

North Dakota Law Review
2005

Article

***309 HOW TO PREVENT HIGH SCHOOL HAZING: A LEGAL, ETHICAL AND SOCIAL PRIMER**

Marc Edelman [\[FN1\]](#)

Copyright © 2005 North Dakota Law Review; **Marc Edelman**

Attorneys at Fargo, North Dakota public schools spent most of their 2004 summer investigating an alleged hazing incident involving Fargo North High School. [\[FN1\]](#) According to published reports, Fargo North students, as part of an annual tradition, solicited a group of junior-high school students and attacked them using paddles and hockey sticks. [\[FN2\]](#)

When parents reported this hazing incident to authorities, Fargo North Superintendent David Flowers hired outside attorneys and social workers to review the situation. [\[FN3\]](#) According to Flowers, "Hazing, by its very nature, is a conspiracy of silence. The victims feel they [cannot] divulge the perpetrators." [\[FN4\]](#) Therefore, "[c]ounseling and education of both the victims and the perpetrators are [the only] ways we can stop the cycle." [\[FN5\]](#)

Flowers' response to the 2004 hazing incident shows understanding about the root causes of hazing. However, his response was still inadequate. Instead of waiting until after Fargo North High School's 2004 hazing attacks, Flowers should have acted preemptively to prevent the return of an annual hazing tradition.

This article presents a broad-based plan to prevent high school hazing. Part I of this article details the problem of high school hazing. Part II explains how American law, both civil and criminal, addresses hazing. Part ***310** III discusses the shortcomings in moral reasoning that underlie American anti-hazing law. Part IV explores four legal alternatives to better address high school hazing. Part V suggests that the best way to prevent hazing is by both implementing broad-based federal anti-hazing law and instituting various state and local reforms.

I. HIGH SCHOOL HAZING

A. What is Hazing?

Hazing is defined as any activity expected of someone that joins a group, which humiliates, degrades, abuses, or endangers its victims. [\[FN6\]](#) Hazing victims often experience physical or emotional pain, [\[FN7\]](#) including anger, fear, nightmares, and suicidal tendencies. [\[FN8\]](#)

According to most psychologists, hazing is perpetuated through a vicious cycle, which requires new members to behave subserviently. [\[FN9\]](#) Older members demand subservience because they believe it will help them to restore their own dignity--lost when they were hazed. [\[FN10\]](#) This is a repetitive pattern. [\[FN11\]](#)

Even though hazing perpetrators expect to feel schadenfreude, [\[FN12\]](#) in the end, hazing harms all parties. [\[FN13\]](#) Hazing victims suffer from physical or ***311** emotional pain. [\[FN14\]](#) Witnesses are tortured by their fear of confronting hazers, [\[FN15\]](#) and hazers themselves suffer from the guilt associated with their wrongdoing. [\[FN16\]](#) Hazing cycles, nonetheless, rarely are disrupted. [\[FN17\]](#)

Hazing cycles persist because outsiders--including parents, classroom teachers, and friends--are often ignorant

about the violence. [\[FN18\]](#) Ignorance occurs because peer pressure impedes student victims from disclosing hazing. [\[FN19\]](#) According to education professor Elizabeth Allan, "[T]he peer pressure is so great that it clouds the thinking of kids who ordinarily have good judgment." [\[FN20\]](#)

B. How Did Hazing Practices Emerge?

Obviously, hazing practices were not invented in high school. [\[FN21\]](#) In fact, long before the American high school was implicated in hazing, Congress had expressed concern about similar practices in the Navy--an institution that, much like high school, thrives on conformity and order. [\[FN22\]](#) In the Navy, there was a long-standing perception dating back to the mid-1800s that physical humiliation was the best way to eradicate conceit among midshipmen. [\[FN23\]](#) In 1874, Congress, hoping to terminate this perception, passed a statute making all forms of naval hazing subject to punishment by court marshal. [\[FN24\]](#) Nevertheless, shortly after Congress passed its statute, similar forms of hazing emerged in other institutions not covered by naval law, including universities. [\[FN25\]](#) While hazing failed to instill respect in *312 universities, it left a blemish on higher education when two students in the early 1900s purchased guns and shot their hazers. [\[FN26\]](#) After these two incidents, most universities actively began to denounce hazing. [\[FN27\]](#)

Once most universities actively began to denounce hazing, hazing practices began to shift from the public sphere to behind closed doors. [\[FN28\]](#) Oftentimes, these hazing practices continued to spread in secrecy among different collegiate organizations, and from these organizations into high schools. [\[FN29\]](#)

Recently, college hazing has waned; however, high school hazing has risen. [\[FN30\]](#) According to an Alfred study conducted in 2000, about one-third of all high school students have been hazing victims. [\[FN31\]](#) Moreover, approximately 1.5 million new high school students become hazing victims each year. [\[FN32\]](#) Some of these students, such as those from Fargo North High School, are as young as twelve or thirteen years old. [\[FN33\]](#)

*313 C. Recent Hazing Examples

Today, high school hazing occurs nationwide, across most demographic and socioeconomic groups. Even though hazing is often perceived as a boys' problem, recent hazings have afflicted both sexes in nearly equal proportion, but in different forms. [\[FN34\]](#)

Generally, girls' hazing involves humiliation and simulated sexual acts. [\[FN35\]](#) For example, in a well-publicized 1996 incident, nineteen San Antonio, Texas cheerleaders were suspended from school for requiring younger teammates to simulate oral sex on male athletes. [\[FN36\]](#) In a similar incident at a Pennsylvania camp in 2001, fourteen female hockey players were suspended from school for forcing younger teammates to simulate oral sex on bananas. [\[FN37\]](#) Whereas, recently, at a suburban Illinois high school, thirty-one senior girls were suspended from school for pelting juniors with animal feces and other debris. [\[FN38\]](#)

Compared to girls' hazing, boys' hazing is less likely to involve simulated sex, but more likely to involve physical violence. For example, during the first day of classes at Lamar High School in Texas, eleven upperclassmen were punished for paddling, painting and urinating on the incoming freshmen. [\[FN39\]](#) At a suburban boys' high school in Baltimore, Maryland, veteran soccer players received reprimands for kicking soccer balls at freshman players from dangerously close range. [\[FN40\]](#) Meanwhile, at Finney High School in Detroit, Michigan, veteran band members avoided punishment despite allegedly assaulting the school's new tuba player with a wooden paddle. [\[FN41\]](#)

In recent years, some of the more violent boys' hazings also have involved sexual assault. [\[FN42\]](#) For example, in Wisconsin, three varsity wrestlers *314 allegedly taped a teammate's buttocks and sodomized him with a mop

handle. [\[FN43\]](#) In Washington, an eighteen year-old wrestler allegedly penetrated a fifteen year-old wrestler's anus, also with a mop handle. [\[FN44\]](#) And, in Massachusetts, veteran football players at a team retreat allegedly "ordered young boys to disrobe, to climb nude into a sleeping bag together, and to dangle objects from their erect penises." [\[FN45\]](#)

Since anti-hazing activists have begun to warn school personnel about the risks of sexual assault/hazings, this new and most vicious form of hazing generally has been limited to schools with slothful supervision. [\[FN46\]](#) For example, in a sexual assault/hazing in 2000, eight members of the Trumbull High School wrestling team were charged with physically and sexually assaulting a fifteen-year-old special-education student. [\[FN47\]](#) According to these allegations, the school's wrestling coach observed many of these acts yet always failed to intervene. [\[FN48\]](#) Similarly, in 2000, several basketball and track stars at Arizona's Winslow High School allegedly sexually assaulted younger athletes, and the high school's basketball coach knew about what was occurring. [\[FN49\]](#) These attacks, which occurred on both school grounds and school buses, involved older teammates pulling down younger athletes' pants and inserting markers, pencils, and fingers into their anuses. [\[FN50\]](#) Further, in Fall 2003, three members of Bellmore, New York's Mepham High School football team, [\[FN51\]](#) ages fifteen, sixteen, and seventeen, systematically and continuously abused younger team members. [\[FN52\]](#) *315 Perpetrators, supposedly supervised by a coaching staff, started their attacks during the first night of camp by taping one of the younger victims to his bed. [\[FN53\]](#) The next day, two perpetrators held down another victim, while a third perpetrator stuck a broomstick coated with Mineral Ice into the victim's anus. [\[FN54\]](#) Then, during the final days of training camp, perpetrators--still inadequately supervised by Mepham school personnel--assaulted three younger teammates by inserting pinecones and golf balls into their anuses. [\[FN55\]](#) In one instance, perpetrators inserted a golf ball into a victim's anus and then pushed it further using a broomstick and a "ramming instrument." [\[FN56\]](#)

II. HOW DOES AMERICAN LAW ADDRESS HAZING?

One reason that schools do not place greater emphasis on preventing hazing is that American law does not require it. Federal law, outside of a single 1874 military statute, ignores hazing completely. [\[FN57\]](#) Meanwhile, local law addresses hazing only in forty-three out of fifty states. [\[FN58\]](#)

Even where anti-hazing law exists, the law is often inadequate. [\[FN59\]](#) Since most anti-hazing law emerged under pressure from collegiate anti-hazing lobbyists, the law does not adequately protect high school students. [\[FN60\]](#) Only twenty-seven states' anti-hazing laws apply to high school students as opposed to college students and fraternities, [\[FN61\]](#) and just twenty-five states' *316 laws carry criminal penalties for high school hazing as opposed to civil liability. [\[FN62\]](#) Additionally, most states do not impute criminal liability to school personnel who fail to report or prevent hazing, [\[FN63\]](#) and many states allow school personnel to escape civil liability under the doctrines of assumption of risk and sovereign immunity.

