

# THE FRATERNITY AS FRANCHISE: A CONCEPTUAL FRAMEWORK

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*A fraternity: it's almost as though it's a franchise operation with terrible quality control. You could get a Big Mac in Cleveland and it's going to look pretty much like a Big Mac in Jacksonville. In a fraternity, you could go to Sigma Chi, the biggest American fraternity on one campus, and those guys are exemplary student leaders. They're doing tons of community service, they're raising money for charities. You could go to the next campus over to Sigma Chi and it's a bunch of thuggish kids who are perpetrating criminal acts and being drunk all the time.<sup>1</sup>*

## I. INTRODUCTION

The local fraternity chapter,<sup>2</sup> for all its ubiquity at North American institutions of higher education, is something of a study in contradictions. It is a voluntary association of like-minded individuals, but one with notoriously onerous rites of admission.<sup>3</sup> It is a student society independent

1. Interview by David Greene with Caitlin Flanagan, author of *The Dark Power of Fraternities*, THE ATLANTIC, Feb. 19, 2014 (Nat'l Pub. Radio, Feb. 5, 2014) (transcript on file with author) [hereinafter Flanagan NPR Interview].

2. This Article uses “national” and “local” throughout both adjectivally and nominally (e.g., “the Alpha Beta Gamma national took a keen interest in its local chapter at MIT”) to refer respectively to a national (or regional or international) fraternal organization and its subordinate local chapter. No implication is intended to exclude from the term “national” organizations regional or international in scope. E.g., Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities’ Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 79 n.4 (2014); Eric A. Paine, *Recent Trends in Fraternity-Related Litigation*, 23 J.L. & EDUC. 191, 191 n.2 (1994). Care should be taken to distinguish such local chapters of national fraternities from so-called “local” fraternities—those unique to a single campus, with no national organization. For clarity, this Article does not use “local” in the latter sense except in quotations of other materials. For like reasons of clarity, this Article uses “fraternity” and “fraternal” throughout to refer to both men’s and women’s fraternal organizations. See C. Sidney Neuhoff, *The Legal Status of Fraternities*, 11 WASH. U. L. REV. 30, 30 (1925) (“No distinction is made in the cases between fraternities and sororities. The word ‘fraternity,’ in its generic sense includes organizations of either or both sexes.”); e.g., Sunshine, *supra*; Shane Kimzey, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 460 n.2 (1997); Paine, *supra*, at 191 n.1; Susan J. Curry, *Hazing and the “Rush” Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 93 n.1 (1989).

3. See Dara Aquila Govan, “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, 679–80 (2000–2001); Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scored . . . And Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 363–65 (1998); e.g.,

from the university, yet screened and recognized (or derecognized and banned) by that university.<sup>4</sup> It is a self-administering group equipped with officers and committees,<sup>5</sup> yet often meticulously regulated by school authorities.<sup>6</sup> It is a uniquely local institution catering to a cloistered

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Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 507 N.E.2d 1193, 155 Ill. App. 3d 231, 237 (Ill. App. Ct. 1987) (“[M]embership in the defendant fraternity was a ‘much valued status.’ It can be assumed that great social pressure was applied to plaintiff to comply with the fraternity’s membership ‘qualifications,’ perhaps to the extent of blinding plaintiff to any dangers he might face.”); see also Edward J. Schoen & Joseph S. Falchek, *You Haze, I Sue: A Fraternity Stew*, 18 J. LEGAL STUD. EDUC. 127, 127–30 (2000) (case study in hazing).

4. Gregory F. Hauser, *Social Fraternities at Public Institutions of Higher Education: Their Rights Under the First and Fourteenth Amendments*, 19 J.L. & EDUC. 433, 435–38 (1990) (“A critical tool for the institutions has been the power to ‘recognize’ a chapter.”); James C. Harvey, *Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Associational Rights*, 17 J.C. & U.L. 11, 34–37 (1990–1991); e.g., Lloyd v. Alpha Phi Alpha Fraternity, 1999 WL 47153 (N.D.N.Y. 1999); Mu Chapter of Delta Kappa Epsilon v. Colgate Univ., 176 A.D.2d 11 (N.Y. App. Div. 1992); Psi Upsilon v. Univ. of Pa., 591 A.2d 755 (Pa. Super. Ct. 1991); see Kerri Mumford, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL’Y 737, 744 (2001); Govan, *supra* note 43, at 704–06; Rutledge, *supra* note 3, at 385–86; cf. Curry, *supra* note 2, at 111 (comparing universities who strictly regulate fraternities with those that disassociate themselves entirely). *But see* Govan, *supra* note 4, at 706 (“Currently, many universities do not have a formal relationship with their Greek organizations.”).

5. E.g., Smith v. Delta Tau Delta, 9 N.E.3d 154, 161 (Ind. 2014); Estate of Hernandez v. Flavio, 930 P.2d 1309, 1313 (Ariz. 1997) (“Each [fraternity] member had the opportunity and the power to vote for the president and two vice presidents, who appointed the social chairman; each fraternity member could have voted to disapprove any of the social chairman’s proposed activities that involved furnishing alcohol to minors; and each member could have run for an officer position or applied for a committee chairmanship.”); see, e.g., Foster v. Purdue Univ., 567 N.E.2d 865, 870–71 (Ind. Ct. App. 1991); Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991); Univ. of Denver v. Whitlock, 744 P.2d 54, 60–61 (Colo. 1987); see also, e.g., Shaheen v. Yonts, 394 F. App’x 224 (6th Cir. 2010).

6. Govan, *supra* note 3, at 698, 699–704 (“Many [colleges] have restricted the independence of fraternities and sororities, and have chosen to regulate them beyond recognition.”); Hauser, *supra* note 4, at 435–37; Rutledge, *supra* note 3, at 378, 385–386; Mumford, *supra* note 4, at 744, 751–53, 769; e.g., Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991); see Paine, *supra* note 2, at 193; Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?*, 18 J.C. & U.L. 419, 469–70 (1991–1992); Harvey, *supra* note 4, at 15, 31–41; cf. Curry, *supra* note 2, at 111 (comparing universities who strictly regulate fraternities with those that disassociate themselves entirely). *But see* Univ. of Denver v. Whitlock, 744 P.2d 54, 60 (Colo. 1987) (“[T]he University did not attempt to regulate the recreational pursuits of members of the fraternities and sororities on campus. Indeed, fraternity and sorority self-governance with minimal supervision appears to have been fostered by the University.”); Paine, *supra* note 2, at 201 (discussing Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. Ct. App. 1985), *rev’d*, 744 P.2d 54 (Colo. 1987)).

community,<sup>7</sup> yet is chartered, licensed, and overseen by an umbrella national organization.<sup>8</sup> It collects dues from and remits services to its members in a self-contained economy of sorts,<sup>9</sup> but itself pays dues to and receives services from that national.<sup>10</sup> What is the essence of the college fraternity that underlies such ramified ambivalences?

Such a question is not merely academic. Much litigation has foundered in the inherent incoherence of what a fraternity is, casting aimlessly amongst the actual tortfeasors, other local members and officers, alumni organizations, the national office and staff, the university and its administration, and state government (in the case of public universities) in search of the parties properly responsible.<sup>11</sup> In one relatively early case, the plaintiff sued not only the individual member of Sigma Phi Epsilon, but also his local chapter, the national fraternity, and the university.<sup>12</sup> The Delaware Supreme Court affirmed dismissal against the local chapter and verdict in

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7. Horton, *supra* note 6, at 437, 469; see Harvey, *supra* note 4, at 41–42; e.g., Pi Lambda Phi Fraternity v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000).

8. Angela N. Marshlain, *Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association Be Required to Assume a Parental Role?*, 5 APPALACHIAN J.L. 1, 3 (2006); Mumford, *supra* note 4, at 763–66; Paine, *supra* note 2, at 191–93; see Shaheen v. Yonts, 394 F. App'x 224 (6th Cir. 2010); Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); Marshall v. Univ. of Del., 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118 (La. App. Ct. 1999); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529 (La. App. 1997); Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991). *But see* Paine, *supra* note 2, at 202.

9. E.g., Estate of Hernandez v. Flavio, 930 P.2d 1309, 1310 (Ariz. 1997); see WM. RAIMOND BAIRD, BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES 495–96 (6th ed. 1905); Horton, *supra* note 6, at 469–70; see also, e.g., Estate of Hernandez v. Flavio, 924 P.2d 1036, 1039 (Ariz. Ct. App. 1997) (Fernandez, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997).

10. E.g., Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (The Pi Kappa Alpha national “serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses.”); see Horton, *supra* note 6, at 469–70; Byron L. LeFlore Jr., *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 221 & n.151, 232 (1987–1988); Kimzey, *supra* note 2, at 467–68, 472–73.

11. E.g., Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. App. Ct. 1999) (plaintiff sued the local chapter, the local president, the national, and the State of Louisiana via the Board of Trustees for State Colleges and Universities); see Reni Gertner, *Fraternity Lawsuits Becoming More Common*, LAWYERS WEEKLY USA, Mar. 14, 2005; Mumford, *supra* note 4, at 737–38; Paine, *supra* note 2, at 191–94; Marshlain, *supra* note 8, at 2–4; Kimzey, *supra* note 2, at 464–66; Rutledge, *supra* note 3, at 366–68.

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

favor of the national fraternity, while remanding for apportionment of liability between the university and the tortfeasor.<sup>13</sup> This result must seem somewhat peculiar: why was the university responsible for the fraternity member's action when no organ of the fraternity itself was?<sup>14</sup> Absent a framework as to how the local chapter of a fraternity functions vis-à-vis the national organization, courts are bound to revisit the same conceptual difficulties time and time again.

The present Article suggests a partial answer for such questions, conjecturing that the local chapter is functionally a franchisee of the national fraternity franchisor, serving a population of university students (with the university acting as a sort of a local gatekeeper-*cum*-regulator).<sup>15</sup> In Part II, the Article briefly details the history of franchises, along with the nature and purpose of franchisor-franchisee relationships. Part III discusses how the franchise organizational structure finds close analogy with the structure of the fraternity system, along with a few notes on the role of the university. Part IV takes up the franchising framework to examine broadly how issues of intellectual property, liability, disclosure, and due process could be addressed under its rubric. The Article closes in Part V with remarks on the more abstract merit or demerit of the franchise framework in analyzing fraternities, in light of alternative legal theories and public policy concerns.

This Article will not push the questionable argument that locals are somehow actual franchisees *de jure* of their nationals in the context of state law, federal statutes, and agency regulations, all of which prescribe detailed strictures to which franchisors and franchisees must adhere.<sup>16</sup> (If nothing else, it is clear that fraternities are not being held to any adherence to such strictures.<sup>17</sup>) Nor, for that matter, can or ought fraternities be artificially reduced from a broader social institution to a purely commercial arrangement.<sup>18</sup> However, the principles animating precedent on franchises may well prove useful in assessing how to view responsibility in the context of fraternity cases, as well as providing a better understanding of how

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13. *Id.* at 526.

14. According to the court, jurisdiction was not obtained over the local by service on its former president, as the unincorporated association had dissolved by the time of trial, and the members of the local had not been served individually. *Id.* at 513–14. As for the national, the jury had absolved it of responsibility, and the court did not see sufficient evidence of knowledge and control to disturb that finding. *Id.* at 514.

15. This author previously raised the possibility of analyzing fraternities in the context of franchise law while reviewing national vicarious liability for hazing in *respondeat superior*; this Article represents a more rigorous exploration of that proposed avenue of investigation. Sunshine, *supra* note 2, at 136.

16. *See, e.g.*, sources cited *infra* notes 55–59.

17. *See infra* Part III.C.

18. *See infra* Part V.

fraternities actually function. By stepping back from formalities stymied by the ambivalent nature of fraternities' local chapters, and looking closer at the practical and functional place of the fraternity in its natural ecology, the law may well be able to yield more satisfactory answers—and justice—for all who participate in and interact with the fraternity system.

## II. THE HISTORY, PURPOSE, AND DEFINITION OF FRANCHISING

Notwithstanding the prevalence of McDonald's hamburger joints and Subway sandwich shops throughout the world,<sup>19</sup> the concept of the franchise or chain store is relatively new to business.<sup>20</sup> Some trace its progenitors to various sponsorship and licensing schemes in Europe,<sup>21</sup> but it is generally accepted that the franchising model as such appeared only in the mid-nineteenth century in America.<sup>22</sup> Its original form was what is now called product franchising or distributorship, whereunder a manufacturer contracts with retailers to exclusively distribute its products to customers, assuring the former of access to the market, and the latter of a ready supply of merchandise to sell.<sup>23</sup> In this category belong pioneers Isaac Singer and Cyrus McCormick, whose vertically-integrated sewing machine and harvester empires represented two of the first true franchises.<sup>24</sup> With the expansion of industrial production in the twentieth century, such arrangements rapidly spread, with the predominant categories of product franchising to this day being automobile dealerships, soda bottling companies, and gas stations.<sup>25</sup>

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19. As of mid-2013, Subway numbered over 40,000 stores, while McDonald's was not far behind with 34,700. Venessa Wong & Steph Davidson, *Subway at 40,000: Fast Food's Global King Keeps Growing*, BLOOMBERG BUSINESSWEEK, Aug. 26, 2013, available at [businessweek.com](http://businessweek.com); cf. Michael I. Swygert, *Harold Brown, Franchising: Trap for the Trusting*, 4 VAL. U. L. REV. 224, 225–26 (1969).

20. THOMAS S. DICKE, *FRANCHISING IN AMERICA: THE DEVELOPMENT OF A BUSINESS METHOD, 1840–1980* at 3–4 (1992); ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* 3–4 (2005).

21. See DONALD W. HACKETT, *FRANCHISING: THE STATE OF THE ART* 5 (1977); Philip Mark Abell, *The Regulation of Franchising in the European Union*, at 34 & nn.71–72, 38 & n.87 (July 4, 2011) (Ph.D. dissertation, Queen Mary University of London) (on file with author), available at <https://qmro.qmul.ac.uk/jspui/handle/123456789/2326>.

22. See DICKE, *supra* note 20, at 1, 3; HACKETT, *supra* note 21, at 5; Joseph H. King Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 421–22 (2005).

23. DICKE, *supra* note 20, at 3; BLAIR & LAFONTAINE, *supra* note 20, at 5; Jerome L. Fels, *Franchising: Legal Problems and the Business Framework of Reference—an Overview*, in *THE FRANCHISING SOURCEBOOK* § 1.2 at 5–6 (Jim McCord ed. 1970); GLADYS GLICKMAN, *FRANCHISING* § 2.01 at 2-2.1 (2014 rel. 128).

24. DICKE, *supra* note 20, at 12–47; see BLAIR & LAFONTAINE, *supra* note 20, at 5–6; Abell, *supra* note 21, at 34–35 & n.73.

25. See BLAIR & LAFONTAINE, *supra* note 20, at 6, 10; DICKE, *supra* note 20, at 3

More pertinent to the present discussion is a second category, business-format franchising, which arose around the end of the nineteenth century.<sup>26</sup> (The pioneer here would be Martha Mathilda Harper, whose hundreds-strong intercontinental network of beauty shops seems curiously less remembered than Singer's and McCormick's enterprises.<sup>27</sup>) Under this model, the franchisor purveys a commercial enterprise wholesale, licensing a successful brand name, and offering a general business plan and "bundle of services" to the franchisee.<sup>28</sup> Such arrangements rose to popularity as "perceptive entrepreneurs realized that, to use a popular example, there was more money to be made selling hamburger stands than selling hamburgers."<sup>29</sup> Although there were some early success stories, business format franchising only reached full steam in the 1950s, as fast-food staples like McDonald's and Burger King multiplied to meet swelling peacetime demand after World War II.<sup>30</sup>

But business-format franchising is not limited to archetypal restaurant operations like McDonald's.<sup>31</sup> Although such establishments comprise a quarter of business-format franchises, the remaining three-quarters span the entire service economy: automotive products and services (12%); white-collar businesses like dentistry and insurance (17%); construction, home improvement, and maintenance (6%); convenience stores (5%); educational services (3%); hotels and other accommodations (3%); laundry (1%); entertainment and travel (3%); car and equipment rental (4%); food retailing

(1992); HACKETT, *supra* note 21, at 5–6; Abell, *supra* note 21, at 38.

26. DICKE, *supra* note 20, at 3; BLAIR & LAFONTAINE, *supra* note 20, at 6–7; Abell, *supra* note 21, at 35 n.75.

27. BLAIR & LAFONTAINE, *supra* note 20, at 6–7; Abell, *supra* note 21, at 35 & n.75 (“The first true business format franchise was created by Martha Mathilda Harper, who developed her network of Harper Beauty Shops at the turn of the century into over 500 shops in the USA, Canada and Europe by the mid-1920s.”).

28. DICKE, *supra* note 20, at 3; see BLAIR & LAFONTAINE, *supra* note 20, at 6–8; Fels, *supra* note 23, § 1.2 at 3; Seth W. Norton, *Towards a More General Theory of Franchise Governance*, in *ECONOMICS AND MANAGEMENT OF FRANCHISING NETWORKS* 20 (Josef Windsperger, Gérard Cliquet, George Hendrikse & Mika Tuunanen, eds. 2004); GLICKMAN, *supra* note 23, §§ 2.01 at 2-2.1, 2.02[2] at 10.

29. DICKE, *supra* note 20, at 3; see William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 *FRANCHISE L.J.* 162, 163–64 (2004–2005).

30. BLAIR & LAFONTAINE, *supra* note 20, at 7, 18; Abell, *supra* note 21, at 35–36; King, *supra* note 22, at 422.

31. See BLAIR & LAFONTAINE, *supra* note 20, at 7–10, 27 (“[F]ranchising is not an industry but a way of doing business that is used in a number of different retail and service sectors”); Fels, *supra* note 23, § 1.2 at 4–7 (“Franchising is merely a new form of business organization, and as such, it cuts across industrial lines.”); see also Abell, *supra* note 21, at 38 (“Business format franchising encompasses a wide range of goods and services across many sectors”).

(6%); non-food retailing (15%); and a grab bag of miscellany like the original beauty parlors of Ms. Harper.<sup>32</sup> The continued expansion of franchising since the fast-food boom in the 1950s and 1960s has been the work of other sectors: white collar business establishments and automotive services drove numbers in the 1970s, while the 1980s and 1990s saw dramatic expansion in the personal service sector: maids, day-care, health and fitness, and so forth.<sup>33</sup> Development has not always proceeded apace; the 1960s and 1970s saw backlash against what many perceived as the abuses of a then-largely-lawless regime,<sup>34</sup> leading to the statutory systems of protections now in place.<sup>35</sup> But in the present day, though claims of stratospheric growth are unfounded,<sup>36</sup> the state of franchising as a form of business operations remains strong.<sup>37</sup>

Economists identify two main rationales for the franchising system.<sup>38</sup> The “economizing” or “agency” theory proposes that franchisees will be more incentivized to succeed than employees of a national organization, because the successes (or failures) of their outlets accrue to them personally, unlike a fixed-salary manager who might shirk his duties absent costly supervision.<sup>39</sup> However, franchisees may be incentivized to free-ride: to underinvest in products, service, or marketing; to rely on the brand’s power to maintain demand; and then to pocket the savings.<sup>40</sup> Robust econometric

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32. BLAIR & LAFONTAINE, *supra* note 20, at 10 (figures as of 1986); *see also* Norton, *supra* note 28, at 20.

33. BLAIR & LAFONTAINE, *supra* note 20, at 18.

34. *See* GLICKMAN, *supra* note 23, § 2.01 at 3–4. *See generally* HAROLD BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* (1969).

35. GLICKMAN, *supra* note 23, § 2.01 at 3–5; *see* BROWN, *supra* note 34, at 87–94; Harold Brown, *Legislative Proposals to Curb Franchisor Abuses: The Realities of Franchising*, in *THE FRANCHISING SOURCEBOOK* § 12.2 at 191–202 (Jim McCord ed. 1970); Abell, *supra* note 21, at 36; *see also* sources cited *infra* notes 55–59 (modern state and federal statutes).

36. BLAIR & LAFONTAINE, *supra* note 20, at 27–34.

37. *See* Norton, *supra* note 28, at 17; Venessa Wong & Steph Davidson, *Subway at 40,000: Fast Food’s Global King Keeps Growing*, BLOOMBERG BUSINESSWEEK, Aug. 26, 2013, available at [businessweek.com](http://businessweek.com) (describing how Subway added 1,761 outlets since from January to August 2013, and plans to add 10,000 more by 2017).

38. *See* Janet E.L. Bercovitz, *The Organizational Choice Decision in Business Format Franchising: An Empirical Test*, in *ECONOMICS AND MANAGEMENT OF FRANCHISING NETWORKS* (Josef Windsperger, Gérard Cliquet, George Hendrikse & Mika Tuunanen, eds. 2004); Abell, *supra* note 21, at 50–53; *see also* BROWN, *supra* note 34, at 3, 23, 29 (quoting Hugh C. Sherwood, *Franchising: Big Business Cashes in on the American Dream*, BUSINESS MANAGEMENT, Aug. 1968); King, *supra* note 22, at 422–23.

39. Bercovitz, *supra* note 38, at 40–41; Abell, *supra* note 21, at 50–51; *see* King, *supra* note 22, at 423; *see also* Seth W. Norton, *An Empirical Look at Franchising as an Organizational Form*, 62 JOURNAL OF BUSINESS 197, 202–03 (1988).

40. Bercovitz, *supra* note 38, at 40–41; *see* Gillian K. Hadfield, *Problematic*

evidence shows that companies more commonly employ franchising when the risk of employee shirking is higher and the risk of franchisee free-riding lower.<sup>41</sup> Franchising is thus favored in “physically dispersed operations,” given the expense of monitoring distant local outposts.<sup>42</sup>

The parallel “resource scarcity” theory holds that companies turn to franchising to outsource capital needs for expansion that the company cannot or does not wish to expend itself,<sup>43</sup> a view that has been empirically demonstrated to have considerable validity as well.<sup>44</sup> The incentives available to the franchisee for success compensate the franchisee for the funding that permits the franchisor faster expansion than would otherwise be possible.<sup>45</sup> Relatedly, by coopting a locally-knowledgeable franchisee, the franchisor can obtain more talented labor without the expense of assaying local conditions—valuable to a franchisor seeking to rapidly conquer unfamiliar or hostile markets.<sup>46</sup> This consideration thus also shows franchising to be preferred for geographically diffuse enterprises.<sup>47</sup>

Despite much discussion, a precise definition of a franchise is elusive.<sup>48</sup> One early author observed that it is “distinctly different from other distribution forms because of the independence from one another of the parties to the contract and the sharing of a common trademark,”<sup>49</sup> and commentators generally agree that the shared brand name is the hallmark of franchising.<sup>50</sup> Courts too concur that the “cornerstone of a franchise system

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*Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 949–50 (1989–1990).

