT. ANN. tit. 16, §§ 570j–570k; VA. CODE ANN. § 18.2-56 (providing generally limited means or forms of recovery for hazing).

267. *See* VA. CODE ANN. § 18.2-56 (defining civil cause of action for hazing).

civil cause of action, which exhaustively details who is liable and under what circumstances, and includes non-physical harm.[268]

The problem with so many states lacking explicit civil liability is that sovereign immunity stands as a barrier unless the government waives it.[269] In *Pelham*, the defendant school board succeeded in its motion for summary judgment on the grounds of sovereign immunity.[270] While there was a colorable claim that the school board violated Georgia's anti-hazing statute, the case at bar was civil, not criminal, and thus probable guilt under the criminal statute did not create a civil cause of action in its own right.[271] This would likely be irrelevant if the defendant was a non-government entity or employee, yet because they were a branch of the government, sovereign immunity existed unless the legislature chose to waive it—something that had not occurred in that case.[272]

Pelham is valuable in demonstrating the other primary flaw deriving from a lack of explicit civil liability: the exception of certain

---

268. *See* OHIO REV. CODE ANN. § 2307.44 (detailing civil cause of action). Ohio's civil liability statute states, in full:

> Any person who is subjected to hazing, as defined in division (A) of section 2903.31 of the Revised Code, may commence a civil action for injury or damages, including mental and physical pain and suffering, that result from the hazing. The action may be brought against any participants in the hazing, any organization whose local or national directors, trustees, or officers authorized, requested, commanded, or tolerated the hazing, and any local or national director, trustee, or officer of the organization who authorized, requested, commanded, or tolerated the hazing. If the hazing involves students in a primary, secondary, or post-secondary school, university, college, or any other educational institution, an action may also be brought against any administrator, employee, or faculty member of the school, university, college, or other educational institution who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it and against the school, university, college, or other educational institution. If an administrator, employee, or faculty member is found liable in a civil action for hazing, then notwithstanding Chapter 2743. of the Revised Code, the school, university, college, or other educational institution that employed the administrator, employee, or faculty member may also be held liable. The negligence or consent of the plaintiff or any assumption of the risk by the plaintiff is not a defense to an action brought pursuant to this section. In an action against a school, university, college, or other educational institution, it is an affirmative defense that the school, university, college, or other institution was actively enforcing a policy against hazing at the time the cause of action arose.

Id.

269. *See* GOLDBERG, *supra* note 88, at 476 (describing sovereign immunity).

270. *See* Pelham v. Bd. of Regents of Univ. Sys. of Georgia, 743 S.E.2d 469, 471–72 (Ga. Ct. App. 2013) (noting resolution of summary judgment ruling).

271. *See id.* (finding no civil claim from violation of criminal statute).

272. *See id.* (finding no waiver of sovereign immunity and refusing to read one into probable violation of criminal statute).

forms of intentional conduct when holding a government entity or employee liable.[273] In Georgia, the state is not liable for the actions of individuals when the theory of recovery stems from assault and battery.[274] The court in *Pelham* held that, because the underlying cause of action stemmed from an assault and battery incident, the exception to the state's waiver applied, thus reinstating sovereign immunity, and barring recovery.[275] The plaintiff unsuccessfully argued that the coach committed hazing independently of the assault and battery that created the cognizable injury, and thus the exception should not apply.[276] The court disagreed, finding that the only relevant act is the one that created the loss.[277] This case emphasizes the dangers of not having a distinct civil cause of action, as any act of hazing will likely involve some form of intentional conduct not covered by a state's waiver of sovereign immunity.[278]

As seen in *Pelham*, negligence and *negligence per se* are not viable when the underlying acts fall under an exception to a state's waiver of sovereign immunity.[279] This failure has nothing to do with the validity of *negligence per se* as a theory of liability, and everything to do with the harsh realities of sovereign immunity—a constant problem when the liable party in a hazing incident works for the government.[280] In the case of Ms. Hunt, she filed claims of negligence and gross negligence, but not *negligence per se*, against the coach defendants.[281] This specific cause of action likely stems from South Carolina's voluminous exceptions to the waiver of statutory immunity, which provides an exception for "responsibility or duty including but not limited to supervision [or] protection . . . of any student . . . *except when the responsibility or duty is exercised in a grossly*

273. *See id.* at 472–73 (finding assault and battery exception to waiver of sovereign immunity applied).

