

COLLEGE AND UNIVERSITY LIABILITY FOR THE DANGEROUS YET TIME-HONORED TRADITION OF HAZING IN FRATERNITIES AND STUDENT ATHLETICS

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INTRODUCTION

In November of 1993 at the University of Nebraska at Lincoln, Jeffrey Knoll, a 19-year-old student seeking membership in the Phi Gamma Delta fraternity, was handcuffed to a radiator and forced to consume large quantities of alcohol.¹ When he became severely intoxicated, he was left alone handcuffed to a toilet pipe in the restroom. Knoll broke loose from the handcuffs and attempted to escape through a third-floor window and slide down a drainpipe. He fell to the ground and suffered severe injuries. Knoll had a blood alcohol content of .209.²

Six years later at an October team party called “The Big Night,” University of Vermont hockey teammates required freshmen to wear women’s underwear, drink hard liquor and warm beer, and parade in a line while holding each other’s genitals.³ In January 2000, the University of Vermont cancelled its men’s ice hockey season “in the wake of freshman walk-on Corey Latulippe’s suit alleging that he was hazed during [the October] team initiation.”⁴

These two cases are emblematic of the fact that throughout history, some form of hazing has occurred in organizations varying from American Indian tribes to military groups to college and university sports and Greek life.⁵ In fact, hazing rituals occurred as far back as the Middle Ages in Europe.⁶ “However, according

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1. Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999). “Over the course of approximately 2½ hours, Knoll consumed 15 shots of brandy and whiskey and 3 to 6 cans of beer.” *Id.* at 760.

2. *Id.*

3. *College Hazing Under Fire*, CBS NEWS, Apr. 2, 2000, <http://www.cbsnews.com/stories/2000/04/02/national/main179106.shtml>.

4. Clark Thiemann, *Men’s Hockey Rival Vermont Cancels Season after Hazing Cover-up*, DAILY PRINCETONIAN (Feb. 3, 2000), available at <http://www.dailyprincetonian.com/archives/2000/02/03/sports/57.shtml>.

5. A. Catherine Kendrick, Note, Ex Parte Barran: *In Search of Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407, 440 n.4 (2000); Michael John James Kuzmich, Comment, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths*, 31 MCGEORGE L. REV. 1087, 1094 (2000).

6. Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . And Injured:*

to one scholar, the form and degree of violence involved in hazing practices is unique to the United States.”⁷ This is not surprising since hazing has grown to become a serious problem at colleges and universities across the nation, as it “capitalizes on the dangerous intersection of vulnerability and daring that is characteristic of college-aged men and women.”⁸ While Greek organizations and athletic teams are usually popular and make positive contributions to campus life through service and social activities,⁹ when it comes to hazing, such organizations are often criticized as being dangerous to students’ health and well-being. Hundreds of men and women have been emotionally disgraced, physically injured, or even killed in ridiculous stunts to gain acceptance in various groups.¹⁰ Fraternities justify these practices by stating that a pledge proves his worth by withstanding the hazing, thus reinforcing “unity among the pledges.”¹¹ Through such justification, hazing continues unabated and has become an unfortunate “rite of passage to which prospective members of organizations are subjected.”¹²

Hazing is not confined to Greek organizations on campus, but also extends to intercollegiate athletes. For example, an Alfred University survey of NCAA athletes found that over eighty percent of the over 325,000 athletes surveyed were subjected to some form of hazing to join a college or university team,¹³ and twenty percent of those surveyed reported hazing that “crossed the line between youthful hijinks and significant danger.”¹⁴ Only one in five participated in exclusively positive initiations, such as ropes courses or team trips.¹⁵ Hazing was most likely

Hazing Litigation in U.S. Colleges and Universities, 25 J.C. & U.L. 361, 369 (1998).

7. *Id.* (citing Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L. J. 111, 112 n.4 (1991)).

8. Jamie Ball, *This Will Go Down on Your Permanent Record (But We’ll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 SW. U. L. REV. 477, 481 (2004).

9. For example, at Ohio Wesleyan University, “[t]he collective contribution by members of the Greek community is significant and is evidenced through their many service and philanthropic programs and activities both on and off campus during the year.” Ohio Wesleyan University Online, Greek Life, <http://greek.owu.edu/> (last visited Apr. 13, 2007). Nevertheless, while “[m]any [fraternities] were originally founded on dedication to principles such as community service, sound learning, and leadership qualities . . . some have become purely ‘social.’” *13th Annual Ministry Conference This Week Goes Greek*, MISSION NETWORK NEWS, Feb. 14, 2007, <http://mnnonline.org/article/9592>.

10. There is an understanding that “youthful college students may be willing to submit to physical and psychological pain, ridicule and humiliation in exchange for social acceptance which comes with membership in a fraternity.” *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1115 (La. Ct. App. 1999) (establishing a precedent that colleges and universities could be held to nearly a standard of strict liability, as the court apportioned thirty-three percent liability to Louisiana Tech despite its clear anti-hazing policy and rules).

11. Rutledge, *supra* note 6, at 369.

12. Ball, *supra* note 8, at 478.

13. Joshua A. Sussberg, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1426–27 (2003); Nadine C. Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams*, Alfred University (Aug. 30, 1999), available at http://www.alfred.edu/sports_hazing/docs/hazing.pdf.

14. *McKenzie v. State*, 748 A.2d 67, 80 n.11 (Md. Ct. Spec. App. 2000).

15. Hoover, *supra* note 13, at 6.

to occur in southern or eastern states with no anti-hazing laws.¹⁶

Such hazing includes physical beatings, forced consumption of excessive amounts of alcohol, and performance of sexual and humiliating activities in front of others. For example, in New York in 1997, a fraternity pledge named Binaya Oja died after consuming excessive amounts of alcohol as part of a hazing ritual at a fraternity house.¹⁷ At Louisiana Tech in 1994, the president of the Kappa Alpha Psi fraternity physically beat Kendrick Morrison, a freshman pledge, during a gathering in a dorm room. Morrison was later taken to the hospital with serious injuries to his neck and head.¹⁸ At the University of Michigan in 1999, students physically beat pledges and shot one in the groin with a BB gun at a fraternity initiation.¹⁹ At Cornell University in 1994, students beat, tortured, and embarrassed Sylvester Lloyd after rushing to join the local Alpha Phi Alpha Fraternity.²⁰ Then in May 2006, pictures surfaced on the Internet of hazing in Northwestern University's women's soccer team. These pictures depicted the women engaged in underage drinking, forced exercise, and obligatory activities including simulating sex acts while wearing blindfolds and having their hands bound behind their backs.²¹

Hazing has not been discriminatory, as it can occur at various colleges and universities nationwide. One student commented in the Alfred University study:

I do believe hazing occurs at each and every college campus. It is not exclusive to certain sports, to gender or to skill level. Does this mean it is OK? Do we accept it as the norm based on the fact that virtually every student-athlete has experienced it in some form? Is there any possible way to regulate such behavior? These are questions I often ask myself when presented with this topic . . . I honestly don't see any possible or realistic method in which to limit, let alone eliminate, this type of behavior.²²

Due to the widespread nature of this problem, colleges and universities have responded by making significant changes to their policies against hazing. After all, "[f]rom a liability standpoint, fraternities no longer can afford their Animal House antics."²³ State colleges and universities must create preventative policies due to the fact that these schools cannot completely prohibit fraternities from being on campus, because these restrictions could violate the constitutionally-protected

16. *Id.*

17. *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344, 345 (N.Y. App. Div. 1999).

18. *Morrison*, 738 So. 2d at 1110.

19. Jodi S. Cohen, *U-M Probes 2nd Hazing*, DETROIT NEWS, Jan. 7, 2000, at C1.

20. *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 1999 WL 47153, at *1 (N.D.N.Y. 1999).

21. *Northwestern Women's Soccer Team Suspended After Photos of Alleged Hazing Are Publicized*, USA TODAY (May 16, 2006), available at http://www.usatoday.com/sports/college/soccer/2006-05-15-northwestern-suspension_x.htm.

22. Sussberg, *supra* note 13, at 1431 n.45.

23. Jenna MacLachlan, *Dangerous Traditions: Hazing Rituals on Campus and University Liability*, 26 J.C. & U.L. 511, 532 (2000) (citation omitted).

freedom to associate.²⁴ Consequently, many states have passed anti-hazing statutes that criminalize hazing.²⁵ Some colleges and universities have attempted to reduce the incidence of hazing by creating “Hazing Hotlines,” where students can report incidents of hazing, and other colleges and universities have taken the extreme step of eliminating Greek life altogether.²⁶ However, these measures have not been enough in most cases.²⁷ Consequently, colleges and universities across the country have found themselves “under siege” due to hazing liability, as courts have held colleges and universities can be liable for students’ hazing activities under several tort law principles.²⁸ Despite the occurrence of hazing in both fraternities and college and university athletic teams, significant attempts to hold colleges and universities liable for hazing have occurred only in the fraternity context. Still, colleges and universities should be aware that they can be held liable in the student-athlete context as well.

This note will examine the liability of colleges and universities in both the fraternity and student-athlete context, reasons for liability, and what limits should be placed on college and university liability. Part I will provide the history of college and university liability from both a statutory perspective as well as state and federal court jurisprudence. Part II will focus on liability in the fraternity context. Part III will compare fraternity liability to the student-athlete context, and discuss the disparity between the number of hazing cases involving fraternities and student-athletes. Part IV will then discuss when liability should be imposed in both the fraternity and student-athlete contexts and whether different rules should be applied in the two contexts. The note will conclude that colleges and universities should be liable in both the fraternity and student-athlete contexts for foreseeable physical injuries from hazing incidents. More specifically, if colleges and universities are aware of hazing occurring on their campuses and have not taken appropriate action to prevent it, then they must be held accountable or else hazing will continue. However, there should be limits to college and university liability; colleges and universities should not be held liable if the hazing incident was an isolated event and the institution had no prior knowledge of hazing incidents in a particular fraternity or athletic team.