41. Bercovitz, *supra* note 38, at 55–57, 62–63; Norton, *supra* note 39, at 204, 209–11, 214; *see also* Abell, *supra* note 21, at 50–51.

42. Norton, *supra* note 39, at 202, 209–11, 214; King, *supra* note 22, at 423.

43. Bercovitz, *supra* note 38, at 41–42; Abell, *supra* note 21, at 51–52; *see also* Norton, *supra* note 39, at 199–200.

44. Bercovitz, *supra* note 38, at 58, 62–63. *But see* Norton, *supra* note 39, at 199–200.

45. Abell, *supra* note 21, at 51–52.

46. *Id.* Norton, *supra* note 39, at 204–05, 211–14.

47. Norton, *supra* note 39, at 211–14.

48. Rochelle Spandorf, *Structuring Licenses to Avoid the Inadvertent Franchise*, LANDSLIDE, Mar.-Apr. 2010, at 38 (“Most people think they know a franchise when they see one. . . . There is no uniform definition of a franchise.”); HACKETT, *supra* note 21, at 3–4 (“[F]ranchising as a distribution form is sometimes ill defined and misunderstood because of its diverse, heterogenous and hybrid forms”); Fels, *supra* note 23, § 1.2 at 3 (“Franchising cannot be easily explained or defined.”); *see* Norton, *supra* note 28, at 17 (“Franchising is a common term in daily life, business discourse, and the law. Nevertheless, the term is used in different contexts and with different meanings.”).

49. *E.g.*, HACKETT, *supra* note 21, at 11.

50. *See, e.g.*, GLICKMAN, *supra* note 23, § 2.02 at 6; *see also* Scott P. Sandrock, *Tort Liability for a Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. CIN. L. REV. 699, 701 (1979) (describing reliance on national brand in patronizing local

must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product.”<sup>51</sup> The franchisor must therefore assiduously cultivate uniformity of quality to avoid dilution of its valuable brand, an undertaking that inherently involves some degree of supervision and control of franchisees.<sup>52</sup> These complementary elements were summed up by the Pennsylvania high court in 1978:

In its simplest terms, a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under the name or mark. More broadly stated, the franchise has evolved into an elaborate agreement by which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services.<sup>53</sup>

State and federal law provide more concrete guidance.<sup>54</sup> Consistent with history and precedent, the use of a common trademark or brand name is the *sine qua non*,<sup>55</sup> along with some payment by the franchisee for the use of the trademark.<sup>56</sup> But trademark license and payment are not enough: the Federal

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establishment).

51. *Krebs Chrysler Plymouth v. Valley Motors*, 141 F.3d 490, 497 (3d Cir. 1998) (quoting *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *appeal dismissed*, 381 U.S. 125 (1965)); *accord. Instruction Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124 (N.J. 1992).

52. *See Norton, supra* note 28, at 32; John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 106–08 (1995–1996); Killion, *supra* note 29, at 164 (“Franchising is not just about the product tasting or looking the same from store to store. It is about one store being no different than another. . . . This is what franchising is all about—finding a business model that works and then insisting that each franchise adhere religiously to the model.”); Kevin M. Shelley & Susan H. Morton, *Control in Franchising and the Common Law*, 19 FRANCHISE L.J. 119, 121 (1999–2000).

53. *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 740 (Pa. 1978) (quoting *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207, 211 (Pa. 1976)); *see Artman v. Int’l Harvester Co.*, 355 F. Supp. 476 (W.D. Pa. 1972).

54. *See Spandorf, supra* note 48, at 38–41. This paragraph’s discussion omits regulations concerning franchising in specific industries, where the definition is particular to the concerns of that particular sector. *See, e.g.*, 15 U.S.C. §§ 1221(b) (definition under the Automobile Dealer’s Franchise Act), 2801 (definition under the Petroleum Marketing Practices Act). *See generally* GLICKMAN, *supra* note 23, §§ 2.02[4][c] at 46.3–46.6, 3.07[1]–[2] at 36–39 (discussing various specialized franchising regimes under state law).

55. Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1(h)(1) (2007); GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law).

56. Federal Trade Commission Disclosure Requirements and Prohibitions

Trade Commission requires that the franchisor “exert a significant degree of control over the franchisee’s method of operation, or provide significant assistance,”<sup>57</sup> while state laws typically demand that the franchisee operate “under a marketing plan or system prescribed in substantial part by a franchisor,”<sup>58</sup> or more generally in a “community of interest in the marketing of goods or services.”<sup>59</sup> The legal necessities for a franchise can thus be paraphrased as (a) the franchisor’s license of a trademark or brand name (b) for which a franchisee pays consideration, (c) for use in an enterprise operated with some significant oversight or support of the franchisor, whether in a formal plan or informal guidance.<sup>60</sup> In one form or another, these elements will control.<sup>61</sup>

### III. THE FRATERNITY AS FRANCHISE

The original advent of the franchising model came at around the same time as fraternities arose in American society, the middle of the nineteenth century, though neither enjoyed widespread success before the dawn of the twentieth.<sup>62</sup> The two models have waxed and waned in tandem in more recent times, seeing stagnation in the years leading up to World War II only to enjoy healthy growth thereafter, face contretemps from societal pushback in the 1970s, and look forward to fairly bright contemporary prospects.<sup>63</sup> And both college fraternities and franchising first blossomed in the United

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Concerning Franchising, 16 C.F.R. § 436.1(h)(3) (2007); GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law).

57. Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1(h)(2) (2007); *see* Spandorf, *supra* note 48, at 38–39.

58. GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law); *see* Spandorf, *supra* note 48, at 38–40.

59. GLICKMAN, *supra* note 23, § 2.02[4][a] at 28 & n.52; *see* Spandorf, *supra* note 48, at 38–40.

60. *See* Spandorf, *supra* note 48, at 38.

61. It may be interesting to compare European Union law, which is perhaps more restrictive, calling for “a common name or sign with uniform presentation of premises, communication of know-how from franchisor to franchisee, and continuing provision of commercial or technical services by the franchisor to the franchisee.” Norton, *supra* note 28, at 19. *See generally* Abell, *supra* note 21.

62. As to franchises, *see supra* notes 20–30 and accompanying text. As to fraternities, *see* Sunshine, *supra* note 2, at 82–83; Craig L. Torbenson, *From the Beginning: A History of College Fraternities and Sororities*, in *BROTHERS AND SISTERS: DIVERSITY IN COLLEGE FRATERNITIES AND SORORITIES* 20–34 (Craig L. Torbenson & Gregory S. Parks, eds. 2009); *see also* Govan, *supra* note 3, at 685.

63. As to franchises, *see supra* notes 30, 33–37 and accompanying text. As to fraternities, *see* Sunshine, *supra* note 2, at 83–34, 110–13; Govan, *supra* note 3, at 685–87; Harvey, *supra* note 4, at 12–13; Torbenson, *supra* note 62, at 34–38.

States, and remain far more prevalent there than abroad.<sup>64</sup> To propose an equivalence between franchise and fraternity structure is therefore not to invoke coincidence or serendipity, but to recognize that the two may be different developments of the same kernel of an idea. Indeed, both may be considered outgrowths of ancient professional guilds and fraternal organizations; the Freemasons, for example, stand at the juncture of such precursors.<sup>65</sup> Given the wide breadth of industries in which franchising has taken hold,<sup>66</sup> the not-so-cloistered university campus is hardly beyond the pale.

#### A. The Business of the Fraternity Chapter

A preliminary objection to the franchise conceit is that fraternities are not engaged in business at all—that they are communal societies, not commercial vendors.<sup>67</sup> Certainly fraternity chapters do not fit the classical archetypes of chain restaurants or licensed automobile dealers.<sup>68</sup> At first blush, then, organizational analogues to franchising falter at the question of what fraternities are selling, aside from collateral transactions in Greek-emblazoned jewelry, sweatshirts, and other paraphernalia.<sup>69</sup> But even as early as 1925, an article concluded with the observation that “whether fraternity houses could be called a business” is “among the interesting questions which may arise.”<sup>70</sup> Fraternities are not so far outside the bounds of ordinary commerce as they might superficially seem.

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64. As to franchises, see Abell, *supra* note 21, at 40–50. As to fraternities, see Sunshine, *supra* note 2, at 82 n.10.

65. See sources cited *supra* note 21 (tracing early history of franchising to professional guilds and warrants); Sunshine, *supra* note 2, at 81–83 & n.10 (tracing early history of fraternal societies in America). See generally BAIRD, *supra* note 9; ALBERT C. STEVENS, CYCLOPÆDIA OF FRATERNITIES (2d ed. 1907). Discussion of these earlier and parallel fraternal organizations would exceed the scope of an article examining college fraternities, but for a more rigorous comparison between historical liability for benevolent fraternities such as the Odd Fellows and Elks and social college fraternities. See generally Sunshine, *supra*.

66. See *supra* text accompanying notes 31–32.

67. See, e.g., LeFlore, *supra* note 10, at 233 (“A national organization of a fraternity is not in business to make a profit.”).

68. Cf. LeFlore, *supra* note 10, at 220 (“The fraternity, however, is not the typical business entity.”).

69. E.g., L.G. Balfour Co. v. FTC, 422 F.3d 1, 7–8 (7th Cir. 1971) (fraternity-licensed jewelry); Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396, 401 (N.D. Tex. 2011) (paddles, pins, clothing, glasses, mugs, etc.), *aff’d*, 708 F.3d 614 (5th Cir. 2013); see also Sarah Otte Graber & Sean K. Owens, *Trademark Infringement: It Can Run Both Ways*, FRATERNAL L., Nov. 2012, at 1 (“These marks can also identify collateral products that these organizations authorize to be licensed and sold to enhance their revenue stream”).

70. Neuhoff, *supra* note 2, at 41.

The fraternity chapter offers a varied package of attractive services to the college community, including recreational and sporting pursuits, academic assistance, leadership training, humanitarian endeavors, social functions, scholarships, and most concretely, dining and housing.<sup>71</sup> The more social decadences of fraternity life are often viewed as paramount is a long-standing,<sup>72</sup> even if unjustified, minimization of the multifarious services provided.<sup>73</sup> And in return for this *à la carte* menu of options, the chapter seeks and obtains payment for its arranging and provision of these amenities.<sup>74</sup> Some options (like athletic competitions or philanthropies) might be available *gratis* to any member, while others (such as housing or a social event) involve payment of a premium by members wishing to avail themselves of the option.<sup>75</sup> Colleges themselves acknowledge that “fraternities will be treated ‘like any other private business that markets services to students off-campus, just like a hardware store.’”<sup>76</sup>

A fraternity chapter’s primary purveyances, however, are not these services considered piecemeal, but rather memberships. The fundamental commercial transaction occurs not every time dues are paid by its members,

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71. See Hauser, *supra* note 4, at 454 (citing “shared living arrangements” and “academics, athletics, social events, community service” as services offered); Daniel J. McCarthy, *Updates on Chico State and UCF Campus-Wide Suspensions*, FRATERNAL L., May 2013, at 4–5 (“Of course, social events, philanthropy events and intramural sports form a large part of the daily activities for chapters and their members.”); Govan, *supra* note 3, at 681; Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 CATH. U. L. REV. 347, 356 (2003–2004); Horton, *supra* note 6, at 459; LeFlore, *supra* note 10, at 210. See *infra* Subpart III.B.3, for a complete discussion of how the national assists in providing these services.

72. See DIANA B. TURK, BOUND BY A MIGHTY VOW: SISTERHOOD AND WOMEN’S FRATERNITIES, 1870–1920, at 44 (2004) (“[In the early 1900s] a shift occurred among the women’s Greek-letter organizations, as the sisters turned away from intellectual and scholarly pursuits and centered instead on social and what some perceived as largely superficial affairs.”); *id.* at 47–53; NICHOLAS L. SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES 156–57 (2008).

73. See *Estate of Hernandez v. Flavio*, 924 P. 2d 1036, 1038 (Ariz. Ct. App. 1997) (“The national fraternity invites membership in a loosely associated group of clubs, one of the primary purposes of which is to engage in parties where liquor is served. Indeed, alcohol abuse is, as the national fraternity recognizes, a serious problem in college fraternities.”), *aff’d in part and rev’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); Govan, *supra* note 3, at 681; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

74. See Horton, *supra* note 6, at 469–70.

75. E.g., *Estate of Hernandez v. Flavio*, 930 P.2d 1309 (Ariz. 1997), *aff’d in part and rev’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); see BAIRD, *supra* note 9, at 495–96; Horton, *supra* note 6, at 469–70.

76. Daniel J. McCarthy, *Tragedy Leads to Off-Campus Fraternity System*, FRATERNAL L., Jan. 2007, at 6.

but when a prospective member agrees to join and pay those dues in subsequent years.<sup>77</sup> Prior to joining, the college student has no financial obligations to the chapter, and after joining, the newly-minted fraternity member has accepted what amounts to an installment plan of payments over the course of his academic career in exchange for membership and the benefits thereof.<sup>78</sup> This view is given force by the fact that fraternities generally include some sort of formal acceptance of responsibility for these financial obligations as a necessary part of admission to the chapter.<sup>79</sup> Properly conceived, the local fraternity chapter is marketing its package of services to the college community as a whole, seeking to find new members—that is, new customers for the Greek business model.

Particular note should be made of chapter housing: “Industry wide, Greek organizations own and operate in excess of \$3 billion in real estate, often located in prime locations. These buildings house some 250,000 students. In short, chapter housing is a big business.”<sup>80</sup> For well over a century,<sup>81</sup> many if not most fraternities have (for payment) provided room and board to a substantial portion of their members.<sup>82</sup> And numerous if not

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77. *E.g.*, *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002) (“Kenner was obliged to pay Kappa an application fee of \$237.00 and sign a membership agreement with Kappa. In exchange, Kenner was permitted to seek membership with Kappa. Such a relationship is, at a minimum, contractual in nature, requiring performance by both parties.” (citations omitted)); *see Estate of Hernandez v. Flavio*, 930 P.2d 1309, 1314–15 (Ariz. 1997) (referring to fraternity policy of informing prospective members of the financial obligations of membership). Viewing the underlying transaction as between the chapter and a prospective member also sidesteps the rather paradoxical situation of a chapter contracting with a member of its own management. Similar concerns animated the belief that a local chapter might be acting as an agent of the national. *Cf. Evans v. Junior Order United Am. Mech. Soc’y*, 111 S.E. 526, 527 (N.C. 1922) (“The subordinate lodge acts for and represents the [national] defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent.” (quoting *Bragaw v. Supreme Lodge*, 38 S.E. 905 (1901))).

78. *Kenner*, 808 A.2d at 182–83; *Estate of Hernandez*, 930 P.2d at 1314–15; *see Horton*, *supra* note 6, at 469–70.

79. *Kenner*, 808 A.2d at 182–83; *Estate of Hernandez*, 930 P.2d at 1314–15; *see Horton*, *supra* note 6, at 469–70.

80. Sean P. Callan, *The Chapter House Rules; How Corporate Structure Can Handcuff a House Corporation*, FRATERNAL L., Nov. 2012, at 3–4; *accord* David Cook, *Good Read: From Joe Biden’s Next Steps, to a Fox News Challenger, to Backpack Nukes*, CHRISTIAN SCIENCE MONITOR, Apr. 1, 2014 (“Fraternities are a big business, housing 1 in 8 students at four-year colleges and owning property worth an estimated \$3 billion.” (discussing Flanagan, *supra* note 1)); *cf.* BAIRD, *supra* note 9, at 33–34 (conservatively estimating the value of fraternity real estate holdings in 1905 at \$3 million); Neuhoff, *supra* note 2, at 31 (referring to fraternities’ “immense holdings of property” in early 1900s).

81. SYRETT, *supra* note 72, at 162–64; BAIRD, *supra* note 9, at 32–34; Neuhoff, *supra* note 2, at 31.

82. Horton, *supra* note 6, at 439, 470; Bauer, *supra* note 71, at 355–57.

most colleges have depended heavily on fraternities to house their students,<sup>83</sup> though this symbiosis has increasingly come under attack by colleges desirous of insourcing this valuable business opportunity.<sup>84</sup> Such accommodations are offered exclusively to the fraternity membership,<sup>85</sup> and are competitive with if not far superior to residential options available from the school.<sup>86</sup>

Accordingly, from the earliest days, state courts considering taxation law viewed fraternity housing as a commercial enterprise.<sup>87</sup> Notwithstanding fraternities' origins as literary societies,<sup>88</sup> Massachusetts and Maine found their properties to be taxable despite an exemption for literary or scientific purposes,<sup>89</sup> while New York went further in imposing taxation given an additional exception for educational use.<sup>90</sup> Even when universities own fraternity houses, educational exceptions may not apply because of the non-scholastic purposes to which a fraternity house is put.<sup>91</sup> That fraternities do not fall within such general noncommercial exemptions is underscored by statutes expressly excluding fraternities from taxation when legislatures

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83. See Bauer, *supra* note 71; Harvey, *supra* note 4, at 13; see Torbenson, *supra* note 62, at 33, 35; BAIRD, *supra* note 9, at 32–33; see also SYRETT, *supra* note 72, at 162–64 (commenting on the advent of fraternity housing).

84. Bauer, *supra* note 71.

85. Hauser, *supra* note 4, at 454.

86. E.g., Bauer, *supra* note 71, at 380 (“[F]raternities submitted evidence that fraternity houses at Hamilton offered superior lodging, meals, and social space, as compared to facilities owned by the college”), 387–88 (“The existing college dormitory facilities ‘paled in comparison’ to the fraternity houses.” (quoting Philip F. Smith, *The Demise of Fraternities at Williams*, CHRON. OF HIGHER EDUC., Apr. 2, 1999, at B6)); see also *id.* at 390; SYRETT, *supra* note 72, at 163–64.

87. See Veil B. Chamberlain, *Tax Exemption of Greek Letter Fraternities*, 4 U. CIN. L. REV. 186 (1930); Neuhoff, *supra* note 2, at 38–40 (discussing and comparing cases in this paragraph).

88. See Sunshine, *supra* note 2, at 82 & n.11; TURK, *supra* note 72, at 32–33 & 180 n.91.

89. *Inhabitants of Orono v. Sigma Alpha Epsilon Soc’y*, 74 A. 19, 21 (Me. 1909); *Phi Beta Epsilon Corp. v. City of Boston*, 65 N.E. 824, 824–25 (Mass. 1903); see also *Powers v. Harvey*, 103 A.2d 551, 555 (R.I. 1954); *Mu Beta Chapter Chi Omega House Corp. v. Davison*, 14 S.E.2d 744, 746 (Ga. 1941). But see *Alpha Rho Zeta of Lambda Chi Alpha, Inc., et al v. Inhabitants of City of Waterville*, 477 A.2d 1131, 1141 (Me. 1984) (distinguishing *Orono* based on the titleholder of the property).

90. *People ex rel. Delta Kappa Epsilon Soc’y of Hamilton College v. Lawler*, 77 N.Y.S. 840 (N.Y. App. Div. 1902), *aff’d*, 71 N.E. 1136 (N.Y. 1904)

91. Compare *Knox College v. Bd. of Review of Knox Cty.*, 139 N.E. 56 (Ill. 1923) (non-scholastic purposes control), with *Alpha Rho Zeta*, 477 A.2d at 1140–41 (exempt from tax because university owns and uses property for its own purposes, “notwithstanding the buildings, with college license, may be occupied by fraternity corporations which may also use the same for social intercourse and recreation”).

sought that result.<sup>92</sup> Fraternities thus are at least operating commercially when they act as landlords (or *de facto* property agents, when title is formally held by a housing corporation or university<sup>93</sup>) for their members.<sup>94</sup>

Chapterhouses are no *sine qua non*, however. The fraternity's general business model—offering paid membership to a selective few, who may then avail themselves of an *à la carte* menu of services both included and premium—is hardly unusual. Indeed, it is employed by virtually every social club in existence,<sup>95</sup> though many do let accommodations to members as well.<sup>96</sup> Lower courts have repeatedly found social clubs such as the Boys Clubs of America, Boy Scouts, and Lions Clubs to be business establishments when the legal issue has arisen.<sup>97</sup> So too has the Supreme Court in holding both the Rotary Club<sup>98</sup> and New York State Club Association<sup>99</sup> to be commercial in nature. Key to these decisions were the

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92. *E.g.*, *Beta Theta Pi Corp. v. Bd. of Comm'rs of Cleveland Cty.*, 234 P. 354, 356 (Okla. 1925); *Kappa Kappa Gamma House Ass'n v. Percy*, 142 P. 294, 296 (Kan. 1914); *State ex. rel. Daggy v. Allen*, 127 N.E. 145, 146 (Ind. 1920); *see* *Delta Psi Fraternity v. City of Burlington*, 969 A.2d 54, 59 (Vt. 2008) (describing modern fraternal taxation exemptions of the nine states that have them).

93. *See, e.g.*, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 411 (Kan. 2002); *Foster v. Purdue Univ.*, 567 N.E.2d 865, 871–72 (Ind. Ct. App. 1991); Hauser, *supra* note 4, at 452–53; Olcott O. Partridge, *The Legal Status of a College Fraternity Chapter*, 42 AM. L. REV. 168, 173 (1908); *see* LeFlore, *supra* note 10, at 194 n.7; *see also* *Campbell v. Bd. of Tr. of Wabash Coll.*, 495 N.E.2d 227, 228 (Ind. Ct. App. 1986) (chapter leased house from the university).

94. *See* sources cited *supra* notes 80–92 and accompanying text. *But see* Neuhoff, *supra* note 2, at 37 (“Where the fraternity contracting is not incorporated, the transaction is no doubt governed by the law applicable to voluntary associations *not for purposes of trade or profit*. The great weight of authority is that such associations, *unlike those organized for trade or profit*, are not partnerships and the liability of its members for debts contracted in behalf of the association is governed by the principles of agency.” (emphasis added)).

95. *E.g.*, *Isbister v. Boys' Club of Santa Cruz*, 707 P.2d 212, 214–15 (Cal. 1985).

96. *See, e.g.*, Paul H. Plotz, *Harvard Club of New York: Social Focus for Locals*, HARVARD CRIMSON (Cambridge, Mass.), Jan. 8, 1957 (subtitled “Clubhouse Is Hotel for Visiting Members, Too”), <http://www.thecrimson.com/article/1957/1/8/harvard-club-of-new-york-social/?page=2>; Carolyne Zinko, *New Private SF Club The Battery*, S.F. CHRONICLE, Feb. 14, 2014, available at sfgate.com.

