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# Articles

## Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act on School Personnel

Marc Edelman\*

On March 9, 2004, a Pennsylvania grand jury issued its findings regarding one of America's most brutal high school hazing incidents.<sup>1</sup> According to the grand jury report, between the days of August 22 and August 27, 2003, three members of the Mepham High School football team,<sup>2</sup> ages fifteen, sixteen and seventeen, systematically and continuously abused younger team members.<sup>3</sup>

Perpetrators started their attacks the first night of camp by taping one of the younger victims to his bed.<sup>4</sup> The next day, two perpetrators held down another victim, while a third perpetra-

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1. *In re* the 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), available at <http://www.newsday.com/news/local/longisland/education/ny-mephamgrandjurytext,0,2717568.story?coll=NY-lischools-archive> [hereinafter Grand Jury Report].

2. Mepham High School is located in Bellmore, NY, and is composed mainly of high school students from the towns of Bellmore, NY and North Bellmore, NY. See W.C. Mepham High School Webpage, available at <http://www.bellmore-merrick.k12.ny.us/mepham/Index.html> (last visited Nov. 20, 2004).

3. See Grand Jury Report, *supra* note 1, at 2. These attacks took place at the Mepham football team's annual training camp in Wayne County, PA. See *id.*

4. *Id.*

tor stuck a broomstick coated with Mineral Ice into the victim's anus.<sup>5</sup> Then, during the final days of training camp, perpetrators assaulted three younger teammates by inserting pinecones and golf balls into their anuses.<sup>6</sup> 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."<sup>7</sup>

These attacks were part of a lengthy "history of hazing both at the [Mephram] football camp and at Mephram High School itself."<sup>8</sup> According to the grand jury report, hazing persisted at Mephram High School because "coaches displayed a lack of common sense and accountability when it came to managing the camp."<sup>9</sup> Specifically, the Mephram coaching staff was more concerned with coaching a football team than with supervising their players as students.<sup>10</sup> Yet, when asked to consider whether criminal charges should be brought against the coaches for a failure to act, the presiding Grand Jury found that under Pennsylvania law, the Mephram coaching staff had done nothing illegal.<sup>11</sup>

Like most states, Pennsylvania does not impose obligations on school personnel to act affirmatively against hazing. In addition, high school personnel do not have adequate incentive to manage hazing risks.<sup>12</sup> Consequently, America's high school hazing problem is worsening.<sup>13</sup> According to field experts, each year, over 1,500,000 American students become new hazing victims.<sup>14</sup> More than one-fifth of these victims risk serious peril.<sup>15</sup>

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5. *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. *Id.*

6. *Id.*

7. See Grand Jury Report, *supra* note 1, at 2.

8. *Id.* Past training-camp hazing practices included: physically assaulting younger players, putting toothpaste in younger players' hair, and dunking younger players' heads in the toilet. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See generally HANK NUWER, *HIGH SCHOOL HAZING: WHEN RITES BECOME WRONGS* 108-21 (Franklin Watts ed., 2000).

13. *Id.* at 19.

14. See Scott R. Rosner & R. Brian Crow, *Institutional Liability for Hazing in Interscholastic Sports*, 39 HOUS. L. REV. 275, 279 (2002); see also Tom Weir, *Hazing Issue Rears Ugly Head Across USA*, USA TODAY, Dec. 9, 2003, at C-1 (stating that "[r]esearchers at Alfred (N.Y.) University, in the first study of its kind, say

This Article argues that, to be effective, hazing law needs to impose both a criminal and civil duty on school personnel to act affirmatively. Part I of this article discusses in detail the problem of high school hazing. Part II discusses how American law addresses (or fails to address) hazing. Part III discusses shortcomings in moral reasoning that underlie current anti-hazing law. Part IV explores legal alternatives to address hazing. Part V concludes that the best way to address hazing is for Congress, under its spending power, to withhold education funds from individual states unless they: 1) impose both a criminal and civil duty on school personnel to act affirmatively against hazing, 2) impose penalties on school personnel that violate these duties, and 3) bar the affirmative defenses of “assumption of risk” and “sovereign immunity” where these duties are violated.

## 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.<sup>16</sup> Hazing victims often experience physical or emotional pain,<sup>17</sup> including anger, fear, nightmares, and suicidal

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about 1.5 million high school students are hazed each year, and about half of those victims are athletes, the group facing the greatest risk of enduring these often-dangerous initiations.”).