A. Criminal Law

In most states, criminal law classifies hazing as a misdemeanor offense. [\[FN64\]](#) As a misdemeanor offense, criminal hazing carries a maximum penalty generally ranging from fines between \$10 and \$10,000 and jail-time between ten days and 365 days. [\[FN65\]](#) Also, most states' criminal law does not require school personnel to act affirmatively to prevent hazing. In fact, only six states impose a duty on school personnel to report hazing or criminal liability for failure to report hazing: Alabama, Arkansas, Massachusetts, New Hampshire, South Carolina and Texas. [\[FN66\]](#) Further, just three states *317 impose a duty on school personnel to implement measures to prevent hazing: Ohio, Rhode Island and Texas. [\[FN67\]](#)

Recently, some states have begun to improve criminal hazing law, but the legislative process has inevitably slowed down the progress of these reforms. Notably, on December 11, 2003, the State of Michigan introduced a bill, which made Michigan the most recent state to impose criminal penalties for high school hazing. [\[FN68\]](#) This bill

made Michigan a leader in imposing criminal sentences for hazers, permitting up to a fifteen-year prison term for the most serious hazing crimes. [\[FN69\]](#) Nevertheless, even the Michigan statute fails to address school personnel responsibility. [\[FN70\]](#)

B. Civil Law

Much like criminal law, American civil law also is often inadequate to address hazing. [\[FN71\]](#) While some hazing victims opt against filing civil lawsuits, [\[FN72\]](#) victims who proceed civilly may seek relief under three bodies of law: civil anti-hazing statutes, tort law, [\[FN73\]](#) and United States Constitutional law. [\[FN74\]](#)

1. Civil Anti-Hazing Statutes

Like their criminal counterparts, civil anti-hazing statutes vary significantly between states. [\[FN75\]](#) In some states, civil anti-hazing statutes stem *318 directly from their criminal law counterparts. [\[FN76\]](#) In other states, civil anti-hazing statutes exist independently. [\[FN77\]](#) In states with civil anti-hazing statutes, these statutes often provide specific grounds for relief. [\[FN78\]](#) For example, according to Ohio's civil anti-hazing statute, "[a]ny person who is subjected to hazing . . . may . . . [sue for] injury or damages, including mental and physical pain and suffering, that result from the hazing." [\[FN79\]](#) Ohio's anti-hazing statute is especially progressive because it permits victims to sue "any administrator, employee, or faculty member . . . who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it." [\[FN80\]](#)

In a few others states, civil anti-hazing statutes also allow victims to sue school personnel for failing to follow statutory requirements. For example, under an Arizona civil statute, adopted in 2003, every public school must "adopt, post and enforce a hazing prevention policy." [\[FN81\]](#) Further, according to the Arizona statute, each school must print its policy in a student handbook and distribute it to parents. [\[FN82\]](#) Meanwhile, a Minnesota civil anti-hazing statute requires each school board to adopt a written policy governing student and staff hazing. [\[FN83\]](#) Whereas, an Oklahoma anti-hazing statute requires that "[a] copy of the policy or the rules and regulations of the . . . [school] . . . which prohibits hazing shall be given to each student." [\[FN84\]](#)

Nevertheless, addressing hazing through civil statutes alone is often inadequate. Civil statutory enforcement fails mainly because some states fail to legislate civil anti-hazing law altogether. [\[FN85\]](#) Moreover, even many states that have anti-hazing law still do not extend liability to school personnel. [\[FN86\]](#)

*319 2. Tort Law

A second civil method to address hazing is tort law. [\[FN87\]](#) Under tort law, hazing victims may bring intentional tort claims against their hazers and negligence claims against supervising school personnel. [\[FN88\]](#) Intentional tort claims are a conventional way for hazing victims to recover monetary damages from hazers. [\[FN89\]](#) Under intentional tort law, all that a victim must prove is intentional wrongdoing by the defendant caused an identifiable harm. [\[FN90\]](#)

Negligence claims, meanwhile, are less predictable. One difficulty with negligence claims is showing that school personnel breached a duty of care. [\[FN91\]](#) To show breach of a duty of care, hazing victims must allege that school personnel had an affirmative duty to supervise students under the common law doctrine, in loco parentis. [\[FN92\]](#) According to in loco parentis, parents delegate certain rights and responsibilities over their children to school personnel in exchange for school personnel accepting limited parental responsibilities. [\[FN93\]](#) Although the duty varies from state to state, [\[FN94\]](#) whether school personnel breach this duty "is [ultimately] a question of fact for a jury to decide." [\[FN95\]](#)

Even where a jury concludes that school personnel breached their duty, negligence claims are further complic-

ated by two affirmative defenses. [FN96] *320 One defense, assumption of risk, recognizes that individuals generally "assume an element of risk" when they participate in known dangerous activities. [FN97] For example, a high school soccer player assumes the risk that he will sprain an ankle while running for a loose ball. [FN98]

In applying the assumption of risk defense to hazing, some courts have concluded that hazing is a risk that students assume when they join a club or sports team. [FN99] Fortunately, only a minority of states share this view. For example, recent cases such as *Siesto v. Bethpage Union Free School District* [FN100] do not allow hazing defendants to plead that their victims assumed the risk. [FN101] Nonetheless, a few states have not addressed whether the assumption of risk doctrine should apply to hazing, and some of these states might find that an assumption of risk defense applies.

A second affirmative defense, sovereign immunity, [FN102] shields government employees from liability when the employees are performing government functions. [FN103] Under most definitions of sovereign immunity, public school personnel are considered government employees and are therefore shielded. [FN104]

Although some states abrogate sovereign immunity where government employees act recklessly, other states extend sovereign immunity to employees engaging in government functions as long as no actual malice is involved. [FN105] In *Caldwell v. Griffin*, [FN106] for example, the Georgia Court of Appeals found that a school's football coach, principal, and school board were all immune from hazing liability even though they should have known *321 that hazing occurred under their supervision. [FN107] Anti-hazing activists often cite *Caldwell* as the epitome of tort law's failure to adequately address hazing. [FN108]

3. Constitutional Law

The most tenuous civil method to address hazing is constitutional law. [FN109] Although the United States Constitution does not speak directly to hazing, victims occasionally make claims under the Due Process Clauses of the Fifth and Fourteenth Amendments, [FN110] which provide for freedom from bodily restraint and punishment. [FN111] Constitutional law is an innovative approach to circumvent the shortcomings of state anti-hazing law; however, in practice, any constitutionally-based theory of hazing liability is probably misguided. Most courts have held that states lack an affirmative duty to protect citizens unless the citizen is taken into custody. [FN112] Although most high school students are required by law to attend school, school attendance requirements do not amount to custody. [FN113] Therefore, failure by school personnel to protect students from hazing probably does not violate the United States Constitution.

III. EXPLORING MORAL INADEQUACIES OF AMERICAN ANTI-HAZING LAW

Legislative failure to adequately address the problem of high school hazing becomes most apparent when considering moral reasoning theory. [FN114] Moral reasoning theory, according to criminal law professor Joshua *322 Dressler, "is of two types." [FN115] One version focuses on "actions as [a] means to good ends." [FN116] This is known as utilitarianism. [FN117] The other focuses on "actions as ends in themselves." [FN118] This is known as retribution. [FN119]

A. Utilitarianism

Utilitarian justice, or utilitarianism, is a forward-looking theory. According to classical utilitarianism, the "purpose of all laws is to maximize the net happiness of society." [FN120] Therefore, "pain inflicted by punishment is justifiable only . . . [if it] result[s] in a reduction in the pain of crime that would otherwise occur." [FN121] Modern utilitarianism permits only punishments that serve a beneficial, forward-looking purpose. [FN122] According to modern utilitarian theory, punishment may serve four different forward-looking purposes: general deterrence, specific deterrence, incarceration, and reform. [FN123]

1. General Deterrence

General deterrence is the most commonly cited forward-looking purpose for punishment. [\[FN124\]](#) It involves inducing society to not partake in undesirable behavior by using punishment of an individual "as an object lesson to the rest of the community." [\[FN125\]](#) General deterrence succeeds where society can intelligently comprehend that punishment follows from a specific wrong, and that the punishment would be more unpleasant than the wrong would be pleasurable. [\[FN126\]](#) For general deterrence to succeed, the would-be-wrongdoer needs to have certain cognitive abilities. These *323 abilities include the capacity to know the law, to understand the law, and to draw conclusions based on the punishment of others.

In the case of high school hazing, many state laws fail to generally deter because they only punish student-hazers--a group lacking these requisite cognitive skills. Most high school hazers lack knowledge about the law, cannot interpret the law, and cannot draw conclusions based on the law. Hazers also may lack sufficient maturity to determine whether their acts are the kind that our legal system seeks to prevent. [\[FN127\]](#)

Yet, despite difficulties associated with deterring high school students from hazing, a general deterrence strategy may prove viable if it were instead aimed at deterring the conduct of school personnel. School personnel generally are capable of knowing, understanding, and drawing conclusions based on the law. Since school personnel are employees, their employers, unions, and co-workers also are positioned to provide them with guidance about appropriate risk management behavior. Nevertheless, most state anti-hazing policy ignores the possibility of assigning hazing liability to school personnel.

2. Specific Deterrence

A second forward-looking purpose, specific deterrence, focuses on dissuading past wrongdoers from repeating their misconduct. [\[FN128\]](#) Upon the expiration of punishment, specific deterrence achieves its results by reminding wrongdoers that if they return to crime, they will experience recurring punishment. [\[FN129\]](#)

Specific deterrence emerges from a theory of instrumental conditioning, [\[FN130\]](#) which was first developed by psychologists Edward Thorndike and B.F. Skinner. [\[FN131\]](#) According to instrumental conditioning, behavior changes occur based on a system of response and reward. [\[FN132\]](#) When applying response and reward to the legal context, to deter a past wrongdoer from repeating wrongful conduct, the punishment (an aversive stimulus) *324 needs sufficient severity to outweigh the benefits of again committing that wrong. [\[FN133\]](#)

Specific deterrence is rarely viable in the hazing context because students do not attend high school for long enough to exhibit post-punishment change. Some psychiatrists may also argue that specific deterrence is negated by peer pressure, as praise from bad-influence students may offset the legal system's rewards for modifying behavior. [\[FN134\]](#)

Nevertheless, as the average age of hazers declines, specific deterrence may garner a more significant role in curbing hazing behavior before hazing behavior reaches its most dangerous levels. [\[FN135\]](#) Additionally, in the few states where hazing law applies to school personnel, specific deterrence may persuade neophyte school personnel to change their slothful ways.

3. Incarceration

A third forward-looking purpose, incarceration, removes wrongdoers from society by placing them in prison. [\[FN136\]](#) Presuming that someone who commits a crime once is more likely to commit that same crime again, incarcerating wrongdoers prevents those predisposed to commit crimes from committing them during the period of punishment. [\[FN137\]](#)

Incarcerating hazers is unlikely to solve America's hazing problem because it is difficult for our legal system to detect hazers absent assistance from inside school personnel. Moreover, even if our legal system were to detect and incarcerate all hazers, recent hazing victims, who have not yet acted as hazers themselves, are still likely to propagate hazing cycles in accordance with traditional patterns of wrongdoing. [\[FN138\]](#)

4. Reform

A final forward-looking purpose of utilitarian punishment is to reform wrongdoers. [\[FN139\]](#) Reform involves altering wrongdoers' basic characteristics in order to make them less antisocial. [\[FN140\]](#) Reform advocates prefer to use the *325 correctional system to change behavior, rather than to secure compliance through fear and punishment. [\[FN141\]](#)

Under the rubric of reform, various psychological therapies are designed to curb hazing tendencies. [\[FN142\]](#) However, unfortunately, there is no formidable evidence to conclude that these therapies succeed on the merits. [\[FN143\]](#) Without formidable evidence that reform therapies work, there is no basis to conclude that reform adequately addresses our society's hazing problem. [\[FN144\]](#)

B. Retribution

In juxtaposition to utilitarian justice, retributive justice, or retribution, is a backward-looking theory of moral reasoning. [\[FN145\]](#) Retributive justice is based on the principal that people who commit wrongs deserve to be punished. [\[FN146\]](#) Retributive justice is not about prevention but rather about fairness. "To an uncompromising retributivist, the wrongdoer should be punished, whether or not it will result in a reduction in crime." [\[FN147\]](#)