97. *See, e.g.*, *Isbister*, 707 P.2d at 217–19 (Boys Clubs of America constitute business establishment under Unruh Act); *Curran v. Mount Diablo Council of The Boy Scouts of America*, 195 Cal. Rptr. 325 (Cal. Ct. App. 1983) (Boy Scouts constitutes business establishment under Unruh Act), *appeal dismissed*, 468 U.S. 1205 (1984); *Rogers v. Int'l Ass'n of Lions Clubs*, 636 F. Supp. 1476 (E.D. Mich. 1986); *Lloyd Lions Club v. Int'l Ass'n of Lions Clubs*, 724 P.2d 887 (Or. App. 1986). *But see* *Isbister*, 707 P.2d at 226–27 (Mosk, J., dissenting); *see also* *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986), *reh'g denied*, 811 F.2d 247 (1987), *cert. dismissed*, 483 U.S. 1050 (1987).

98. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *see* Horton, *supra* note 6, at 455–56 (discussing case).

99. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1987); *see* Horton,

fundamentally pecuniary natures of such organizations in providing premium services and business opportunities while exacting fees.<sup>100</sup>

Finally, the economics of fraternities have not gone without scholarly analysis.<sup>101</sup> One rigorously mathematical proof revealed that the selection process and *de facto* accreditation by fraternal membership is a robust indicator of applicant quality in the labor market, making the fundamental service that fraternities provide—membership—valuable indeed.<sup>102</sup> Other authors have questioned whether fraternity membership is truly economically advantageous from a business networking perspective.<sup>103</sup> And one article analyzed the market for collegiate housing and argued that collegiate campaigns to take over fraternities' facilities constituted anticompetitive monopolization of the market by eliminating competitors.<sup>104</sup> Whatever the social aspects of fraternities (and they are manifold), they are conceptually analyzable as economic entities.

#### B. The Sundry Analogues Between Franchises and Fraternities

Given their pecuniary undertakings, it cannot be maintained that fraternities are beyond the bounds of commerce. Nor is their business model categorically insusceptible of franchising. To be sure, some social clubs stridently condemn franchising as diluting the exclusivity or panache of their establishment.<sup>105</sup> But the far reach of franchising has grasped even such hoary institutions: The Camping and Caravanning Club in Britain is over a century old and franchises about 15% of its clubs,<sup>106</sup> while similar if less

*supra* note 6, at 452–53 (discussing case).

100. *E.g.*, *N.Y. State Club Ass'n.*, 487 U.S. at 11–12; *Bd. of Dir. of Rotary Int'l.*, 481 U.S. at 543.

101. In this day and age, very little has gone without scholarly analysis, including the phenomenon that little has gone without scholarly analysis. *See, e.g.*, Joseph J. Brannin & Mary Case, *Reforming Scholarly Publishing in the Sciences: A Librarian Perspective*, 45 NOTICES AM. MATH. SOC'Y 475 (1998).

102. Sergey V. Popov & Dan Bernhardt, *Fraternities and Labor-Market Outcomes*, AMERICAN ECONOMIC JOURNAL: MICROECONOMICS, Feb. 2012, at 116–41.

103. *E.g.*, Hauser, *supra* note 4, at 455 & n.164 (“Actual indications are that any economic advantage of college fraternity membership is negligible.”).

104. Bauer, *supra* note 71.

105. *E.g.*, Nicole LaPorte, *Soho House Is Taking the Party Global*, N.Y. TIMES, Jun. 1, 2012 available at [http://www.nytimes.com/2012/06/03/fashion/soho-house-is-taking-the-party-global.html?\\_r=0](http://www.nytimes.com/2012/06/03/fashion/soho-house-is-taking-the-party-global.html?_r=0) (“‘We’re absolutely not becoming a franchise,’ he said, emphasizing that last word with disdain. ‘Our team does get bigger, but I still wrap my arms around every single bit that goes on in Soho House. I’m just more of an octopus now.’”).

106. The British Franchise Association – The Camping and Caravanning Club (Franchising) Ltd., <http://www.thebfa.org/members/the-camping-and-caravanning-club-franchising-ltd>.

venerable examples can be found amongst the social, recreational, and country clubs of the United States.<sup>107</sup> As for the courts, the Seventh Circuit has found that a local Girl Scouts council fell within Wisconsin franchise law protections.<sup>108</sup> The inquiry thus turns to whether college fraternities' idiosyncratic national-local structure can be usefully analogized to that of franchisor and franchisee.

### 1. Trademarks: Greek Letters as Brand Names

The most central and obvious connection between the fraternal and franchise relationship is the role of trademarks.<sup>109</sup> Fraternities originally opted to brand themselves with Greek letters to "more closely identify with the glories of ancient civilization, including athletics, art, literature, philosophy, and democratic values."<sup>110</sup> Although there remain a few exceptions,<sup>111</sup> virtually all fraternities use two or three Greek letters to identify their organizations, both at the national and chapter level.<sup>112</sup> Indeed, so fundamental are such trademarks to fraternities that their business model is often known as Greek life on campuses and even in scholarly literature.<sup>113</sup>

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107. See, e.g., About Us - Nautical Boating Country Clubs, <http://nauticalboatclubs.com/about/> (discussing both membership and franchise opportunities); Franchise Opportunities: Grand Rapids Sport & Social Club, <http://grssc.com/pages/franchise> (discussing qualifications for franchisees).

108. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A. Inc.*, 549 F.3d 1079 (7th Cir. 2008).

109. Although fraternity names are generally not only trademarks but also service marks and collective membership marks, see Donald F. Frei & Kurt L. Grossman, *Protection of Fraternity Names*, FRATERNAL L., Mar. 1984, at 4, for concision, this Article uses the term "trademark" generically to refer to any mark in which the organization may have an intellectual property interest. For example, while the fraternity letters on a baseball cap represent a trademark, the use of a Greek name to market a social event or other chapter affairs is more in the way of a service mark. While there are legal distinctions between these subspecies of marks, they are not relevant at the high level of generality regarding intellectual property discussed herein. See generally Joseph M. Lightman, *Economic Aspects of Trademark in Franchising*, 14 PAT. TRADEMARK & COPY. J. RES. & ED. 481 (1970-1971) (reviewing use of trademarks and service marks in franchises with little distinction); David Laufer & David Gurnick, *Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees*, 6 FRANCHISE L.J. 3 (1986-1987) (same).

110. Bauer, *supra* note 71, at 352.

111. Of the seventy-odd members of the North-American Interfraternity Council, only three - Acacia, FarmHouse, and Triangle - do not have a Greek letter name. See Member Fraternities | North-American Interfraternity Council, available at <http://www.nicindy.org/member-fraternities.html>.

112. See BAIRD, *supra* note 9, at 2-3; *Abraham v. Alpha Chi Omega*, 781 F. Supp. 2d 396 (N.D. Tex. 2011), *aff'd*, 708 F.3d 614 (5th Cir. 2013); *L.G. Balfour Co. v. FTC*, 422 F.3d 1, 7 (7th Cir. 1971).

113. E.g., Rutledge, *supra* note 3, at 362-63; Govan, *supra* note 3, at 681.

Many neighborhoods where fraternity houses cluster, prominently displaying letters to advertise their affiliations, are aptly known as Greek rows.<sup>114</sup>

Nor is there any question that these Greek letters are brand names—indeed, well-protected trademarks.<sup>115</sup> A half century ago, only a third of national college fraternities had registered their letters under the Lanham Act, and fewer still had sought statutory trademark protection.<sup>116</sup> Even so, fraternities of the day were (too) shrewd in licensing these trademarks exclusively to official purveyors, catching the attention of antitrust regulators.<sup>117</sup> In the modern day, however, most fraternities diligently maintain trademark registrations and licensing operations.<sup>118</sup> One scholar counseled in 2002 that “Greek organizations should be just as aggressive to use the civil lawsuits to enforce their trademarks as they would to use the criminal process to prosecute an armed robber.”<sup>119</sup> Fraternities have taken this advice to heart, launching suits to protect their brands against rogue chapters<sup>120</sup> and unauthorized commercial use alike.<sup>121</sup> And in a dramatic show of interfraternal force, thirty-two national fraternities recently prevailed in a lawsuit against a decorative paddle manufacturer who had been using their trademarks without permission, a sweeping victory affirmed

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114. *E.g.*, Page Jones, *Renovation and Reconstruction Plans for OU's Greek Row*, OKLAHOMA DAILY, Sept. 16, 2014, available at [http://www.oudaily.com/news/renovation-and-reconstruction-plans-for-ou-s-greek-row/article\\_ab552084-3b70-11e4-9da3-0017a43b2370.html](http://www.oudaily.com/news/renovation-and-reconstruction-plans-for-ou-s-greek-row/article_ab552084-3b70-11e4-9da3-0017a43b2370.html).

115. *Abraham*, 781 F. Supp. 2d at 409-410 (holding that Greek letter names have the second-highest level of trademark protection as “arbitrary” marks). *See generally* Robert E. Manley, *Intellectual Property in the Twenty-First Century*, FRATERNAL L., Mar. 2001, at 6; Frei & Grossman, *supra* note 109, at 4-6.

116. *L.G. Balfour*, 442 F.2d at 7.

117. *Id.* at 8, 22-26.

118. *Abraham*, 781 F. Supp. 2d at 403 (“In the 1990s, the Greek Organizations began to increase their vigilance in policing their marks. At present, each of the Greek Organizations has a licensing program, and hundreds of vendors are licensed to produce memorabilia containing their Greek letter combinations, insignia, crests, and symbols.”); *id.* at 401 (“Most of the Greek Organizations are the owners of valid registrations of trademarks of these Greek letter combinations and insignia issued by the United States Patent and Trademark Office.”).

119. Robert E. Manley, *Enforcement of Trademarks*, FRATERNAL L., Nov. 2002, at 2.

120. *E.g., id.*; Gary E. Powell, *Fraternity Sues Students*, FRATERNAL L., Nov. 1996, at 2.

121. *E.g.*, *Alpha Tau Omega Fraternity, Inc. v. Pure Country, Inc.*, 185 F. Supp. 2d 951 (S.D. Ind. 2004); Robert E. Manley, *Trademark Enforcement*, FRATERNAL L., Nov. 2004, at 4 (discussing case); *Alpha Kappa Alpha Sorority Inc. v. Converse Inc.*, 175 F. App'x 672, 680 (5th Cir. 2006).

on appeal.<sup>122</sup>

As these cases indicate, it is the national fraternity that holds the trademark,<sup>123</sup> and licenses its use by its local chapters: “The relationship between the national fraternity and the local fraternity involves the national fraternity offering . . . its brand to the local fraternity.”<sup>124</sup> National by-laws and manuals typically provide explicitly for such licensing provisions,<sup>125</sup> and national licensing contracts for official paraphernalia are compulsorily “imposed” on local chapters.<sup>126</sup> Locals that are expelled from the national fraternity and stripped of their operating charter are forbidden from continued use of the fraternity’s name, even if individual members remain on campus.<sup>127</sup> It is thus clear that the local operates under at least a *de facto* license, even if there is no written agreement.<sup>128</sup> The local chapter employs the national fraternity’s brand only at the latter’s sufferance, just as in a franchise relationship.

Although local fraternity chapters typically have both national and local names, it is the national trademark by which a chapter primarily identifies itself.<sup>129</sup> This makes good sense: the local chapter is by design the national’s

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122. *Abraham*, 781 F. Supp. 2d 396, *aff’d*, 708 F.3d 614 (5th Cir. 2013); see Timothy M. Burke, *Court of Appeals Upholds Paddletramps Decision*, FRATERNAL L., Jan. 2013, at 3.

123. See *Abraham*, 781 F. Supp. 2d at 401–04 (“The [national] Greek Organizations act as holding-type companies which hold ownership of their properties, including their trademarks.”).

124. *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014); accord *Yost v. Wabash College*, 3 N.E.3d 509, 521–22 (Ind. 2014) (“The designated facts show that the relationship between the national fraternity and local fraternity involves the national fraternity offering . . . a brand to the local fraternity.”).

125. E.g., Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 14, available at <http://www.joindeltasig.com/files/Fraternity%20Manual%202010.pdf> (outlining trademark policy and allowance of local commercial use given national permission).

126. *L.G. Balfour Co. v. FTC*, 422 F.3d 1, 10 (7th Cir. 1971).

127. E.g., Robert E. Manley, *Enforcement of Trademarks*, FRATERNAL L., Nov. 2002, at 2; see, e.g., Jim Ewbank, *Kappa Alpha Order Prevails Against Break Away Group*, FRATERNAL L., May 2013, at 4; Timothy M. Burke, *Loss of Charter Leads to Litigation*, FRATERNAL L., Sept. 2008, at 6; Gary E. Powell, *Fraternity Sues Students*, FRATERNAL L., Nov. 1996, at 2.

128. Cf. Spandorf, *supra* note 48, at 39 (describing situations in which *de facto* licenses are inferred in franchise relationships).

129. Different fraternities use different styles for local chapter names—some simply proceed alphabetically from the Alpha chapter through the Omega, then begin again with Alpha Alpha. Others proceed similarly, but maintain separate lists in each state, yielding names like Alpha of Pennsylvania. And some assign chapter letters out of alphabetical order. The full name of a local chapter might therefore be the Alpha Chapter of the Beta Gamma Delta Fraternity. See BAIRD, *supra* note 9, at 2–3; e.g. *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402 (Kan. 2002), *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525 (La. App. 1997).

sole outpost on any given campus.<sup>130</sup> As will be discussed below, the prestige of a fraternity brand has two distinct but interrelated effects. *First*, a more reputable brand is more likely to attract new chapters to affiliate with the national fraternity—that is, more franchisees.<sup>131</sup> *Second*, a better brand allows the local chapter to better market itself to prospective members by parlaying the many benefits available from a successful national organization: the very reason the national brand is valuable to the chapter.<sup>132</sup>

The overarching conclusion is that the national fraternity grants its imprimatur to each of its chapters, holding them out as approved outposts of an organization worthy of attracting new customers.<sup>133</sup> Most fraternities also offer trademarked iconography besides their names, such as official coats of arms, badges, flags, flowers, logos, mottos, or even color schemes.<sup>134</sup> This is no different from any franchise, where the valued name of the chain is augmented with unique trade dress, imagery, and slogans to reinforce the experience being marketed to customers.<sup>135</sup> The quintessence of franchising—the mutual use and promotion of a common brand identity amongst legally distinct but cooperating parties<sup>136</sup>—lies at the heart of the fraternity system.

## 2. Consideration: Chapter Dues and Fees

Similarly, the dues paid by the local to the national should address the requisite that a fee be paid for the use of the national brand. Every fraternity assesses regular dues on its local chapters, which must be paid in order to remain in good standing.<sup>137</sup> These are often denominated as chapter dues—

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130. See *infra* notes 179–182 and accompanying text.

131. See *infra* notes 166–167, 200–202 and accompanying text.

132. See generally *infra* Part III.B.3.a.

133. Cf. Ingram, *supra* note 52, at 106–07 (“The franchisor, by displaying the brand name, is saying to the public that at this particular drive-in you will receive the same kind of food and beverages that you receive at any other drive-in at which this sign is displayed. In short, the franchisor is ‘holding out’ all the franchises as the same.”).

134. See Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396, 401–04 (N.D. Tex. 2011), *aff’d*, 708 F.3d 614 (5th Cir. 2013); Sarah Otte Graber & Sean K. Owens, *Trademark Infringement: It Can Run Both Ways*, FRATERNAL L., Nov. 2012, at 1; Robert E. Manley, *Intellectual Property in the Twenty-First Century*, FRATERNAL L., Mar. 2001, at 6; see also Alpha Kappa Alpha Sorority Inc. v. Converse Inc., 175 F. App’x 672, 680 (5th Cir. 2006) (color scheme); BAIRD, *supra* note 9, at 3–4.

135. E.g., Donald R. Kirk, *Franchise Dual-Branding: The Irony of Association*, 10 DEPAUL BUS. L.J. 1 (1997–1998); Robert Butts, *Franchise Trade Dress: What Do Courts Mean by the Terms Distinctiveness, Functionality, and Likelihood of Confusion?*, 16 FRANCHISE L.J. 129 (1996–1997).

136. HACKETT, *supra* note 21, at 11.

137. E.g., Timothy M. Burke, *Potential Liability for National*, FRATERNAL L., Mar.

payable by virtue of the chapter's agreement with the national fraternity, to compensate for the services the national provides.<sup>138</sup> Frequently, a substantial portion of the total fee is earmarked for the chapter's insurance coverage through a nationally-provided policy.<sup>139</sup> In almost all cases, special pledge payments or initiation fees are due on the submission of a new member's application or formal initiation into the chapter.<sup>140</sup> Yet in all this profusion of payments, there do not appear to be any instances of chapters paying "franchise fees" or "license fees" as such.

But nomenclature is ultimately beside the point: "From the time the first franchise disclosure statute was passed, regulators recognized that an initial fee or franchise fee for entering a business could be disguised as some other kind of charge,"<sup>141</sup> and accordingly the consideration requirement "captures all sources of revenue which the franchisee must pay to the franchisor or its affiliate for the right to associate with the franchisor and market its goods and services."<sup>142</sup> This is not to say that fraternity fees involve any subterfuge, but rather that consideration for affiliation may take many forms.<sup>143</sup> Where payment is required as a condition of the local chapter's association with the national fraternity, the fee is at least arguably in the nature of a franchise fee.<sup>144</sup>

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1990, at 6 ("Members of local chapters pay dues to Zeta Psi and are governed by the rules, regulations and membership criteria of Zeta Psi, all as set forth in the Bylaws of Zeta Psi."); see LeFlore, *supra* note 10, at 232.

138. *E.g.*, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) (The Pi Kappa Alpha national "serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses."); see *Horton*, *supra* note 6, at 469–70; LeFlore, *supra* note 10, at 232; *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

139. *Kimzey*, *supra* note 2, at 467–68, 472–73; see LeFlore, *supra* note 10, at 221 & n.151; *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

140. *E.g.*, *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002); Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

141. GLICKMAN, *supra* note 23, § 2.02[4][a] at 30–31.

142. *Id.* §§ 2.02[2] at 14, 2.02[4][a] at 30.1–30.2; see Spandorf, *supra* note 48 at 40–41.

143. *Cf.* Spandorf, *supra* note 48 at 40–41 (discussing the various kinds of payments that may constitute franchise fees generally).

144. That said, the general federal consideration requirement looks to up-front fees rather than continuing obligations, and thus a fraternity ought to be able to structure its chartering process to avoid any fee payments at all within the relevant six-month statutory sampling period prescribed by the FTC. See GLICKMAN, *supra* note 23, § 2.02[2] at 16–17 n.29; Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.2(a)(3)(iii) (2007); Spandorf, *supra* note 48 at 40–42 (examining how to avoid meeting franchise definition). Many

One distinction should be mentioned: in some cases, fraternity candidates, members, or other customers make certain payments directly to the national organization, bypassing the local chapter's accounts.<sup>145</sup> Yet this does not differ categorically from commercial franchises. Dunkin' Donuts regulars might purchase gift cards offered by a national licensee, only to present them to local franchises to obtain goods and services. Or an aficionado of the AutoZone chain of car part stores might order a trademarked baseball cap from a central website rather than from a local franchise. That some fees or dues may flow straight from ground-level customers does not matter; what matters is that the chapter-*qua*-franchise itself must provide ongoing payments to the national in order to remain in good standing. Only if the chapter were excluded from nearly all intercourse between members and the national would its similarity to a franchise come into question, and that is hardly the case.

### 3. Support and Oversight: The Carrot and the Stick

The local chapter's use of, and payment for, the Greek-letter brand name is hardly the end of similarities to the franchising framework. Consider how one early text described the franchisor-franchisee relationship:

The sound franchisor grants a franchisee contractually limited use of a proven trademark, good will and know-how, including use of trade secrets and copyrights, access to a pre-sold market developed by him for an established business, product and/or service, system-wide promotion, proven standardized operating procedures, product and service research and mass purchasing power. In many cases, the franchisor grants the franchisee an exclusive right to distribute a trademarked product or otherwise conduct the licensed business in a particular territory. He should train the franchisee in the use of the know-how and establishment and operation of the business and maintain and agree to maintain continuing interest and assistance.<sup>146</sup>

Or one might look to a briefer formulation: "Franchising is a continuing relationship in which a franchisor provides a licensed privilege to do

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states' laws, however, have no such temporal limit on payments, making deferral of dues an incomplete remedy. *See, e.g.,* GLICKMAN, *supra* note 23, § 2.02[4][a] at 34 (discussing To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 152 F.3d 658 (7th Cir. 1998), *aff'g* 953 F. Supp. 987 (N.D. Ill. 1997)).

145. *See, e.g.,* Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002) (describing candidates as paying application fee of \$237 directly to the national).

146. Fels, *supra* note 23, § 1.2 at 4; *see* BROWN, *supra* note 34, at 3–5.

business, plus assistance in organizing, training, merchandising, and management, in return for a consideration from the franchisee.”<sup>147</sup>

These sound rather like what a fraternity does, albeit in commercial parlance. The Indiana Supreme Court recently used more fraternal terms: “The relationship between the national fraternity and the local fraternity involves the national fraternity offering informational resources, organizational guidance, common traditions, and its brand to the local fraternity.”<sup>148</sup> The national’s “primary purpose,” after all, is to support the local chapters “by providing services.”<sup>149</sup> Fraternities employ consultants whose portfolio is traveling to the local chapters to deliver these services in person, and some have ramified supervisory establishments at the local, regional, and national level.<sup>150</sup> Just as in a franchise, this national support and oversight are the carrot and the stick used to impose some measure of uniform standards throughout the network of chapters.

*a. The Carrot: Benefits Conferred by the National Organization*

The national fraternity confers many benefits and services that are close analogues to the more business-like franchise. For example, what are ritual practices and ceremonies but closely-guarded trade secrets? Indeed, “all central fraternal activities are carried on behind closed doors. Fraternities conduct all their meetings in an atmosphere of privacy, secrecy, and confidentiality so that initiation ceremonies and other ritual-based activities are carefully guarded from public view. Only initiated fraternity members may attend meetings and other ritual ceremonies.”<sup>151</sup> Even closely-affiliated persons like faculty advisors are not permitted to attend the fraternity’s

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147. Hadfield, *supra* note 40, at 958 (quoting HARRY KURSH, *THE FRANCHISE BOOM* 22 (ed. 1968)).