274. *See* GA. CODE ANN. § 50-21-24(7) (2015) (listing exceptions to state waiver of sovereign immunity).

275. *See Pelham*, 743 S.E.2d at 472–73 (finding exception to waiver of sovereign immunity valid and applicable to facts of case).

276. *See id.* (describing plaintiff's argument).

277. *See id.* (finding against plaintiff's argument that coach did not commit assault or battery).

278. *See generally* GA. CODE ANN. § 50-21-24(7) (listing assault, battery, and false imprisonment as exceptions to waiver).

279. *See Pelham*, 743 S.E.2d at 472 (attempting, and failing, to utilize negligence and *negligence per se* as theories of liability against school board).

280. *See id.* at 474 (noting harshness of sovereign immunity, particularly when school employee was likely at fault).

281. *See* Complaint, *supra* note 1, at 114–21 (detailing cause of action against coach defendants).

negligent manner[.]"[282] The fact that a plaintiff must limit her claims and jump through definitional hoops before she can even hope to pierce sovereign immunity is a compelling argument in favor of both state-based exceptions for hazing and an explicit § 1983 exception for when the underlying conduct constitutes hazing.

V. CONCLUSION

In many respects, hazing is a well-established custom, stemming from civilizing processes aimed at cultivating an individual into a proper member of the university.[283] In the modern sense, it remains utterly pervasive in the school setting, yet trades the civilizing aspect for faux camaraderie.[284] Despite the stereotypes, the greatest prevalence is not in Greek fraternities and sororities, but in sports.[285] Hazing is so pervasive that it is difficult to believe that there are more than a handful of student athletes who have not experienced it in some form or another, even if they do not recognize that they had been hazed.[286] While some acts of hazing are seemingly harmless, the instances of sexual abuse, permanent injury, and death are all too common.[287]

When hazing does occur, it rarely results in punishment of any kind.[288] While the vast majority of states have adopted statutes that criminalize hazing, these laws are so diverse and ineffective that they are functionally useless, and are generally incapable of making any meaningful difference in the world of hazing.[289] Even when a law recognizes the diverse nature of hazing, it often fails to introduce reliable means of enforcement against anyone beyond the stu-

282. S.C. CODE ANN. § 15-78-60(25) (2015) (emphasis added) (listing one of many exceptions to waiver of sovereign immunity).

283. *See* STOP HAZING, *History*, http://www.stophazing.org/hazing-information/history/ (describing historical origins of hazing).

284. *See* Nuwer, *supra* note 14 (discussing illusion of bonding that accompanies hazing by students).

285. *See* Allan, *supra* note 12, at 15–16 (listing prevalence of hazing by type of organization and noting that varsity athletic teams are most likely to experience hazing).

286. *See id.* at 29–30 (discussing reasons why students do not report hazing, such as being unaware that activity constituted hazing, or disagreeing that activity was hazing).

287. For further discussion on some of the extreme acts of hazing, see *supra* notes 50-73 and accompanying text.

288. *See generally* Chamberlin, *supra* note 7, at 944 (discussing general ineffectiveness of anti-hazing laws in United States).