24. Kendrick, *supra* note 5, at 437. Courts have held that a state would need to meet a “heavy burden” if it did not recognize a student group. *Healy v. James*, 408 U.S. 169, 184 (1972).

25. See *infra* note 30. See also Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 682 (2001).

26. The University of Oregon uses “Hazing Hotlines” while Amherst, Colby, and Franklin & Marshall colleges have banned fraternities altogether. Govan, *supra* note 25, at 682–83 n.20, 22.

27. See Ball, *supra* note 8, at 482; R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN’S L. REV. 87, 113 (2002).

28. Govan, *supra* note 25, at 681–82 (citing *Furek v. Univ. of Del.*, 594 A.2d 506, 520–28 (Del. 1991) (discussing the principles of tort law that impose duties on colleges and universities to protect students from injury)).

I. LEGISLATIVE AND JUDICIAL HISTORY

A. State Statutes and the Definition of Hazing

Hazing has been a chronic problem in United States' educational institutions at least since 1874 when Congress passed the first hazing statute to prevent hazing at the Naval Academy in Annapolis, Maryland.²⁹ Over the years, forty-four states have enacted anti-hazing laws,³⁰ but many have struggled to define hazing. Thus, several definitions exist not only for states but also for colleges and universities as well as fraternities and sororities, which make it difficult to determine what sort of activities can be considered hazing when imposing liability. Some statutes and policies provide brief definitions while others are lengthier. For example, hazing has been characterized as:

any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person's willingness to participate. This does not include activities such as rookies carrying the balls, team parties with community games, or going out with your teammates, unless an atmosphere of humiliation, degradation, abuse or danger arises.³¹

However, many states have limited their definition to either eliminate the humiliation element or simply do not cover athlete hazing.³² States also differ on whether consent of the person hazed is included in the definition.³³ Other more

29. Act of June 23, 1874, ch. 453, 18 Stat. 203 (1874). See Kendrick, *supra* note 5, at 409.

30. See ALA. CODE § 16-1-23 (2001); ARK. CODE ANN. § 6-5-201 (West 1999); ARIZ. REV. STAT. ANN. § 15-2301 (2001); CAL. EDUC. CODE § 32051 (West 2002); COLO. REV. STAT. § 18-9-124 (West 2004); CONN. GEN. STAT. ANN. § 53-23a (West 2001); DEL. CODE ANN. tit. 14, §§ 9301-9304 (1999); FLA. STAT. § 240.262 (1998); GA. CODE ANN. § 16-5-61 (West 2003); IDAHO CODE § 18-917 (1997); 720 ILL. COMP. STAT. ANN. 120/5 (West 2003); IND. CODE ANN. § 35-42-2-2 (West 2004); IOWA CODE § 708.10 (West 2003); KAN. STAT. ANN. § 21-3434 (West 1995); KY. REV. STAT. ANN. § 164.375 (West 2006); LA. REV. STAT. ANN. § 17:1801 (2001); ME. REV. STAT. ANN. tit. 20, § 10004 (West 1993); MD. CODE ANN., CRIMINAL LAW, § 3-607 (West 2002); MASS. ANN. LAWS ch. 269, § 17 (LexisNexis 1992); MICH. COMP. LAWS ANN. § 750.411t (West 2004); MINN. STAT. ANN. § 121A.69 (West Supp. 2007); MISS. CODE ANN. § 97-3-105 (West 2005); MO. ANN. STAT. § 578.360 (West 2003); NEB. REV. STAT. § 28-311.06 (1995); NEV. REV. STAT. ANN. § 200.605 (LexisNexis 2006); N.H. REV. STAT. ANN. § 631:7 (1996); N.J. STAT. ANN. § 2C:40-3 (2005); N.Y. PENAL LAW § 120.16 (McKinney 1998); N.C. GEN. STAT. § 14-35 (2005); N.D. CENT. CODE § 12.1-17-10 (1997); OHIO REV. CODE ANN. § 2903.31 (West 2006); OKLA. STAT. ANN. tit. 21, § 1190 (West 2002); OR. REV. STAT. § 163.197 (2005); 24 PA. CONS. STAT. § 5353 (West 2006); R.I. GEN. LAWS § 11-21-1 (2002); S.C. CODE ANN. § 16-3-510 (West Supp. 2006); TENN. CODE ANN. § 49-7-123 (2002); TEX. EDUC. CODE ANN. § 37.152 (West 2006); UTAH CODE ANN. § 76-5-107.5 (2003); VT. STAT. ANN. tit. 16, § 140b (2004); VA. CODE ANN. § 18.2-56 (West 2005); WASH. REV. CODE ANN. § 28B.10.901 (West 1997); W. VA. CODE § 18-16-3 (2003); WIS. STAT. ANN. § 948.51 (West 2005). The only states that do not have an anti-hazing law are Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming. StopHazing.org, *State Anti-Hazing Laws*, <http://www.stophazing.org/laws.html> (last visited Apr. 13, 2007).

31. Hoover, *supra* note 13, at 8.

32. *Id.*

33. *Id.*

simple definitions state: “any activity that might reasonably be expected to bring physical harm to the individual.”³⁴ Most hazing violations constitute misdemeanor offenses,³⁵ but in some states, such as Utah, a hazing violation is classified as a felony.³⁶

The 2006 mistrial involving the hazing of five Florida A&M University fraternity members demonstrated the importance of hazing-definition specificity. In that case, the jury said “it was perplexed by an undefined legal term and unable to reach a verdict.”³⁷ This would have been the first trial to test a new Florida state law that made hazing a felony if it resulted in death or “serious bodily injury,” but the statute did not define what constituted serious bodily injury.³⁸ Defense lawyer Chuck Hobbs stated: “That is a very serious legal term and it has been defined in other statutes and yet for whatever reason it’s not defined in this one.”³⁹ The circuit judge merely instructed the jury that it meant neither slight nor moderate.⁴⁰ Thus, the four Kappa Alpha Psi brothers were not sentenced for using their fists, boxing gloves, and canes to beat Marcus Jones, who suffered a broken ear drum and needed surgery on his buttocks due to the severity of the beatings over the four nights of initiation.⁴¹ Nonetheless, Florida A&M suspended the defendants pending the outcome of the criminal case, and also suspended the fraternity until 2013.⁴²

While many states maintain definitions of hazing that may seem vague,⁴³ state

34. *Rocha v. Faltys*, 69 S.W.3d 315, 324 (Tex. App. 2002).

35. *See, e.g.*, ALA. CODE § 16-1-23 (2001); ARK. CODE ANN. § 16-5-201 to 203 (1999); CAL. EDUC. CODE §§ 32050–32051 (West 2002); COLO. REV. STAT. ANN. § 18-9-124 (West 2004); DEL. CODE ANN. tit. 14, §§ 9301–9304 (1999); GA. CODE ANN. § 16-5-61 (2003); IDAHO CODE ANN. § 18-917 (1997); IOWA CODE ANN. § 708.10 (West 2003); KAN. STAT. ANN. § 21-3434 (West 1995); MO. ANN. STAT. §§ 578.360, 578.363 & 578.365 (2005); NEB. REV. STAT. §§ 28-311.06 & 28-311.07 (1995); N.H. REV. STAT. ANN. § 631:7 (1996); N.Y. PENAL LAW §§ 120.16 & 120.17 (McKinney 1998); N.C. GEN. STAT. §§ 14-35, 14-36 & 14-38 (2005); N.D. CENT. CODE § 12.1-17-10 (1997); OHIO REV. CODE ANN. § 2903.31 (West 2006); OKLA. STAT. ANN. tit. 21, § 1190 (West 2002); 24 PA. STAT. ANN. §§ 5352–5354 (West 2006); R.I. GEN. LAWS §§ 11-21-1 (2002); WASH. REV. CODE ANN. §§ 28B.10.900–902 (West 1997).

36. UTAH CODE ANN. § 76-5-107.5 (2003) (hazing is a felony if it involves a dangerous weapon or bodily injury). *See also* 720 ILL. COMP. STAT. ANN. 120/10 (West 2003) (hazing is a misdemeanor unless it results in “death or great bodily harm” and then it is a felony); IND. CODE ANN. § 35-42-2-2 (West 2004) (imposes both misdemeanor and felony penalties depending on severity); TEX EDUC. CODE ANN. § 37.152 (West 2006) (hazing may rise to a felony only if death results); VA. CODE ANN. § 18.2-56 (West 2003) (hazing is a “Class 1 misdemeanor”); W. VA. CODE § 18-16-3 (2003) (misdemeanor unless acts constitute a felony); WIS. STAT. ANN. § 948.51 (West 2005) (misdemeanor unless the “act results in great bodily harm to another”).