According to the underlying theory of retribution, the right to administer punishment stems from the right of a sovereign nation as the supreme power to inflict pain on those that engage in wrongdoing. [\[FN148\]](#) Retribution recognizes that a sovereign may never administer punishment merely to promote another good. [\[FN149\]](#) However, a sovereign may inflict punishment because the individual on whom punishment is inflicted has committed a moral wrong. [\[FN150\]](#)

*326 According to the forefather of retribution, Immanuel Kant, "justice would cease to be justice, if it were bartered away for any consideration whatever." [\[FN151\]](#) Applied in the hazing context, retributive justice requires society to determine whether punishments levied against high school hazers are appropriate on a case-by-case basis. In cases where the moral wrongs are especially severe, harsher punishments become warranted. [\[FN152\]](#)

According to Kant's principles, retributive justice also would permit punishing school personnel for failing to act affirmatively against hazing, assuming that society perceives the failure to act as morally wrong. Based upon the overwhelming view of parents, modern society generally perceives there is a moral wrong where school personnel do not report hazing incidents or where they fail, if capable, to protect students from hazing. [\[FN153\]](#)

In the hazing context, retributive justice probably would reject the affirmative defenses of assumption of risk and sovereign immunity. Assumption of risk is perceived as a weak defense because the notion of wrongdoing stems from universal normative values, not simply one party's consent. [\[FN154\]](#) Therefore, even if a hazing victim could provide consent, lawmakers may still punish hazing conduct for its more generalized harm. [\[FN155\]](#) Similarly, sovereign immunity is also perceived as a weak defense because any moral wrong that stems from failing to prevent hazing is not lessened because the wrongdoer is a government employee. [\[FN156\]](#)

IV. HAZING LAW ALTERNATIVES

Since the current legal approach fails to adequately address high school hazing, academics have proposed various alternatives. Four of the more commonly recommended alternatives are: (1) implementing a uniform federal

anti-hazing law; (2) increasing criminal punishments for hazing; (3) establishing mandatory punishments for failure to report/prevent hazing; and (4) requiring school districts to increase their internal punishment of student hazers without altering federal or state law.

*327 A. Uniform Federal Anti-Hazing Law

Two legal scholars recently suggested uniform federal anti-hazing law. [\[FN157\]](#) In the article Regulation of Rites: the Effect and Enforcement of Current Anti-Hazing Statutes, Amie Pelletier argues, "[U]ntil all fifty states have enacted anti-hazing legislation and uniform principles . . . hazing will continue to go virtually unchecked by the law." [\[FN158\]](#) Similarly, in Shattered Dreams: Hazing in College Athletics, Joshua Sussberg suggests, "[t]he time has come for federal regulation to alleviate the disparity among those states that have enacted anti-hazing laws [and those that have not]." [\[FN159\]](#)

As both authors suggest, there are clear advantages to implementing uniform federal anti-hazing law. For example, uniform anti-hazing law would provide a minimum standard of hazing protection in all states. [\[FN160\]](#) Clearly, this would prevent hazing from going unpunished in states with weak or non-existing anti-hazing law. [\[FN161\]](#) Additionally, uniform anti-hazing law would resolve the legal conflicts that emerge if hazers and their victims are domiciled in different states, or if one of the hazing victims is domiciled in a different state from where the misconduct occurred. [\[FN162\]](#)

Implementing uniform federal anti-hazing law, however, also presents some challenges. For example, many uniform anti-hazing proposals might violate the United States Constitution's Tenth Amendment, [\[FN163\]](#) which *328 prevents Congress from commandeering the states. [\[FN164\]](#) Additionally, many uniform anti-hazing proposals would lead states to uniformly apply bad law. [\[FN165\]](#) Without adopting laws that meet the requirements of moral reasoning theory, uniformity is moot.

B. Increasing Prison Sentences

A second alternative to prevent high school hazing is for states to increase hazers' prison sentences. In both New Jersey and New York, state legislatures recently have initiated bills to upgrade certain hazing conduct to felonies. [\[FN166\]](#) The movement was also powerful leading up to the recent implementation of new hazing law in Michigan. [\[FN167\]](#)

From a utilitarian perspective, there is limited value to increasing hazers' prison sentences. [\[FN168\]](#) Increasing prison sentences is unlikely to generally deter hazing because most high school students are either unaware of the criminal penalties that result from hazing, unable to interpret hazing penalties, or unable to draw conclusions based on others' hazing penalties. Moreover, increasing hazers' prison sentences is also unlikely to specifically deter hazing because of the countervailing force of peer pressure. [\[FN169\]](#)

From a retributive perspective, however, the movement to increase hazers' punishment yields some promise. [\[FN170\]](#) As compared to similar kinds of wrongdoing, the current punishment for hazing is modest. [\[FN171\]](#)

Also, one of the underlying purposes of retributive justice is to vindicate victims. [\[FN172\]](#) According to Professor Jean Hampton, victims are *329 vindicated when society makes "right a wrong." [\[FN173\]](#) To the extent that hazing punishments are brought in line with similar wrongs, society can right some of the wrongs caused by hazing. [\[FN174\]](#)

C. Punishing Failure to Report Hazing

As a third alternative to address hazing, some academics suggest increasing the scope of who may be criminally

punished for hazing incidents. [FN175] In *Hazing in High Schools: Ending a Hidden Tradition*, author Melissa Dixon suggests that states could better prevent hazing by implementing zero tolerance laws, which require all witnesses, including both hazing victims and student witnesses, to report their experiences to authorities or else face criminal punishment. [FN176] Dixon derives her proposal from New Hampshire law, which states that a person is guilty of a Class B misdemeanor for failing to report knowledge of or submission to hazing. [FN177] Incidentally, Dixon's proposal also parallels Texas law, which requires anybody with firsthand knowledge of hazing to report it. [FN178]

Dixon justifies her proposal based on a 2000 Alfred study, which states that sixty-one percent of all students support stricter penalties for hazing. [FN179] Dixon also contends that a universal duty to report hazing would benefit high school students by providing an "incentive for someone who would ordinarily not report a hazing incident to do so." [FN180] However, even though requiring all members of society to report hazing may preempt some hazing incidents, Dixon overstates her argument by applying the duty to report hazing beyond school personnel and onto student victims and student witnesses. Society cannot realistically expect high school students to act as whistleblowers. [FN181] Student victims are often too ashamed to report hazing, and student witnesses often fear that hazers will retaliate against them if they report. [FN182] Moreover, society does not generally require adult witnesses *330 to report crimes. [FN183] Why should ashamed and frightened children be held to a higher standard?

Dixon's proposal, nevertheless, is viable if any additional duty to report hazing is construed narrowly--to apply only to school personnel. Applying a duty to report hazing to school personnel is reasonable because school personnel are in an authoritative position, which provides them with legal authority to restrict the freedom of minors. [FN184] In this capacity, school personnel do not suffer from the same feelings of fear, shame, peer pressure, and futility that justify students' decisions against reporting. Further, a criminal duty for school personnel to report hazing seems to flow naturally from school personnel's special status as a supervisor of children. This special status emerges from social contract theory, which presupposes an obligation to comply with society's normative values where multiple stakeholder groups are involved. [FN185]

D. Requiring Schools to Enforce Internal Anti-Hazing Policies

Finally, some academics have suggested that hazing is best regulated internally by schools, not through legislation or the courts. Academics supporting this view consist mainly of libertarians concerned about the costs associated with government regulation. Considering the importance of reducing government overhead costs, it is logical to require high schools to develop anti-hazing policies alongside conventional legal remedies. School anti-hazing policies encourage school personnel to think critically about curtailing hazing, and sometimes can lead to creative solutions that are less possible under more traditional rulemaking.

Nevertheless, it will not suffice merely to require educational institutions to develop anti-hazing policies without also imposing legislation. [FN186] As Dixon eloquently states, internal anti-hazing requirements "merely support the educational institutions' development of anti-hazing policies without putting any real teeth into such measures." [FN187]

*331 Moreover, internal anti-hazing rules assume that high school hazing stems only from deviant student behavior and not from deviant school-personnel behavior. By allowing school personnel exclusively to develop the rules to guard against hazing, the possibility that school personnel contribute to or even exacerbate hazing is wrongly disregarded. [FN188]

V. HOW TO PREVENT HIGH SCHOOL HAZING

Upon review of the four commonly recommended alternatives to address high school hazing, it seems that the best way to prevent high-school hazing incidents is to adopt a hybrid solution. This hybrid solution would consist of both implementing broad-based federal anti-hazing law and instituting various state and local reforms.

A. Implementing Federal Anti-Hazing Law

Implementing federal anti-hazing law targeted at slothful school personnel is an essential step to address high school hazing. Specifically, federal legislation should withhold education funds from individual states that fail to: (1) impose a duty on school personnel to act affirmatively against hazing; [\[FN189\]](#) (2) impose criminal and civil penalties on school personnel that violate this duty; and (3) bar assumption-of-risk and sovereign immunity as affirmative defenses to hazing violations.

Under properly drafted legislation, Congress may delegate the specifics of the statute to individual states' discretion. However, a minimum enforcement standard needs to require at least the duty to report hazing, the duty to prevent hazing where actually observed, and the duty to prevent hazing where hazing would have been observed if school personnel conformed to a model code of conduct. As an example of a model code of conduct, Congress should point to the fifteen-step risk-management plan to stop hazing, proposed by anti-hazing expert Hank Nuwer in his recent book, *High School Hazing: When Rites Become Wrongs*. [\[FN190\]](#) However, recognizing that different states are under different budgetary constraints, Congress should allow individual states to remain eligible for federal funding even if they replace Hank Nuwer's risk management policy with one of their own creation. Federal anti-hazing law in this form is both Constitutional and desirable.