148. *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014); *see Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) (the Pi Kappa Alpha national “serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses.”); *see also Yost v. Wabash College*, 3 N.E.3d 509, 521–22 (Ind. 2014) (“The designated facts show that the relationship between the national fraternity and local fraternity involves the national fraternity offering networking opportunities and a brand to the local fraternity, along with providing aspirational goals and encouraging good behavior by individual members.”).

149. LeFlore, *supra* note 10, at 205.

150. Barbara S. Bromberg, *Just What Are Fraternal Educational and Charitable Purposes Anyway?*, *FRATERNAL L.*, Mar. 1997, at 2–3; *e.g.*, *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 161–62 (Ind. 2014); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. App. Ct. 1999); *Furek v. Univ. of Del.*, 594 A.2d 506, 514 (Del. 1991).

151. *Horton*, *supra* note 6, at 438; *see BAIRD*, *supra* note 9, at 488.

councils at which business is transacted, in order to secure these fraternal secrets.<sup>152</sup>

The use of any number of valuable copyrighted materials and training accrue to the local chapter. These include membership handbooks used for the instruction of new recruits,<sup>153</sup> as well as more traditional fare such as regular newsletters, group-wide catalogues of membership, histories, and songbooks.<sup>154</sup> Catalogues are of particular use to the chapter for networking purposes, as well as in marketing to legacy students favorably disposed towards membership.<sup>155</sup> Nationals typically provide training and manuals for the management of risk, both to protect their brand and their own insurance from claims against the fraternity.<sup>156</sup> They may also directly oversee or offer guidance to a “house risk manager” so that eyes and ears on the ground are able to effectively minimize liability.<sup>157</sup>

Nationals are likely most vigorously involved in scholastic and eleemosynary affairs, given their wholly salubrious character. Fraternities often offer academic scholarships, and generally promote academic scholarship through printed resources, local outreach, and scholastic awards.<sup>158</sup> Many also hold regional or national leadership conferences to which high-achieving members are invited.<sup>159</sup> A commitment to charity is in the creed of “virtually every national fraternity”; many have nationwide affiliations with major philanthropies, and thus provide significant know-how to chapters in organizing successful fund- and awareness-raising events.<sup>160</sup> Such benevolent causes are amongst the most laudable aspects of

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152. *E.g.*, Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1119 (La. App. Ct. 1999).

153. Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 528–29 (La. App. 1997).

154. Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 409–10 (Kan. 2002); BAIRD, *supra* note 9, at 20–31.

155. BAIRD, *supra* note 9, at 21–23.

156. Kimzey, *supra* note 2, at 487–88; Bromberg, *supra* note 150, at 2–3; *e.g.*, Yost v. Wabash Coll., 2 N.E.3d 509, 520 (Ind. 2014); Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 660 (Iowa 2000) (Lavorato, J., dissenting); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529 (La. App. 1997).

157. *E.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014).

158. See Barbara S. Bromberg, *Just What Are Fraternal Educational and Charitable Purposes Anyway? Part II*, FRATERNAL L., Nov. 1997, at 4–5; Bromberg, *supra* note 150, at 2–3; Timothy M. Burke, *Potential Liability for National*, FRATERNAL L., Mar. 1990, at 6; see also Sean Callan & John Christopher, *IRS Denies Exemption to Local Foundation*, FRATERNAL L., Sept. 2010, at 5; TURK, *supra* note 72, at 28–29.

159. Bromberg, *supra* note 150, at 2–3.

160. Timothy M. Burke, *Publisher’s Note on Associational Rights*, FRATERNAL L., Sept. 2011, at 2 (“Fraternities and sororities on a national level encourage broad range of philanthropic activities. Chapters, to be in the best position to fight for their

the Greek system, which is often at pains to emphasize them, presumably in part to offset more negative perceptions of perpetual partying.<sup>161</sup> By contrast, nationals (undoubtedly prudently) have essentially no involvement with local social functions.<sup>162</sup>

Most centrally to the commercial aspects of their mission, national fraternities offer guidance, training, and know-how on the recruitment and induction of new members. At times, national personnel work directly with local chapters' recruitment and new member training officers to advise on effective strategies.<sup>163</sup> Given nationals' focus on reducing risk, such assistance is often focused on preventing hazing and ensuring the new member intake process proceeds legally and without risk to fraternity or member.<sup>164</sup> In many cases, the induction of each new member is scrutinized and must be pre-approved by the national organization.<sup>165</sup> And, of course, the initiation of new members is accomplished by the secret ceremonies and

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associational rights, must actively participate in the philanthropic activities supported by the national organizations. Philanthropic efforts by national Greek organizations and their foundations include programs like Sigma Gamma Rho's dedication to teaching young people the concepts of financial savings and investing. Phi Delta Theta is maintaining a commitment to defeating ALS, which took the life of Lou Gehrig, one of their most famous brothers. Chi Omega supports Make a Wish Foundations. These are but examples."); Bromberg, *supra* note 150, at 2–3.

161. See Burke, *supra* note 160, at 2; Bromberg, *supra* note 150, at 2–3; Govan, *supra* note 3, at 681; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014; see also Horton, *supra* note 6, at 438 (public relations efforts by chapters).

162. See Marshlain, *supra* note 8, at 4–5; e.g., *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) ("The Court further finds that as to the allegations in Plaintiff's Petition regarding the Pledge Dad Night, Tennessee did not plan, participate in, schedule, coordinate, direct or have any involvement with that event, or any similar event in which intoxicating beverages were consumed."); *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000); *Miller v. Int'l Sigma Pi Fraternity*, 41 Pa. D. & C. 4th 282, 286 (Pa. Ct. Com. Pl. 1999); *Millard v. Lambda Chi Alpha*, 611 A.2d 715, 485 (Pa. 1992).

163. See Barbara S. Bromberg, *Revisiting the Phi Gamma Delta IRS Settlement – Part I*, FRATERNAL L., Jan. 1999, at 3–4 (national consultants' non-educational work includes rush assistance); Bromberg, *supra* note 150, at 2–3 (same); e.g., *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 529 (La. App. 1997); Craig G. Moore, *Social Media Alert – Facebook Used Against Rush Candidates*, FRATERNAL L., Jan. 2011, at 4 (national should advise chapters on social media in recruitment); Timothy M. Burke, *Beta Theta Pi Sanctions*, FRATERNAL L., Mar. 2002, at 6 (national involvement in encouraging diversity in recruitment).

164. E.g., *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 529 (La. App. 1997).

165. E.g., *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 183 (Pa. Super. Ct. 2002); see, e.g., *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. App. Ct. 1999) (national has "the right to control intake" of members).

rituals provided by the national fraternity.<sup>166</sup>

Thus the national fraternity brings significant resources to bear in aid of its locals: the maintenance of its prestige and brand name; the use of its secret traditions and printed materials; risk management guidance; assistance with scholastic and philanthropic undertakings; practiced know-how on recruitment. Without these nationally-provided benefits, the fraternity's chapters would be less successful, providing the local outposts of a national organization with powerful advantages over a single-location independent fraternity.<sup>167</sup> Aspiring groups therefore seek to become chapters—franchises, as it were—of a national organization, and extant independent groups often seek to affiliate with a national as the benefits become clear.<sup>168</sup> By 1970, over 90% of campus chapters across the country had become affiliated with nationals.<sup>169</sup>

*b. The Stick: National Oversight and Discipline*

Nor is all this helpful guidance from the national always hortatory. Just as in franchising, the national's oversight of the local may be mandatory and pervasive, extending at times even to “day-to-day activities,” in order to “ensure they are carrying out the fraternity's purpose.”<sup>170</sup> To be sure, not every quotidian action of a far-flung chapter is or plausibly could be under the thumb of national overseers, as commentators and courts have repeatedly

166. See Schoen & Falchek, *supra* note 3, at 133–34 (“National fraternity organizations normally prescribe the manner in which induction ceremonies are conducted.”); Horton, *supra* note 6, at 438; Rutledge, *supra* note 3, at 39.

167. SYRETT, *supra* note 72, at 83 (“While local fraternities [*i.e.*, as quoted in this note, those with no national organization] did exist, many saw the benefits of national membership as being preferable to a purely local membership.”); see Hauser, *supra* note 4, at 435 (“As for local fraternities, recognition and the attendant benefits - including access to campus facilities and other resources - are critical to survival, especially since they lack the professional and other support provided by national fraternities.”).

168. SYRETT, *supra* note 72, at 83–85 (“Usually, a group of young men would join together for the purpose of petitioning a national fraternity for a charter to start a chapter of that fraternity at their school.”); see Torbenson, *supra* note 62, at 27; *e.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (“Five years ago, a group of CMU students contacted Nate Lehman, current regional director for TKE, and his predecessor expressing their interest to start a chapter”); Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

169. L.G. Balfour Co. v. FTC, 422 F.3d 1, 7 (7th Cir. 1971).

170. Mumford, *supra* note 4, at 763; see *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); *Estate of Hernandez v. Flavio*, 924 P.2d 1036, 186 Ariz. 517, 519 (Ariz. Ct. App. 1997) (“The national fraternity exercises control over many aspects of the activities of its local chapters.”), *aff'd, in part and rev'd, in part on other grounds*, 930 P.2d 1309 (Ariz. 1997).

and rightly reminded.<sup>171</sup> But particularly as regards risk management and potential legal infractions, the national's instructions are not suggestions: the chapter disregards guidance against alcohol, hazing, assaults, and other illegal or risky behaviors at its own existential peril.<sup>172</sup> One fraternity executive admitted that "the national organization is, in a sense, responsible for all that goes on in its chapters, as it has the right to control intake, expel or suspend members, and revoke charters."<sup>173</sup>

Apropos of that entitlement, what of the wayward franchisee that refuses to pay its fees or disregards the franchisor's mandates? Per the formative franchising scholar Harold Brown:

If the franchisee fails to follow these instructions, the agreement will provide for the termination of the franchise. If this happens,

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171. LeFlore, *supra* note 10, at 211, 229–30, 236 (national has little to no control over locals' "day-to-day" activities); G. Coble Caperton & Mary L. Wagner, *Tennessee Court Holds That National Fraternity Does Not Owe a Duty to Third Parties*, FRATERNAL L., Mar. 2012, at 4–5 (same); Smith v. Delta Tau Delta, 9 N.E.3d 154, 163 (Ind. 2014) (no "right to exercise direct day-to-day oversight and control of the behavior of the activities of the local fraternity and its members"); Yost v. Wabash Coll., 2 N.E.3d 509, 520 (Ind. 2014) (same); Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529–30 (La. App. 1997); Furek v. Univ. of Del. 594 A.2d 506, 514 (Del. 1991); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548, 553 (Mo. 1987) (en banc); see Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 572 Pa. 356, 365 (Pa. 1990); Stein v. Beta Rho Alumni Ass'n, Inc., 621 P.2d 632, 637 (Or. 1980).

172. See, e.g., Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (Pi Kappa Alpha "has a standard concerning hazing contained in 'Standards for Retention of Membership, Officer Status, and a Chapter Charter in Good Standing.' The standard defines hazing, in summary, as including physical abuse, sleep deprivation, or anything that is contrary to the appropriate laws. The standard also includes the need of chapters to comply with all applicable laws regarding alcohol. The standard states that the Chapter should abide by the standards for retention, and if they do not, they are subject to a charter suspension or termination. The standard further specifically prohibits hazing activities as defined in the standard."); Flavio, 186 Ariz. at 519–20 ("The argument that the national fraternity had no power to control the activities of the local chapter or its members is belied by the much stricter alcohol policy adopted by the local chapter at the request of the national after the incident in this case."); see also, e.g., Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 654 (Iowa 2000) (national fraternity policy against underage drinking "may authorize discipline" of the chapter); Foster v. Purdue Univ., 567 N.E.2d 865, 872 (Ind. Ct. App. 1991) (national fraternity sanctioned chapter for alcohol violations). But see Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548 (Mo. 1987) (en banc) ("Though the National had adopted a policy against 'hazing' and required compliance with that directive, the National did not participate in the day-to-day management of the Local. Further, the National neither disciplined nor took corrective action when it came to its attention that a local chapter furnished alcoholic beverages to those under the lawful age because such measures were considered impractical.").

173. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118 (La. App. Ct. 1999).

the franchisee will lose his franchise and, through activation of the covenant not to compete, is barred from engaging in a competitive business within a prescribed territory over a prescribed period of time.<sup>174</sup>

So too with local fraternity chapters. Invariably, the national organization reserves the power to revoke the charter of chapters that become delinquent in their fees,<sup>175</sup> or violate the terms of that charter and its associated bylaws and risk management policies.<sup>176</sup> These rules, together with membership agreements that local members sign, have legal weight.<sup>177</sup> And like the dispossessed franchisee, the members of the dissolved university chapter are not then free to set up a rival fraternity on campus: fraternity constitutions specify that members, once admitted, are not permitted to affiliate with any other fraternity.<sup>178</sup> Indeed, such prohibitions are often not time-delimited

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174. BROWN, *supra* note 34, at 4; *see id.* 26–28.

175. *E.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (chapter lost its charter “because of financial issues”); Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014) (national has power to inspect chapters financial ledgers and books and revoke the charter of chapters out of compliance).

176. Kimzey, *supra* note 2, at 476 (“[F]raternities that fail to comply with risk management guidelines face the possibility of suspension or closure of their chapters.”); Mumford, *supra* note 4, at 763 (“The National Fraternity has rules, regulations and requirements that each local chapter must abide by in order to remain in good standing. That National Fraternity controls the local chapter by enforcing the National Chapter’s policies and by-laws, supervising local chapters’ day-to-day activities, punishing or revoking the local chapter’s charter . . . .”); *e.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014); Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118–19 (La. App. Ct. 1999); Furek v. Univ. of Del. 594 A.2d 506, 514 (Del. 1991). *But see* Heaton v. Hull, 28 Misc. 97 (Sup. Ct. N.Y. 1899) (enjoining national fraternity from de-chartering one of its chapters, based on lack of due process under fraternity rules); Partridge, *supra* note 93, at 176–78 (discussing case at length); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548 (Mo. 1987) (en banc) (arguing for a lack of practical national disciplinary power).

177. *See, e.g.*, Jim Ewbank, *Kappa Alpha Order Prevails Against Break Away Group*, FRATERNAL L., May 2013, at 4 (“The Court also found that the former chapter members and alumni House Corporation Board members had violated their membership agreements (Oaths, Charter, Constitution and Bylaws) by taking votes contrary to the best interests of KAO.”).

178. *See* Timothy M. Burke, *Loss of Charter Leads to Litigation*, FRATERNAL L., Sept. 2008, at 6 (“The suit, currently in its very early stages, claims that the new members had not been properly advised of the Chapter’s past misconduct and the possibility that the Chapter could be stripped of its Charter, leaving them with no membership in a Greek social organization. They say that was particularly damaging since having been initiated in Sigma Sigma Sigma, they could not then join a different women’s Greek social organization.”); SYRETT, *supra* note 72, at 46 (“Fraternity membership was understood to be exclusive; a man could not join more than one.”); BAIRD, *supra* note 9, at 15

like the franchisee's, but lifelong.<sup>179</sup>

Perhaps the most striking similarity of all is the territorial exclusivity granted both franchisees and local chapters. Just like many franchisees,<sup>180</sup> a local chapter receives a charter for a geographical territory—the university at which it operates—embodying a promise from the national fraternity to authorize no other representative on that campus.<sup>181</sup> The local chapter thus gains greater selling power than if the national opted to sponsor competing groups to see which proved the stronger in the long run. While such an alternative might sound odd, it is no less natural than a chain's choice between granting a single franchisee locational exclusivity and allowing multiple franchisees to battle for supremacy, at potential cost to the brand name.<sup>182</sup> Better for both national fraternity and chain, it seems, to authorize a single standard-bearer to compete with rival fraternities and chains than to allow infighting within their brands.<sup>183</sup>

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(“Membership in two fraternities has been a source of trouble and vexation. It is almost universally forbidden.”); see Partridge, *supra* note 93, at 169 (“Membership in the fraternity does not terminate if the chapter goes out of existence.”); see, e.g., Timothy M. Burke & Daniel J. McCarthy, *Kappa Alpha Order Sues Former Chapter at UT-Austin*, FRATERNAL L., Nov. 2011, at 1–2; Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 15, available at [www.deltasig.org](http://www.deltasig.org) (“There is no inactive class of membership. An initiated member may not resign. An initiated member may not join any other men's general fraternity.”).

179. SYRETT, *supra* note 72, at 46 (“[I]n the first edition of his *Baird's Manual of College Fraternities*, Baird objected to a practice called ‘lifting,’ whereby a man left one fraternity and joined another in the same college. Competing for new members was, of course, acceptable, but once a man joined a fraternity, he was expected to remain a brother for life.”); e.g., Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 15 (“IMPORTANT NOTE: ONCE INITIATED, MEMBERSHIP IS FOR LIFE” [*sic*]); cf. BAIRD, *supra* note 9, at 15.

180. See Luis Vázquez & Ana Branca Carvalho, *Territorial Exclusivity in Franchisee Systems*, June 25, 2010, at 2–5, available at <http://ssrn.com/abstract=1630427>; Arturs Kalnin, *An Empirical Analysis of Territorial Encroachment Within Franchised and Company-Owned Branded Chains*, 23 *MARKETING SCIENCE* 476 (2004); Frank Matthewson & Ralph Winter, *Territorial Restrictions in Franchise Contracts*, 32 *ECONOMIC INQUIRY* 181 (1994); see also *supra* text accompanying note 146.

181. See SYRETT, *supra* note 72, at 83–84 (noting expansion was only possible if there were not already a chapter of the same fraternity on campus); TURK, *supra* note 72, at 202 n.106 (fraternity promulgating a rule that “No chapter shall invite to membership a girl from the normal territory of another chapter without first consulting that chapter and securing its approval of the girl”); BAIRD, *supra* note 9, at 18–19.

182. See Vázquez & Carvalho, *supra* note 180, at 2–5; Kalnin, *supra* note 180; Matthewson & Winter, *supra* note 180.

183. See Vázquez & Carvalho, *supra* note 180, at 9–11; Matthewson & Winter, *supra* note 180; BAIRD, *supra* note 9, at 13–14; TURK, *supra* note 72, at 62–63; see also Horton, *supra* note 6, at 437 (“[F]raternities continue to compete extensively for new members of the same sex.”).

#### 4. Economics: A Geographically Diffuse Body

This brings the discussion neatly to the common economic motivators for both fraternity and franchise. National fraternities, by their very nature, are geographically dispersed organizations, with the central office often far removed from any given local chapter.<sup>184</sup> Indeed, courts have often pointed to this distance as a reason why national offices are limited in their control of local chapters.<sup>185</sup> Particularly in their early days, fraternities were forced to rely on remote contacts when colonizing new chapters.<sup>186</sup> Even today, national offices have neither the staff and cash nor the localized know-how to prosecute serious programs of expansion and colonization absent involvement by local students or alumni volunteers.<sup>187</sup> Meanwhile, groups of would-be members are familiar with the campus, and highly motivated to succeed in order to gain the many benefits that flow from the resources of a national organization.<sup>188</sup>

For their part, universities rigorously regulate expansion into their markets by refusing recognition of new fraternities absent extensive screening processes.<sup>189</sup> In doing so, universities are often explicitly seeking to protect the welfare of incumbents as well as to control supply and demand in both Greek recruitment and student housing.<sup>190</sup> To this end, universities usually delegate recognition of new chapters to a quasi-official school-controlled council of existing fraternities, whose interests in forestalling new competition are self-evident.<sup>191</sup> Fraternities that try to expand outside the ægis of official recognition are deemed “hostile” and “recognition of such groups will not be endorsed” by school authorities,<sup>192</sup> with courts being

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184. Mumford, *supra* note 4, at 765–66; *see* LeFlore, *supra* note 10, at 211.

185. *E.g.*, Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529–30 (La. App. 1997); Millard v. Osborne, 611 A.2d 715, 719 (Pa. Sup. Ct. 1992); Marshall v. Univ. of Del., 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); *see also* Shaheen v. Yonts, 394 F. App'x 224 (6th Cir. 2010).

186. *See* TURK, *supra* note 72, at 26–27.

187. *See, e.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

188. *See supra* notes 167–168 and accompanying text.

189. Hauser, *supra* note 4, at 436–37; Harvey, *supra* note 4, at 34–37.

190. *See* Hauser, *supra* note 4, at 437; Harvey, *supra* note 4, at 36–37.

191. *See* Harvey, *supra* note 4, at 35–37; Hauser, *supra* note 4, at 464–65; *see also* Timothy M. Burke, *Is a Greek Council a State Actor?*, FRATERNAL L., Jan. 2012, at 5–6 (reviewing status of Greek councils at public universities); *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 11, *available at* [www.deltasig.org](http://www.deltasig.org).

192. Hauser, *supra* note 4, at 437.

invoked to preserve the university's right of refusal.<sup>193</sup> Sometimes, universities themselves reach out to desired fraternities to invite them to colonize.<sup>194</sup> And it is only fraternities—not other university social clubs or groups—that are subject to these severe restraints.<sup>195</sup> (Indeed, commentators have raised concerns about antitrust aspects of university regulation of fraternities, a question that deserves more scrutiny.<sup>196</sup>)

These are just the conditions under which franchising is economically favored: The fraternity franchisor is geographically diffuse;<sup>197</sup> the franchisee group at the university is motivated to provide the manpower and resources that the limited national organization cannot;<sup>198</sup> and the entrenched university powerbroker makes recruitment and selection of membership reliant on local connections.<sup>199</sup> Under these circumstances, fraternities pursuing aggressive expansion are highly dependent on the availability of start-ups keen to create a new chapter from scratch under the auspices of the national, or an existing chapter looking to affiliate with a new national organization.<sup>200</sup> The more prestigious the national fraternity is, the more likely a local group will wish to petition or affiliate.<sup>201</sup> Like any other franchisors, national fraternities are strongly incentivized to continue burnishing their brand, lest competitors end up with the most promising local groups.<sup>202</sup> Moreover, a better-reputed national fraternity is more likely to

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193. See, e.g., *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007) (reversing trial court's holding that the chapter must be recognized); Gregory F. Hauser, *Chi Iota Colony v. CSI: What Happened and Why*, FRATERNAL L., Mar. 2008, at 4–5 (discussing case). But see James C. Harvey, *Court Upholds Damage Award Against University of Iowa*, FRATERNAL L., Mar. 2009, at 1–2 (successful suit against college for suspension of fraternity).