37. Bill Kaczor, *Mistrial in Florida A&M Hazing Case*, BOSTON GLOBE (Oct. 9, 2006), available at http://www.boston.com/news/nation/articles/2006/10/09/mistrial_in_florida_am_hazing_case/?rss_id=Boston.com+%2F+News.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. “For example, Louisiana [sic] and Kansas’s statutes prohibit behavior that could

supreme courts across the nation have upheld hazing statutes. For example, in *Haben v. Anderson*,⁴⁴ the Illinois Supreme Court held that the Illinois hazing statute did not promote arbitrary enforcement and was not unconstitutionally vague.⁴⁵ The Missouri Supreme Court in *State v. Allen*⁴⁶ held that Missouri's statute was neither vague (because it clearly defined the reach of the words based on common understanding) nor overly broad.⁴⁷ In *McKenzie v. State*,⁴⁸ an intermediate court in Maryland found that an anti-hazing statute defining hazing as "activities and situations . . . that i) recklessly or intentionally ii) subject a student to the risk of serious bodily injury iii) for the purpose of initiation into a student organization" was not void for vagueness under the Due Process Clause.⁴⁹

Beyond determining whether a state statute's definition of hazing is vague, other courts have also limited the scope of liability imposed by the statutes. For example, in *Perkins v. Commonwealth*,⁵⁰ an intermediate appellate court in Massachusetts held that the Massachusetts hazing statute's criminal prohibition of "brutal treatment or forced physical activity" is directed at student organizations and not at the educational institutions themselves.⁵¹ Still, this distinction does not answer the question of when colleges and universities may be held liable for the hazing of their students.

B. State and Federal Court Jurisprudence

Amidst this lack of uniformity in the definition of hazing is a similar lack of uniformity in courts' imposition of liability on colleges and universities for the hazing done by students. The primary theory that students rely on is negligence. In order to recover under any claim of negligence against a college or university, a student must prove four elements: (1) the college or university had a legal duty of care to protect the student from unreasonable risks; (2) breach of this duty of care by the college or university; (3) actual and proximate causation; and (4) injury to the plaintiff.⁵² Historically, there have been three theories that plaintiffs have relied on to establish the presence of the duty of care: (1) the doctrine of *in loco*

'reasonably be expected to result in great bodily harm.'" Jacinda Boucher, *Hazing and Higher Education: State Laws, Liability, and Institutional Implications*, STOPHAZING.ORG, http://www.stophazing.org/devtheory_files/devtheory7.htm (last visited Apr. 13, 2007) (citation omitted). See, e.g., KAN. STAT. ANN. § 21-3434 (1995).

44. 597 N.E.2d 655 (Ill. App. Ct. 1987) (involving several members of the Western Illinois University Lacrosse Club who were charged under the state's anti-hazing statute).

45. *Id.*

46. 905 S.W.2d 874 (Mo. 1995).

47. *Id.* at 877-78.

48. 748 A.2d 67 (Md. Ct. Spec. App. 2000).

49. *Id.* at 74.

50. 752 N.E.2d 761 (Mass. App. Ct. 2001).

51. *Id.* at 765.

52. Crow & Rosner, *supra* note 27, at 92-93; Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001) (holding that the University owed a duty of care to the cheerleader because there was a special relationship and it voluntarily assumed a duty of care to the cheerleader); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. Ct. App. 1999).

parentis, (2) the landowner-invitee theory, and (3) a special relationship between the students and the college or university.⁵³ There have been three separate eras of liability for colleges and universities: (1) *in loco parentis* holding colleges and universities to a high duty of care, (2) the “no duty” rule following the demise of the *in loco parentis* standard, and (3) the exceptions to the “no duty” rule commenced by *Furek v. University of Delaware*.⁵⁴ These three eras of college and university liability will be discussed in turn.

1. *In Loco Parentis*

Until the 1960s and 1970s, colleges and universities stood *in loco parentis* to their students, or “in place of the parents.”⁵⁵ Under this doctrine, colleges and universities are responsible for the welfare of students in their care. In *Gott v. Berea College*, the Kentucky Supreme Court used the *in loco parentis* doctrine to sustain a school’s claim of authority over its students.⁵⁶ The demise of this doctrine began in the 1960s when society began to view college and university students as adults who do not need extra attention,⁵⁷ and by the 1970s “courts began to hold that colleges had no duty to protect their students.”⁵⁸

2. “No Duty” Rule

The “no duty” rule states that “the relationship between the college and the student is simply one that provides education only. The university is under no obligation or duty to control or govern the students’ behavior.”⁵⁹ For example, in *Beach v. University of Utah*,⁶⁰ the Utah Supreme Court rejected the claim that a special relationship existed between the student and the school, thus accepting the notion that college and university students are adults and do not require extra protection beyond what they can provide themselves.⁶¹ Colleges and universities enjoyed immunity from liability during this period. However, this veil of immunity was breached by *Furek v. University of Delaware*.

3. Exceptions to the “No Duty” Rule

While the demise of the *in loco parentis* doctrine led to decreased liability for colleges and universities, *Furek* demonstrated that courts will impose a duty on

53. Crow & Rosner, *supra* note 27, at 93.

54. See MacLachlan, *supra* note 23, at 522; Kerri Mumford, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL’Y 737, 746–53 (2001).

55. Crow & Rosner, *supra* note 27, at 93. See MacLachlan, *supra* note 23, at 513–15.

56. 161 S.W. 204 (Ky. 1913). See MacLachlan, *supra* note 23, at 513–14; ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999).

57. See MacLachlan, *supra* note 23, at 513–15.

58. Crow & Rosner, *supra* note 27, at 93. See Mumford, *supra* note 54, at 740–41.

59. Mumford, *supra* note 54, at 738 (citation omitted).

60. 726 P.2d 413 (Utah 1986).

61. MacLachlan, *supra* note 23, at 520.

colleges and universities to protect their students in certain situations—particularly foreseeable, dangerous activities by students that occur on college or university property.⁶² *Furek* was the first major case to hold an institution liable for the injuries to a student caused by a third party. In *Furek*, the Delaware Supreme Court focused on Section 323 of the Restatement of Torts⁶³ and the rejection of the *in loco parentis* standard.⁶⁴ The next section will discuss the question of when to impose liability on colleges and universities for the hazing at fraternities.

II. COLLEGE AND UNIVERSITY LIABILITY FOR HAZING AT FRATERNITIES

Over the decades, there has been an escalated interest in Greek organizations across the country at various colleges and universities. For example,

[i]n the first one-half of the 1980s, membership in Greek organizations grew by one hundred and fifty thousand. By 1988, four hundred thousand students were active in Greek organizations in the six thousand or so chapters nationwide, one hundred thousand of which were replacing graduates each year. Thus, about one million students proceed through the Greek system each decade, with approximately eighty percent of all Greek chapters nationally affiliated.⁶⁵

Moreover, even though fraternities are founded on the basis of brotherhood, “[t]he stereotypical image of fraternities includes students participating in binge drinking, partying, hazing, drug use and sexual freedom.”⁶⁶ Unfortunately, this behavior has resulted in sexual assaults, alcohol-related deaths and injuries, and hazing-related injuries and deaths.⁶⁷

This increased popularity, coupled with increased injuries in fraternities, has led to a similar escalation in litigation involving fraternities. Since the early 1980s, “[s]ubpoenas and depositions [have been] replacing beer cans and pledge paddles as icons on fraternity row.”⁶⁸ Due to public outcry, courts have increasingly held fraternities and the affiliated colleges and universities liable for hazing injuries to students. Liability was usually imposed on colleges and universities when a fraternity was located on the campus and the college or university had exerted authority by imposing hazing regulations on the fraternities.⁶⁹ The following two cases illustrate the increased imposition of liability on colleges and universities.

62. *Id.* at 528–29.

63. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

64. Mumford, *supra* note 54, at 748.

65. Rutledge, *supra* note 6, at 365–66 (citation omitted).

66. Mumford, *supra* note 54, at 743.

67. *Id.* See also Christopher T. Pierson & Lelia B. Helms, *Liquor and Lawsuits: Forty Years of Litigation Over Alcohol On Campus*, 142 EDUC. L. REP. 609, 616 (2000).

68. Mumford, *supra* note 54, at 743–44 (quoting Gary Taylor, *Increasingly Vulnerable: Fraternities Face (Legal) Facts*, NAT’L L.J., Dec. 31, 1990, at 26).

69. *Id.* at 743.

A. *Furek v. University of Delaware*

Furek initiated a major transformation in court jurisprudence on school liability for hazing by paving the way to imposing liability on colleges and universities for fraternity hazing in certain instances.⁷⁰ The case originated at the University of Delaware, where several football players encouraged Jeffrey Furek, who had received a full football scholarship, to join the local chapter of Sigma Epsilon. During initiation, fraternity members ordered Furek to crawl on his hands and knees while being sprayed by a fire extinguisher, and then they paddled him, compelled him to do calisthenics, and forced him to eat food out of a toilet.⁷¹ Furek received the worst injuries when a fraternity member poured a container of lye-based liquid oven cleaner over Furek's back and neck from which he received first and second degree chemical burns.⁷² Furek sought damages in the Delaware Superior Court against the University of Delaware, among others.⁷³

While rejecting the *in loco parentis* doctrine, the Delaware Supreme Court held that based on Section 323 of the Restatement of Torts, the University assumed a "direct responsibility for the safety" of its students, and "[i]f one 'takes charge and control of [a] situation, he is regarded as entering into a relation which is attenuated with responsibility.'" ⁷⁴ Moreover, the court stated that

[t]he evidence in this record . . . strongly suggests that the University not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the University policy of discipline for hazing infractions. The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'⁷⁵

The court held that due to the University's anti-hazing regulations, it had exercised control and authority over hazing activities. This "constituted an assumed duty,"⁷⁶ demonstrating that the University had knowledge of hazing on its campus.⁷⁷ The University, the court said, had a duty to protect Furek from injury, and thus the injuries Furek sustained constituted a breach of that duty. The court stated: "While we agree that the University's duty is a limited one, we are not persuaded that none

70. See, e.g., MacLachlan, *supra* note 23, at 522; Crow & Rosner, *supra* note 27, at 94; Govan, *supra* note 25, at 692-94. However, not all state courts have followed *Furek's* precedent. For example, in *Bash v. Clark University*, a Massachusetts Superior Court recently found no special relationship existed between the student and the University, and therefore the court held that Clark University owed no duty to protect Bash from voluntary use of drugs and alcohol. *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297 (Mass. Sup. Ct. Nov. 20, 2006).