*332 1. Why Congress May Impose Federal Anti-Hazing Law with an Affirmative Duty to Act on School Personnel

From a Constitutional law perspective, Congress may tie federal education funding to a requirement that states adopt anti-hazing law. [\[FN191\]](#) Article I, Section 8 of the United States Constitution states that Congress has the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence [sic] and General Welfare of the United States." [\[FN192\]](#) In interpreting Article I, Section 8, the Supreme Court has held that, when related to spending power, "Congress may attach conditions on the receipt of federal funds" to further broad policy objectives. [\[FN193\]](#) However, all spending must serve a general public purpose, [\[FN194\]](#) must allow states to exercise the choice of whether to comply, [\[FN195\]](#) and must relate to a federal interest in specific national projects or programs. [\[FN196\]](#)

The Supreme Court last considered whether conditions on the receipt of federal funds are permissible in its 1987 opinion *South Dakota v. Dole*, [\[FN197\]](#) and its 1992 opinion *New York v. United States*. [\[FN198\]](#) In *Dole*, the Supreme Court upheld a federal statute intended to withhold five percent of federal highway funds from any state that would not set the minimum drinking age at twenty-one. [\[FN199\]](#) The *Dole* Court upheld this statute because implementing a minimum drinking age was directly related to the "general welfare" purpose of making interstate travel safe. [\[FN200\]](#)

Conversely, in *New York*, the Supreme Court overruled a federal statute intended to require states to accept responsibility for disposing of low-level radioactive waste within their borders. [\[FN201\]](#) The New York Court concluded that the disputed federal statute was unconstitutional because it required state governments either to take title to their waste, or to accept congressional regulations over them. [\[FN202\]](#) This choice effectively forced states to *333 follow one of two federal regulations, thus denying them the option not to regulate. [\[FN203\]](#) According to the New York Court, because "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all," the congressional statute at issue in *New York* commandeered the states' legislative process. [\[FN204\]](#)

Based on the Supreme Court's reasoning in both *Dole* and *New York*, it seems that a statute withholding state education funds for failing to implement anti-hazing requirements would be permissible because education funding is directly related to the "general welfare" purpose of making schools safer for children. [\[FN205\]](#) In fact, Congress has a history of exercising its general spending power with respect to education. [\[FN206\]](#)

Additionally, withholding of state's educational funding does not commandeer the states, because states retain a right to opt out of anti-hazing law by simply forgoing federal funds. [\[FN207\]](#) Such an ability to opt out of federal funding differentiates a hybrid anti-hazing statute from the New York statute, while likening it to the Dole statute. [\[FN208\]](#)

2. Why Congress Should Impose Federal Anti-Hazing Law with an Affirmative Duty to Act on School Personnel

Further, from both a moral and social perspective, Congress should tie federal education funding to a requirement that states adopt anti-hazing law. This is because it is important for Congress to promote a duty that requires school personnel--those best positioned to halt hazing cycles--to act against hazing. [\[FN209\]](#) Since outsiders rarely know about hazing practices and students rarely squeal, there is a special importance placed on "insider" school personnel to act affirmatively against hazing. [\[FN210\]](#) Failing to act *334 affirmatively may lead to negative consequences not only for the current generation of would-be victims, but also for any future generation that might face similarly abusive rituals. [\[FN211\]](#)

In light of various recent hazing attacks, requiring states to adopt both criminal and civil penalties for school personnel who fail to act affirmatively is justified because parents expect school personnel to keep their children safe. Where children are harmed under school personnel supervision, basic elements of trust and safety are violated. If parents lose trust in our school system's ability to protect children, parents will remove their children from school or forbid them from participating in extracurricular activities.

Moreover, criminal and civil penalties targeted at school personnel would deter slothful school personnel conduct, both generally and specifically. [\[FN212\]](#) By imposing criminal and civil penalties for malfeasance, most school personnel would be deterred, both generally and specifically, from disregarding hazing risks. [\[FN213\]](#) Indeed, some may argue that a "duty to act affirmatively" unfairly places greater criminal liability on school personnel than is generally applied under our nation's criminal laws. While the proposed criminal liability standard may appear somewhat nontraditional, elevating criminal liability in the hazing context is appropriate because hazing victims are otherwise placed in a powerless position. [\[FN214\]](#)

Even though common law generally denies criminal liability for failing to protect those outside specific, special relationships, [\[FN215\]](#) both the United States overall and the fifty states individually may override the presumption against criminal liability for failing to act. [\[FN216\]](#) For example, the Sarbanes *335 Oxley Act of 2002 established a new criminal liability for attorneys who fail to report evidence of securities law violations to the corporate board of directors, where such reporting is necessary to prevent perpetration of fraud. [\[FN217\]](#) Much as how Sarbanes Oxley imposes an affirmative duty on attorneys to protect America's corporate financial assets, [\[FN218\]](#) the above anti-hazing proposal would impose a similar duty on school personnel to protect our "human assets." Of course, protecting American children is at least as important as protecting our money.

Finally, a uniform bar on assumption-of-risk and sovereign immunity defenses in the hazing context is needed to prevent school personnel from avoiding civil liability based on a technicality. Assumption of risk is not an appropriate defense to hazing since children, especially those as young as twelve or thirteen, cannot appreciate hazing risks. [\[FN219\]](#) Additionally, unlike an on-the-field sports injury, hazing is not the kind of risk that flows naturally from sports involvement. [\[FN220\]](#) Rather, hazing is completely preventable if school personnel implement diligent risk management policies. [\[FN221\]](#) Likewise, sovereign immunity is not an appropriate defense because society discourages individuals incapable of preventing hazing from becoming school personnel. [\[FN222\]](#) Sovereign immunity generally serves the important purpose of protecting state employees from liability, but in this instance, discouraging individuals from entering the field of education who cannot maintain children's safety is the superior public policy. [\[FN223\]](#)

B. State and Local Reforms to Prevent Hazing

In addition to congressional legislation, individual states and school districts also need to help to prevent hazing by implementing various reforms. Reforms required from states and school districts to help prevent hazing include: (1) drafting state anti-hazing laws; (2) drafting school anti-hazing policies; (3) revising school tenure agreements; (4) investing in anti-hazing detection workshops; (5) increasing employee accountability for hazing; and (6) implementing a confidential system for high school students to report hazing allegations.

*336 1. State Anti-Hazing Laws

As directed by the model federal statute, states need to impose their own anti-hazing laws. [\[FN224\]](#) When drafting anti-hazing laws, states should enlist the help of professionals including educators, lawyers, psychologists, and social workers. States also should enlist the help of past hazing victims to provide first-hand accounts of cultures under which hazing thrives.

Once states draft their anti-hazing laws, states next need to develop an enforcement plan. A suitable enforcement plan empowers each state's highest-ranking officer to hire a cabinet member, preferably a psychologist or social worker, to oversee anti-hazing compliance. In an effort to aid compliance, states should require prospective teachers to attend an anti-hazing workshop before receiving their teacher's licenses and require experienced teachers periodically to attend refresher courses in preventing hazing.

2. School Anti-Hazing Policies

Moreover, as directed by the model federal statute, local school districts also should impose anti-hazing policies. School district anti-hazing policies should focus first on complying with federal and state law, and second, on addressing individualized needs extending beyond their legal requirement.

School districts should write their anti-hazing policy in plain-language, explaining both the definition of hazing under the policy, and the consequences if anyone violates the policy. [\[FN225\]](#) Each year, school districts also should require all students, parents, and personnel to sign and agree to the policy. [\[FN226\]](#) By requiring students, parents, and personnel each to sign the policy, the district ensures that all parties affiliated with the school understand the obligation to act against hazing.

3. Changes to School Tenure Agreements

To maximize the efficiency of new anti-hazing rules, states and school districts additionally need to revamp their employee tenure agreements. Most employee tenure agreements prevent school districts from terminating their employees without first providing a hearing, and second, showing fault. A better tenure agreement, however, would allow a school district to *337 terminate any employee that oversees any act of hazing without the need to show fault.

In general, tenure agreements shift the employer-employee relationship from an at-will relationship to one providing the employee with greater protection. [\[FN227\]](#) Whereas employers may terminate at-will employees for any reason or for no reason at all, tenured employees generally enjoy broad job-related protection. In the public-school context, tenure agreements are established in one of two ways. In some states, uniform laws legislate tenure terms for all public school employees. For example, in Connecticut public schools, the Connecticut Tenure Act requires school supervisors to provide all teachers that are employed for forty or more months with tenure. [\[FN228\]](#) Meanwhile, in other states, tenure is negotiated independently through collective bargaining. [\[FN229\]](#)

Both where tenure emerges from state law and where it emerges from collective bargaining, tenure agreements

encourage building long-term relationships between school districts and their employees. [\[FN230\]](#) The main benefit of these relationships is to facilitate a comfort level between neighborhood students, their families, and school personnel. This benefit, however, is offset where tenured employees act slothfully and reinforce hazer-friendly cultures.

Sadly, to the detriment of most students, some school employees implicated in hazing incidents have used tenure to inhibit school districts from terminating their employment. For example, on February 13, 2004, the Bellmore-Merrick United Secondary Teachers Union filed two grievances against the school district, seeking to reinstate the Mepham High School football coaches despite their implication in hazing. [\[FN231\]](#) According to the district's tenure agreement, the district needed to provide the coaches with a pre-termination hearing, despite the showing by a Pennsylvania Grand Jury Report that the coaches "displayed a lack of common sense accountability." [\[FN232\]](#)

***338** Recognizing the innate difficulty in showing fault, as well as the hefty often-associated litigation costs, a superior employee tenure agreement would allow school districts to terminate any employee, overseeing any activity where hazing occurred. Thereafter, that employee may earn reinstatement only by showing the alleged hazing never happened. This "burden shifting" in the hazing context recognizes the important public policy of removing school employees that fail to keep children safe--a public policy interest that overrides the desire to maintain long-term school employee relationships.

4. Enhanced Hazing Detection

Another reform to help prevent hazing is for school districts to better teach their employees about how to detect hazing. [\[FN233\]](#) Although college courses are educating prospective teachers about bullying, prospective teachers rarely receive training about how to act affirmatively against hazing. [\[FN234\]](#) Consequently, when school districts hire rookie teachers, these teachers enter the school district with an education gap. Where a school district fails to fill this gap, there is increased risk that the district will allow hazing cycles to persist. Conversely, where school districts provide proper training, school personnel become more likely to detect hazing. Where school personnel are more likely to detect hazing, school administrators are better positioned to take appropriate steps to halt hazing cycles.

5. Improved Student Supervision and Accountability

State and school districts additionally need to impose individual accountability for hazing incidents. An ideal way to improve accountability is through "24-7 supervision," [\[FN235\]](#) which designates individual members of school personnel as responsible for any conduct occurring under their designated scope of authority during a specific time. For example, "24-7 supervision" would require a head high-school soccer coach to: provide a detailed list of all areas where soccer players practice, assign at least one coaching-staff member responsibility to oversee each area, and require each assistant coach to provide a daily safety report to the head coach. Under ***339** "24-7 supervision," if an attempted hazing incident were to occur, a specifically designated coach is positioned to halt and report the incident. The assigned coach also garners the duty to inform the head coach, who then has an obligation to inform the school district and the local police, if necessary. The head coach would also have an obligation to ensure the conduct or attempted conduct is not repeated.

Another aspect of "24-7 supervision" involves determining the number of chaperones required for each school trip. A policy determining the number of chaperones is important to ensure that all student activities always have sufficient supervision. [\[FN236\]](#) For example, as part of Mepham High School's new anti-hazing policy, Mepham now requires a set ratio of chaperones to students - two chaperones for a group of four to twenty-four students, and four chaperones for a group of thirty-seven to forty-eight. [\[FN237\]](#)

6. Confidential Hazing Reporting

A final reform to help prevent hazing is for school districts to implement a system allowing students to confidentially report hazing allegations. [FN238] Confidential reporting is important because it allows students to disclose alleged wrongdoing without fear of retaliation. [FN239] In an ideal reporting system, each school district would hire a "union buffered" [FN240] social worker to confidentially investigate hazing allegations. The school district would require this specialist to sign a confidentiality agreement, promising not to reveal the names and confidences of students that report hazing. Moreover, the school would require the specialist to minimize contact with students, school personnel, and the teacher's union outside the scope of the general school day. [FN241] If school districts hire a trustworthy anti-hazing specialist, perhaps students would inform the specialist about *340 alleged hazing incidents without fear of retaliation. [FN242] If more students freely report hazing allegations, then hazing detection would increase. Moreover, if hazing detection increases, school districts would become positioned to disrupt hazing cycles.