194. E.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN, Sept. 24, 2014 (“Universities with Greek systems in place typically reach out to national fraternities and sororities, inquiring if they would like to establish a chapter on that campus.”).

195. Hauser, *supra* note 4, at 461.

196. E.g. Bauer, *supra* note 71, at 400–12; see, e.g., Burke, *supra* note 191, at 6 (noting antitrust concerns in regard of university-sponsored Greek councils).

197. See *supra* notes 39–47 and accompanying text.

198. See *supra* notes 39–41, 45–47 and accompanying text.

199. See *supra* note 46 and accompanying text.

200. See *supra* notes 167–168 and accompanying text.

201. SYRETT, *supra* note 72, at 83 (“As fraternities became more well known during this period, certain fraternities had particularly appealing reputations—often dependent upon the schools where the fraternities already had chapters—and thus were chosen as the nationals to which the hopeful students addressed their petition.”); BAIRD, *supra* note 9, at 12–13; see, e.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (petitioning group reached out to Kappa Sigma because it was the oldest and largest fraternity).

202. See BAIRD, *supra* note 9, at 12–13.

obtain the necessary approvals from university authorities.<sup>203</sup> All things considered, for the fraternity, the franchising framework is not so much a choice as an economic necessity in addressing its idiosyncratic market.

Of course, fraternities do not employ the franchise framework identically.<sup>204</sup> Some emphasize quantity over quality, seeking to found as many chapters as possible, at any school that will have them.<sup>205</sup> Under such a “sink or swim” model, some local chapters will emerge as successful, while weaker chapters are left to flounder and fail.<sup>206</sup> Other fraternities take an opposite approach, and colonize only more prestigious schools, or accept only groups of a certain measured caliber, in order to maximize every established chapter’s long-term success.<sup>207</sup> Most fraternities fall naturally somewhere in the middle of the continuum defined by these antipodal strategies. Such a continuum is to be found in the greater world of business-format franchising as well,<sup>208</sup> which only reinforces the economic correspondence between the fraternity and franchising systems.

### C. Fraternities as Inadvertent De Jure Franchises?

The purpose of this Article is not to press a dubious argument that fraternities are actually franchises within the definition of statute. But it is worth pausing for a moment to consider that possibility, given the evident similarities in structure and purpose between the models. This is all the more so given that ordinary licensing business relationships sometimes accidentally meet statutory requirements for franchises, because one “cannot avoid a franchise relationship simply by disclaiming its existence. What the

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203. See, e.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (noting the university invited service fraternities to campus and adverting to the prestige of having such national organizations represented).

204. See BAIRD, *supra* note 9, at 12–13.

205. E.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (Kappa Sigma, as the largest fraternity, is “the most willing to take a chance on any group, so we had the opportunity to define it however we wanted to,” Rasmussen said. “They’re aggressive in terms of recruiting because they are willing to expand.”).

206. See, e.g., Kae Holloway, *WKU Chapter of Delta Tau Delta Suspended*, COLLEGE HEIGHTS HERALD (Bowling Green, Ky.), Aug. 27, 2014.

207. See, e.g., Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (“We hand select our campuses very carefully, we know this is a school that will support these young men in what they are trying to do.”).

208. See, e.g., Killion, *supra* note 29, at 163–64 (describing expansion strategies employed historically by different fast food chains).

parties call themselves is immaterial.”<sup>209</sup> So-called “inadvertent franchises” are frequently discovered when business associates fall out and one side belatedly realizes, undoubtedly on the advice of counsel, that he may have another arrow in his quiver for litigation.<sup>210</sup> Accordingly, much ink and effort has gone into detailing how licensors may avoid qualifying as a franchisor.<sup>211</sup> At base, such maneuvers must negate at least one of the three prongs of statutory franchising tests: the license of a trademark, consideration, and substantial oversight or guidance by the licensor.<sup>212</sup>

Such traditional remedies may be less available to fraternities, which permit their local chapters to operate under their trademark, exact payments from those chapters, and both offer critical support to and exercise substantive oversight over the chapters’ operations.<sup>213</sup> As with more traditional for-profit relationships, a cogent argument can often be made that the national’s oversight is still too attenuated to create a franchise relationship.<sup>214</sup> Fraternities might also structure initial payments from the local so as to avoid federal definitions of consideration.<sup>215</sup> But at least one categorical saving grace for fraternities lies elsewhere, in the perhaps misleading reference to a unitary local fraternity chapter, which obscures the nature of an essentially obscure entity.<sup>216</sup>

Local chapters are typically unincorporated voluntary associations of university students.<sup>217</sup> Within a half-decade, the local will be comprised of a completely different set of members and officers by the regular

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209. Spandorf, *supra* note 48, at 38.

210. *See id.* at 37–38 (recounting cases involving such situations).

211. Jonathan Solish, *Unrecoverable Investments Define Franchise Relationship*, 26 FRANCHISE L.J. 3, 3 (2006–2007) (“The danger of inadvertently crossing the line into the realm of franchising has been raised in many articles and treatises. Franchise practitioners are keenly aware of the problem of what might be a franchise and often structure business relationships to avoid inadvertently stepping over the line.”); *e.g.*, Spandorf, *supra* note 48, at 39–42; James R. Sims III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 FRANCHISE L.J. 54 (1998–1999).

212. *E.g.*, Spandorf, *supra* note 48, at 39–41 (addressing methods for negating each of three statutory prongs); *see supra* notes 55–61 and accompanying text (statutory requirements).

213. *See supra* Subparts III.B.1–3.

214. *See* Spandorf, *supra* note 48, at 39–40; *e.g.*, sources cited *supra* note 171.

215. *See supra* note 144 and accompanying text.

216. *Cf.* Neuhoff, *supra* note 2, at 113 (“Most national college fraternities consist of three units; the national organization, the local chapter, and the property holding unit for the local chapter. These various units are sometimes incorporated and sometimes not incorporated. The property holding unit, however, is generally either a corporation or a common law trust. In considering these units they will be spoken of as the ‘fraternity.’”).

217. Marshlain, *supra* note 8, at 5–7; LeFlore, *supra* note 10, at 195–96; Partridge, *supra* note 93, at 169–70; *see also* Neuhoff, *supra* note 2, at 113; *e.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 161 (Ind. 2014).

matriculation and graduation of an ephemeral student body.<sup>218</sup> The more persistent local organizations—alumni social groups or alumni-controlled housing corporations—are legally distinct parties;<sup>219</sup> indeed, often the local chapter members are themselves lessees from the housing corporation lessor.<sup>220</sup> To treat alumni as part of the local college chapter would ignore the reality that alumni pay no dues, participate little if at all in local chapter affairs, and may not avail themselves of key services such as the room and board so central to the business of the fraternity.<sup>221</sup>

The unincorporated local chapter, as such, therefore may not be a proper legal party to any franchise contract.<sup>222</sup> As early commentator Olcott Partridge set forth:

In the case of the undergraduates of a fraternity chapter, these individuals are residents of different States; most of them are minors,<sup>223</sup> and nearly all of them remain resident at the college or university for a period of only four years or less, and then are scattered far and wide throughout the country. A contract with such an organization, in most States, does not bind the successors or predecessors of the persons who make it, but binds only the makers themselves.<sup>224</sup>

The author concludes: “a contract with the undergraduate members of a fraternity chapter is often difficult to enforce.”<sup>225</sup> So too would be any

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218. Hauser, *supra* note 4, at 453; Partridge, *supra* note 93, at 170; *see Foster v. Purdue Univ.*, 567 N.E.2d 865, 870 (Ind. Ct. App. 1991) (“It retains its character as a local fraternal chapter, despite the continual change in membership due to graduating and incoming students.”).

219. *See* Neuhoff, *supra* note 2, at 36–37; Partridge, *supra* note 93, at 170–73.

220. Hauser, *supra* note 4, at 452–53; Partridge, *supra* note 93, at 173; *see* LeFlore, *supra* note 10, at 194 n.7; *e.g.*, *Foster*, 567 N.E.2d at 871–72.

221. Hauser, *supra* note 4, at 452–53; *see also* LeFlore, *supra* note 10, at 211 n.88 (“This argument applies to alumni associations and house corporations as well. By definition, their membership is often spread out across the state or nation, unable to oversee or act except through local alumni on a volunteer basis.”); *supra* Subpart III.A. *But see* Partridge, *supra* note 93, at 168–69.

222. *See* *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 405 (Kan. 2002) (“[I]n the absence of a statute to the contrary, an unincorporated association is not a legal entity.” (quoting *Kansas Private Club Ass’n v. Londerholm*, 408 P.2d 891 (Kan. 1965))); *see also* *Johnston v. Meredith*, 840 So. 2d 315 (Fla. Dist. Ct. App. 2003).

223. Partridge writes in an era in which the age of majority was twenty-one, but his point is scarcely attenuated by the change in such statute – in addition to which, some fraternity members will be minors even today.

224. Partridge, *supra* note 93, at 170 (footnote added).

225. *Id.*; *see also* Neuhoff, *supra* note 2, at 114 (difficulty of assessing debt against members of unincorporated fraternity chapter); *cf.* Marshlain, *supra* note 8, at 5–7 (difficulty of suit against unincorporated fraternity chapter); LeFlore, *supra* note 10, at

supposed franchise agreement, being solely a creature of contract.<sup>226</sup> Indeed, a local chapter can simply dissolve and avoid any civil or even criminal liability.<sup>227</sup> Construing the fraternity charter for a chapter and ensuing national-local relationship as a *de jure* franchising agreement runs into the likely insuperable barrier that the national has no consistent legal counterparty with whom to contract. While Partridge half-heartedly suggests undergraduate chapters might incorporate and provide that membership in the corporation somehow pass to initiates as successors,<sup>228</sup> few modern chapters appear to have done so, whether because of prudence or passivity.<sup>229</sup>

But perhaps the franchise may be agreed with the founding local members as individuals, who in turn transfer partial ownership of the franchise to each new initiate, and withdraw from the franchise as they graduate? After all, the national grants charters to those founding members as explicit beneficiaries of the agreement.<sup>230</sup> Such a notion still runs into the logistical difficulties proffered by Partridge in setting up an undergraduate corporation, largely concerning the lack of formalities—votes, legal writings and the like—to such regular transferences and withdrawals, as well as the lack of detailed notice to initiates of the compact to which they would then be acceding.<sup>231</sup> Moreover, franchises are not freely alienable, but rather are subject to restrictions on sale and subject to franchisor approval, making such frequent *ad hoc* exchanges in membership problematic to say the least.<sup>232</sup> And other structural differences – for example, the cross-recognition of

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195–96 (same).

226. BROWN, *supra* note 34, at 32; see Jerrold G. Van Cise, *A Franchise Contract*, in THE FRANCHISING SOURCEBOOK § 5 at 95 (Jim McCord ed. 1970).

227. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 513–14 (Del. 1991) (no jurisdiction obtained over dissolved chapter in civil case); Michael John James Kuzmich, *In Vino Mortuus: Fraternal Hazing and Alcohol Related Deaths*, 31 MCGEORGE L. REV. 1087, 1125 & nn.327–29 (1999–2000) (chapter dissolved when faced with a criminal indictment for manslaughter).

228. Partridge, *supra* note 93, at 171–72 & n.5.

229. E.g., *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 161 (Ind. 2014); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 409 (Kan. 2002) (“[T]here were 200 different chapters in the Pi Kappa Alpha Fraternity in February of 1997 which were located in 200 different colleges and universities throughout the United States and Canada. Each chapter is a separate, unincorporated association composed of undergraduate college students.”); *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 657 (Iowa 2000) (Lavorato, J., dissenting).

230. See, e.g., BLANCHE GARTEN, *THE ANCHORA OF THE DELTA GAMMA FRATERNITY* 247, 277, 282 (1915) (describing charters being granted to the individual founding members of a chapter); WALTER BENJAMIN PALMER, *THE HISTORY OF THE PHI DELTA THETA FRATERNITY* 386 (1906) (same).

231. Partridge, *supra* note 93, at 171.

232. See BROWN, *supra* note 34, at 24–26; see also Spandorf, *supra* note 48, at 38 (It is a “felony to sell a franchise without complying with a franchise sales law”).

members transferring between schools – make a formal identity between the fraternal and franchise system elusive.<sup>233</sup>

Then again, the admission of new members is typically preceded by official votes and due ceremony,<sup>234</sup> and the national fraternity might be said to preemptively consent as franchisor to such *pari passu* transfers by prescribing and sanctioning the process for admitting new members to the chapter.<sup>235</sup> Indeed, in many cases chapters must apply (in writing) to the national organization for permission to bring in each new member.<sup>236</sup> Prospective members may even be given a chance to review in detail the obligations that will accrue to them upon admission,<sup>237</sup> for whatever good that will do for an undergraduate intent on joining.<sup>238</sup> Were national-local fraternity relations ever to be found to meet state or federal requirements for a franchise inadvertently, such reasoning is one avenue a court could take.

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233. See, e.g., Horton, *supra* note 6, at 437 (“Furthermore, fraternity chapters are so selective that even when one local chapter selects and initiates a student, another chapter often does not have to extend full membership to the transfer student duly initiated into the national fraternity at the first chapter”).

234. Horton, *supra* note 6, at 437 (“A fraternity’s extension of a membership bid is definitely not made to the public community, but rather is limited to selected students of a particular sex enrolled at the college or university of the local chapter. All current members of the fraternity chapter vote on whether to extend a bid to a specific individual to join the fraternity”).

235. See, e.g., Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753–54, 756 (M.D. Tenn. 2006) (describing national rules, oversight, and investigation of local initiation practices); Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 179–80, 183–84 (Pa. Super. Ct. 2002) (describing how the national fraternity issued an “executive order” preventing all its chapters from initiating new members, and once the moratorium was lifted, allowed the admission of new members only after national certification of the process); see also, e.g., Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1119 (La. App. Ct. 1999) (“Following the battery on Kendrick, however, Kappa National banned further membership intake at Tech.”); Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 291 S.C. 140, 152 (S.C. Ct. App. 1986).

236. E.g., Kenner, 808 A.2d at 183; see, e.g., Alexander, 464 F. Supp. 2d at 753.

237. See, e.g., Kenner, 808 A.2d at 182–83 (noting that new members were required to review and execute a membership agreement in order to accede to the fraternity); Daniel J. McCarthy, *Arbitration Clause Is Enforceable in Hazing Case*, FRATERNAL L., Sept. 2007, at 5–6 (discussing Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364 (E.D. Pa. Mar. 2, 2007)).

238. Cf. BROWN, *supra* note 34, at 5–7 (“Although the franchisee may consult an attorney before signing his franchise agreement, in fact this is seldom done. . . . The prospective franchisee, with little business or management background, is usually all too anxious to become associated with a ‘national’ product and will sign whatever is placed before him. The franchisee places his faith and confidence in the franchisor as his teacher and guide, with seldom a question about the terms of the contract. Although an opportunity to study the agreement is not necessarily denied the prospective franchisee, ordinarily he will have little to no understanding of all the legal and practical implications”).

Wisely, however, no court has yet crossed (or even approached) this dubious doctrinal Rubicon.

#### IV. COROLLARIES FROM FRAMING THE FRATERNITY AS FRANCHISE

That fraternities are not *de jure* franchises is not to say that all of the structural and economic parallels between fraternity and franchise should be disregarded. As has been demonstrated, fraternities operate in a manner that is quite analogous to purely for-profit franchising, and seem rather unlike any other sort of arrangement. This Part therefore briefly reviews a few of the more instructive legal corollaries following from conjecturing a franchise relationship between the fraternity national and local.<sup>239</sup>

##### A. “Naked Licenses” and Quality Control

It has already been mentioned that while fraternities were once not as assiduous as they might have been with their intellectual property, modern nationals employ better practices.<sup>240</sup> Fraternities derive considerable benefit from the exclusive use of their trade and service marks, and the courts’ protection of those marks.<sup>241</sup> The other side of the coin, however, is that fraternities are thereby obligated to maintain some modicum of oversight to assure the quality of the services provided under their name.<sup>242</sup> Yet even casual inspection reveals that fraternities are not uniformly successful in guaranteeing the quality of their chapters.<sup>243</sup> Even though fraternities are now taking their trademarks seriously, they face persistent problems in discharging the duties necessary to preserve their property.

Such duties are imposed on all trademark owners under the Lanham Act.<sup>244</sup> In the first place, owners must contest any unauthorized use of their brands or risk losing them.<sup>245</sup> As for those they do authorize through

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239. The purpose of this Article is not to plumb the depths of every corollary; rather, it is to propose the availability of franchise law in resolving fraternity cases given the close structural ties between the two. As such, the review in this Part is more exemplary of the franchise framework’s potential, and further research is called for to fully explore the sundry consequences of a franchise relationship being imputed to fraternities.

240. See *supra* notes 115–122 and accompanying text.

241. Frei & Grossman, *supra* note 109, at 4–6; e.g., Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396 (N.D. Tex. 2011), *aff’d*, 708 F.3d 614 (5th Cir. 2013); Alpha Kappa Alpha Sorority Inc. v. Converse Inc., 175 F. App’x 672 (5th Cir. 2006); Alpha Tau Omega Fraternity, Inc. v. Pure Country, Inc., 185 F. Supp. 2d 951 (S.D. Ind. 2004).

242. See *infra* notes 245–255.

243. See Caitlin NPR Interview, *supra* note 1.

244. 15 U.S.C. §§ 1051–1127.

245. Compare, e.g., Warner Bros. Inc. v. Gay Toys, Inc., 724 F.2d 327, 334 (2d Cir. 1983) with Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1080 (5th Cir. 1997).

licenses, established law views owners who fail to impose quality controls over the licensees' use of their marks—issuing so-called “naked licenses”—as having abandoned their claims of exclusive use.<sup>246</sup> Written but unenforced standards are not enough: a trademark owner must actually implement controls, not merely mouth the proper niceties.<sup>247</sup> And franchisors, in their role as licensors of their marks, must comply with the same requirements.<sup>248</sup> Although cogent arguments have been made that strict requirement of quality controls does not comport with normative policy interests,<sup>249</sup> the Lanham Act's plain language continues to place naked licensors at risk of dispossession.<sup>250</sup>

There is little doubt that general intellectual property standards apply to fraternities with equal force.<sup>251</sup> Generally speaking, fraternities must challenge any unauthorized use of their name, on pain of losing it.<sup>252</sup> As for local oversight, chapters are at least *de facto* licensees of the national fraternity brand,<sup>253</sup> and “the fraternity must be very careful to establish standards of quality for the licensee's merchandise and/or services. Moreover, the fraternity must regularly check to ensure that quality standards are being maintained by the licensee in order to preserve the legal rights of the fraternity to its name. Absence of effective quality control can result in

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246. See Irene Calboli, *The Sunset of Quality Control in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 354–56 (2007); Michelle S. Friedman, *Naked Trademark Licenses in Business Format Franchising: The Quality Control Requirement and the Role of Local Culture*, 10 J. TECH. L. & POL'Y 353, 356–60 (2005); Ann E. Doll, *Trademark Licensing: Quality Control*, 12 J. CONTEMP. L. ISSUES 203, 204 (2001–2002); e.g., *Movie Mania Metro, Inc. v. GZ DVD's Inc.*, 2014 WL 4435590 (Mich. App. Sept. 9, 2014).

247. See Doll, *supra* note 246, at 204.

248. See Sandroock, *supra* note 50, at 706; Friedman, *supra* note 246, at 365–73; Laurence R. Hefter, *Collateral Product Licensing: Benefits and Pitfalls for the Franchisor*, 6 FRANCHISE L.J. 3, 3–4 (1986–1987); e.g. *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367–68 (2d Cir. 1959).

249. E.g., Calboli, *supra* note 246.

250. See *id.* at 356 & nn. 62–64 (citing cases and 15 U.S.C. § 1064(3) for the proposition that “the Lanham Act also provides that lack of quality control can lead to the forfeiture of trademark rights if consumers are misled.”); *Movie Mania*, 857 N.W.2d 677, 684 (Mich. Ct. App. 2014) (“The Lanham Act explicitly states that naked licensing constitutes ‘abandonment’ of a trademark, in that trademark holders who engage in naked licensing relinquish all rights to their mark.”).

251. See, e.g., *L.G. Balfour Co. v. FTC*, 422 F.3d 1 (7th Cir. 1971) (finding fraternities liable for anticompetitive trademark licensing); *Abraham*, 708 F.3d 614 (confirming fraternities' right to exclude manufacturer from unlicensed use of trademarks).

252. See Graber & Owens, *supra* note 69, at 1–2; Manley, *supra* note 119; Frei & Grossman, *supra* note 109, at 5.

253. See *supra* notes 123–128 and accompanying text.

loss of those valuable rights to the name.”<sup>254</sup> Fraternities therefore must involve themselves in the operations of their chapters to the extent necessary to enforce quality, lest their valuable trademark be lost. When a fraternity holds out its chapters as dependably worthy outposts of its organization by granting them use of its name,<sup>255</sup> the fraternity must actually exercise the necessary diligence to make sure that its imprimatur is warranted.<sup>256</sup>

Yet the evidence suggests that fraternities find such diligence challenging.<sup>257</sup> Commentators have described nationals grappling with quality control at their chapters as being “forced to attempt the impossible.”<sup>258</sup> Many courts too have viewed nationals as lacking meaningful day-to-day control over their chapters’ conduct and operations.<sup>259</sup> Given limited resources, nationals may be limited at times to *post facto* remedial action rather than proactive quality control campaigns.<sup>260</sup> Hence while national fraternities’ responsibility to monitor may be clearly set forth in the law, their actual ability to fully comply remains questionable.<sup>261</sup>

Moreover, these intellectual property duties are in tension with the sword of Damocles posed by litigation. One writer on fraternity tort liability suggested that nationals “must sever ties [with chapters] to whatever extent is necessary to counterbalance the implication of control. This means getting out of the supervision business altogether and becoming similar to a licensing agency for its fraternity.”<sup>262</sup> But this runs athwart trademark law, which forbids nationals from disclaiming control and becoming naked licensors, at least if they want to preserve the exclusivity of their brand.<sup>263</sup>

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254. Frei & Grossman, *supra* note 109, at 5–6; *see* Graber & Owens, *supra* note 69, at 1–2.

255. *See supra* notes 123–133 and accompanying text.

256. *Cf.* Frei & Grossman, *supra* note 109, at 4 (explaining that when fraternities license their name, they place their “imprimatur” on the licensee’s offerings, and “members are likely to believe that the enterprise is sponsored by [the national] and that its goods or services meet [its] standards of quality”).

257. *See* Caitlin NPR Interview, *supra* note 1.