15. See Rosner & Crow, *supra* note 14, at 279 (stating that approximately twenty-two percent of high school hazings are dangerous).

16. See WEBSTER'S THIRD INT'L DICTIONARY 1041 (1986). Hazing can occur in any organization that lacks proper risk management. See also 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/sororities, gangs, the military, sports teams, cheerleading squads, vocational groups, and groups in the arts and theater. See also Mark Walsh, *Hazing is Widespread, Student Survey Shows*, EDUCATION WEEK, Sept. 6, 2000, at 14. In organizations where hazing exists, hazing usually occurs in two different forms. See NUWER, *supra* note 12, at 49. In one, veteran group-members use harsh treatments, shunning, ridicule and abuse to cause undesirable prospective members to quit. *Id.* In the other, veteran members place prospective members through a series of tests, thereafter accepting them fully. *Id.*

17. 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); Rosner & Crow, *supra* note 14, at 276; Melissa Dixon, *Chalk Talk: Hazing in High Schools: Ending a Hidden Tradition*, 30 J.L. & EDUC. 357, 358 (2001).

tendencies.<sup>18</sup> According to psychologists, hazing perpetuates through a vicious cycle, which requires new members to behave subserviently.<sup>19</sup> Older members demand subservience because they believe it will help them to restore their own dignity, which they themselves lost as victims of hazing incidents.<sup>20</sup> This pattern is not surprising.<sup>21</sup> The same way that hazing victims are more likely to become hazers, abused children in general are also more likely to become child abusers.<sup>22</sup> Even though hazing perpetrators expect to feel *schadenfreude*,<sup>23</sup> in the end, hazing harms all parties.<sup>24</sup> Hazing victims suffer from physical or emotional pain,<sup>25</sup> witnesses are tortured by their fear of confronting hazers,<sup>26</sup> and hazers themselves suffer from guilt associated with their wrongdoing.<sup>27</sup>

Yet, hazing cycles are rarely disrupted.<sup>28</sup> When hazing cycles begin, outsiders including parents, classroom teachers and friends are often ignorant to the violence.<sup>29</sup> This ignorance occurs because peer pressure impedes student victims from disclosing hazing.<sup>30</sup> According to education professor Elizabeth

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18. See Douglas Fierberg, *High School, Where Hazing is Amazing*, EDUC. DIG., Dec. 2000, at 48. Victims also may suffer negative effects on their academic performance. See Walsh, *supra* note 16, at 14.

19. See NUWER, *supra* note 12, at 21.

20. *Id.* at 26 (explaining that revenge is a powerful factor in provoking hazing).

21. *Id.*

22. *Id.* In fact, according to psychiatrist William Kaplan – testifying on behalf of one of the recent Mephams hazers – the ringleader of the Mephams hazing himself was a high school hazing victim during his freshman year. Wahl & Wertheim, *supra* note 17, at 74. Additionally, Norman Pollard, who is Alfred University's director of counseling and student development found "that teammates who perpetrate the hazing are the ones who suffered it the year before, and they want to make it much more dangerous to validate their experience." Weir, *supra* note 14, at C-1.

23. *Schadenfreude* is defined as "[e]njoyment derived from the misfortune of others." See WEBSTER II NEW RIVERSIDE DICTIONARY (1988).

24. See NUWER, *supra* note 12, at 56 (discussing who the losers are when hazing occurs).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 28-29.

29. NUWER, *supra* note 12, at 45.

30. *Id.* Victim silence is prevalent even in brutal hazings. For example, in 1998, three Southern California high school wrestlers, who had suffered serious physical injury, asked their parents to halt the hazing investigation. See *id.* Similarly, investigators at Mephams High School found that most parties initially did

Allan, "the peer pressure is so great that it clouds the thinking of kids who ordinarily have good judgment."<sup>31</sup>

### B. *How Did Hazing Practices Emerge?*

Hazing practices were not invented in high school.<sup>32</sup> In fact, long before the American high school was implicated in hazing, Congress had expressed concern about similar practices in the Navy.<sup>33</sup> In the Navy, there is a perception dating back to the mid-1800s that physical humiliation is the best way to eradicate conceit among midshipmen.<sup>34</sup> In response, Congress, in 1874, passed a statute making all forms of naval hazing subject to punishment by court martial.<sup>35</sup>