VI. CONCLUSION

High school hazing has garnered newfound attention in recent years, especially in the aftermath of several disturbing hazing incidents. [FN243] In recent years, high school hazing has become more violent, [FN244] has afflicted younger students, [FN245] and has occurred mainly where school personnel have failed to accept proper accountability. [FN246]

Upon recognizing the magnitude of America's high school hazing problem, society needs to adopt a better solution. Seven out of our fifty states have no anti-hazing laws, [FN247] and most other states' anti-hazing laws fail to adhere to moral reasoning theory. [FN248] Additionally, anti-hazing law rarely punishes culpable school personnel even where their actions enable misconduct.

While most anti-hazing proposals fail to prevent high school hazing, [FN249] a more viable solution implements federal law that withholds education funding from states that fail to impose a "duty to act affirmatively." [FN250] In addition, a viable solution encourages states and school districts to: (1) draft state anti-hazing laws; (2) draft school anti-hazing policies; (3) revise school tenure agreements; (4) invest in anti-hazing detection workshops; (5) increase employee accountability for hazing; and (6) implement a confidential system for high school students to report hazing allegations.

In recent years, high school hazing has emerged as a vicious problem, requiring proactive solutions. To date, our legal system has failed to *341 provide these solutions. Consequently, high school hazing has exacerbated. Clearly, society needs a new approach to prevent high school hazing.

A new approach to prevent high school hazing should involve both implementing broad-based federal anti-hazing law and instituting various state and local reforms. By both implementing broad-based federal anti-hazing law and instituting state and local reforms, America would improve the wellbeing of its entire high school population. In doing so, America would finally break the vicious cycle of high school hazing.

[FN1]. **Marc Edelman** (marcedelman@aol.com) is a member of the New York bar. He graduated cum laude from Michigan Law School, summa cum laude from the Michigan School of Kinesiology (M.A. Sports Management) and magna cum laude from the Wharton School. Excerpts from this article previously appeared in the author's Fall 2004 Pace Law Review article. See **Marc Edelman**, [Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act On School Personnel](#), 25 Pace L. Rev. 15 (2004).

[FN1]. See Erin Hemme Froslic, Report on Hazing Near Completion, The Fargo Forum, Aug. 10, 2004, at A4, available at <http://www.in-forum.com/articles/index.cfm?id=66460§ion=News>. This alleged hazing incident occurred during the final week of classes. See id.

[FN2]. See Editorial, Flowers is Right on Hazing, The Fargo Forum, July 23, 2004, at A11, available at ht-

[tp://www.in-forum.com/articles/index.cfm?id=65069%section=Opinion](http://www.in-forum.com/articles/index.cfm?id=65069%section=Opinion). See also Erin Hemme Froslic and Marie Jo Almquist, Hazing May Be 'Assault,' The Fargo Forum, June 15, 2004, at A1, available at <http://www.in-forum.com/articles/index.cfm?page=view&id=129303&pid=852> (providing greater detail on the alleged Fargo North hazing incident).

[FN3]. See Froslic, supra note 1, at A4.

[FN4]. See Erin Hemme Froslic, Schools to Get Tough on Hazing: Investigation into Paddling Hits Roadblocks, The Fargo Forum, Jul. 21, 2004, at A1, available at <http://www.in-forum.com/articles/>.

[FN5]. See Froslic, supra note 1, at A4.

[FN6]. Webster's Third International Dictionary 1041 (1986). Hazing can occur in any organization that lacks proper risk management. See Amie Pelletier, Note, [Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes](#), 28 *New Eng. J. on Crim. & Civ. Confinement*, 377, 377-78 (2002). Hazing is most common amongst fraternities or sororities, gangs, the military, sports teams, cheerleading squads, vocational groups, and groups in the arts and theater. See Mark Walsh, Hazing is Widespread, Student Survey Shows, Education Week, Sept. 6, 2000, at 14 (defining hazing in a national survey of researchers as "any humiliating or dangerous activity expected of you to join a group, regardless of your willingness to participate."). In organizations where hazing exists, hazing usually occurs in two different forms. See Hank Nuwer, High School Hazing: When Rites Become Wrongs 49 (2000). In one, veteran group-members use harsh treatments, shunning, ridicule and abuse to cause undesirable prospective members to quit. See *id.* In the other, veteran members place prospective members through a series of tests, thereafter accepting them fully. See *id.*

[FN7]. See generally Grant Wahl & L. Jon Wertheim, A Rite Gone Terribly Wrong, Sports Illustrated, Dec. 22, 2003, at 70 (explaining the need for different grades of hazing punishments); Scott R. Rosner & R. Brian Crow, [Institutional Liability for Hazing in Interscholastic Sports](#), 39 *Hous. L. Rev.* 275, 276 (2002); Melissa Dixon, Chalk Talk: [Hazing in High Schools: Ending a Hidden Tradition](#), 30 *J.L. & Educ.* 357, 358 (2001).

[FN8]. See Douglas E. Fierberg, High School, Where Hazing is Amazing, Educational Digest, Dec. 2000, at 48. Victims also may suffer negative effects on their academic performance. See Walsh, supra note 6, at 14.

[FN9]. See Nuwer, supra note 6, at 21.

[FN10]. See *id.* at 26 (explaining that revenge is a powerful factor in provoking hazing).

[FN11]. See generally *id.*

[FN12]. Schadenfreude is defined as "enjoyment derived from the misfortune of others." See Merriam-Webster's Collegiate Dictionary 1637 (Deluxe ed. 1998).

[FN13]. See Nuwer, supra note 6, at 56 (discussing who the losers are when hazing occurs).

[FN14]. See *id.*

[FN15]. See *id.*

[FN16]. See generally *id.*

[FN17]. See generally *id.* at 28-29.

[FN18]. See generally *id.* at 45.

[FN19]. See *id.* Victim silence is prevalent even in brutal hazings. In 1998, for example, three Southern California high school wrestlers, who suffered serious physical injury asked their parents to halt the hazing investigation. See *id.* Similarly, investigators at Mephram High School found that most parties initially did not cooperate with police. See Wahl & Wertheim, *supra* note 7, at 70. According to published reports, it was not until the team's bus ride that whispers about what had transpired began to spread. See *id.*

[FN20]. See Linda Marsa & Mary Kate Hogan, *Dangerous Games*, *Good Housekeeping*, Apr. 2002, at 80.

[FN21]. See Dixon, *supra* note 7, at 357. In fact, hazing practices date back to "medieval schools in Greece, North Africa and western Europe." Nuwer, *supra* note 6, at 17.

[FN22]. See Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, *Miss. L. J.* 111, 117 n.25 (1991). In June 1874, concerns about military hazing led Congress to enact a drastic law that made any form of hazing, "whether harmful or not, into an offense punishable by court marshal." See *id.* at 117.

[FN23]. See *id.* at 117 (citing Hazing, 53 *The Independent*, 51-52 (1901)). According to Congress, this perception is nothing more than pretense for causing pain to others. See *id.*

[FN24]. See *id.* State legislatures were not quick to follow this hazing ban, as in 1901 Illinois became the first state to impose anti-hazing law. See *id.* at 119.

[FN25]. See generally Nuwer, *supra* note 6, at 17 (discussing the emergence of collegiate hazing).

[FN26]. See *id.* Specifically, in 1911, one hazing victim at the University of Texas "shot and wounded an upperclassman who was tormenting him." *Id.* Three years later, another hazing victim at Saint John's Military College in Maryland shot a bullet through his hazer's door, killing him. *Id.*

[FN27]. See generally Joshua A. Sussberg, Note, [Shattered Dreams: Hazing in College Athletics](#), 24 *Cardozo L. Rev.* 1421, 1430 (2003). Specifically, in 1923, the Hobart College president formally punished students for conducting a hazing ritual. See *id.*

[FN28]. See generally Nuwer, *supra* note 6, at 17-18.

[FN29]. See *id.* at 19. In high schools, upperclassmen, seemingly in search of a way to mark their own passage into adulthood, began to replicate similar wrongs on their younger classmates. *Id.*

[FN30]. See *id.* According to the 1999 Statement of Policy on behalf of Vermont's anti-hazing statute, "harassment and hazing have become a major and pervasive problem with [the schools and] students who are continually filled with apprehension and anxiety are unable to learn and unlikely to succeed. Statement of Policy 1999, No. 120 (Adj. Sess.), § 1, at 16 *Vt. Stat. Ann. tit. 16, § 140a* (2003).

[FN31]. See Nadeline C. Hoover & Norman J. Pollard, *Initiation Rites in American High Schools: A National Survey Final Report*, Alfred University, August 2000, at 1, available at http://www.alfred.edu/news/executive_summary.html [hereinafter *Alfred Survey*]. The Alfred Study involved 1,541 high school juniors and seniors. See Dixon, *supra* note 7, at 357 n.3. According to the Alfred Study, 22 percent of the surveyed students reported being subjected to some form of dangerous hazing, where they felt their health was threatened. See *Alfred Survey*, *supra* note 33, at 6. See also Donna Harrington-Lueker, *Teenagers' Hazing Becomes Voyeurs' Viewing Pleasure*, *USA Today*, May

(Cite as: 81 N.D. L. Rev. 309)

21, 2003, at 11-A (discussing the Alfred Study generally and citing the specific example of Glenbrook North in Illinois).

[FN32]. See Tom Weir, *Move Afoot to Educate Teachers on Hazing*, USA Today, December 9, 2003, at C-1.

[FN33]. See Marsa & Hogan, *supra* note 20, at 80. In recent years, hazing has also become more violent. See *id.* See also Andrew Jacobs, *Violent Rites*, New York Times Upfront, Apr. 24, 2000, at 8, available at 2000 WLNR 5098385. Specifically, according to hazing expert Gary Powell, "Hazing has changed from the goofy high jinks of the '50s and '60s to something remarkably brutal and vicious." *Id.*

[FN34]. See Dixon, *supra* note 7, at 357; Rosner & Crow, *supra* note 7, at 279; Harrington-Lueker, *supra* note 31, at 11-A.

[FN35]. See Nuwer, *supra* note 6, at 51. According to Nuwer, "Adolescence is a time when males and females are expressing a strong curiosity in their sexuality. It is not surprising that so many initiation horror stories in high school today include simulated sex." *Id.*

[FN36]. *Id.*

[FN37]. See Marsa & Hogan, *supra* note 20, at 80.

[FN38]. See Harrington-Lueker, *supra* note 31, at 11-A. The Glenbrook North hazing also involved some physical violence, as five hazing victims visited the hospital, including one with a broken ankle and another that received ten stitches to her head. Wahl & Wertheim, *supra* note 7, at 71. See also *Eliminating Hazing By Getting Students in on the Act*, Curriculum Review, Dec. 2003, at 14.

[FN39]. See Dixon, *supra* note 7, at 357. This incident occurred in 1996. See *id.*

[FN40]. See Jacobs, *supra* note 33, at 8.