258. LeFlore, *supra* note 10, at 223 (“The national fraternity has been forced to attempt the impossible . . . . The standard of care that it has set for itself, after assuming this duty through its nationwide guidelines, will be impossible to meet.”); *see also* Paine, *supra* note 2, at 204 (“despite national directives . . . underage students will continue to drink”).

259. *See* cases cited *supra* note 171.

260. *See infra* note 312.

261. *See* Jonathan F. Farr, *Troubled Times in a New England University’s Fraternity System*, in *THE HAZING READER* 130, 136 (Hank Nuwer ed., 2004) (quoting an administrator that “assigning *responsibility* over the fraternities . . . has nothing to do with exerting *control* over people”).

262. LeFlore, *supra* note 10, at 191.

263. *See supra* notes 245–255 and accompanying text.

This problem confronts every franchisor, who must walk the careful line between maintaining sufficient control to protect its trademarks without assuming responsibility for torts its franchisees commit.<sup>264</sup> Much scholarly effort has gone into advising how to accomplish this delicate task<sup>265</sup>—a task made all the more difficult for lack of clarity about the nature and extent of franchisor tort liability, the subject of the next Subpart.

## B. Responsibility and Liability in Tort

The discussion of trademark controls thus provides an apt segue to tort liability for franchises. This is because the franchisor's accountability turns on the same sort of oversight that it is required to exercise to safeguard its trademarks.<sup>266</sup> Or as one commentator put it more vividly, the "typical vicarious liability case boils down to an argument between lawyers over the significance of the franchisor's controls."<sup>267</sup>

### 1. An Historical Précis of Franchise Tort Law

The franchise relationship is *sui generis*: neither one of independently contracting entities nor that of principal and agent, but rather some intermediate hybrid between these two extremes.<sup>268</sup> This uniqueness posed problems for early jurists seeking to adjudicate responsibility and liability for torts involving franchises.<sup>269</sup> Compounding the problem, cases from franchises' early days were few and far between, leading courts to "shoehorn" this novel relationship into a more traditional body of law.<sup>270</sup>

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264. See Shelley & Morton, *supra* note 52, at 119, 126–27; Laufer & Gurnick, *supra* note 109, at 4–5; Sandrock, *supra* note 50, at 702–06; see also Friedman, *supra* note 246, at 365–73.

265. E.g., Laufer & Gurnick, *supra* note 109; Sandrock, *supra* note 50; Shelley & Morton, *supra* note 52, at 127.

266. See Shelley & Morton, *supra* note 52, at 119, 127; Laufer & Gurnick, *supra* note 109, at 4–5.

267. Killion, *supra* note 29, at 165.

268. See John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 3 (1999) ("The franchisor-franchisee relationship is neither that of an employer-employee (or master-servant) nor of an employer and independent contractor. It was developed purposefully to have attributes of both and of neither."); Hadfield, *supra* note 40, at 928 ("The franchising structure combines elements of integration and delegation, control and independence. The franchise contract creates neither an employment relation nor an independent contracting relationship."); *id.* at 931–32; Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 89–90 (1993).

269. See Flynn, *supra* note 268, at 89–90.

270. Killion, *supra* note 29, at 164; accord Flynn, *supra* note 268, at 89–90.

What emerged from these straits was a rather crabbed jurisprudence where franchise relationships were analyzed not on their own terms, but rather in an effort to categorize them as either principal and agent or independent contractors.<sup>271</sup> The dichotomy is typically dispositive: “If the former, the franchisor—like any ‘master’—is subject to vicarious liability through the doctrine of *respondeat superior*; if the latter, no liability ensues.”<sup>272</sup>

In practice, this artificial framework led to courts parsing endless and unpredictable series of factors to determine whether the franchisor had employer-like overall day-to-day control over a franchisee, or merely contractor-like general authority over the enterprise as a whole.<sup>273</sup> Even express agreements that the relationship is one of independent contract are often ignored by courts in favor of their own assessment of the “true” nature of the relationship.<sup>274</sup> Finding the overall relationship contractual typically barred recovery, even when a franchisor might intuitively appear responsible for the particular injury.<sup>275</sup> On the other hand, imposing vicarious liability on innocent franchisors would be unfair when franchisees in fact enjoy ample independence, leaving the franchisor responsible for torts it could not have prevented.<sup>276</sup>

All in all, the results were highly inconsistent and often contradictory.<sup>277</sup> Commentators could regularly advert to poignant examples of a single franchisor both being found liable and exonerated for nearly identical torts under nearly identical franchise agreements, sometimes within in the space of a single year.<sup>278</sup> Such uncertainty is, of course, undesirable for any of the parties in a franchise relationship, or even for plaintiffs seeking recourse.<sup>279</sup> By the end of the twentieth century, legal scholars were criticizing this regime stridently, calling with increasing urgency for a doctrinal

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271. See Flynn, *supra* note 268, at 89–94; Hanks, *supra* note 268, at 3–4.

272. Flynn, *supra* note 268, at 90; see also Hanks, *supra* note 268, at 3–4.

273. See Flynn, *supra* note 268, at 91–94; see also Shelley & Morton, *supra* note 52, at 122.

274. Shelley & Morton, *supra* note 52, at 127; e.g., *J.M. v. Shell Oil Co.*, 992 S.W.2d 759 (Mo. 1996), *reh'g denied* (Mo. 1996).

275. See Sandroock, *supra* note 50, at 700–02.

276. See Flynn, *supra* note 268, at 94–102; Killion, *supra* note 29, at 165.

277. See Killion, *supra* note 29, at 165; Flynn, *supra* note 268, at 91–94.

278. Compare *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808 (Iowa 1994), with *Miller v. McDonald's Corp.*, 945 P.2d 1107 (Or. Ct. App. 1997); compare *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975) with *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874 (Va. 1975). See Killion, *supra* note 29, at 165 (discussing *McDonald's*); Flynn, *supra* note 268, at 92 & n.17 (discussing *Holiday Inns*); Comment, *Theories of Liability for Retail Franchisors: A Theme and Four Variations*, 39 MD. L. REV. 264, 267 n.14 (1979) (same).

279. See Roy Strom, *Uncertainty Isn't Easy to Stomach for Franchisees*, CHI. DAILY L. BULL., Aug. 6, 2014; cf. Sunshine, *supra* note 2, at 129 (disutility of uncertainty in fraternity tort cases).

reevaluation that better reflected the distinctly different franchise relationship.<sup>280</sup>

Broadly speaking, three credible options were put forward to circumvent the vicious dichotomy that had emerged: (a) promulgate a uniform statutory regime setting forth the contours of vicarious liability for franchisors; (b) impose vicarious liability in all franchise relationships, effectively transforming franchisors into employers; or (c) determine liability based on whether the franchisor or franchisee exercised predominant control over the tortious act itself.<sup>281</sup> In the event, neither Congress nor state legislatures pursued the first path, leaving the judiciary to sort out the situation.<sup>282</sup> The second path, while expedient in application, abolishes the unique status of the franchisor as distinct from employer—a drastic step justifiable only if franchising is so prone to abuse that it must be eradicated as a distinct legal relationship.<sup>283</sup> To adopt this theory would “turn franchising on its head,” ignoring the economic reality that the franchisor has bargained away much control and profit to the franchisee in exchange for the franchisee taking on many of the risks, which include losses from injuries to third parties.<sup>284</sup>

This left the third approach, which has found considerable currency in contemporary franchise cases. One of the earliest,<sup>285</sup> *Exxon Corp. v. Tidwell*, explained:

The focus should be on whether Exxon had the right to control the alleged security defects that led to Tidwell’s injury. If Exxon did not have any right to control the security of the station, it cannot have had any duty to provide the same. If Exxon had such a right of control, on the other hand, its conduct may be found to have contributed to Tidwell’s injury. Applying the traditional test of right of control over general operations simply does not answer

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280. *E.g.*, Killion, *supra* note 29, at 165–67; Flynn, *supra* note 268, at 103–07; Hanks, *supra* note 268 at 5–9, 31–34; *see, e.g.*, Shelley & Morton, *supra* note 52, at 119–22.

281. Flynn, *supra* note 268, at 103–06. Flynn dismissed out of hand the possibility of insulating franchisors from liability entirely: “After all, that would legitimate the use of franchisees as liability-free substitutes for employees in many cases where some form of franchisor liability is warranted.” *Id.* at 103. In a 1999 article, the late Professor John L. Hanks of Cardozo School of Law proposed a fourth option: leaving the franchisor immune from liability except as a guarantor in the event that a franchisee tortfeasor cannot satisfy a judgment, thus ensuring that victims are properly paid. *See* Hanks, *supra* note 268. Although this is a conceptually attractive idea in allocating responsibility, and a temptingly easy to administer rule, it does not appear to have been well-accepted by the courts.

282. *See* Flynn, *supra* note 268, at 103–04.

283. *Id.* at 104–05.

284. Killion, *supra* note 29, at 165; *see also* Flynn, *supra* note 268, at 104–05.

285. *See* Killion, *supra* note 29, at 166 (stating it was the first case on point).

this question. It requires a factfinder to surmise a general right of control from factors unrelated to safety, and then to infer from that general control a right of control over the safety conditions that are the real issue in the case.<sup>286</sup>

The question must be whether the franchisor reserved and exercised the right to control *the particular instrumentality that caused the tort*.<sup>287</sup> Such reasoning has the benefit of apparent fairness, absolving franchisors for local actions beyond their control, while imposing liability for torts occurring in zones of oversight the franchisor reserves to itself.<sup>288</sup> Indeed, this approach neatly defers to the contractual wellspring of franchising by allowing the local and national parties to negotiate which of them will ultimately control—and thereby be responsible for—each aspect of the franchisee’s operations.<sup>289</sup> It is thus unsurprising that the instrumentality-focused analysis has been taken up in many courts, both state and federal.<sup>290</sup> This judicial reevaluation is by no means universal; other courts continue to apply something like the original generalized day-to-day control analysis.<sup>291</sup> Regardless of such judicial division, however, in seeking the best model to export from franchise liability, the instrumentality approach conforms best to normative expectations of predictability, responsibility and fairness.

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286. *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993); see Killion, *supra* note 29, at 166 (discussing *Exxon*).

287. *Exxon*, 867 S.W.2d at 23; King, *supra* note 22, at 432–33 n.58 (collecting authorities and cases); cf. Flynn, *supra* note 268, at 105 (proposing the rule in assigning liability as resting on “which party had greater control over whatever proximately caused the accident”).

288. Flynn, *supra* note 268, at 105–06.

289. See Flynn, *supra* note 268, at 105–06. Viewed in this light, the instrumentality approach is a sort of contractual assumption of the risk. See Killion, *supra* note 29, at 167.

290. King, *supra* note 22, at 432–33 & n.58 (expansively detailing such authority); Note, *Court Addresses Appropriateness of Summary Judgment in Case of Vicarious Liability Against Franchisors*, FRANCHISE L. INSIDER, at 8 (Jan.-Mar. 2001); e.g., *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998) (“[B]y requiring its distributors to sell vacuum cleaners only through in-home demonstration, Kirby had retained control over that portion of the distributor’s work [and] . . . must therefore exercise this control reasonably.”); see, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 331–32 (Wis. 2004); *Johnson v. Burger King Corp.*, 2000 WL 1160490 (Tex. App. Aug. 17, 2000); *Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83, 90 (E.D.N.Y. 2000), *aff’d*, 4 F. App’x 82 (2d Cir. 2001); *Walters v. Ramada Franchise Systems, Inc.*, 2000 WL 1201688 (Tex. App. Aug. 24, 2000); *Miller v. D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 808 (D. Or. 1998); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997); *Martin v. McDonald’s Corp.*, 572 N.E.2d 1073 (Ill. App. 3d 1991), *appeal denied*, 580 N.E.2d 117 (Ill. 1991); *Hayman v. Ramada Inn., Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

291. See, e.g., King, *supra* note 22, at 431–32 & nn. 57–58 (juxtaposing courts applying generalized “day-to-day” control tests to those looking to the “specific aspects of the franchisee’s business operations from which the injury arose”).

Finally, there are entirely separate sources of liability, prominently apparent agency: the theory that the franchisor is vicariously liable because the plaintiff reasonably relied on the belief that the franchisee was an agent rather than mere franchisee of the national brand.<sup>292</sup> Courts, however, have largely been dismissive of apparent agency in this context,<sup>293</sup> ostensibly because the common brand cannot *ipso facto* create reasonable reliance,<sup>294</sup> given that the nature of franchising is “common knowledge”—that is, everyone knows a local McDonald’s is owned and operated separately from the international McDonald’s Corporation.<sup>295</sup> Perhaps more honestly, however, apparent agency has been rejected because it would eviscerate the franchising system in subjecting every franchisor to vicarious liability based only on the shared brand name.<sup>296</sup> Other arguments against franchisors include product liability<sup>297</sup> and reliance on national advertising,<sup>298</sup> but these miscellany are more honored in the breach than in the observance,<sup>299</sup> and discussion would in any event wade overfar into the weeds.

## 2. Lessons for Fraternities from Contemporary Franchise Liability

Instead, the argument is better served returning to fraternities: what lessons can be gleaned about their responsibility in tort from franchise law? It is hard to even briefly review the evolution of franchise law without glimpsing some of the problems inherent in fraternity decisions. Liability for a Greek national “typically relies on a phalanx of ill-defined factors that

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292. See Robert W. Emerson, *Franchisors’ Liability When Franchisees Are Apparent Agents*, 20 HOFSTRA L. REV. 609 (1991–1992); e.g., *Buchanan v. Canada Dry Corp.*, 226 S.E.2d 613 (Ga. Ct. App. 1989); *Crinckley v. Holiday Inns, Inc.*, 844 F.2d 156, 167 (4th Cir. 1988); *Fernanden v. Thigpen*, 293 S.E.2d 424 (S.C. 1982).

293. Hanks, *supra* note 268, at 14 (“Numerous courts have rejected franchisor liability founded on an apparent agency theory.”).

294. See *Gonzalez v. Walgreens Co.*, 878 F.2d 560, 562 (1st Cir. 1989); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121–22 (Mass. 2000); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995).

295. See Emerson, *supra* note 292, at 610 & n.2 (collecting cases); *id.* at 645–48; Hanks, *supra* note 268, at 15 (citing *Hoytt v. Docktor Pet Center, Inc.*, 1986 WL 11619, at \*2–3 (N.D. Ill. Oct. 10, 1986); *Ortega v. General Motors Corp.* 392 So. 2d 40, 44 (Fla. Dist. Ct. App. 1980); *Wash. v. Courtesy Motor Sales, Inc.*, 199 N.E.2d 263, 265 (Ill. App. Ct. 1964)). *But see* Emerson, *supra*, at 648–60 (empirical data refuting the common knowledge doctrine); e.g., *Beck v. Arthur Murray, Inc.*, 245 Cal. App. 2d 976, 979–81 (Cal. Ct. App. 1966).

296. See Hanks, *supra* note 268, at 25–26.

297. E.g., *Kosters v. Seven-Up Co.*, 595 F.2d 347, 352 (6th Cir. 1979).

298. E.g., *Beck*, 245 Cal. App. 2d 976.

299. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 1, sc. iv.

might or might not give rise to a custodial duty to control, supervise, or otherwise restrain its undergraduate chapters from injurious behavior.”<sup>300</sup> Much like the initial approach to franchise liability,<sup>301</sup> this *ad hoc* identification and application of such factors can only lead to a broadly inconsistent body of law and engenders undesirable uncertainty in all parties as to whether liability will attach.<sup>302</sup> Perhaps most perversely, uncertainty compromises preventative measures by leaving unclear (until a court’s ruling) who will be responsible and thus who has the most interest in prophylaxis.<sup>303</sup>

Specifically, traditional national fraternity liability in tort looks to state common law to inquire whether the national has accrued a duty to act in respect of the third party plaintiff and breached it.<sup>304</sup> Courts generally employ a set of broad criteria, including vague appeals to public policy, social utility, and foreseeability, to assess duty in any given case.<sup>305</sup> The Restatement does identify a few common situations such as parent-over-child and master-over-servant where the former’s duty to supervise the latter unambiguously arises, but fraternity cases typically depend on a “catch-all category” imposing a duty for “other relationships giving rise to a danger to third parties.”<sup>306</sup> Whether the national fraternity has a duty at all therefore depends on the overall relationship between national and chapter.<sup>307</sup>

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300. Sunshine, *supra* note 2, at 80; *see id.* at 113–15, 129; *see also* sources cited *id.* at 80 n.6.

301. *See supra* notes 277–280 and accompanying text.

302. *See* Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (“A quick look at the cases cited by Prime reveals that some state courts impose liability on national fraternities and others do not.”); Sunshine, *supra* note 2, at 113–15 (discussing inconsistent decisions); *id.* at 129 (“Such uncertainty is hardly desirable for the national, local, prospective members, or a society at large seeking to curb injurious hazing.”).

303. *See, e.g., infra* notes 398–399 and accompanying text.

304. *See, e.g.,* Sparks v. Alpha Tau Omega Fraternity, Inc., 255 P.3d 238, 245–46 (Nev. 2011) (examining whether national had and breached a duty to supervise a local’s tailgate party); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (examining whether national had and breached a duty to supervise local alcohol service); Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (same).

305. *See, e.g.,* Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 182 (Pa. Super. Ct. 2002) (looking to “(1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.” (quoting Althaus *ex rel.* Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (Pa. 2000))).

306. Rutledge, *supra* note 3, at 373 n.70; *see* RESTATEMENT (SECOND) OF TORTS §§ 315–20 (1965); LeFlore, *supra* note 10, at 208–10 & nn.85–86 (discussing at length).

307. *See* RESTATEMENT (SECOND) OF TORTS §§ 315–20 (1965); LeFlore, *supra* note 10, at 208–10 n.85; *e.g.,* Sparks, 255 P.3d at 245–46 (finding no duty after reviewing general nature of relationship of national and local); Andres, 730 S.W.2d at 553 (same);

Fraternity cases should not, however, turn on the abstract and normatively inapt question of whether this relationship is sufficient to give rise to a generalized duty, while disregarding the involvement (or lack thereof) of the national in the actual injury done the plaintiff.<sup>308</sup> Such an all-or-nothing inquiry harkens back to the blunt original test in franchise cases that has proven unsatisfactory to many authorities.<sup>309</sup>

The instrumentality doctrine used in franchise law would bring greater fairness to disputes involving fraternities: the question would be whether the national fraternity had specifically reserved to itself the right to direct and control the sort of acts or negligence that gave rise to the injury. Unlike the approach in tort, in which duty is decided *ad hoc* employing factors of social utility and public interest, the instrumentality doctrine assigns responsibility to the party with predetermined control. This is more just to both national and local, permitting parties to structure their relationship to create predictable zones of accountability. Such an approach is neither uniformly to the benefit nor detriment of either party: An otherwise uninvolved national might be inculcated because it deliberately retained some narrow area of authority,<sup>310</sup> or a more restrictive national might be exculpated because the injury occurred in a zone over which it disclaimed any authority.<sup>311</sup>

At a highly generalized level, the instrumentality doctrine most clearly tends to exonerate nationals from torts committed during social and recreational events. General guidance about avoiding risky behavior and the overarching ability to expel members or chapters *post facto* do not add up to responsibility for a national that has nothing to do with the parties thrown by their local members (and any misdeeds occurring thereat).<sup>312</sup> This is further

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*Sullivan*, 572 A.2d at 1213 (same).

308. See generally Marshlain, *supra* note 8; LeFlore, *supra* note 10.

309. See *supra* notes 268–280 and accompanying text.

310. See, e.g., Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 492–95 (S.C. Ct. App 1986).1986).

311. See, e.g., Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc).

312. Compare, e.g., *Sullivan*, 572 A.2d at 1213 (Pa. 1990) (“National organizations do not have the ability to monitor the activities of their respective chapters which would justify imposing the duty appellant seeks. The national organization in fraternal groups has only the power to discipline an errant chapter after the fact. It does not possess the resources to monitor the activities of the chapter contemporaneous with the event. . . . From this factual matrix, there is no basis in the relationship to expand the liability of the national body to include responsibility for the conduct of one of its chapters.”), *Sparks*, 255 P.3d at 245–46 (following *Sullivan*), and *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014) (“It is significant, however, that these alleged enforcement powers are remedial only. The national fraternity has no right to direct or control a local fraternity member’s personal actions and behavioral choices.”) with *Hayman v. Ramada Inn., Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987) (like logic in traditional franchise context).

illustrated by analogy to franchise cases in which the victims of violent crimes unsuccessfully sought recompense from a national franchisor because the tort occurred at a franchisee, alleging the national brand had an obligation to assure their security.<sup>313</sup> But national fraternities are not and cannot be guarantors of the general safety of every person at or after local fêtes and functions.<sup>314</sup> Only a national that reserves specific control over a local party should face potential vicarious liability.<sup>315</sup>

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313. *E.g.*, *Hayman*, 357 S.E.2d at 397; *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 90 (E.D.N.Y. 2000), *aff'd*, 4 F. App'x 82 (2d Cir. 2001); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997). *But cf.*, *e.g.*, *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 763–64 (Mo. 1996) (finding question of specific control in violent tort committed on franchise premises unsuitable for summary judgment); *Walters v. Ramada Franchise Systems, Inc.*, 2000 WL 1201688 (Tex. App. Aug. 24, 2000) (same).

314. *See* *Marshlain*, *supra* note 8, at 4–5; *e.g.*, *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000); *Miller v. Int'l Sigma Pi Fraternity*, 41 Pa. D. & C. 4th 282, 286 (Pa. Ct. Com. Pl. 1999) (“Unless defendants fraternity and university had actual knowledge of the party at which plaintiff was injured, liability will not follow. Plaintiff fails to aver actual knowledge on the part of plaintiff. Therefore, in the absence of actual knowledge, plaintiff claims of negligence against defendants fraternity and university must be dismissed.”); *Millard v. Lambda Chi Alpha*, 611 A.2d 715, 720 (Pa. 1992); *Campbell v. Bd. of Tr. of Wabash College*, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986); *see also* *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 255 P.3d 238, 245–46 (Nev. 2011) (finding no duty to supervise local tailgate); *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (finding no duty or negligence for national over local service of alcohol at party); *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (same). *But see, e.g.*, *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*8 (Del. Super. Ct. Oct. 8, 1986); *cf. supra* note 281 (discussing Professor Hanks' proposal that guarantor liability be imposed on franchisors).