71. *Furek v. Univ. of Del.*, 594 A.2d 506, 509 (Del. 1991).

72. *Id.* at 510.

73. *Id.* at 509.

74. *Id.* at 520 (citation omitted).

75. *Id.* (quoting *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983)).

76. *Id.*

77. Mumford, *supra* note 54, at 750.

exists.”⁷⁸ The court also questioned the claims in *Beach* that the “adult status of college students made university intrusion into alcohol-related activities inappropriate.”⁷⁹

In holding the University liable for Furek’s injuries, the court also recognized liability based on Furek’s status as an invitee on the University’s property.⁸⁰ The court stated that “[a] landowner who knows or should know of an unreasonably dangerous condition or use of his property has a duty to invitees to safeguard the invitee against such hazards including the conduct of third parties.”⁸¹ The court relied on Section 344 of the Restatement of Torts which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.⁸²

The Court determined that the University’s duty to protect Furek under Section 344 was not absolute, and that foreseeability is the “determining factor” for whether the duty exists.⁸³ Thus, a college or university can be held liable as a landowner if it had prior knowledge of a hazardous condition and did not protect students from that hazard.⁸⁴ The Court held that

because at the time of the incident the [U]niversity was aware of past hazing incidents, had made attempts to control fraternity hazing, and was aware that the practice was on-going, there was sufficient evidence for a jury to have determined that the hazing that caused Furek’s injuries was foreseeable.⁸⁵

Thus, the *Furek* court based University liability for Furek’s injuries on two premises: (1) the duty of a service provider to render the necessary service to protect another, and (2) the University’s duty as a landowner to protect the plaintiff as an invitee against any foreseeable and dangerous conditions on the University

78. *Furek*, 594 A.2d at 517.

79. MacLachlan, *supra* note 23, at 525.

80. *See id.* at 528; Mumford, *supra* note 54, at 760–61.

81. *Furek*, 594 A.2d at 520. *See also* Miller v. Int’l Sigma Pi Fraternity, No. 1837 Civil 1995, 1999 WL 1098201 (Pa. Com. Pl. Jan. 25, 1999) (demonstrating the importance of knowledge in invitee relationships, as the court held that the University was not liable as a social host for injuries because it was not demonstrated that the University had actual knowledge of the party at which the plaintiff was injured).

82. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

83. MacLachlan, *supra* note 23, at 528.

84. *See* Crow & Rosner, *supra* note 27, at 94.

85. MacLachlan, *supra* note 23, at 529. *See also* Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003) (holding that liability should not be imposed due to the absence of the foreseeability of injury).

property.⁸⁶ Since the second basis is more frequently relied upon than the first, it will be the focus of this section. “A majority of jurisdictions hold that landowners have a duty to protect invitees from foreseeable attacks.”⁸⁷ Similarly, “[a] university owes student tenants the same duty to exercise reasonable care as a private landowner.”⁸⁸ With regard to the foreseeability component of the landowner-invitee theory, courts have used four tests to ascertain if the conduct was foreseeable:⁸⁹ the specific harm test,⁹⁰ the prior similar incidents test,⁹¹ the balancing test,⁹² and the totality of the circumstances test.⁹³ By contrast, “other courts have rejected the notion that a landlord has a duty to protect a tenant from harm caused by intentional or criminal acts of third persons.”⁹⁴

Despite the significant change in jurisprudence with the *Furek* decision, some courts have been reluctant to employ its analysis.⁹⁵ “Even though universities have taken active steps to enforce their drinking or hazing policies, courts have continually held that a social policy prohibiting underage drinking does not create a special relationship and a duty for the university to protect students.”⁹⁶ For example, in *Booker v. Lehigh University*,⁹⁷ a federal district court in Pennsylvania held that if a college or university’s policies regarding protection of students created a special relationship, then there would be an unwarranted return to the *in loco parentis* standard.⁹⁸ Instead, the court held that the policies merely constituted instructions for students on how to behave like adults and drink

86. Govan, *supra* note 25, at 696.

87. Mumford, *supra* note 54, at 761 (citing *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 973–74 (Ind. 1999) (holding that the chapter of the fraternity as landowner owed a duty of care to protect the student as invitee from foreseeable sexual assaults at the chapter)).

88. *Id.* (citing *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (holding that the community college district had a duty to exercise care to protect students from reasonably foreseeable assaults on campus)).

89. *Delta Tau Delta*, 712 N.E.2d at 971; Mumford, *supra* note 54, at 761. *See generally* *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405 (Wyo. 1997); *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891, 899–901 (Tenn. 1996); *Boren v. Worthen Nat’l Bank of Ark.*, 921 S.W.2d 934, 940–41 (Ark. 1996); *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993).

90. “Under the specific harm test, a landowner owes no duty unless the owner knew or should have known that the specific harm was occurring or was about to occur.” *Delta Tau Delta*, 712 N.E.2d at 971 (citation omitted).

91. “Under the prior similar incidents (PSI) test, a landowner may owe a duty of reasonable care if evidence of prior similar incidents of crime on or near the landowner’s property shows that the crime in question was foreseeable.” *Id.* at 972 (citation omitted).

92. “Under . . . the balancing test, a court balances ‘the degree of foreseeability of harm against the burden of the duty to be imposed.’” *Id.* (quoting *McClung*, 937 S.W.2d at 901).

93. “Under the totality of the circumstances test, a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.” *Id.* (citation omitted).

94. Mumford, *supra* note 54, at 761 (citation omitted).

95. *Id.* at 751.

96. *Id.*

97. 800 F. Supp. 234 (E.D. Pa. 1992).

98. Mumford, *supra* note 54, at 752.

responsibly, and thus the University did not assume a duty to protect the students.⁹⁹

Nonetheless, the refusal of some courts to follow the *Furek* analysis does not mean that a college or university should escape liability when it tries and fails to protect students from hazing or excessive drinking merely because it is an educational institution and has no duty to protect its students from injury.¹⁰⁰ Moreover, colleges and universities should be held liable based on the landowner-invitee standard when they own the property where fraternity-related injuries occur.¹⁰¹ Nonetheless, liability largely depends upon the facts of each case—for example, a college or university should be liable if it has exercised control over a fraternity and its members and it has knowledge that its hazing policies have not been followed.¹⁰² While some courts have refused to follow *Furek*, other courts have held colleges and universities liable for hazing incidents. One such court is the *Morrison* court.

B. *Morrison v. Kappa Alpha Psi Fraternity*

In *Morrison v. Kappa Alpha Psi Fraternity*, which occurred a little over eight years after *Furek*, an intermediate appellate court in Louisiana held a school thirty-three percent liable because “social policy justifies a special relationship between the University and its students in this particular instance.”¹⁰³ In *Morrison*, a student and his parents brought an action against Louisiana Tech, among others, arising out of a fraternity hazing incident at the University on April 10, 1994.¹⁰⁴ Kendrick Morrison, a freshman interested in membership in Kappa Alpha Psi, suffered injuries to his head and neck after the president of the Tech Kappa chapter physically beat him at a gathering in the president’s dorm room. Morrison received treatment at the Lincoln General Hospital, and reported the incident to campus police.¹⁰⁵ In the litigation that ensued, Morrison sought loss of earning capacity based on an expert’s testimony that Kendrick’s lifelong dream of becoming a physical therapist would most likely no longer be achievable due to Kendrick’s injuries from the hazing incident.¹⁰⁶

The appellate court imposed liability on Louisiana Tech on the theory of negligence because the University breached a duty owed to Morrison and that breach was the legal cause of his injuries. The court determined that the University had a special relationship with Morrison, and that special relationship created a duty on the part of the University to Morrison. This duty was based on the circumstances of this case in which a school that allows and regulates fraternal organizations has a “duty toward their students to act within reasonable bounds to

99. *Booker*, 800 F. Supp. at 241.

100. *See Mumford*, *supra* note 54, at 753.

101. *Id.* at 762.

102. *Id.* at 762–63, 767.

103. *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1115 (La. Ct. App. 1999).

104. *Id.* at 1110.

105. *Id.*

106. *Id.* at 1111.

protect against illegal and proscribed hazing.”¹⁰⁷ In order to ascertain whether a breach occurred, the court determined whether the University failed to exercise reasonable care in protecting those students at risk of injury due to hazing activities. The court found “that a university with known and documented history of hazing by a fraternal organization” is obligated “to monitor such further behavior by the fraternity.”¹⁰⁸ In determining whether to impose a duty, the court gave great weight to the fact that the Assistant Dean of Student Life had received complaints about the fraternity’s hazing on campus and did not adequately respond to those reports, which occurred only one year prior to Morrison’s beating.¹⁰⁹ The University was “under a duty to monitor and prevent any further prohibited hazing activity by Kappa.”¹¹⁰ The court held that since the “[U]niversity’s response to and investigation of reports of Kappa hazing in 1993, the year prior to the incident involving Kendrick, were inadequate,” the University breached its duty to protect Morrison.¹¹¹ Lastly, in order to prove causation, the court determined that the “[U]niversity’s failure was a precipitating or contributing factor which made it possible for Kendrick to be physically hazed by the president.”¹¹² In that sense, the court said that the University had caused Kendrick’s injury. The University’s breach of duty was also the legal cause of injury since “[t]he risk that a student might be injured as a result of physical hazing is clearly within the scope of protection contemplated by imposition of such a duty.”¹¹³

The court’s decision in *Morrison* established “a precedent that colleges and universities may be held near a standard of strict liability, providing all the more incentive for administrators to be more aggressive in their efforts to address hazing.”¹¹⁴ Although courts have not taken a uniform approach in determining when to impose liability on colleges and universities, it is safe to say that they are most likely to do so when officials knew of hazing activities, when the institution has issued anti-hazing regulations, and when it ultimately failed to prevent hazing.¹¹⁵

C. College and University Attempts to Limit Liability

Due to the increase in liability initiated by *Furek* and *Morrison*, colleges and universities nationwide have employed various methods, including creating and

107. *Id.* at 1115.