[FN41]. See Melanie D. Scott, *Hazing's Legal, But it Hurts; Students, Parents and Lawmakers Seek Change*, The Detroit Free Press, Feb. 26, 2004, at 1A, available at [2004 WL 70023287](#).

[FN42]. See Nuwer, *supra* note 6, at 52.

[FN43]. *Id.* at 70. This incident allegedly occurred at Johnson Creek High School. See *id.*

[FN44]. *Id.* The Sunnyside High School sexual assault "caused [the victim] internal injuries and later prompted the victim to seek therapy." *Id.*

[FN45]. *Id.* at 72.

[FN46]. See generally *id.* at 15.

[FN47]. See Rosner & Crow, *supra* note 7, at 279-80. Amongst the charges against the Trumbull wrestlers included that the victim was hog-tied with athletic tape, stuffed inside a locker, and repeatedly sodomized with a plastic knife. See *id.* at 279-80.

[FN48]. See *id.*

[FN49]. See *id.* at 280-81 (citing Mark Shaffer, *Winslow 7 Get Jail Time: Hazing Caused "So Much Trouble,"* Ariz. Repub., Oct. 19, 2000, at A-1). In reaction to the Winslow High School hazing, Arizona thereafter implemented

anti-hazing law. See *id.* at 281. See also [Ariz. Rev. Stat. Ann. § 15-2301 \(2002\)](#).

[FN50]. See Rosner & Crow, *supra* note 7, at 281.

[FN51]. Mephram High School is located in Bellmore, New York, and is composed mainly of high school students from the towns of Bellmore, New York and North Bellmore, New York. See Mephram High School Webpage, available at <http://www.bellmore-merrick.k12.us/mephram/index.html>. The author of this article was a 1995 graduate of Sanford H. Calhoun High School, which is located in the same school district as Mephram High School.

[FN52]. See *In re Wayne County Investigative Grand Jury: Investigation #4*, No. 26-2003 (Pa. Ct. Com. Pl. Wayne County Mar. 9, 2004) (Criminal Misc. Order Accepting and Filing Investigating Grand Jury on Investigation #4) at 2, available at <http://www.newsday.com/news/local/longisland/education/ny-mephramgrandjurytext,0,2717568.story?coll=NY-lischools-archive> [hereinafter Grand Jury Report]. The attacks took place at the Mephram football team's annual training camp in Wayne County, PA. See *id.*

[FN53]. See *id.* at 3.

[FN54]. See *id.* A similar broomstick assault occurred the third day, but only after two perpetrators had applied duct tape to the victim's legs, eyebrows and buttocks region. See *id.*

[FN55]. See *id.*

[FN56]. *Id.* These attacks were part of a lengthy "history of hazing both at the [Mephram] football camp and at Mephram High School itself." See *id.* at 2. According to the grand jury report, hazing persisted at Mephram High School because "coaches displayed a lack of common sense accountability when it came to managing or running the camp." *Id.* at 4. Specifically, the Mephram coaching staff was more concerned with being coaches of a football team than with supervising their players as students. *Id.*

[FN57]. See Lewis, *supra* note 22, at 118 (citing acts of Congress, approved June 23, 1874 and August 5, 1874).

[FN58]. See 43 States Have Laws, Your School and the Law, Nov. 5, 2003, at 1. See also Kermit Pattison, Minnesota Grapples with How to Curb Hazing in High School, *Christian Science Monitor*, Feb. 4, 1997, at 3 (discussing how the state of Minnesota considered responding to a rash of local hazing incidents in that year).

[FN59]. See *id.*

[FN60]. See Pattison, *supra* note 58, at 3.

[FN61]. North Dakota is one of these states. See [N.D. Cent. Code § 12.1-17-10 \(2004\)](#). The other states include: Alabama, Arkansas, Arizona, California, Colorado, Georgia, Iowa, Illinois, Indiana, Maryland, Massachusetts, Mississippi, New York, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas and Utah. See [Ark. Code Ann. § 6-5-201\(a\)\(1\) \(1999\)](#); [Ariz. Rev. Stat. Ann. § 15-2301\(c\)\(1\)\(a\)-\(c\) \(2002\)](#); [Cal Educ. Code § 32050 \(Deering 2005\)](#); [Colo. Rev. Stat. § 18-9-124\(2\)\(a\) \(2005\)](#); [Ga. Code Ann. § 16-5-61\(a\)\(2\) \(2003\)](#); [Iowa Code 708.10\(1\)\(a\) \(2005\)](#); [720 Ill. Comp. Stat 120/5 \(2005\)](#); [Ind. Code § 35-42-2-2\(a\) \(2004\)](#); [Md. Code Ann. Crim. Law § 3-607\(a\) \(LexisNexis 2005\)](#); [Mass. Gen. Laws Ann. Ch. 269 § 17 \(2000\)](#); [Miss Code Ann. § 97-3-105 \(2000\)](#); [N.Y. Penal Law §§ 120.16-120.17 \(Consol. 2005\)](#); [N.H. Rev. Stat. Ann. § 631:7\(D\)\(a\) \(LexisNexis 1997\)](#); [N.J. Stat. Ann. § 2C:40-3 \(West 2005\)](#); [N.C. Gen. Stat. § 14-35 \(2005\)](#); [Ohio Rev. Code Ann. § 2903.31\(A\) \(LexisNexis 2003\)](#); [Okla. Stat. Ann. tit. 21 § 1190\(A\) \(2002\)](#); [R.I. Gen. Laws § 11-21-1\(D\) \(2005\)](#); [S.C. Code Ann. § 16-3-510 \(2003\)](#); [Tenn. Code Ann. § 49-2-120\(b\) \(2005\)](#); [Tex. Educ. Code](#)

(Cite as: 81 N.D. L. Rev. 309)

[Ann. § 37.151\(1\), \(4\)](#) (Vernon 1996); [Utah Code Ann. § 76-5-107.5](#) (2005).

[FN62]. The two states with high school hazing law without criminal penalties are Arizona and Vermont. See [Ariz. Rev. Stat. Ann. § 15-2301](#); [Vt. Stat. Ann. tit. 16 § 140\(a\)-\(d\)](#) (2005). In applying this above definition, the Oregon anti-hazing statute is considered a criminal statute, even though the maximum penalty for hazing under Oregon law is merely a "Class A" violation. See [Or. Rev. Stat. § 163.197\(5\)](#) (2003).

[FN63]. States that impute criminal liability to school personnel that facilitate hazing are limited to Alabama, Arkansas, New Hampshire, Ohio, Rhode Island, South Carolina and Texas. See [Ala. Code § 16-1-23\(c\)](#) (2003); [Ark. Code Ann. § 6-5-202\(b\)\(1\)-\(2\)](#) (2003); [N.H. Rev. Stat. Ann. § 631:7\(II\)\(b\)](#); [Ohio Rev. Code Ann. § 2903.31\(B\)\(2\)](#); [R.I. Gen. Laws § 11- 21-2](#) (2005); [S.C. Code Ann. 16-3-520](#) (2004); [Tex. Code Ann. § 37-152](#) (Vernon 1996).

[FN64]. See e.g., [Ark. Code Ann. § 6-5-203\(a\)](#) (2003) (stating that the offense of hazing in Arkansas is a Class B misdemeanor); [Ala. Code § 16-1- 23\(d\)](#) (stating that any person that commits an act of hazing in Alabama is guilty of a Class C misdemeanor). There are a few exceptions, however, to this general rule. For example, in Georgia, hazing constitutes "a misdemeanor of a high and aggravated nature." [Ga. Code Ann. § 16-5-61\(c\)](#) (2002). In Illinois, "[h]azing is a Class A misdemeanor, except hazing that results in death or great bodily harm is a Class 4 felony." [720 Ill. Comp. Stat. 120/10](#) (2003). In Virginia, hazing is "a Class 1 misdemeanor." [Va. Code Ann. 18.2-56](#) (2003).

[FN65]. See Rosner & Crow, *supra* note 7, at 277 (describing penalties most often proscribed in hazing incidents).

[FN66]. In Alabama, Arkansas, New Hampshire, South Carolina and Texas failing to report hazing is a misdemeanor. See [Ala. Code § 16-1-23 \(d\)](#); [Ark. Code Ann. §6-5-203\(a\)](#) (2003); [N.H. Rev. Stat. Ann. §631:7\(II\)\(a\)](#); [S.C. Code Ann. 16-3-530](#) (2003); [Tex. Educ. Code § 37.152\(b\)](#). See also [Mass. Ann. Laws Ann. ch. 269, § 18](#) (2003).

[FN67]. See [Ohio Rev. Code Ann. § 2903.31\(B\)\(2\)](#); [R.I. Gen. Laws § 11- 21-2](#); [Tex. Educ. Code § 37.152\(a\)\(4\)](#).

[FN68]. See 2003 Mich. H. B. 5378 (codified as amended at [Mich. Comp. Laws § 750.411t](#) (2004)).

[FN69]. See [Mich. Comp. Laws § 750.411t\(2\)\(c\)](#) (2004).

[FN70]. See generally [id. § 750.411t](#).

[FN71]. As a legal body, civil law provides injury victims with the opportunity to recover both economic loss and punitive damages. See generally Marc. A. Franklin & Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials 1* (1996). For several centuries, tort law was the single civil outlet for remedies. *Id.* However, tort law today comprises just "seven percent of total compensation for economic loss in nonfatal accidents in the United States." *Id.*

[FN72]. See Andrea Fine, *Another Rising Menace in Schools: Hazing*, *Christian Science Monitor*, Jun. 1, 1999, at 3. Specifically, some victims opt out of filing civil lawsuits based on the emotional nature of reliving abuse. *Id.*

[FN73]. See generally Rosner & Crow, *supra* note 7, at 293-97 (discussing state law civil remedies for hazing).

[FN74]. See generally *id.* at 282-92.

[FN75]. See Nathan L. Essex, *School Law and the Public Schools: A Practical Guide for Educational Leaders* 124-60 (2d ed. 2002) (discussing, in general, liability issues for schools and school personnel). In 35 states, civil anti-hazing law mirrors its criminal counterpart, albeit with different burdens of proof. In two states, civil anti-hazing statutes are broader than their criminal counterpart statutes. While, in six states, civil anti-hazing statutes exist on a stand-alone basis.

[FN76]. In these cases, there is no separate civil anti-hazing statute, but rather hazing is regarded as negligence per se.

[FN77]. States that only have civil anti-hazing statutes are: Arizona, Florida, Kentucky, Maine, Minnesota and Vermont.

[FN78]. See *infra*, notes 81-86.

[FN79]. [Ohio Rev. Code Ann. § 2307.44](#) (LexisNexis 2005).

[FN80]. *Id.*

[FN81]. [Ariz. Rev. Stat. Ann. § 15-2301\(A\) \(2003\)](#).

[FN82]. See *id.* According to the Arizona statute, a suitable policy must include a statement requiring students, teachers and staff to take reasonable measures to prevent hazing. See *id.* at (A)(6). The statement must also include a description of the procedures for students, teachers and staff to report hazing. See *id.* at (A)(7).