315. *See* *Sparks*, 255 P.3d at 245–46 (no control and no liability); *Miller*, 41 Pa. D. & C. 4th at 286 (same); *Andres*, 730 S.W.2d at 553 (same); *Sullivan*, 572 A.2d at 1213 (same); *LeFlore*, *supra* note 10, at 231 (summarizing of *Sullivan* that “plaintiff failed to state a case . . . absent allegations that the national organization authorized or ratified the serving of alcohol at the party”); cases cited *supra* note 162; *see also* *Estate of Hernandez v. Flavio*, 186 Ariz. 517, 519, 924 P.2d 1036 (Ariz. Ct. App. 1997) (“The national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored.”), *aff'd in part, and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997) (discussing theories of national and local involvement with social events).

Liability in this arena is more plausible if, for example, a “dry” national fraternity expressly forbade any alcohol at its chapters' in-house functions in its by-laws, and the injury complained of was alcohol poisoning. (To be sure, general guidelines about responsible alcohol use are not the same as forbiddance.) It may be argued that such a regime would dissuade fraternities from imposing hard-line regulations against alcohol use, and this is likely so. *See, e.g.*, *LeFlore*, *supra* note 10, at 234–37. But that is the point: if fraternities hold themselves out as enforcing teetotaling rules on alcohol to ensure health and safety, then they must actually do so. Proffering such rules while allowing local chapters to flout them is worse than having no rules at all. A national fraternity that finds its local chapters cannot be realistically restrained from some measure of alcohol use is better served promulgating policies that channel this behavior into safer forms, not a misleading policy that pretends to unfeasibly high standards. But

Contrariwise, torts committed in the process of inducting new members can more plainly be laid at the national's door. This author has elsewhere argued that the induction of new members is conducted within an agency relationship of *respondeat superior*, because the local chapter acts for the direct benefit of the national—local inductions are the only way the national can obtain new members—and because the local operates under the express authorization and direction of the national in conducting initiations.<sup>316</sup> Nationals not only prescribe what must be done, but proscribe in excruciating detail what may not.<sup>317</sup> Viewed through the lens of the instrumentality doctrine, the induction of new members is clearly a zone in which every national fraternity has reserved the right to command and control.<sup>318</sup> local chapters must use the nationally-mandated process, and have no authority to induct new members without national assent.<sup>319</sup> National liability for hazing, therefore, is well-founded within the context of the franchising framework.<sup>320</sup>

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failure is hardly certain *a priori*: experience shows that some fraternities have been successful at eliminating alcohol from chapterhouses. *See, e.g.*, Robert E. Manley, *Alcohol-Free Housing Works*, FRATERNAL L., Jan. 2006, at 1; Robert E. Manley, *Chapter Houses and Fraternity Culture*, FRATERNAL L., Jan. 2005, at 1–2. Rogue chapters that refuse to fall in line can be drummed out of the fraternity. *E.g.*, Timothy M. Burke, *Phi Delta Theta's Alcohol-Free Policy Upheld*, FRATERNAL L., Sept. 2008, at 1–2.

316. *See* Sunshine, *supra* note 2, at 129–37; *see also id.* at 87–109 (reviewing and analyzing historical precedent attributing vicarious liability for hazing to national fraternal organizations).

317. *See, e.g.*, Smith v. Delta Tau Delta, 988 N.E.2d 325, 329–30 (Ind. Ct. App. 2013) (“[N]o chapter of Delta Tau Delta shall indulge in any physical abuse or undignified treatment (hazing) of its pledges or members. Hazing is defined as any action taken or situation created intentionally, whether on or off Fraternity premises, to produce mental or physical discomfort, embarrassment, harassment, or ridicule. Such activities and situations include paddling in any form, creation of excessive fatigue, physical and psychological shocks, quests, treasure hunts, scavenger hunts, road trips or any other such activities, kidnapping of actives by pledges or pledges by actives as well as the forced consumption of alcohol, wearing apparel which is conspicuous and not normally in good taste, engaging in any public stunts and buffoonery, morally degrading or humiliating games and activities, late work sessions which interfere with academic activity . . . .” (quoting by-laws)), *rev'd on other grounds*, 9 N.E. 154 (Ind. 2014).

318. *See* sources cited *supra* note 235–236 (fraternities exercising direct control over local induction).

319. *See id.*; Rutledge, *supra* note 3, at 391 (“persons could only become members by joining a local chapter” and the national “prescribed the initiation ceremony as the tool for joining”); Schoen & Falchek, *supra* note 3, at 133–34 (“National fraternity organizations normally prescribe the manner in which induction ceremonies are conducted.”); Sunshine, *supra* note 2, at 131–32 (“That national fraternities have the right to control the physical details of inductions to their orders can hardly be gainsaid.”).

320. *See, e.g.*, Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 492–95 (S.C. Ct. App. 1986) (affirming national liability for hazing); *e.g.*, Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753–54, 756 (M.D. Tenn. 2006) (denying

A closer question concerns whether recruitment efforts—what most fraternities call “rush”—should engender liability.<sup>321</sup> On the one hand, such recruitment efforts are prerequisite to the goal of obtaining new members, and nationals often provide guidance on how to maximize recruitment and cultivate prospects.<sup>322</sup> On the other hand, the national typically does not prescribe or proscribe any particular course of attracting new members,<sup>323</sup> and local chapters are therefore free (and likely) to develop approaches based on their local campus conditions.<sup>324</sup> Saliently, those conditions are under the pervasive authority of the university,<sup>325</sup> which usually regulates the details of fraternity rush fastidiously.<sup>326</sup> If anyone beyond the local chapter were to

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summary judgment to national for hazing injury); *cf., e.g.,* *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998) (holding franchisor that exercised control over specific practices by franchisee liable when they were not conducted safely).

321. From the point of view of analyzing liability, it is therefore necessary to draw a clear line between recruitment and induction activities. Fortunately, fraternities do so themselves. Rush activities are addressed to the university population at large and intended to identify and attract prospective members. At the conclusion of rush, the identified collegian is extended a bid: an offer to join the fraternity. If the bid is accepted, the prospective member becomes a pledge or neophyte and proceeds through the process of induction into the fraternity (pledging), culminating in an initiation ceremony that signifies the completion of the process. It is during this pledging period that hazing as such may occur. *See generally* Hauser, *supra* note 4, at 435–36; Horton, *supra* note 6, at 437, 469, 472; Harvey, *supra* note 4, at 25; *e.g.,* Tim Burke & Chris Hoskins, *Tragedy at University of Northern Colorado: Complaint Filed Against Delta Tau Delta*, FRATERNAL L., Nov. 2012, at 6 (distinguishing injuries occurring during pledging, after a bid, from earlier period of rush).

322. *See supra* notes 163–164 and accompanying text.

323. *See Smith*, 988 N.E.2d at 329–30 (reversing summary judgment in favor of national on agency grounds because “the national fraternity prescribed rules and requirements for recruiting and initiating new members, and for approved conduct in daily activities”), *rev’d*, 9 N.E. 154 (Ind. 2014) (finding no such agency relationship).

It must be noted that most if not all fraternities have adopted a dry rush—that is, a recruitment process free from alcohol. This is at best a tautological requirement, however, because prospective members are reliably below the legal drinking age, and therefore providing rushes with alcohol would be *per se* illegal. *See* Matthew W. Fellerhoff, *Comprehensive Party Planning*, FRATERNAL L., Sept. 1997, at 1 (“Most, if not all fraternities, prohibit alcohol at rush events. Considering the likelihood that most rushes are underage, that is as it should be. From a risk management standpoint, dry rush should be the only option.”); *e.g., Smith*, 988 N.E. 2d at 330; Editorial, *ATQ Launches Risk Avoidance Campaign*, FRATERNAL L., Mar. 1986, at 4 (“Chapters shall, if not already mandated by the sheltering institution, implement a ‘Dry Rush’ program, using the guidance provided in the ATO Rush Manual.”). High-level expectations of legal behavior ought not engender liability without more. *See infra* notes 336–337 and accompanying text.

324. *See* Hauser, *supra* note 4, at 462; Robert E. Manley, *Chapter Officers’ Checklist*, FRATERNAL L., Sept. 1989, at 3; *see also* Harvey, *supra* note 4, at 36 (considering how university governing bodies can override local members’ recruitment plans).

325. *See supra* notes 4, 6, 189–196 and accompanying text.

326. *See* Hauser, *supra* note 4, at 435–36 (“Host campuses have also long regulated

be vicariously liable for injuries in rush, university overseers and their Greek council proxies are the more likely parties,<sup>327</sup> not the national fraternity.<sup>328</sup> That said, the implications for supervisory collegiate liability under the franchise framework, although fecund territory for future research, would exceed the scope of this initial Article.

Other activities are similarly susceptible to fact-laden dissection. National fraternities often assist directly with philanthropic or academic undertakings, and where the national is the animating force behind an event, the instrumentality doctrine would presumably place liability there. Whereas a general fraternity policy to engage in philanthropy would not suffice, national direction in conducting a particular charitable event likely would. Likewise, a national granting academic scholarships or offering scholastic assistance incurs no generalized responsibility for a recipient's actions, but the national might be responsible for torts committed at a leadership or academic conference it convened. Such hypotheticals remain largely that, however, as few cases arise from misbehavior at fraternity-sponsored symposia.<sup>329</sup>

What is the unifying principle amongst these admittedly high-level generalizations of liability?<sup>330</sup> At base, the question is with what precision a fraternity holds the reins on local operations. National organizations are usually uninvolved with any detail of social events: they have no opinion or interest as to whether a tennis-themed gala in the quad or a riverside dance

membership in fraternity chapters by exercising control of the chapters' recruitment (usually known as 'rushing'."); *id.* at 462–64; Daniel J. McCarthy, *Tragedy Leads to Off-Campus Fraternity System*, FRATERNAL L., Jan. 2007, at 4–6; Daniel J. McCarthy, *Local Sorority Sues Chico State University*, FRATERNAL L., Mar. 2006, at 1; James C. Harvey, *Deferred Rush: A Violation of Equal Protection*, FRATERNAL L., Sept. 2005, at 1–2; *see also* Robert E. Manley, *People Problems*, FRATERNAL L., Sept. 1982, at 2 ("A college has the right to impose regulations over the rush process").

327. *See* Robert E. Manley & Timothy M. Burke, *All-Greek Councils*, FRATERNAL L., Mar. 1996, at 6 ("If an all-Greek council attempts to impose regulations such as the regulation of the use of alcohol or the regulation of rush its members may very well be sued for mistakes in the regulatory process."); *cf.*, *e.g.*, *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*28–32 (Del. Super. Ct. Oct. 8, 1986).

328. *See, e.g.*, *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 305 (Ida. 1999) (no national liability for injuries sustained following inebriation at "several parties sponsored by campus fraternities celebrating the end of 'Rush Week.'").

329. *But see, e.g.*, Complaint, *Loomba v. Zeta Psi Fraternity, Inc.*, Case No. RG15774019 (Super. Ct. Cal. Jun. 12, 2015) (alleging negligence in death at social event associated with fraternity leadership conference); *cf.*, *e.g.*, Jason Schultz, *New York Girl Sues Benjamin School, Alleges She Was Sexually Assaulted by Student on Field Trip*, PALM BEACH POST, Sept. 17, 2013 (school sued for alleged assault by one of its students at school-sponsored participation in model United Nations conference).

330. These generalizations are high-level indeed. The resolution in any given case will depend on the facts surrounding the relationship of the particular national and local chapter to the injury done.

with jazz quartet is scheduled. As far as the national is concerned, local chapters are free to host no social functions at all.<sup>331</sup> On the other hand, the national mandates and describes minutely the forms for inducting new members, and encourages its chapters to bolster its numbers; it is not agnostic about whether and how new members are initiated.<sup>332</sup> The fact that national fraternities might have general guidelines regarding both parties and pledging is ultimately not the issue; what matters is whether the national fraternity reserves an interest in the activity giving rise to the tort. Under that microscope, parties are ultimately a local affair, while initiations are under national control.

If national fraternities say anything germane to a social event, it usually concerns alcohol, that persistent plague on fraternities.<sup>333</sup> Incidents arising out of alcohol use unfortunately occur at rush, pledging, social, athletic, and even purely domestic affairs.<sup>334</sup> The calculus of liability, however, derives not from a beverage but from the national fraternity's role (or lack thereof) in the service of the beverage.<sup>335</sup> Fraternities regurgitate legalities by rote: mandates for "dry rush" and against providing alcohol to the underage or intoxicated are tautological reminders not to break the law, not a reservation of control.<sup>336</sup> Without more, advisories against criminality, even with the

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331. It should be reiterated that nationals that *does* micromanage the details of local social functions can hardly disclaim responsibility for their execution. *See supra* notes 314–315. National fraternities are free to structure their contractual relations with their chapters however they wish, and accept the responsibilities that come with it. *See supra* text accompanying notes 287–289.

332. Indeed, it is because of this encouragement that this Article rush activities might arguably come with the scope of national responsibility, even though it is the chapter and university who are the principle actors in determining the actual contours of rush. *See supra* notes 321–328.

333. *Cf.* Harvey, *supra* note 4, at 14 ("Virtually every other problem faced by fraternities (including hazing incidents and sexual assaults) can be traced directly to substance abuse by individual members.").

334. *See generally* Kuzmich, *supra* note 227.

335. *See, e.g.,* Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 492–95 (S.C. Ct. App. 1986) (finding the fraternity's role in providing and pressuring the decedent to imbibe dispositive); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (finding no duty or negligence for national over local service of alcohol at event); Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (same); *see also supra* note 315.

336. *See supra* note 323 and accompanying text; *e.g.,* Shaheen v. Yonts, 394 F. App'x 224, 229 (6th Cir. 2010) ("With regard to alcohol, specifically, Farkas testified that no one at the national chapter is charged with the responsibility of monitoring underage drinking at the local chapters. There is a general policy statement regarding social welfare and alcohol. However, there are no specific rules or policies dedicated to alcohol consumption. The fraternity is expected to abide by federal, state and local law. Period. However, there is no oversight in this regard."); Mitchell Schnurman, *7-Eleven Must Step Up To Prevent Worker Abuses By Franchisees*, DALLAS MORNING NEWS (June 22, 2013), <http://www.dallasnews.com/business/columnists/mitchell->

*post facto* penalty of expulsion, should provide no basis for liability: friends, parents, counsel, and even law enforcement officers may advise against breaking the law and warn of the ensuing repercussions; none is liable for criminal acts contrary to advice.<sup>337</sup> To find otherwise would reify the worst fears of pundits that wiser minds be foreclosed from admonishing collegians to behave properly.<sup>338</sup> That said, a national that specifically commands a local chapter to serve alcohol in a particular fashion might find itself vulnerable should that service lead to injury.<sup>339</sup>

These implications are hardly revolutionary. Some courts in fraternity cases have already effectively recognized that the question must be whether the national had control over the instrumentality of injury; an Arizona court found no agency liability for a national sued for a local member's drunk-driving incident that followed a chapter social event, explaining:

We affirm summary judgment for the national on other theories of liability. The members of the local chapter were not employees or servants of the national fraternity so as to impose *respondeat superior* liability for their torts. That the local may have been an agent of the national for purposes of collecting dues or accepting members does not create liability for all tortious activity of the agents.<sup>340</sup>

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schnurman/20130622-7-eleven-has-to-step-up-to-prevent-worker-abuses.ece June 22, 2013 ("The company also said that franchise owners must follow the law and 7-Eleven's franchise agreement, which assigns all labor issues to the franchisees.").

337. *Shaheen*, 394 F. App'x 224 (finding national not liable given no oversight over alcohol use despite general policy advising responsible and legal behavior); *cf.*, *e.g.*, Marshlain, *supra* note 8, at 14–16 ("If individuals are threatened with the possibility of their friends suing them for failing to warn them not to stand too close to the edge of the deck, or place their bed near a window, they may avoid entering such friendships. Even if it was practical to require fraternity and sorority members to take a parental role with their friends who are also members of the same fraternity or sorority, there is no proof that their policing will have any effect on the student seeking protection."). *Contra* Estate of Hernandez v. Flavio, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995) ("The national fraternity exercises control over many aspects of the activities of its local chapters. That a duty exists in this circumstance was implicitly admitted by the act of the national fraternity in sending to local chapters instructions to abide by local laws and university regulations in serving alcohol at chapter functions. Whether such an admonitory letter is sufficient to discharge any duty to exercise reasonable care is, of course, for the jury to decide.").

338. *E.g.*, LeFlore, *supra* note 10, at 220.

339. *E.g.*, Smith v. Delta Tau Delta, 988 N.E.2d 325, 337–38 (Ind. Ct. App. 2013) (reversing summary judgment in favor of national because of extensive national control of alcohol use and policy), *rev'd*, 9 N.E. 154 (Ind. 2014); *see supra* notes 312–315 and accompanying text.

340. Estate of Hernandez v. Flavio, 924 P.2d at 1039 (Ariz. Ct. App. 1995), *aff'd in part and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997). Tellingly, despite affirming summary judgment on these agency theories based on a more instrumentality-

Consider the facts adduced in the peculiar case mentioned in the introduction, *Furek v. University of Delaware*.<sup>341</sup> There, the plaintiff had suffered severe chemical burns during the “culmination of the initiation process[,] a secret ritual known as ‘Hell Night’—an extended period of hazing during which the pledges are physically and emotionally abused.”<sup>342</sup> The jury absolved the national of liability under traditional tort rules,<sup>343</sup> but application of the instrumentality doctrine would throw such a verdict into question. The national fraternity required initiation for membership, forbade hazing, and conducted an annual certification from the local that it was complying with national rules for initiation, yet a few years before the incident, the local had reported that their program “was *not* free of hazing.”<sup>344</sup> Given that the national prescribed the rituals and rules for its initiation process and required regular certification of compliance (which it knew the local had recently failed), it would be difficult to gainsay national control over the instrumentality that caused the injury: the abusive secret ritual.

Embracing the instrumentality doctrine will not make the resolution of fraternity cases effortless. Franchise statutes vary by state; courts must contend with disputed facts; and liability will turn on the details of contractual assignments of control between the fraternal parties—though, as discussed, this last is more a feature than a bug in the system. While the *ad hoc* traditional approach to liability might sometimes reach the same result as an instrumentality approach, the vague and various factors employed in the former mean cases may fall out either way. The wisdom of focusing on relative control over the instrumentality of injury is compelling, and broader acceptance of this reasoning would go far in providing predictability and fairness (if not uniformity of result) to cases involving fraternities.

### C. Disclosure and Due Process Duties

Stepping back from fraught questions of liability, viewing the fraternity as a franchise also highlights the need for equitable disclosures and due process. Much of the criticism of franchising during its Wild West era in the 1960s and 1970s centered on franchisors’ failure to adequately disclose restrictions and legalities that trapped comparatively unschooled franchisees.<sup>345</sup> In many cases, franchisors invoked the secrecy required to

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focused approach, *Flavio* denied the national summary judgment under the traditional tort analysis.

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

342. *Id.* at 509.

343. *Id.* at 511.

344. *Id.* at 510.

345. *See, e.g.*, BROWN, *supra* note 34, at 7–9; *see also id.* at 10–18 (undisclosed charges and fees).

protect valuable trade practices and secrets being divulged to competitors.<sup>346</sup> Even after franchisees were inevitably given access to the franchise terms, trade secrets and know-how in order to properly conduct their business, franchisors often sought to prevent any further dissemination through expansive non-disclosure agreements.<sup>347</sup> These had the incidental (or perhaps intended) side effect of preventing franchisees from warning about any exploitation perpetrated by the franchisor.<sup>348</sup> Today, however, federal and state law prescribe a lengthy list of disclosures that must be made available to any prospective franchisee.<sup>349</sup>

Fraternities face similar concerns and criticism. Detractors have long focused on fraternities' refusal to publicize the details of their secret rituals and ceremonies.<sup>350</sup> Perhaps in response, a few groups adopted "open rituals" in which the full details of their processes for inducting and initiating new members are freely available to both prospective members and the public.<sup>351</sup> Other fraternities have insisted that the confidentiality of their rituals is essential to their mystical origins and mission.<sup>352</sup> One group that faced intractable problems during pledging and initiation rituals has recently eliminated such ceremonies entirely, throwing the proverbial baby out with the bathwater.<sup>353</sup> But there is no need for such extremes: so long as

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346. See Tom Arnold, *Protecting Intellectual Property and Good Will in Franchised Business Operations*, in THE FRANCHISING SOURCEBOOK §§ 17.20-23, at 406-10 (Jim McCord ed. 1970); GLICKMAN, *supra* note 23, § 3A.03[2] at 3A-33 to 36.

347. See Arnold, *supra* note 346, at §§ 17.20-23; BROWN, *supra* note 34, at 7.

348. See BROWN, *supra* note 34, at 7 ("The reason for such secrecy is rather obvious. Its purpose is to conceal from the general scrutiny of the public, the bar, and the court a unique contract, whose publication would put the franchisors to shame.")

349. See Emerson, *supra* note 292, at 615-16 & nn.16-17; e.g., Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1 (2007).

350. E.g., BAIRD, *supra* note 9, at 485-89 (discussing three early critiques of fraternities' secrecy); TURK, *supra* note 72, at 114-17 (tracing criticism of secrecy to nineteenth century).

351. BAIRD, *supra* note 9, at 137-40 (Delta Upsilon); Ryan Anderson, *Greek Rituals Set Chapters Apart*, IOWA STATE DAILY (Apr. 3, 2013), [http://www.iowastatedaily.com/news/article\\_3e0f81ca-970e-11e2-9689-001a4bcf887a.html](http://www.iowastatedaily.com/news/article_3e0f81ca-970e-11e2-9689-001a4bcf887a.html) ("The rituals that occur in fraternities and sororities range from chapter events, ceremonies, and new member initiations. There are two fraternities, FarmHouse and Delta Upsilon, that hold open rituals which non-members can attend."); Rebecca Castagna, *Delta Upsilon Comes to QU*, QUINNIPIAC CHRON. (Hamden, Conn.), Feb. 6, 2013.

352. See Anderson, *supra* note 351; sources cited *supra* note 151; see also BAIRD, *supra* note 9, at 487-89 (arguments for why ritual secrecy is innocuous).