108. *Id.*

109. *Id.* at 1114–15.

110. *Id.* at 1115.

111. *Id.* at 1117. “[W]hen universities fail to prevent the hazing of pledges, and a pledge is injured, courts may find that the universities have breached their duty to protect the students because these institutions have attempted to control and regulate hazing activities by having anti-hazing rules.” Kendrick, *supra* note 5, at 437.

112. *Morrison*, 738 So. 2d at 1117.

113. *Id.*

114. Ball, *supra* note 8, at 492.

115. Kendrick, *supra* note 5, at 437. Moreover, “[w]here the universities had particular knowledge of hazing activities and then attempted to regulate and supervise the fraternities with anti-hazing regulations, the courts have determined that a duty of care to the students exists.” *Id.*

enforcing stricter policies against hazing and alcohol consumption, with the hope of limiting their liability and protecting themselves from fraternity hazing liability.¹¹⁶ For example, some have banned alcohol from fraternity premises while others notify parents of high-risk behavior.¹¹⁷ Some colleges and universities require that only students of legal drinking age are permitted to consume alcoholic beverages on fraternity premises, and third parties must provide those beverages.¹¹⁸ Other options to decrease liability include that a college or university could “choose to completely deny any association between itself and the student organization, thereby relinquishing all control over the organization.”¹¹⁹ It could also “maintain control over the student organizations, [and] . . . carefully monitor the organizations and make sure regulations were being implemented.”¹²⁰ It is important for colleges and universities to take these initiatives because they are in a better position than national fraternities to implement these policies to prevent tragedies.

Defenses that have been used for injuries that occurred during hazing activities in fraternities include consent, assumption of the risk, and contributory negligence—each of which similarly suggests that the pledge was to some extent responsible for his injury.¹²¹ Consent is an “[a]greement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person; legally effective assent.”¹²² In order for consent to function as a defense, the plaintiff must have had the capacity to consent and actually consented to the conduct in question or to substantially similar conduct.¹²³ Consent cannot be used as a defense if the conduct in question was excessive or disproportionate to the consent or if the injured person is exposed to serious bodily injury or death.¹²⁴ Assumption of the risk is broader than consent; it requires that the plaintiff knew of the risk and understood its nature, and that the plaintiff’s choice was free and voluntary.¹²⁵ “This knowledge requirement is exceedingly difficult for a defendant

116. Mumford, *supra* note 54, at 767.

117. *Id.* at 768.

118. *Id.* at 767–68.

119. Kendrick, *supra* note 5, at 437 (citing Jennifer L. Spaziano, Comment, *It’s All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 244 (1994)).

120. *Id.*

121. See Susan J. Curry, *Hazing and the “Rush” Toward Reform: Responses From Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 107 (1989).

122. BLACK’S LAW DICTIONARY 160 (8th ed. 2004).

123. Curry, *supra* note 120, at 108. See *Davies v. Butler*, 602 P.2d 605, 611 (Nev. 1979) (holding that the giving of the jury instruction that “[a] person may expressly or by voluntarily participating in an activity consent to an act which would otherwise be a battery,” was misleading and reversible error).

124. Curry, *supra* note 120, at 109.

125. *Id.* See *Ballou v. Sigma Nu Gen. Fraternity*, 352 S.E.2d 488, 495 (S.C. Ct. App. 1986) (holding that the plaintiff’s consumption of an excessive quantity of liquor detracted from his ability to appreciate the increased risks and the jury could conclude that it no longer constituted “deliberate drinking with knowledge of what [was] being consumed.”). See also *Ex parte Barran*, 730 So. 2d 203, 206–08 (Ala. 1998) (holding that the plaintiff could not hold a fraternity liable for his injuries because the pledge had assumed the risk of participating in the fraternity’s hazing

to prove, even if the hazing does not involve drinking to intoxication.”¹²⁶ Contributory negligence, unlike assumption of the risk, denies all recovery to the plaintiff due to her own negligent behavior.¹²⁷ Due to the severe result from the imposition of the contributory negligence defense, courts have adopted the alternative of comparative negligence, which shifts the focus from liability to damages and divides the damages among all of the negligent parties based on their individual degree of fault.¹²⁸

D. Recent Fraternity Hazing Litigation with No Liability Imposed

There also exist cases in which institutions and fraternities have escaped liability. For example, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*¹²⁹ demonstrates how colleges and universities have avoided liability when taking part in the hazing activities at fraternity houses is voluntary rather than required. In *Prime*, a pledging fraternity member brought a personal injury action for injuries sustained from participating in a fraternity initiation event. Matthew Prime, a nineteen-year-old pledge of the Beta Gamma chapter of Pi Kappa Alpha fraternity at the University of Kansas, “was provided alcoholic beverages in large quantities and encouraged *but not required* to drink them during the occasion.”¹³⁰ Prime consumed excessive amounts of alcohol because of what he perceived to be “peer pressure” after he was told “if you want to drink that would be fine because it will be ‘the time of your life’” and Prime did so in order to “fit in.”¹³¹ However, Prime was not able to recall who had actually said those words to him. He later lost consciousness, at which point the fraternity members took him to the hospital. Prime’s blood alcohol content was .294.¹³² Prime brought a personal injury action against the local chapter, the national fraternity organization, and the University of Kansas, among others. Eventually, Prime released the University from all claims, and the Kansas Supreme Court granted summary judgment in favor of all defendants after it determined that no duty was breached.¹³³ One statement which greatly aided the court’s finding was a statement Prime made to the emergency room physician who treated him at the hospital—Prime told her that his intoxication “had nothing to do with hazing and that he was told he did not have to drink alcohol if he did not want to.”¹³⁴ Thus, this case illustrates that when hazing is a choice, defendants may avoid liability.

Cornell University avoided liability in *Lloyd v. Alpha Phi Alpha Fraternity*.¹³⁵

activities).

126. Curry, *supra* note 121, at 110.

127. *Id.*

128. *Id.*

129. 47 P.3d 402 (Kan. 2002).

130. *Id.* at 404 (emphasis added).

131. *Id.* at 406.

132. *Id.* at 404. “[Prime] alleged that he incurred medical expenses but no permanent injuries.” *Id.*

133. *Id.*

134. *Id.* at 406.

135. No. 96-CV-348, 97-CV-565, 1999 WL 47153 (N.D.N.Y. Jan. 26, 1999).

In that case, Sylvester Lloyd, Jr. was accepted to pledge Alpha Phi Alpha Fraternity, the oldest African-American fraternity in the United States. Lloyd based his complaint on his participation in the initiation activities that occurred on March 12, 1995, and allegedly included physical beatings and torture, psychological coercion, and embarrassment—some of which occurred at the fraternity house, which was owned by Cornell.¹³⁶ Lloyd sought to hold Cornell liable for his injuries under three New York common law theories: (1) premises liability, (2) negligent supervision and control, and (3) breach of implied contract. In *Lloyd*, the federal district court for the Northern District of New York held that “[a]lthough the University published materials about the dangers of hazing and its prohibition on campus, and at times offered a seminar to help fraternities improve their pledge education programs, this involvement does not rise to the level of encouraging and monitoring pledge participation.”¹³⁷ Moreover, Lloyd failed to prove that a duty to supervise is to be “imposed whenever a university creates a ‘special relationship’ with an organization affiliated with the campus.”¹³⁸

With regard to premises liability, the *Lloyd* court cited cases that recognized that a landowner could be “held liable to a plaintiff for harm suffered—even where the plaintiff engages in a voluntary activity—if the landowner (a) had actual or constructive knowledge that injurious conduct was likely to occur or recur, and (b) fails to control that conduct despite the opportunity to do so.”¹³⁹ The court held, however, that Lloyd did not prove that Cornell had a duty as a landowner to control the behavior of the fraternity members, as Lloyd failed to show actual knowledge through a history of hazing and failed to show constructive knowledge through the landlord/agent relationship.¹⁴⁰

The court distinguished *Lloyd* from *Furek*, where the court held the University liable to Furek as an invitee on campus grounds, because in *Furek* the University’s knowledge came from past experience. More specifically, the *Lloyd* court noted several differences between *Furek* and the case at hand. In *Furek*, the University had knowledge of past hazing incidents on campus that resulted in injuries to students; pre-hazing activities were witnessed by campus security personnel; and it was common knowledge that hazing was occurring, including the fact that Furek’s

136. *Id.* at *1.

137. *Id.* at *3. See *Rothbard v. Colgate Univ.*, 652 N.Y.S.2d 146, 148 (N.Y. App. Div. 1997) (rejecting the plaintiff’s contention that because the university expressly provided in its student handbook that “certain conduct by its students was prohibited,” it thus voluntarily “assumed the duty to take affirmative steps to supervise plaintiff and prevent him from engaging in the prohibited activity”).

138. *Lloyd*, 1999 WL 47153, at *3.