[FN83]. [Minn. Stat. Ann. § 121A.69 subdiv. 2](#) (Supp. 2004). Further, according to the Minnesota statute: "The policy must apply to student behavior that occurs on or off school property and during and after school hours. The policy must include reporting procedures and disciplinary consequences for violating the policy...." *Id.* at subdiv. 3.

[FN84]. [Okla. Stat. Ann. tit. 21 §1190](#) (West 2002).

[FN85]. Seven states lack anti-hazing statutes.

[FN86]. But see [Ohio Rev. Code Ann. § 2307.44](#) (imposing liability on school personnel that knew or should have known about hazing). According to the Ohio statute:

If the hazing involves students in a primary, secondary or post-secondary school, university, college, or any other educational institution, an action may also be brought against any administrator, employee, or faculty member of the school, university, college, or other educational institution who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it....

Id.

[FN87]. See *Essex*, *supra* note 75, at 135-36 (discussing intentional torts such as assault or battery in the school context).

[FN88]. See *id.* ("An intentional tort results from a deliberate act committed against another person."). Intentional torts include: assault, battery, defamation, libel, slander, mental distress, false imprisonment, and trespass. See generally *id.* at 135-40. An unintentional tort (or negligence) claim results when someone with a duty of care acts negligently and thereby causes injury. See *id.* at 140.

[FN89]. See generally *id.*

[FN90]. See generally *id.*

[FN91]. See *id.* at 140-42 (discussing the standard of care in negligence tort actions).

[FN92]. See *Rosner & Crow*, *supra* note 7, at 293

[FN93]. See *id.* See also [Benitez v. N.Y. Bd. of Educ., 541 N.E.2d 29, 30 \(N.Y. 1989\)](#) (stating that a school owes a

duty of reasonable care to protect interscholastic student-athletes from injuries that result from "unassumed, concealed, or unreasonably increased risks").

[FN94]. See *Essex*, supra note 75, at 148 (introducing the duty of school personnel to "supervise students under their charge"). The need to supervise is greater with young students and students likely to engage in known, dangerous conduct.

[FN95]. *Id.* at 148.

[FN96]. See generally *id.* at 143-48 (discussing the negligence defenses of contributory negligence, assumption of risk, comparative negligence, and immunity).

[FN97]. *Id.* at 144-45.

[FN98]. See *id.* at 145 (describing an injury suffered by a high school football player). Recent courts have become more skeptical of the assumption of risk defense in hazing cases. See R. Brian Crow, Hazing, in Doyice Cotten et al., *Law for Recreation and Sports Managers* 251, 253 (2d ed. 2001).

[FN99]. See generally *Essex*, supra note 75, at 144-46 (presenting the assumption of risk defense).

[FN100]. *Siesto v. Bethpage Union Free Sch. Dist.*, N.Y. L.J., Dec. 30, 1999, at 21 (N.Y. Sup. Ct.), available at Doyice J. Cotton et al., *Law for Recreation and Sports Managers* 258-59 (2d ed. 2001).

[FN101]. Specifically, in *Siesto* the court stated, "[W]hile a student athlete assumes the risk of injury from the risks inherent in the sport... students do not assume the risk of injury from a hazing ritual or tradition...." *Id.*

[FN102]. See *Essex*, supra note 75, at 147 (stating that the "legal concept" of immunity is based on sovereign immunity). Sovereign immunity emerges from the old common law view that the king can do no wrong. *Id.*

[FN103]. *Id.*

[FN104]. *Id.*

[FN105]. See *id.* See also [Caldwell v. Griffin Spalding County Bd. of Educ.](#), 232 Ga. App. 892, 892 (Ga. Ct. App. 1998).

[FN106]. [232 Ga. App. 892 \(Ga. Ct. App. 1998\)](#).

[FN107]. [Caldwell](#), 232 Ga. App. at 894.

[FN108]. See Rosner & Crow, supra note 7, at 296-97.

[FN109]. Law professors Scott Rosner and Brian Crow, who took great lengths to discuss Constitutional law claims related to hazing in their article, concede that "courts have been reluctant to hold schools liable for hazing under § 1983." Rosner & Crow, supra note 7, at 283.

[FN110]. See *Essex*, supra note 75, at 63 (stating that there are two types of due process: procedural and substantive). "Procedural due process means that when a person is deprived of life, liberty or property,... [the government must follow] a proscribed constitutional procedure." *Id.*

[FN111]. See e.g. *Hilton v. Lincoln-Way High Sch.*, No. 97-C-3872, 1998 U.S. Dist. LEXIS 508, *5-6 (N.D. Ill. Jan. 14, 1998) (describing a student's hazing-related claims under the Due Process Clause); [Murphy v. Morgan](#), 914

[F.2d 846, 849 \(7th Cir. 1990\)](#) (noting that a state owes an individual the rudimentary duty of safekeeping).

[\[FN112\]](#). See e.g., *DeShaney v. Winnebago County Dept. of Social Servs.*, 498 U.S. 189, 191 (1988).

[\[FN113\]](#). See generally *id.* at 199-203 (discussing duties of the government to protect).

[\[FN114\]](#). See generally Kent Greenawalt, *Punishment*, in Joshua Dressler, *Cases and Material on Criminal Law* 30-31 (2d ed. 1999) (presenting a general discussion of theories of punishment and the related "moral principles").

[\[FN115\]](#). Joshua Dressler, *Understanding Criminal Law* 8 (1995).

[\[FN116\]](#). *Id.*

[\[FN117\]](#). *Id.*

[\[FN118\]](#). *Id.*

[\[FN119\]](#). *Id.*

[\[FN120\]](#). *Id.* at 9. See also Thomas Donaldson & Thomas W. Dunfee, *The Ties that Bind: A Social Contract Approach to Business Ethics* 12 (1999) (stating that certain forms of utilitarianism define a "right action" as one which "contributes to the greatest happiness of the greatest number.").

[\[FN121\]](#). Dressler, *supra* note 115, at 9.

[\[FN122\]](#). See generally Greenawalt, *supra* note 114, at 34-35.

[\[FN123\]](#). *Id.*

[\[FN124\]](#). See Dressler, *supra* note 115, at 10.

[\[FN125\]](#). *Id.* See also Greenawalt, *supra* note 114, at 34-35 (discussing general deterrence).

[\[FN126\]](#). See Greenawalt, *supra* note 114, at 34-35. From a would-be-wrongdoer's perspective, committing a wrong becomes undesirable when general deterrence is applied, even after harms of punishment are discounted by the probability of avoiding detection. See *id.* Consequently, the greater the temptation there is to commit a particular crime and the smaller the chance of detection, the greater the penalty that is warranted. See *id.*

[\[FN127\]](#). This may be based on hazers' earlier experience as hazing victims.

[\[FN128\]](#). See Greenawalt, *supra* note 114, at 35.

[\[FN129\]](#). See Dressler, *supra* note 115, at 10.

[\[FN130\]](#). See Harry Gleitman, *Psychology* 115 (1995). Instrumental conditioning is otherwise known by some psychologists as operant conditioning. *Id.*

[\[FN131\]](#). See *id.* at 116, 118.

[\[FN132\]](#). See *id.* at 119. Given a positive response, rewards appear either in the form of positive reinforcement, where a response produces an appetitive stimulus, or negative reinforcement, where a response produces an aversive stimulus. See *id.*

[FN133]. See Greenawalt, *supra* note 114, at 35. According to individual deterrence theory, repeat offenders warrant more severe punishment "because the first penalty has shown itself ineffective from the standpoint of individual deterrence." *Id.*

[FN134]. See generally Nuwer, *supra* note 6, at 45 (discussing the impact of peer pressure).

[FN135]. See Marsa & Hogan, *supra* note 21, at 80 (providing examples of 14 and 15 year olds being hazed, evidencing the declining average age of hazers and hazing victims).

[FN136]. See Greenawalt, *supra* note 114, at 35. Greenawalt titles this theory "Incapacitation." *Id.*

[FN137]. See *id.* See also Dressler, *supra* note 115, at 10.

[FN138]. See Nuwer, *supra* note 6, at 21, 26 (describing the hazing cycle).

[FN139]. See Dressler, *supra* note 115, at 10 (referring to reform as "rehabilitation").

[FN140]. See *id.*

[FN141]. See generally *id.*

[FN142]. Dressler, *supra* note 115, at 10. According to Dressler, "The methods of reformation will vary from case to case, but could consist of, for example, psychiatric therapy, lobotomy, or academic or vocational training." *Id.*

[FN143]. See Joshua Dressler, *Cases and Materials on Criminal Law* 36 (2d ed. 1999) [hereinafter *Cases and Materials*]. According to Dressler:

The conventional wisdom is that past efforts to rehabilitate convicted offenders were most unsuccessful. Advocates of rehabilitation argue that adequate funds for reform measures have never been appropriated and, therefore, the 'failures' really represent a failure of will by legislators, hesitant to appropriate large sums of money for what some taxpayers consider 'coddling' of criminals.

Id.

[FN144]. See generally *id.*

[FN145]. See *id.* at 32.

[FN146]. See *id.*

[FN147]. See Dressler, *supra* note 115, at 11.

[FN148]. Immanuel Kant, *The Philosophy of Law*, in Joshua Dressler, *Cases and Material on Criminal Law* 37 (2d ed. 1999).

[FN149]. *Id.*

[FN150]. *Id.*

[FN151]. See *id.* at 38.

[FN152]. See generally *id.*

[FN153]. See *infra*, notes 175-85 and accompanying text (discussing the need for appropriate punishment for failure

to report hazing).

[FN154]. See generally Dressler, *supra* note 115, at 11-14 (discussing retributivism).

[FN155]. See generally *id.*

[FN156]. See generally *id.*

[FN157]. Pelletier, *supra* note 6, at 413.

[FN158]. *Id.*

[FN159]. Sussberg, *supra* note 27, at 1490.

[FN160]. See generally Sussberg, *supra* note 29, at 1428-29 (asserting that states have struggled to define hazing, resulting in broad and varying definitions). See also Pelletier, *supra* note 6, at 413 (suggesting that an "all encompassing" anti-hazing statute is the best way to address the problem).

[FN161]. See Pelletier, *supra* note 6, at 413.

[FN162]. "Uniformity of results, regardless of forum, has always been a major goal in choice of law theory." R.A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations* in David Currie et. al., *Conflict of Laws: Cases, Comments, Questions* 223 (2001). Absent uniform federal law, the state with jurisdiction over a matter needs to determine what state's substantive law to apply. See generally *id.* Generally, states reach this decision through government interest analysis. See *id.* However, where multiple states each have interest in applying their own law, different states apply different techniques to determine the "better law," often to limited avail. See generally *id.* at 115-222.