After Congress passed its 1874 statute, similar forms of hazing emerged in other institutions.<sup>36</sup> For example, universities introduced hazing under a similar pretext of instilling respect.<sup>37</sup> While hazing failed to instill respect, it left a blemish on higher education when two students in the early 1900s purchased guns and shot their hazers.<sup>38</sup> After these incidents, most universities began to denounce hazing.<sup>39</sup> Once most uni-

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not cooperate with police. See Wahl & Wertheim, *supra* note 17, 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.*

31. Linda Marsa & Mary Kate Hogan, *Dangerous Games*, GOOD HOUSEKEEPING, Apr. 2002, at 80.

32. See Dixon, *supra* note 17, at 357. In fact, hazing practices date back to medieval schools in Greece, North Africa and Western Europe. See NUWER, *supra* note 12, at 17.

33. See Darryll Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 Miss. L.J. 111, 117 (1991). Concerns about military hazing led Congress in June 1874 to enact a drastic law that made any form of hazing, whether harmful or not, into an offense punishable by court martial. See *id.*

34. See *id.* at 117. According to Congress, this perception is nothing more than pretense for causing pain to others. *Id.*

35. *Id.* State legislatures were not quick to follow this hazing ban, as in 1901 Illinois became the first state to impose anti-hazing law. *Id.* at 119.

36. See generally NUWER, *supra* note 12, at 17 (discussing the emergence of collegiate hazing).

37. See *id.*

38. *Id.* Specifically, one hazing victim at the University of Texas in 1911 shot and wounded an upperclassman that 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.*

39. See generally Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1430 (2003). Specifically, in 1923, the

versities denounced hazing, hazing practices shifted from the public sphere to behind closed doors.<sup>40</sup> In secrecy, hazing rituals continued to spread between different collegiate organizations and from these organizations into high schools.<sup>41</sup>

Recently, college hazing has waned; however, high school hazing has risen.<sup>42</sup> According to the 2000 Alfred study, about one-third of all high school students have been hazing victims.<sup>43</sup> Moreover, approximately 1.5 million new high school students become hazing victims each year.<sup>44</sup> Some of these students are as young as twelve or thirteen years old.<sup>45</sup>

### C. Modern Hazing

Today, high school hazing occurs nationwide, across most demographic and socioeconomic groups. Even though hazing is often perceived as a boys' problem, recent hazing incidents have afflicted both genders in nearly equal proportion.<sup>46</sup>

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Hobart College president formally punished students for conducting a hazing ritual. *See id.*

40. *See generally* NUWER, *supra* note 12, at 17-19.

41. *See id.* In high schools, upperclassmen – seemingly, in search to mark their own passage into adulthood – began to replicate similar wrongs on their younger classmates. *Id.*

42. *Id.* at 19. 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." 2000 Vt. Acts & Resolves 120 (codified as statement of policy at VT. STAT. ANN. tit. 16, § 140(a) (2000)).

43. *See* Dixon, *supra* note 17, at 357 (citing Nadeline C. Hoover & Norman J. Pollard, *Executive Summary, Initiation Rites in American High Schools: A National Survey Final Report, Alfred University* (Aug. 2000), available at [http://www.alfred.edu/news/executive\\_summary.html](http://www.alfred.edu/news/executive_summary.html)). The Alfred Study involved 1,541 high school juniors and seniors. Rosner & Crow, *supra* note 14, at 278-79. According to the Alfred Study, twenty-two percent of the surveyed students reported being subjected to some form of dangerous hazing, where they felt their health was threatened. *Id.* *See also* Donna Harrington-Lueker, *Teenagers' Hazing Becomes Voyeurs' Viewing Pleasure*, USA TODAY, May 21, 2003, at A-11.

44. *See* Weir, *supra* note 14, at C-1.

45. *See* Marsa & Hogan, *supra* note 31, at 80. In recent years, hazing has also become more violent. *See id.*; *see also* Andrew Jacobs, *Violent Rites*, N.Y. TIMES UPFRONT, Apr. 24, 2000, at 8. Specifically, according to hazing expert Gary Powell, "[h]azing has changed from a goofy high jinks of the '50s and '60s to something that is remarkably brutal and vicious." *Id.*

46. *See* Dixon, *supra* note 17, at 357; Rosner & Crow, *supra* note 14, at 279; Harrington-Lueker, *supra* note 43, at A-11.