139. *Id.* at *4. See *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 680 N.Y.S.2d 277, 278 (N.Y. App. Div. 1998) (“[A] landowner cannot be held liable for injuries sustained by a party engaged in a voluntary activity unless the landowner had knowledge of the activities and exercised a degree of supervision or control.”); *Jarvis v. Eastman*, 609 N.Y.S.2d 683, 684 (N.Y. App. Div. 1994) (“[N]o liability will be imposed when the injury . . . is the direct result of the manner in which the injured party engaged in a voluntary activity and the landowner neither participated in the activity nor exercised any supervision and control over the activity.”).

140. *Lloyd*, 1999 WL 47153, at *5–9.

fraternity had performed hazing for at least five years before Furek's injuries.¹⁴¹ In contrast, the court stated that "Cornell did not have this much history to rely upon."¹⁴² For example, while Cornell officials received two anonymous letters alleging that the fraternity members were engaging in hazing activities, the letters did not indicate how the pledges were being mistreated, and one of the letters came from a phony address.¹⁴³ More importantly, Lloyd did not demonstrate that the fraternity at Cornell participated in yearly ritual hazing as had the fraternity in *Furek*, and Lloyd did not demonstrate that Cornell students were generally aware of hazing at the fraternity.¹⁴⁴ The court stated:

The only common knowledge to which Plaintiff holds Cornell is that black fraternities have a history of problems with hazing. This knowledge[,] however, is too general to impose a duty upon Cornell. Otherwise, the common knowledge that hazing can occur within any fraternity would impose a duty upon all colleges that have Greek organizations, regardless [of] whether any hazing actually occurs on a particular campus.¹⁴⁵

Moreover, Lloyd made a concerted effort to hide the incidents rather than report them to Cornell officials. Thus, "[i]f Cornell is unable to learn about hazing through the individual student, the fraternity chapter, the student body, or the national fraternity organization, then it is contrary to common sense to think a duty could be imposed upon the University to protect persons against these unknown activities."¹⁴⁶ Cornell also took immediate action when it was informed of suspected hazing, including opening an investigation and commencing disciplinary proceedings.¹⁴⁷ Due to Cornell's responses to previous hazing incidents and to its lack of knowledge of the hazing at Alpha Phi Alpha, it could be argued that Cornell was justifiably excused of any liability for Lloyd's injuries.

Both *Prime* and *Lloyd* demonstrate that despite the major turning point in hazing litigation begun by the *Furek* and *Morrison* decisions, those cases have not resulted in a complete rejection of the "no duty" rule for colleges and universities. *Prime* and *Lloyd* suggest that for a college or university to incur liability for hazing, the hazing occurring at fraternities housed on college or university property must be compulsory; the student must not hide the injuries; and, most importantly, the colleges and universities must have knowledge of the hazing activities, either due to previous reports of hazing or common knowledge that hazing has occurred at a certain fraternity.¹⁴⁸

The question now becomes whether this analysis also extends to the student-

141. *Id.* at *6. See *Furek v. Univ. of Del.*, 594 A.2d 506, 510, 520 (Del. 1991).

142. *Lloyd*, 1999 WL 47153, at *7.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Common knowledge of hazing at fraternities in general is not included because that would impose liability upon all colleges and universities with Greek organizations.

athlete context. While this analysis of college and university liability for hazing at fraternities is comparable to the analysis of college and university liability for injuries caused by hazing in intercollegiate athletic team settings, it should also be somewhat different if the college and university's duty toward the student-athlete is stronger than its duty toward the fraternity pledge. The next section will compare the analysis of college and university liability in the fraternity context to the student-athlete context.

III. COLLEGE AND UNIVERSITY LIABILITY FOR HAZING OF STUDENT-ATHLETES

Since the first recorded incident of hazing in collegiate sports in 1923 at Hobart College when football players beat a freshman and threw him into a lake, "hazing in college sports has continued and appears to be on the rise."¹⁴⁹ Awareness of athlete hazing grew even more after the death of Nicholas Haben in a lacrosse team initiation involving alcohol in 1990 at Western Illinois University.¹⁵⁰ However, hazing continued despite this increased awareness. For example, in January 2000, the University of Vermont cancelled its men's ice hockey season after a freshman filed suit alleging that players hazed the freshmen team members by coercing them "into drinking large amounts of alcohol, parading naked while holding one another's genitals and engaging in other degrading activities."¹⁵¹ More recently, in June 2006, the University of California at Santa Barbara issued a press release stating that "[f]ollowing a campus investigation, the University . . . has taken punitive actions against the women's lacrosse club team for engaging in activities that were in violation of the campus's anti-hazing regulations."¹⁵² This investigation occurred after the disclosure on the Internet of photographs from a 2004 party "showing members of the team engaging in activities that appeared to be in violation of UCSB's anti-hazing rules."¹⁵³

149. Sussberg, *supra* note 13, at 1430. For example, in 1996, a freshman on the University of North Carolina men's soccer team was hospitalized after drinking excessive amounts of alcohol at a team co-captain's house; in 1997, seventeen swim/dive team members at West Virginia University were suspended for two meets after they forced underclassmen to drink alcohol and perform calisthenics; also in 1997, the University of Washington placed the men's soccer team on probation after campus police found three players taped to a luggage cart on school grounds; in 1999, students on the University of Vermont hockey team alleged alcohol consumption, improper sexual touching, and other hazing practices; and in 2000, Coach Paul Caufield of Marian College's hockey team resigned after a hazing incident on the team bus. ESPN.com, *Sports Hazing Incidents*, June 3, 2002, <http://espn.go.com/otl/hazing/list.html> (containing a list compiled by ESPN.com using various sources including newspaper articles and hazing authority Hank Nuwer).

150. Tom Farrey, *Athletes Abusing Athletes*, ESPN.COM (June 3, 2002), <http://espn.go.com/otl/hazing/monday.html>.

151. Clark Thiemann, *Men's Hockey Rival Vermont Cancels Season after Hazing Cover-up*, DAILY PRINCETONIAN (Feb. 3, 2000), available at <http://www.dailyprincetonian.com/archives/2000/02/03/sports/57.shtml>.

152. Press Release, University of California, Santa Barbara, UCSB Investigation Finds Women's Lacrosse Club Team Did Engage in Hazing; Team is Issued Punitive Sanctions (June 6, 2006), available at <http://www.ia.ucsb.edu/pa/display.aspx?pkey=1472>.

153. *Id.*

Hazing of student-athletes is comparable to that of fraternity pledges in several ways including its frequency. For example, more than eighty percent of the over 325,000 athletes surveyed in 1999 were subjected to some form of hazing to join a collegiate team,¹⁵⁴ and twenty percent of those surveyed reported hazing that “crossed the line between youthful hijinks and significant danger.”¹⁵⁵ When these figures are projected to the national population, over 255,000—more than a quarter of a million athletes—were hazed.¹⁵⁶ “Athletes most at risk for any kind of hazing for college sports were men; non-Greek members; and either swimmers, divers, soccer players, or lacrosse players.”¹⁵⁷ However, out of the forty-five percent who reported that they knew of, heard of, or suspected hazing on their campuses, only twelve percent reported being hazed as part of this initiation into an athletic team.¹⁵⁸ “[W]hile students would acknowledge a wide range of hazing-type behaviors, they most often were reluctant to label them ‘hazing,’”¹⁵⁹ which is understandable since hazing is a crime in most states.¹⁶⁰ This reluctance to label hazing-type behaviors as hazing explains why eighty percent of those surveyed admitted to being subjected to some form of hazing to join a college or university team while only twelve percent of athletes reported actually being hazed.¹⁶¹ One student even wrote, “If no one is hurt to the point where they need medical attention, just leave it alone. All the kids get accepted when it’s over . . . [ninety] percent of the time, it’s a one-time deal and it’s over. Leave it alone.”¹⁶²

The large role alcohol plays in joining athletic teams was also confirmed by respondents in the Alfred University survey, as more than half of them admitted to involvement in alcohol-related initiation activities despite the fact that many were under the legal drinking age.¹⁶³ This also includes prospective college and university teammates who are in high school and given alcohol on their recruit trips, as two in five respondents reported they consumed alcohol on recruitment visits before enrolling.¹⁶⁴ Interestingly, NCAA Division I athletes and NCAA scholarship athletes “were significantly more likely to consume alcohol on

154. Sussberg, *supra* note 13, at 1426–27; Hoover, *supra* note 13, at 8.

155. Peter Schmuck, *Solution to Hazing is Elusive*, BALTIMORE SUN, Sept. 17, 1999, at 1D.

156. Hoover, *supra* note 13, at 12. The Alfred University study was conducted in response to a hazing incident involving the school’s football team. *Alfred University Cancels Football Game Following Hazing Incident*, AP ONLINE (Sept. 2, 1998), available at <http://www.highbeam.com/doc/1P1-19515635.html> (detailing the incident involving five players arrested for restraining freshmen with rope and forcing them to consume alcohol). The study was conducted together with the National Collegiate Athletic Association (NCAA), and was done via direct mail that guaranteed anonymity. The survey included athletes, coaches, administrators, and all NCAA athletic directors and senior student affairs officers. Results for the athletes were based on 2,027 respondents. Hoover, *supra* note 13, at 8.

157. Hoover, *supra* note 13, at 6.

158. *Id.* at 8.

159. *Id.*

160. *See supra* note 30 and accompanying text.

161. Hoover, *supra* note 13, at 8.

162. *Id.* at 13.

163. *Id.*

164. *Id.* at 6.

recruitment as part of initiation onto a team than Division II, III, or non-scholarship athletes.”¹⁶⁵

The Alfred University survey was very influential in helping the public realize that hazing was not simply confined to the Greek life on college and university campuses nationwide, but it also occurs at a fairly high rate in other campus groups, especially athletic teams. However, despite the prevalence of hazing in college and university athletic teams across the country, there are significantly fewer cases reaching state and federal courts involving athlete hazing rather than fraternity hazing. This is surprising simply considering the fact that the Alfred University study found that nearly eighty percent of college and university athletes nationwide are subjected to hazing. The next section will explain possible reasons for this disparity.