289. For further discussion on hazing laws, see *supra* notes 16–49 and accompanying text.

dent who committed the specific acts in question.[290] Lack of inchoate and third-party liability, along with an inability to target schools and coaches, leaves many anti-hazing laws impotent.[291] The lack of explicit civil liability is also extremely problematic, as it prevents many civil litigants from piercing the sovereign immunity that protects governmental actors, leaving them without remedy against some of the worst perpetrators of the harm.[292]

The blame does not lie squarely on the states; even federal law has its flaws, such as the inability to succeed under a § 1983 claim without meeting various thresholds of conduct and relationships.[293] The continued weakening of the theory of *in loco parentis*, the special relationship exception, and the state-created danger doctrine make it unlikely that coaches will ever be liable under federal law unless they acted directly against the student.[294] Even when a coach does act directly, that liability does not often transfer to the school that employed the coach.[295]

Any attempts at litigation must weave a circuitous route around these various problems; finding liability under the general laws, to the exclusion of the anti-hazing statutes, may prove the most viable option under the limited scope of hazing liability.[296] Even when a litigant uses those anti-hazing laws, circumstances may require turning to general principles of criminal and civil law to create inchoate and third-party liability.[297] States, as well as the federal government, must be the ones to act before true liability attaches to acts of hazing, including the allowance, direction, and solicitation of hazing.[298]

---

290. For further discussion on the issues of enforcing anti-hazing laws, see *supra* notes 163–2210 and accompanying text.

291. For further discussion on the issues of inchoate liability, third-party liability, and non-student actors, see *supra* notes 163–210 and accompanying text.

292. For further discussion on the issue of sovereign immunity, see *supra* notes 87–108 and accompanying text.

293. For further discussion on federal § 1983 claims, see *supra* notes 109–59 and accompanying text.

294. For further discussion on theories of liability against coaches, see *supra* notes 109–59 and accompanying text.

295. For further discussion on the weaknesses of imputing liability on the inaction of schools, see *supra* notes 109–59 and accompanying text.

296. For further discussion on the weaknesses of liability under state anti-hazing laws, see *supra* notes 160–210 and accompanying text.

297. For further discussion on alternative approaches to liability, see *supra* notes 160–210 and accompanying text.

298. For further discussion on the need for government action to address hazing liability, see *supra* notes 205–10 and accompanying text.

Hazing as a problem will likely continue to exist well into the future; it is a staple of sports and college life, and it is a tradition that coaches pass down and establish to students of subsequent generations.[299] Anti-hazing laws are frankly too little, too late, and do not provide criminal or civil penalties, responsibility, or liability to any meaningful degree.[300] Change must occur at both the state and the federal levels. There must be uniformity, proper recognition of the broad scope of what constitutes hazing, and recognition that the individuals most at fault are not necessarily the ones holding the paddle or the bottle of alcohol. Schools and coaches cannot hide behind sovereign immunity, because they are in the best position to fix this problem before it starts.[301]

Even if a state government does not want to foot the bill for the misconduct of coaches, they can at a minimum substitute civil liability for criminal sanctions. It is unlikely that coaches will continue endorsing and promoting hazing when their fellow coaches find themselves sitting behind bars. At the same time, the federal government is in a position of power; they have less personal interest in protecting a state government from state action, and can provide explicit remedies and the removal of immunities for acts of hazing. It is a common refrain to think of the children, yet this is one case where we simply must care for our student athletes—no matter how old they may be. Even putting aside the issue of whether schools use these students as unpaid marketing tools and for-profit entertainment, school sports are dangerous enough to begin with.

There is simply no excuse for increasing that danger in the locker rooms, the dorms, and after the stadium lights go out. While the chances may yet be slim, individuals such as Ms. Hunt should be lauded for taking a brave stand against their oppressors. With increased awareness and pressure against the government, we may yet see a reform in anti-hazing laws and practices. Until then, hazing victims must do what they can—one lawsuit at a time.

*Nicholas Bittner**

299. *See generally* Nuwer, *supra* note 14 (describing nature of team culture as deriving from coaches and athletic directors).

300. For further discussion on the inadequacies of anti-hazing laws and their related penalties, see *supra* notes 23–26 and accompanying text.

301. *See generally* Nuwer, *supra* note 14 (noting that positive change flows from coaches).

* J.D. Candidate, May 2016, Villanova University Charles Widger School of Law; B.A. Criminal Justice, January 2013, Temple University; author of The Bitter Road: A Treatise on Diacritical Nihilism and The Roads Around Religion: Finding Your Way in a Secular World.