Girls' hazing frequently involves humiliation and simulated sexual acts.<sup>47</sup> 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.<sup>48</sup> Similarly, in a 2001 Allendale, Pennsylvania incident, fourteen female hockey players were suspended from school for forcing younger teammates to simulate oral sex on bananas.<sup>49</sup> Recently, at a suburban Illinois high school, thirty-one senior girls were suspended from school for pelting juniors with animal feces and other debris.<sup>50</sup>

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 Texas' Lamar High School, eleven high-school upperclassmen were punished for paddling, painting and urinating on the incoming freshmen.<sup>51</sup> At a suburban Baltimore, Maryland boys' high school, veteran soccer players received reprimands for kicking soccer balls at freshman players from dangerously close range.<sup>52</sup> 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.<sup>53</sup>

In recent years, some of the more violent incidents of boys' hazing have also involved sexual assault.<sup>54</sup> For example, in Wisconsin, three varsity wrestlers allegedly taped a teammate's buttocks and sodomized him with a mop handle.<sup>55</sup> In Washington, an eighteen year-old wrestler allegedly penetrated a fif-

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47. According to Nuwer, "Adolescence is a time when males and females are expressing strong curiosity in their sexuality. It is not surprising that so many initiation horror stories in high school today include simulated sex." NUWER, *supra* note 12, at 51.

48. *See id.*

49. *See* Marsa & Hogan, *supra* note 31, at 80.

50. *See* Walsh, *supra* note 16, at 4; Wahl & Wertheim, *supra* note 17, at 71; *see also* *Eliminate Hazing By Getting Students In On The Act*, 43 CURRICULUM REV. 14 (Dec. 2003), available at <http://search.epnet.com/direct.asp?an=11735013ad=tfh> (interview with Bill Stanley, teacher at West Aurora High School).

51. *See* Dixon, *supra* note 17, at 357. This incident occurred in 1996. *Id.*

52. *See* Jacobs, *supra* note 45, at 8.

53. *See* Melanie D. Scott, *Hazing's Legal, But it Hurts; Students, Parents and Lawmakers Seek Change*, THE DETROIT FREE PRESS, Feb. 26, 2004.

54. *See* NUWER, *supra* note 12, at 52.

55. *See id.* at 70. This incident allegedly occurred at Johnson High School. *Id.*



teen-year old wrestler's anus with a mop-handle.<sup>56</sup> In Massachusetts, veteran football players at a team retreat allegedly ordered young boys to disrobe, climb nude into a sleeping bag, and dangle objects from their erect penises.<sup>57</sup>

Since anti-hazing activists began to warn school personnel about the risks of sexual assault/hazings, this form of abuse generally has been limited to schools that are less vigilant.<sup>58</sup> For example, in a 2000 sexual assault/hazing incident, eight members of the Trumbull High School wrestling team were charged with physically and sexually assaulting a fifteen-year-old special-education student.<sup>59</sup> According to these allegations, the school's wrestling coach observed many of these acts yet always failed to intervene.<sup>60</sup> Additionally, in 2000, several basketball and track stars at Arizona's Winslow High School allegedly sexually assaulted younger athletes, despite the school basketball coach's knowledge of the incident.<sup>61</sup> These attacks occurred on both school grounds and school buses, and involved older teammates pulling down younger athletes' pants and inserting markers, pencils and fingers into their anuses.<sup>62</sup>

Most recently, during Mephram High School's annual preseason training camp in Wayne County, Pennsylvania, at least three veteran football players sodomized their younger teammates with broomsticks, golf balls and pinecones.<sup>63</sup> Allegedly, just one week before these attacks, a junior varsity football

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56. *Id.* The Sunnyside High School sexual assault caused the victim internal injuries that later required the victim to seek therapy. *Id.*

57. *Id.* at 72. In the Wilmington hazing, the victims that reported the incident to authorities were thereafter threatened by the older players with additional physical abuse. *Id.*

58. See generally NUWER, *supra* note 12, at 15.

59. See Rosner & Crow, *supra* note 14, at 279-80 (citing Denise Lavoie, *Eight High School Wrestlers Charged in Brutal Attack on Teammate*, ASSOCIATED PRESS NEWSWIRES, (Mar. 2, 2002)). 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 Rosner & Crow, *supra* note 14, at 280.