A. The Dearth of College and University Athlete Hazing Cases

A possible explanation for the lack of cases involving college and university athlete hazing reaching the state and federal court system is that the schools deal with the situation themselves rather than involving the court systems.¹⁶⁶ After all, “[h]azing is secretive by its very nature” and “[t]he idea of taking part in the private rituals of an exclusive organization is part of the allure of hazing.”¹⁶⁷ Under-reporting may be caused, in part, by the contradictory objectives of the Crime Awareness and Campus Security Act¹⁶⁸ (“CSA”) and the Federal Educational Rights and Privacy Act (“FERPA”).¹⁶⁹ While CSA requires colleges and universities to make a full report of campus crimes, FERPA requires that student records be protected from disclosure.¹⁷⁰ Moreover,

[w]hile hazing is a crime in most states, there is no consistency among colleges and universities as to whether hazing incidents are to be prosecuted criminally, handled through an institution’s in-house judicial process, or both. There is still no clear answer as to whether student disciplinary records are educational records within the meaning of FERPA, thus crimes that are handled through a college or university’s judicial process may go unreported in official campus crime statistics.¹⁷¹

165. *Id.* at 18. The number of Division I athletes hazed was forty-one percent while the number of Division II athletes hazed was twenty-two percent and Division III was thirty-seven percent. *Id.*

166. *See* Ball, *supra* note 8.

167. *Id.* at 479 (citing Amie Pelletier, Note, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 381 (2002)). *See* Curry, *supra* note 120, at 117.

168. 20 U.S.C. § 1092(f) (2000) (originally enacted as the Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, §§201–05, 104 Stat. 2381 (1990)).

169. 20 U.S.C. § 1232(g) (2000) (originally enacted as the Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974)).

170. Ball, *supra* note 8, at 478.

171. *Id.* (citing Benjamin F. Sidbury, Note, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress*

Therefore, “[a]t the intersection of FERPA and CSA is a potential loophole by which colleges and universities could disguise the number of student-on-student crimes when those crimes are adjudicated through a campus judicial system rather than through the criminal courts.”¹⁷² The secretive nature of campus crimes committed within the context of hazing may also contribute to the under-reporting.¹⁷³

Rather than encourage criminal prosecution, some college and university communities choose to handle hazing incidents through their in-house judicial processes.¹⁷⁴ This use of in-house judicial processes results in under-reporting because after a campus judicial proceeding is put on a student’s educational record, FERPA protects it from being disclosed.¹⁷⁵ Thus, using the campus judicial process instead of criminal prosecution prevents hazing incidents from being compiled as campus crime statistics.¹⁷⁶ This under-reporting can be particularly dangerous due to the widespread nature of the hazing problem on campuses nationwide. The danger lies in the fact that the under-reporting of hazing incidents will leave students unaware of the possibility that they may be hazed if they join these organizations. “Among the possible solutions to the problem of under-reporting of hazing incidents are to prosecute all hazing incidents criminally, to enact legislative reform to specifically include hazing incidents in reports required under CSA, or to require disclosure of hazing incidents to all prospective members of organizations.”¹⁷⁷ The most effective method to prevent hazing of students would be to disclose hazing incidents to all prospective members of organizations. Students will then be aware of potentially hazardous situations that they can then avoid.

It is possible that under-reporting and the use of an institution’s own in-house judicial process affects cases involving athletes more than fraternity pledges due to the significant difference in the number of cases that actually go to trial between the two. This possibility that student-athlete cases are more affected could be a result of stronger fiduciary duties or existing special relationships between a college or university and the student-athletes who represent it. Thus, colleges and universities may take extra measures to ensure that these hazing incidents involving student-athletes are taken care of in-house. Colleges and universities do not want the reputation of their athletic teams tarnished, which may provide further incentive to use their in-house judicial process. At the same time, however, it is

Can Eliminate the Loophole, 26 J.C. & U.L. 755, 769 (2000)).

172. *Id.* at 479 (citing Ethan M. Rosenzweig, Comment, *Please Don’t Tell: The Question of Confidentiality in Student Disciplinary Records under FERPA and The Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 448–49 (2002)). This judicial process, for most colleges and universities, “serves the dual purposes of punishing unacceptable behavior as well as providing an opportunity for education in the development of an appropriate community based value system.” *Id.* at 484.

173. Pelletier, *supra* note 166, at 381.

174. Rosenzweig, *supra* note 171, at 448.

175. *Id.*

176. *Id.* at 449–50.

177. Ball, *supra* note 8, at 479 (citation omitted).

possible that the in-house judicial processes may affect both Greek life and student-athletes to the same extent, but that injured student-athletes may simply be less likely to bring such suits—whether it be for fear of tarnishing the team’s reputation or fear of rattling out his or her teammates, or because they are simply less likely to recover.

B. College and University Liability in the Athlete Context

As noted before, despite the lack of cases holding colleges and universities liable for the hazing of student-athletes, hazing has still been a major problem in varsity sports across the nation.¹⁷⁸ Moreover, “[w]hile the Alfred Survey confirmed that hazing was not merely a concern for fraternities and sororities, there are notable differences between hazing in college athletics and that which occurs during fraternity . . . ‘pledge’ periods.”¹⁷⁹ For example, one key difference is that the coach of a college or university team has usually already selected the students who will compete on the team while fraternities solicit students who voluntarily pledge and desire to become members typically through initiation activities that many times consist of hazing activities.¹⁸⁰ Since an athlete is already part of a team, one cannot also argue that a student-athlete voluntarily assumes the risk involved in potential initiation activities as a fraternity pledge does. After all, an athlete may be unaware that such an initiation was to take place until immediately before it occurs. Moreover, “the youngest members are simply looking for peer acceptance from their teammates,” and “that need for approval can be a powerful component, considering the importance of teamwork in an individual’s athletic success.”¹⁸¹ Therefore, in some circumstances “[a] student-athlete [may have] no choice but to be hazed, and failure to do so may negatively impact his athletic experience due to the numerous social costs that will be imposed.”¹⁸² So, while it seems as if colleges and universities should be held to a higher level of liability for hazing in athletics, it remains problematic that so few cases involving the hazing of athletes are actually brought to trial.

Another reason for this scarcity may lie in the fact that it is difficult for student-athletes injured from hazing incidents to demonstrate that the institution had a legal duty to protect them from foreseeable injury.¹⁸³ In order for a student-athlete to establish a duty, she will most likely use the landowner-invitee theory and the special relationship theory—both seen in the fraternity context. A student-athlete may use the landlord-invitee theory based on the fact that “[u]niversities are considered landlords to their student-athletes based on the ownership of campus

178. See *supra* Part II.

179. Sussberg, *supra* note 13, at 1432 (citation omitted).

180. *Id.*

181. Farrey, *supra* note 150.

182. Crow & Rosner, *supra* note 27, at 100.

183. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367–68 (3d Cir. 1993). Just as in the fraternity context, student-athletes injured in hazing incidents will primarily rely on the theory of negligence, in which they must prove: (1) legal duty of care on the university’s behalf, (2) breach of this duty, (3) actual and proximate causation, and (4) resulting injury to the plaintiff. Crow & Rosner, *supra* note 27, at 92–93.

dormitories and buildings.”¹⁸⁴ Moreover, “a landlord has a duty to aid or protect those invitees who enter his land. This duty, which is one of reasonable care, extends only to reasonably foreseeable acts.”¹⁸⁵ Therefore, pursuant to the court’s finding in *Furek*, to recover under the landowner-invitee theory, the student-athlete must demonstrate that the hazing was reasonably foreseeable—the college or university knew or should have known about it—and that it occurred on the college or university’s property.¹⁸⁶ Recovery could be constrained by the location at which the hazing took place, for example, if it occurred off of institutional property, even if it is proven that the hazing was foreseeable (either by demonstrating a tradition of hazing or a high prevalence of hazing on that team) and even if it is proven that the college or university does have a duty to protect student-athletes from hazing via the landlord-invitee theory.¹⁸⁷

There is a similar result in liability arising out of the special relationship between student-athletes and colleges and universities. One would think that since “college sports [can be] a business, with student-athletes essentially ‘working’ for the university,” the courts would take the creation of a special relationship between student-athletes and the college or university for granted.¹⁸⁸ However, while several courts have found a special relationship between student-athletes and a college or university,¹⁸⁹ court systems, including the Third Circuit, have inconsistently described the special relationship, thus creating ambiguity in determining when the duty of care is owed. Moreover, “[i]f a special relationship between a university and its student-athletes exists, it is still unclear whether a student-athlete injured during a hazing incident may succeed in recovering under this theory.”¹⁹⁰ Based on the Third Circuit’s holding in *Kleinknecht v. Gettysburg College*,¹⁹¹ a special relationship between the school and its student-athlete is established when three factors are shown: (1) the injured student-athlete must have been “actively recruited,” (2) the athlete must have been acting in an athletic capacity while injured, and (3) the resulting injury must have been reasonably foreseeable.¹⁹² Applying this to the hazing context, the hazing itself along with the resulting injury would have to be reasonably foreseeable. The most problematic

184. Crow & Rosner, *supra* note 27, at 94 (citing Gil B. Fried, *Illegal Moves Off-The-Field: University Liability for Illegal Acts of Student-Athletes*, 7 SETON HALL J. SPORT L. 69, 77 (1997)).

185. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 314A(3), 344 (1965)).

186. *Id.* at 95.

187. *Id.* at 96.