353. See Peter Jacobs, *The Deadliest Fraternity in the US Just Banned Its Secret Initiation Rituals*, BUSINESS INSIDER (Mar. 7, 2014), <http://www.businessinsider.com/sae-bans-initiation-rituals-2014-3> ("The bad publicity Sigma Alpha Epsilon has received is challenging and regretful because we know that some of our groups have great new-member (pledge) programs and do the right thing.")

prospective members themselves are informed of the process they will be undertaking,<sup>354</sup> third-party detractors' morbid curiosity need not be satisfied. Fraternities have a legitimate—and arguably constitutional—right to keep their innocuous secrets.<sup>355</sup>

In any case, outside the ritualistic context, fraternities are more open than their detractors would have it. For example, fraternities generally inform prospective members of the sundry rights and obligations that accrue with membership.<sup>356</sup> As a modern innovation, many fraternities have begun employing mandatory arbitration agreements between themselves and their members, while taking seriously their obligation to obtain informed consent.<sup>357</sup> (Courts have evidently agreed, by upholding these arbitration clauses against challenges.<sup>358</sup>) Certainly, however, many fraternities could and should do better in advising prospective members and the public at large of what they can expect from Greek life, both in the new member induction process and afterwards. At the very least, fraternities should make transparently clear that any member is not only free but obligated to report abuses of any kind, notwithstanding putative strictures of secrecy.<sup>359</sup>

Perhaps the most strenuous early criticisms of franchising were directed at the franchisor's reserved right to unilaterally dispossess the franchisee of his livelihood entirely.<sup>360</sup> Despite a diligent franchisee's putting much effort into building a successful enterprise, a capricious or covetous franchisor could extinguish his interest at a whim,<sup>361</sup> and invoke non-compete clauses to prevent his establishing an independent business thereafter.<sup>362</sup> Modern

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354. See, e.g., Paine, *supra* note 2, at 208–09 (addressing the discussion in *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) of the importance of informing candidates of the specific risks they will face and obtaining informed consent).

355. See, e.g., Harvey, *supra* note 4, at 25–26 (discussing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)); Timothy M. Burke, *History Channel Looks at Fraternities*, FRATERNAL L., Sept. 2003, at 4.

356. See *supra* note 237 and accompanying text.

357. See Jim Ewbank, *Mandatory, Binding Arbitration: Will It Work in the Greek System?*, FRATERNAL L., Mar. 2008, at 1–2.

358. See, e.g., Daniel J. McCarthy, *Colorado Court Compels Arbitration*, FRATERNAL L., Jan. 2014, at 4–6; Daniel J. McCarthy, *Arbitration Clause Is Enforceable in Hazing Case*, FRATERNAL L., Sept. 2007, at 5–6.

359. Cf. Elianna Marziani, *There Is Such a Thing as 'Too Much Fun'*, FRATERNAL L., Mar. 2001, at 2 (“My primary duty is not to my friends in the Greek system, to ignore the problems in their system in hopes of encouraging a freshman class to rush and pledge without thinking of any possible consequences. My primary duty is to let people know what I’ve seen in my years here, and warn them of the dangers.”).

360. E.g., BROWN, *supra* note 34, at 22–30.

361. See BROWN, *supra* note 34, at 22 (“Worst of all, the franchisee must live in constant peril of termination of his franchise and loss of his investment.”); *id.* at 26 (discussing “litigated cases of arbitrary terminations”); Hadfield, *supra* note 40, at 966.

362. See BROWN, *supra* note 34, at 27–28; Hadfield, *supra* note 40, at 966; see also GLICKMAN, *supra* note 23, § 3A.05 at 3A-42 to 47.

regulations, however, protect franchise agreements from being terminated without a meaningful quantum of due process.<sup>363</sup> Even a social organization as innocuous as the Girl Scouts—which, prior to the intervention of the courts, might never have imagined a local council to be a franchisee—have been enjoined from expelling a local council, based on statutory franchise protections.<sup>364</sup>

Fraternities should take note. Like those early-day franchisors, national fraternities typically can and do revoke local charters at their discretion.<sup>365</sup> In practice, few fraternities would do so unless the local should have amassed substantial arrears or seriously violated fraternity rules or the law, and as such it would be difficult for a local to complain that its equitable expectations were flouted.<sup>366</sup> Nonetheless, fraternities should be mindful to diligently afford a reasonable procedure for a chapter accused of financial or behavioral delinquency to defend itself. Courts typically defer to the internal adjudicative rules of the organization.<sup>367</sup> But where those rules are disregarded or fail to afford the accused basic due process, fair-minded jurists may feel compelled to intervene,<sup>368</sup> as in the influential early case *Heaton v. Hull*,<sup>369</sup> which the Yale Law Journal summarized with a concision this author could not hope to excel:

Charges were brought against a chapter of a college fraternal organization by its president because of lack of culture and refinement among the women of the college. No proof was offered that any rule of the order was broken except the exhibition of the

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363. See Hadfield, *supra* note 41, at 929. See generally GLICKMAN, *supra* note 23, § 10.13 at 10-146.13 to 177.

364. See *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A. Inc.*, 549 F.3d 1079 (7th Cir. 2008).

365. See *supra* notes 175–176 and accompanying text.

366. See, e.g., *supra* cases cited note 176.

367. See Timothy M. Burke, *Wise Use of Free Speech*, FRATERNAL L., Jan. 2012, at 4 (“The law across the country is generally very clear that courts will avoid becoming involved in second guessing the disciplinary decisions of private social organizations so long as in doing so, the organizations have complied with their own rules and procedures.”); Timothy M. Burke, *Phi Delta Theta’s Alcohol-Free Policy Upheld*, FRATERNAL L., Sept. 2008, at 1–2 (“Private organizations are vested with broad discretion when making internal disciplinary decisions, and if such decisions are “made honestly and in good faith, [they] will not be reviewed by the courts” on their merits.” (quoting Pennsylvania Court of Common Pleas)).

368. See Burke, *Wise Use*, *supra* note 367; Burke, *Phi Delta Theta*, *supra* note 367; cf. James C. Harvey, *Court Upholds Damage Award Against University of Iowa*, FRATERNAL L., Mar. 2009, at 1–2 (successful suit against college for violations of process in suspension of fraternity).

369. *Heaton v. Hull*, 59 N.Y.S. 281 (N.Y. Sup. Ct. 1899), *aff’d*, 64 N.Y.S. 279 (N.Y. App. Div. 1900).

constitution to counsel by a member of the order. No causes of expulsion are provided for by the constitution. Nor was any chance given the chapter to defend itself against the charges. *Held*, the court would enjoin consummation of the expulsion.<sup>370</sup>

So significant was this holding in protecting a chapter against a despotic central organization that the venerable Baird reprinted both the trial court and appellate decisions in full as an appendix to the edition of his standard manual on fraternities appearing shortly thereafter.<sup>371</sup>

In many ways, the relationship of fraternity national and local is still mired in the sort of Wild West jurisprudence that characterized early franchise law, with courts hesitating to insert themselves into the internal matters of a unified organization.<sup>372</sup> Moreover, the increasing regularity of properly executed arbitration agreements will only increase such judicial abstinence.<sup>373</sup> Fraternities, however, should draw important lessons from the backlash against abuses once perpetrated by franchisors, and proactively maintain practices of disclosure and due process that would stand up to equitable scrutiny if haled into court.

#### V. WHITHER FRATERNALISM: MERITS AND DEMERITS OF THE FRANCHISE FRAMEWORK

The conceit of forcing the venerable institution of fraternalism into a functional franchisor-franchisee relationship is undoubtedly reductionist in the extreme. The candidate's motivation for joining a fraternity is likely to be social in nature, seeking recognition or prestige;<sup>374</sup> by contrast, for business-format franchises, "[a]lthough appeals such as 'prestige' or 'community recognition' may be part of the sales message, the strongest motivator is generally the economic one."<sup>375</sup> If dreams of commercial success tempt franchisees to accept onerous terms,<sup>376</sup> the prospect of a

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370. Recent Cases, *Fraternal College Societies—Expulsion of Subordinate Chapters—Injunction*, 9 YALE L.J. 99 (1899).

371. BAIRD, *supra* note 9, at 472–84.

372. See sources cited *supra* note 367.

373. See *supra* notes 357–358 and accompanying text.

374. See SYRETT, *supra* note 72, at 154; Govan, *supra* note 3, at 691–92, 682 n.18; Rutledge, *supra* note 3, at 391; e.g., *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197–98 (Ill. App. Ct. 1987); see also Curry, *supra* note 2, at 110–11; Paine, *supra* note 2, at 203 n.58; Kuzmich, *supra* note 227, at 1119, 1126.

375. Douglas C. Basil & Curtis W. Cook, *Managerial Behavior and Management Styles in Franchising*, in THE FRANCHISING SOURCEBOOK § 9.3 at 155 (Jim McCord ed. 1970); see also Swygert, *supra* note 19, at 233 (commenting on in-group motivations for franchisees).

376. See BROWN, *supra* note 34, at 7–18; Swygert, *supra* note 19, at 226–32.

respected place in the university milieu inspires candidates to undergo the rigors of affiliating with a fraternity.<sup>377</sup> These deviating motivations counsel caution in attempting to analogize statutes and precedent protecting the franchisee to the fraternity chapter.

But as the history of franchise jurisprudence illustrates, it is at least as reductionist to try to force fraternities into ill-fitting molds of liability.<sup>378</sup> On one extreme, some courts have viewed nationals as inherently responsible for the misdeeds of their chapters, reasoning that the “national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored.”<sup>379</sup> On the other extreme, courts have found that the communal fraternal structure is categorically insusceptible of the hierarchical control that could support national liability.<sup>380</sup> Like the original dichotomized test in franchise law, such generalist oversimplifications of fraternal arrangements blithely elide over the factual circumstances of the injury in question, missing the trees to focus on the forest.<sup>381</sup>

Numerous courts have held that national fraternities do not have the “right to exercise direct day-to-day control and oversight” over every aspect of their chapters,<sup>382</sup> and that may well be so in the mine-run of cases (outside the context of inducting new members, where control seems clearer).<sup>383</sup> Such a holding tends to exonerate the national under theories involving duty in tort and *respondeat superior*.<sup>384</sup> Yet can it be that the national, whose

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377. See *Sunshine*, *supra* note 2, at 137; *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997).

378. See *supra* notes 277–284 and accompanying text.

379. *Estate of Hernandez v. Flavio*, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995), *aff’d in part and rev’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); see *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118–19 (La. App. Ct. 1999).

380. *E.g.*, *Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (“It is equally clear appellee Sigma Chi Fraternity is an inappropriate body from which to require the duty urged by appellant. By definition such organizations are based upon fraternal, not paternal, relationships. . . . Fraternal organizations are premised upon a fellowship of equals; it is not a relationship where one group is superior to the other and may be held responsible for the conduct of the other. From this factual matrix, there is no basis in the relationship to expand the liability of the national body to include responsibility for the conduct of one of its chapters.”).

381. See sources cited *supra* notes 286–290.

382. *E.g.*, *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 163 (Ind. 2014); *Yost v. Wabash Coll.*, 2 N.E.3d 509, 522 (Ind. 2014); see sources cited *supra* note 171.

383. See *Marshlain*, *supra* note 8, at 2–4 (“[R]equiring fraternities and sororities to act as parental figures has negative policy implications and thus they should be immune from liability in non-hazing situations”); see also *Sunshine*, *supra* note 2, at 130–37 (arguing for control and liability in the specific context of hazing).

384. See sources cited *supra* note 171.

primary purpose is to support the local chapters, and which depends upon the success of those chapters, is wholly divorced from their conduct?<sup>385</sup> The more nuanced contours of a franchise-like liability regime better apportion responsibility between the on-the-ground local members and the national that supports and benefits from them. It allows the local and national to clearly and contractually allocate responsibility and thus invest appropriately in preventative measures.<sup>386</sup> And the franchise framework valuably underscores that national fraternities must ensure some modicum of quality control by virtue of granting chapters the use of their national brand.<sup>387</sup>

There remain serious conceptual difficulties with the franchise framework. The most knotty is that college students, the essential customers of the fraternity chapter, do not merely purchase services, but also “buy in” on becoming members of the local chapter—fractional owners of the conjectural franchise.<sup>388</sup> So viewed, the business of the chapter-*qua*-franchisee then seems to be recruiting new co-owners of the franchise, which looks uneasily like a pyramid scheme.<sup>389</sup> Such ploys are of ancient provenance and widely banned by federal and state law.<sup>390</sup> The mantra of the fraternity is only to “replace yourself” rather than profit by inveigling ever-growing numbers of recruits,<sup>391</sup> but the conflation of customers and franchisees implies that the fraternity chapter is somewhat different from a franchise proper. Indeed, the national fraternity is at base not out for profit, but rather to support and regulate the various local chapters for the benefit of all,<sup>392</sup> which suggests an entity more like a cooperative than a franchisor.<sup>393</sup> Such cooperative organizations are categorically excluded from federal regulation as franchisors,<sup>394</sup> though there may remain antitrust issues where

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385. See *Sunshine*, *supra* note 2, at 106–09; *cf. supra* note 281 (rejecting out of hand on policy grounds the possibility that franchisors be completely insulated from liability).

386. See *supra* notes 289, 302–303 and accompanying text; *infra* notes 398–399 and accompanying text.

387. See *supra* Subpart IV.A.

388. See *supra* notes 230–238 and accompanying text.

389. See GLICKMAN, *supra* note 23, § 2.03[3][a] at 2–61 (“A pyramid distribution scheme is one in which distributors are recruited to recruit additional distributors rather than to sell products.”).

390. See *id.* § 3.03[a] at 2-62 to 2-71 & n.30.

391. *E.g.*, M. David Hunter, *Participate This Fall!*, THE UFZETE, (Sept. 17, 2007) <http://archive.constantcontact.com/fs028/1101134317095/archive/1101802195921.html> (“Also, at your school, remember it is your obligation to replace yourself while a Zete. Actively participate in the recruitment process and do your part to insure Zeta Psi continues at your school.”).

392. See, *e.g.*, LeFlore, *supra* note 10, at 205, 233.

393. See GLICKMAN, *supra* note 23, § 2.03[6] at 2–76.

394. *Id.*; Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,529–30 (Mar. 30, 2007) (explaining that although the final rule does not include an express exception for cooperatives, “the

the cooperative imposes geographical exclusivity, as does a fraternity.<sup>395</sup> The fit between the franchise framework and fraternity is imperfect, to say the least.

All in all, however, the franchise framework at least provides a more nuanced analysis of how the national and local bodies actually divide responsibility for the collective endeavors of the order, hopefully allowing for more practical avoidance of injury in the first place. Indeed, the central mission of vicarious liability regimes is to place responsibility with the parties who are best able to avoid the injury.<sup>396</sup> Holding a national fraternity to task for local events over which it has no control is perverse and pointless.<sup>397</sup> But insisting—via the imposition of liability—that national fraternities ensure that the protocols of nationally-prescribed induction and initiation are followed safely may help eliminate subcultures of hazing that still permeate some outposts of Greek life.<sup>398</sup> A national at greater risk from local hazing infractions is a national more likely to bring its resources to bear to eradicate such behavior.<sup>399</sup>

Courts and commentators have fretted that imposing any national liability poses an existential threat to the fraternity system.<sup>400</sup> Some have

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Commission continues to hold that these business relationships do not meet the criteria for such coverage”).

395. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

396. E.g., *Shaheen v. Yonts*, 394 F. App'x 224, 229 (6th Cir. 2010) (“Following *Carneyhan*, crucial to the analysis of the relationship between the LXA and its local chapter is whether the imposition of a duty would ‘meaningfully reduce the risk of the harm that actually occurred.’ *Carneyhan*, 169 S.W.3d at 851. The concern here is the imposition of duty where the responsible party has no real means of controlling the behavior of the one supervised. So, this Court must ask, assuming a special relationship giving rise to a duty existed, would it have reduced the risk of Yonts’ intoxication and consequent behavior? The obvious answer is no.”); see *LeFlore*, *supra* note 10, at 231–33; see also *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182 (Pa. Super. Ct. 2002) (citing as factors in imposing a duty in tort as “(4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution”).

397. See *Shaheen*, 394 F. App'x 224; *Marshallain*, *supra* note 8, at 15–16; *LeFlore*, *supra* note 10, at 233–37.

398. See *Rutledge*, *supra* note 3, at 395–97; see also *LeFlore*, *supra* note 10, at 223–24, 235.

399. See, e.g., *LeFlore*, *supra* note 10, at 223–24, 235 (describing how, in the face of liability, Alpha Tau Omega stepped up supervision and enforcement of local conduct); *Jacobs*, *supra* note 353 (discussing Sigma Alpha Epsilon’s decision to eliminate pledging entirely when faced with perennial hazing violations). As discussed, nationals may also reserve control over other zones of local operations; command and control of inductions and initiations is discussed here as the most universal of such zones, given the essential nature of fraternities.

400. E.g., *LeFlore*, *supra* note 10, at 220, 223; *Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289, 292 (Mich. Ct. App. 1994); *Alumni Ass’n, Delta Zeta Zeta*

predicted direly that “[i]f the courts continue to impose liability on the national fraternities, it will effectively force the national organizations to withdraw from the field and leave the local fraternities completely without guidance or regulation in areas of acute fraternity liability.”<sup>401</sup> Other authorities would not go so far, but still worry that “the purpose of organizations like the national fraternity would fundamentally change from an instructor of the principles, rituals, and traditions of the fraternity to a central planning and policing authority.”<sup>402</sup> One court even saw liability as a direct threat to higher education as a whole by impeding the virtuous mission of the fraternity.<sup>403</sup> But the franchising framework is parsimonious, excluding much quotidian local conduct from national responsibility, leaving only that over which the national has reserved control.

Drawing lessons for fraternities from the franchise framework is no harbinger of a return to the deprecated days of *in loco parentis*, when universities were held liable for virtually any injury to their students: “College students and fraternity members are not children. Save for very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. Colleges and fraternities are not expected to assume a role anything akin to *in loco parentis* or a general insurer.”<sup>404</sup> If college students engage in athletic games, take road trips, or host parties at which injuries occur, national fraternities should not be held accountable simply because the students were also fraternity members.<sup>405</sup> Like

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of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 572 Pa. 356, 366 (Pa. 1990).

401. LeFlore, *supra* note 10, at 220. LeFlore further argued that fraternities could easily sidestep any such liability regime: “A national organization of a fraternity is not in business to make a profit. Fraternities can always reorganize in such a fashion as to eliminate the national entity that is being sued if the cost of defending or insuring against lawsuits becomes prohibitive. This could be accomplished by reliance on annual conventions as the sole means of national identity and allowing related business concerns to provide the services associated with a national organization.” *Id.* at 232–33.

402. Colangelo v. Tau Kappa Epsilon Fraternity, 517 N.W.2d 289 (Mich. Ct. App. 1994).

403. Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (“Moreover, the increased cost which would enure to such bodies could seriously impede the mission of these institutions which serve a vital role in the development of our youth.”).

404. Campbell v. Bd. of Tr., 495 N.E.2d 227, 232 (Ind. Ct. App. 1986); see Marshlain, *supra* note 8, at 11–16. *But see* Eric Posner, *Universities Are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, SLATE (Feb. 12, 2015), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/university\\_speech\\_codes\\_students\\_are\\_children\\_who\\_must\\_be\\_protected.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/university_speech_codes_students_are_children_who_must_be_protected.html) (arguing that “students themselves . . . , apparently recognizing that their parents and schools have not fully prepared them for independence, want universities to resume their traditional role in loco parentis”).

405. *See* Marshlain, *supra* note 8, at 1–7, 14–16; *see* Swanson v. Wabash College, 504 N.E.2d 327, 330 (Ind. Ct. App. 1987).

franchisees, local chapters and members enjoy a wide ambit to conduct their own affairs within their own wheelhouse—and to take responsibility for the consequences.<sup>406</sup> That some of those consequences may involve the termination of the franchise or chapter does not make the national any more liable than a court system that imposes fines or punishment *post facto* as well.<sup>407</sup>

Beyond liability, the franchise framework also shines a light on key issues in fraternity culture. Set against the milieu of mystery and rote tradition characteristic of Greek societies, the virtues of full disclosure and fair treatment are all the more important to reiterate.<sup>408</sup> In the wake of a fatal hazing incident, one member of the chapter “explained the twin watchwords that were drilled into their pledges: ‘[s]ecrecy and obedience.’”<sup>409</sup> Fraternities have a right to their privacy, and to maintain an internal system for disciplining their chapters and membership, but such rights neither are nor should be limitless.<sup>410</sup> By looking to the history of franchising, fraternities can learn lessons as to how much latitude they may expect in these critical arenas.

The franchise framework is thus valuable because it heuristically approximates the essential nature of fraternalism. Considerations that animate franchise law apply powerfully to fraternities as well: expecting the owners of well-known brands to act responsibly with their marks; imposing liability on nationals that command and control local conduct for their own benefit, without making them answer for behavior beyond their bailiwick; and requiring fair disclosure to and due process for participants in the system.<sup>411</sup> As this Article’s epigram said, fraternities are rather like franchises—but franchises with a serious quality control problem.<sup>412</sup> By placing the franchise framework in the foreground, fraternities can better grasp and grapple with these issues, and ensure that all of their chapters live up to the high standards to which every organization aspires. Like the franchises to which they are so similar, fraternities have survived an

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406. *Id.* at 14–16 (“College students should be required to take responsibilities for their actions, as they are viewed as adults by our court systems and given many of the rights and privileges which come along with adulthood.”). *But see* Posner, *supra* note 404.

407. *See supra* note 312 and accompanying text.

408. *See* Paine, *supra* note 2, at 208–09 (“Because of the secret nature of most fraternity initiations, plaintiffs often remain ignorant of the situation until immersed in it.”).

409. Sunshine, *supra* note 2, at 133 n.350 (quoting HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* 183 (1990)).

410. *See supra* Part IV.C.

411. *See supra* Part IV.

412. Caitlin NPR Interview, *supra* note 1.

uncertain childhood and unruly adolescence to become mature participants in civil society.<sup>413</sup> Franchises were compelled into this adulthood by the imposition of statutory responsibilities,<sup>414</sup> and fraternities must likewise put away childish things,<sup>415</sup> and embrace the panoply of both the rights and responsibilities they have grown into.<sup>416</sup>

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413. See *supra* notes 62–63 and accompanying text.

414. See BROWN, *supra* note 34, at 95–102 (“[F]ranchisors act at their extreme peril in taking this attitude, since it is such repressive and abusive actions which have given rise to the remedies that now exist and will give rise to others.”); *e.g.*, *supra* notes 34–35, 345–349, 360–363 and accompanying text.

415. 1 *Corinthians* 13:11 (King James).

416. Cf. Marshlain, *supra* note 8, at 13–16 (explaining the importance of treating college students like adults and imposing responsibility on them for their own actions); Robert E. Manley, *New Risks Facing Campus IFCs and Panhellenic Conferences*, FRATERNAL L., Jan. 1992, at 5 (“The Delta Tau Delta lawsuit is the first step on a new level of maturity for campus [fraternity councils].”).