[FN163]. [U.S. Const. amend. X](#). The U.S. Constitution's Tenth Amendment states that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." *Id.* The Tenth Amendment emerged from the principles of federalism, which purposefully divide governmental authority between the state and nation. See Geoffrey Stone et. al., *Constitutional Law* 149-50 (3d ed. 1996) (discussing the "values of federalism"). The Constitution makes clear that the federal government is limited in power, with most responsibilities left to the states. See [U.S. Const. amend. X](#). Therefore, where Congress legislates in a manner limiting states' abilities to regulate residual responsibilities, Tenth Amendment concerns are triggered. See *id.*

[FN164]. See generally [South Dakota v. Dole, 483 U.S. 203, 207-08 \(1987\)](#) (discussing the power of Congress to usurp the authority of the state government with regards to receipt of federal monies). The Supreme Court also recognized this anti-commandeering principle in the case [New York v. United States, 505 U.S. 144, 149 \(1992\)](#). Commandeering is most likely to occur where anti-hazing legislation is derived from Congress' power to regulate commerce, and less likely where legislation is derived from Congress' spending power. See [New York, 505 U.S. at 167](#). See also Sussberg, *supra* note 27, at 1465- 66.

[FN165]. For example, if states simply applied the majority law, hazing problems would not improve because the majority law does not impose sufficient obligations on school personnel. Conversely, if all states adopted the strictest existing requirements, the law would be too harsh to satisfy moral reasoning theory.

[FN166]. See 2004 NJ A.B. 1108 (codified as [N.J. Stat. Ann. § 2C:40-3](#) (West 2004)). See also 2003 NY A.B. 8941.

[FN167]. See 2003 Mich. H. B. 5378 (codified as [Mich. Comp. Laws § 750.411t](#)). Under the codified statute, the maximum sentence for the most serious hazing crimes resulting in death is 15 years. [Mich. Comp. Laws §](#)

[750.411t\(2\)\(c\) \(2004\)](#)).

[FN168]. See Dressler, *supra* note 115, at 9-10.

[FN169]. See generally Nuwer, *supra* note 6, at 45 (mentioning peer pressure in the hazing context).

[FN170]. See generally Dressler, *supra* note 115, at 12-13 (describing "protective retribution").

[FN171]. See generally Nuwer, *supra* note 6, at 108-21 (describing the development of anti-hazing law and punishment).

[FN172]. See Dressler, *supra* note 115, at 12.

[FN173]. See *id.* at 13.

[FN174]. See *id.* at 13.

[FN175]. See e.g. Dixon, *supra* note 7, at 358-59.

[FN176]. See *id.*

[FN177]. See *id.* at 360. See also [New Hampshire Rev. Stat. Ann. 631:7\(II\)\(a\)\(2\)](#).

[FN178]. See [Tex. Educ. Code Ann. 37.152\(a\)\(4\)](#).

[FN179]. See Dixon, *supra* note 7, at 358.

[FN180]. *Id.* at 361.

[FN181]. See *id.* at 361-62 (discussing the Alfred Study, where 40% of students admitted they would not report hazing because either there was nobody to tell or adults would not know how to handle the problem). Basic psychology, however, suggests that student witnesses would almost never report, for the same reasons that witnesses in general sometimes fail to report crimes.

[FN182]. The combination of shame, peer pressure and futility discourage high school students from reporting hazing. See generally Nuwer, *supra* note 6, at 45. Futility is especially likely in cases such as Mephram where school administrators have shown a history of non-responsiveness to student hazing claims.

[FN183]. See Cases and Materials, *supra* note 143, at 121-23 (discussing the 1964 murder of Kitty Genovese as an example of where society did not report crime).

[FN184]. See [Veronia School Dist. v. Acton, 515 U.S. 646, 654-55 \(1995\)](#).

[FN185]. See generally Donaldson & Dunfee, *supra* note 120, at 1-82 (discussing social contract theory). See also Cases and Materials, *supra* note 143, at 121 (discussing failure to act as a breach of duty to another when that other person is harmed).

[FN186]. See Dixon, *supra* note 7, at 358-59.

[FN187]. *Id.* at 359.

[FN188]. See *id.*

[FN189]. The criminal aspect of this duty should require at least a negligent mental state to obviate due process concerns.

[FN190]. See Nuwer, *supra* note 6, at 123-30.

[FN191]. U.S. Const. art. I, 8, cl. 1.

[FN192]. *Id.*

[FN193]. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

[FN194]. See *id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640- 41 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936)).

[FN195]. See *id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

[FN196]. See *id.* at 207-08 (citing *Massachusetts v. United States*, 435 U.S. 44, 46 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958)).

[FN197]. 483 U.S. 203 (1987).

[FN198]. 505 U.S. 144 (1992).

[FN199]. *Dole*, 483 U.S. at 211-12.

[FN200]. See *id.* at 205, 211-12.

[FN201]. See *New York*, 505 U.S. at 149-51.

[FN202]. See *id.* at 176.

[FN203]. See *id.* at 176-77.

[FN204]. *Id.* at 176.

[FN205]. See *Dole*, 483 U.S. at 207. See also *New York*, 505 U.S. at 149-51.

[FN206]. See e.g., 20 U.S.C. § 1681(b) (2000) (conditioning receipt of federal education monies on prohibition of sex discrimination at education institutions). See also Sussberg, *supra* note 29, at 1475 (discussing Title IX funding in the context of a university). Here, the conditioned federal funding is predicated on anti-hazing legislation rather than gender equality. Nevertheless, the underlying logic is similar.

[FN207]. See *New York*, 505 U.S. at 174-75 (explaining that under the low-level radioactive waste policy amendments, there was no ability to opt out of regulation).

[FN208]. See *id.* See also *Dole*, 483 U.S. at 208-09.

[FN209]. Given the difficulty in addressing hazing through the majority's approach, a few states already expand criminal liability to school personnel for failure to report/prevent hazing. This expanded duty is desirable because hazing cycles propagate at schools where personnel implement poor risk management. Therefore, to the extent law can prevent poor risk management, hazing would seem to decline.

[FN210]. See generally Nuwer, *supra* note 6, at 37-38 (discussing several hazing examples and asserting the need for school officials to actively report the incidents).

[FN211]. See generally Nuwer, *supra* note 6, at 21 (describing the hazing cycle).

[FN212]. See generally Dressler, *supra* note 115, at 10.

[FN213]. This is because the punishment for detected hazing would be more undesirable to school personnel than allowing hazing practices to continue. Similarly, school personnel who previously allowed hazing would be specifically deterred from reengaging in the same wrongful behavior. Further, the school personnel would recognize that school districts, for liability purposes, would be unlikely to keep school personnel on staff that have multiple past incidents of failure to report hazing.

[FN214]. See Cases and Materials, *supra* note 143, at 121 (citing [Jones v. United States, 308 F.2d 307, 310 \(D.C. Cir. 1962\)](#)). According to Jones:

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first where a statute imposes a duty... second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Id.

[FN215]. See *id.* at 123.

[FN216]. See [Jones v. United States, 308 F.2d 307, 310 \(D.C. Cir. 1962\)](#).

[FN217]. See [15 U.S.C.A. § 7245\(1\) \(2002\)](#).

[FN218]. See generally *id.*

[FN219]. See generally Essex, *supra* note 75, at 144-45 (discussing the assumption of risk doctrine).

[FN220]. See Cotten et. al., *supra* note 100, at 253.

[FN221]. See generally *id.*

[FN222]. See generally Essex, *supra* note 75, at 147.

[FN223]. See generally *id.*

[FN224]. Even though states may "opt out" by declining federal education funding, doing so would be a mistake.

[FN225]. Rosner & Crow, *supra* note 7, at 297.

[FN226]. See *id.*

[FN227]. Duncan Forsyth, Teacher Tenure Act: Everyone Except Superintendent Can Have a Termination Hearing, Connecticut Employment Law Letter, September 2002, at 1.

[FN228]. *Id.* As an example of one such act, the Connecticut Teacher Tenure Act "provides that a tenured teacher can be dismissed only for ... (1) inefficiency or incompetence, (2) insubordination, (3) moral misconduct, (4) medical disability, (5) elimination of the job and the teacher or (6) another sufficient cause." *Id.* According to the Teacher

Tenure Act, a teacher obtains tenure after completing forty months of continuous, full-time school employment. *Id.*

[FN229]. See generally Forsyth, *supra* note 227, at 1.

[FN230]. See *id.*

[FN231]. See Court Requires Arbitration of Coach Terminations After Hazing Involving Football Team Members, 231 N.Y. L. J. 19 (June 8, 2004).

[FN232]. See Grand Jury Report, *supra* note 52, at 5.

[FN233]. See Rosner & Crow, *supra* note 7, at 297.

[FN234]. Tom Weir, *supra* note 32, at C-1.

[FN235]. The author, **Marc Edelman**, developed the ideas behind "24-7 supervision" from his mentor Larry Parker—a long-time educator and camp supervisor, first at Camp Anawana in Catskills, NY, and then at Merrick Woods Country Day Camp in North Merrick, NY. Larry Parker's approach to individual accountability, oversight, and daily feedback has helped many schools and camps to prevent hazing incidents. His level of planning and diligence lies in strict contrast to the slothful supervision applied at many school districts throughout the country.

[FN236]. See generally Keiko Morris, Assaults Were a Wake-up Call for Districts, *Newsday*, Aug. 22, 2004, at A34 (describing the increased supervision used at Connetquot, New York high schools).

[FN237]. *Id.*

[FN238]. Obviously, the intent is to allow the identity of students who report the hazing allegations to remain confidential. The allegations themselves do not remain confidential.

[FN239]. Students often fear retaliation for revealing hazing not only from fellow students, but also from school personnel who enable hazer-friendly cultures.

[FN240]. The suggestion of "union buffered" is not intended to imply that schools should avoid using union labor. Rather, the hired social workers possibly should serve as a member of a union separate from other members of school personnel. The importance in strict separation of the anti-hazing advocate from the teacher's union is based on a conflict of interests, as the teacher's union seeks to reinstate terminated school employees, whereas the anti-hazing specialist needs to always maintain a position in opposition to hazing facilitators.

[FN241]. The anti-hazing specialist should not associate because the specialist's position requires confidentiality and impartiality, and because the specialist's findings often may impact the employment of school personnel.

[FN242]. Rosner & Crow, *supra* note 7, at 298.

[FN243]. See e.g. Wahl & Wertheim, *supra* note 7, at 68-76; Weir, *supra* note 32, at C-1 (providing examples of some national anti-hazing incidents occurring in the Mepham tragedy aftermath).

[FN244]. See Jacobs, *supra* note 33, at 8; Marsa & Hogan, *supra* note 21, at 80; Nuwer, *supra* note 6, at 35-37.

[FN245]. See Marsa & Hogan, *supra* note 20, at 80 (noting that a student in Minnesota who was violently hazed was only fourteen years old).

[FN246]. Examples of incidents where school personnel could have prevented harm but failed to act include, among

others, incidents at Trumbull High School, Winslow High School, and Mepham High School.

[\[FN247\]](#). See supra, note 85.

[\[FN248\]](#). See generally supra Part III.

[\[FN249\]](#). See supra Part IV.

[\[FN250\]](#). See supra Part V.

END OF DOCUMENT