188. Sussberg, *supra* note 13, at 1435 (citing Elsa Kircher Cole, Book Note, *Applying a Legal Matrix to the World of Sports*, 99 MICH. L. REV. 1583, 1584 (2001) (“The recent NCAA/CBS negotiations that resulted in a record \$6.2 billion contract for the right to broadcast, *inter alia*, the Men’s Division I Final Four Basketball Championship over an eleven-year period, [are] an example of the value quality sports events have in today’s media market.”)).

189. See, e.g., *Kleinknecht*, 989 F.2d at 1368 (holding that the student-athlete was owed a duty of reasonable care when participating in a college-sponsored athletic activity for which he was recruited).

190. Crow & Rosner, *supra* note 27, at 98.

191. *Kleinknecht*, 989 F.2d 1360.

192. *Id.* at 1367.

factor for student-athletes injured during hazing incidents is the second factor—that they should be acting in an athletic capacity in order to deserve a duty of care.¹⁹³ One court has noted that this factor is established when a student-athlete was “participating as one of its intercollegiate athletes in a school-sponsored athletic activity”;¹⁹⁴ participated in “an athletic event involving an intercollegiate team of which he was a member”;¹⁹⁵ and “in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity.”¹⁹⁶ Thus, liability based on a special relationship will largely depend upon the facts of the specific case and will probably only arise when the student-athlete is actually playing the sport. Therefore, a student-athlete injured in a hazing incident is “unlikely to recover”¹⁹⁷ on a special-relationship theory unless it is expanded beyond the *Kleinknecht* framework.

This potentially great difficulty in establishing college and university liability for injuries to student-athletes during hazing incidents is most likely the main reason for the small number of such cases going to trial as compared to hazing at fraternities. This difficulty may also help to facilitate such hazing at colleges and universities across the nation at levels consistent with those reported in the Alfred University study in 1999. Thus, courts should consider adopting new tests for when to impose college and university liability for physical injuries resulting from hazing incidents. The next section will outline when colleges and universities should be held liable for injuries to students from hazing incidents in both the fraternity and student-athlete context.

IV. WHEN SHOULD LIABILITY BE IMPOSED?

The *Furek* and *Morrison* decisions found that the college or university assumes a duty of care to a pledge of a fraternity when the college or university attempts to regulate certain conduct with student welfare in mind and when it has knowledge of hazing activities taking place at fraternities. In such situations, a college or university should be held liable for any injuries to students from these foreseeable hazing incidents, since their inaction or lack of appropriate action may have facilitated the occurrence of those incidents. Thus, if colleges and universities are aware of hazing taking place on their campuses at particular fraternities, either due to previous reports of hazing or common knowledge that hazing has occurred over the years at a certain fraternity, it is imperative that they take immediate action in order to prevent injuries to students as a result of engaging in hazing activities. It will be up to courts to determine whether colleges’ and universities’ responses to prevent foreseeable injuries are adequate.

This argument that liability should be imposed for foreseeable injury accords with the general progression of tort law. More specifically, the history of tort law has led toward an abandonment of no-duty rules and the subsequent creation of

193. Crow & Rosner, *supra* note 27, at 99.

194. *Kleinknecht*, 989 F.2d at 1373.

195. *Id.* at 1368.

196. *Id.* at 1369.

197. Crow & Rosner, *supra* note 27, at 100.

rules of liability for failure to prevent foreseeable injuries.¹⁹⁸ The relationship of colleges and universities to their students justifies moving in that direction. Moreover, this increased “negligence liability is also supported by a concern for safety. An obvious safety advantage of negligence liability is that it can discourage improper harmful conduct; indeed, a deterrence rationale has been influencing tort judges for over a century.”¹⁹⁹ Thus, not only is imposing liability on colleges and universities for foreseeable injuries from hazing incidents in accordance with the general trend of American tort law, but it is also consistent with deterrence and safety rationales.

In order to ensure the safety of student-athletes across the country from senseless hazing that can destroy athletic careers and lives, a college or university’s responsibility and liability to its student-athletes, “should carry over to unexpected acts of hazing that have now become an extension of the actual game.”²⁰⁰ Courts should impose a different test from those currently applied to establish a college or university’s duty to the student-athlete to prevent hazing injuries. For example, the requirement that the injury occur while the student-athlete is acting in an athletic capacity should be changed to include acts of foreseeable hazing that occur due to a student’s participation in an athletic team. If such hazing incidents are foreseeable and a college or university could have prevented them, then it should be liable for the resulting injuries. This increased liability should in turn lead to deterring hazing incidents from occurring at college and university campuses nationwide.

Thus, this imposition of liability in the student-athlete context would be similar to that in the fraternity context where the key factor is foreseeability rather than whether the injured student was acting in an athletic capacity when being hazed. The definition of foreseeability would be roughly the same in both contexts: whether colleges and universities are aware of hazing taking place on their campuses at particular fraternities or athletic teams, either due to previous reports of hazing or common knowledge that hazing has occurred over the years in a certain fraternity or athletic team. The degree of foreseeability would be a question for each circumstance. Due to the stronger relationship between a college or university and its student-athletes, who are representing the college or university

198. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 959 (1981) (“Gradually the no-liability principles—immunities, privileges, and no-duty considerations imported from other conceptual systems (property, contract, and such)—retreated, like a melting glacier in a hostile environment, before the successive onslaughts of fault.”); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (describing the huge growth in tort liability occurring since 1960 and characterizing that rise as involving “the vitality of negligence,” or the expansion of a defendant’s liability for harm caused by negligent conduct) (“The last quarter-century has witnessed what can fairly be described as a vindication or unleashing of the negligence principle—the dismantling of obstacles that previously have impeded the achievement of that principle’s full potential.”) (citation omitted). See also Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

199. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, *supra* note 197, at 607.

200. Sussberg, *supra* note 13, at 1435–36 (citation omitted).

during athletic competitions, than that between the college or university and fraternity pledges, less may be required to establish liability for foreseeable hazing injuries to student-athletes. At the same time, more should be required to establish liability for foreseeable hazing injuries to fraternity pledges who are further removed from the college or university.²⁰¹ Thus, liability should be more readily imposed for injuries to student-athletes because of the peculiar relationship between the students and the college or university. However, this liability should be limited to physical injuries from foreseeable hazing incidents, and not extend to rituals among college or university sports teams that do not lead to serious physical injury. Additionally, courts should not discriminate between actively recruited athletes and walk-ons. Hazing injuries to walk-ons should be treated just as seriously as those to recruited athletes because they both represent their schools in the same capacity. Admittedly, courts may have difficulty establishing such a precedent since few student-athlete hazing cases go to trial, but just one seminal case comparable to *Furek's* impact on fraternity hazing could stem the tide of injuries related to student-athlete hazing. Such a case would safeguard student-athletes from the potentially disastrous consequences of hazing on college and university campuses.

For the sake of the well-being of these students, hazing is a problem that cannot and should not be ignored. While both state legislatures and colleges and universities themselves have taken measures to correct the problem, further efforts need to be made in light of the continuing problem hazing poses both in the fraternity and the student-athlete context. One of the main problems that needs to be fixed is the under-reporting of hazing. As "more information becomes available, the more empowered potential victims are likely to be."²⁰² If students realize that the hazing injuries they suffered are not a unique occurrence at colleges and universities, they may feel more comfortable with reporting such incidents. Consequently, this increased reporting will deter students or coaches from encouraging hazing activities. Colleges and universities must also educate their students about hazing and its potentially disastrous consequences. Education may make students aware of the detriments of engaging in hazing activities, and thus education might serve to deter such activity. It is also imperative to standardize the definition of hazing at least within each state to ensure a clear definition that courts can easily apply without confusion. This will prevent such mistrials as the Florida A&M hazing case, which occurred due to confusion on the scope of the definition of serious bodily injury.²⁰³ The implementation of such recommendations is a step in the right direction toward ridding colleges and

201. Cf. RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (explaining that a duty to control dangerous behavior arises from a special relationship between the defendant and the victim or the defendant and the injurer).

202. Ball, *supra* note 8, at 495.

203. See *supra* Part I.A.

universities of the plague of hazing in fraternities and college and university athletics.

CONCLUSION

Hazing is a serious problem among students in colleges and universities from the east coast to the west, as it “capitalizes on the dangerous intersection of vulnerability and daring that is characteristic of college-aged men and women.”²⁰⁴ Colleges and universities must take responsibility for the hazing occurring on their campuses. While strict liability is not recommended, some courts seem to be moving in the right direction, as is evidenced by the decisions in *Furek* and *Morrison*. If colleges and universities have knowledge of hazing occurring on their campuses and have not taken appropriate action to prevent such incidents, then colleges and universities must be held accountable or else hazing will continue to occur.²⁰⁵ However, there should be limits to college and university liability; colleges and universities should not be held liable if the hazing incident was not foreseeable—if, for example, it was an isolated event or if the college or university had no prior knowledge of hazing incidents in that fraternity or athletic team. Definitions of what exactly constitutes hazing in both state legislatures and college and university policies should also be made clear so that ambiguity is minimized. For example, innocent jokes that do not result in physical harm should not be confused with hazing that often results in significant physical and emotional injury. More efforts to prevent hazing must also be made in the student-athlete context because even though significantly fewer cases involving student-athlete hazing and college and university liability go to trial, hazing still frequently occurs. Student-athlete hazing is shrouded in secrecy, and this veil must be lifted in order for the physical and emotional injuries of hazing to disappear from the lives of college and university students nationwide.

204. Ball, *supra* note 8, at 481.

205. “The university/student relationship is such that it should include a duty of reasonable care to protect the student from foreseeable, dangerous or negligent acts of third persons.” Mumford, *supra* note 54, at 746.