60. *Id.*

61. *Id.* at 280-81 (citing Mark Shaffer, *Winslow 7 Get Jail Time: Hazing Caused "So Much Trouble"*, ARIZ. REPUBLIC, Oct. 19, 2000, at A-1). In reaction to the Winslow High School hazing, the State of Arizona thereafter implemented an anti-hazing law. *Id.* at 281; see also ARIZ. REV. STAT. ANN. § 15-2301 (West Supp. 2001).

62. See Rosner & Crow, *supra* note 14, at 281.

63. See Wahl & Wertheim, *supra* note 17, at 69.

player's father warned the school principal that hazing threats were made against his son.<sup>64</sup> However, the school failed to respond.<sup>65</sup>

The Mephram incident captured more media attention than any previous hazing incident because it involved students from a middle-class town in the heart of New York suburbia – not an area generally predisposed to violence.<sup>66</sup> Moreover, the Mephram hazing was not just a single incident, committed by a single kid, in a single school, in a single year.<sup>67</sup> Rather, the Mephram hazing was part of an identifiable pattern of abuse that emerged from poor risk management.<sup>68</sup> Sadly, risk management practices at Mephram High School are not ostensibly different from those at many other American high schools.<sup>69</sup> If risk management practices are not improved nationally, hazing incidents similar to those that occurred at Mephram High School will eventually repeat throughout the country.

## II. How Does American Law Address (or Fail to Address) Hazing?

One reason that schools do not place greater emphasis on preventing hazing is that the law does not require it. Federal law, outside of a single 1874 military statute, ignores hazing completely.<sup>70</sup> Meanwhile, local law addresses hazing only in forty-three of fifty states.<sup>71</sup>

64. *Id.*

65. *See id.* at 73.

66. *Id.* at 68, 71.

67. *Id.* at 68 (“The members of the jayvee team – freshman and a few sophomores – expected to be the subject of hazing. It had all but ossified into a Mephram football tradition: the upperclassmen would initiate the new kids.”).

For example, in 1995, Wesley Berger, then a Mephram freshman football player, filed suit against the Bellmore-Merrick Central High School District to recover damages for head and mouth damages he suffered while resisting older players that were trying to dunk his head in a urine-filled toilet. Wahl & Wertheim, *supra* note 17, at 74. Berger thereafter settled with the school district for a small amount of money. *Id.*

68. *See id.*; *see also* Grand Jury Report, *supra* note 1.

69. *See generally* NUWER, *supra* note 12, at 28-42.

70. *See* Lewis, *supra* note 33, at 118 (citing acts of Congress, approved June 23, 1874 and Aug. 5, 1874).

71. *See* Kermit Pattison, *Minnesota Grapples with How to Curb Hazing in High School*, CHRISTIAN SCI. MONITOR, Feb. 4, 1997, at 3; *see also* 43 States Have Laws, YOUR SCHOOL AND THE LAW, Nov. 5, 2003. Lexis, Academic Universe-Legal.

Even where anti-hazing laws exist, the law is often inadequate.<sup>72</sup> Since most anti-hazing law emerged under pressure from collegiate anti-hazing lobbyists, the issues most relevant to high school students are often ignored.<sup>73</sup> Only twenty-seven states' anti-hazing laws apply to high school students (as opposed to college students and fraternities),<sup>74</sup> and just twenty-five states' laws carry criminal penalties for high school hazing (as opposed to civil liability).<sup>75</sup> Most states do not impute criminal liability to school personnel that fail to report or prevent hazing.<sup>76</sup> 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.<sup>77</sup> As a misdemeanor, the maximum penalty for hazing generally ranges from fines between \$10 and \$10,000 and jail-time between 10 and 365 days.<sup>78</sup> Often, criminal law does not punish school personnel for not acting affirmatively against hazing. In fact, only six states impose a criminal duty

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72. *See id.*

73. *See* Pattison, *supra* note 71, at 3.

74. These states include: Alabama, Arkansas, Arizona, California, Colorado, Georgia, Iowa, Illinois, Indiana, Maryland, Massachusetts, Mississippi, New York, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas and Utah.

75. The two states with high school hazing laws without criminal penalties are Arizona and Vermont. 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 violation. *See* OR. REV. STAT. § 163.197(j)(5) (2003).

76. 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.

77. *See, e.g.*, ARK. CODE ANN. § 6-5-2003(a) (Michie 2003) (stating that the offense of hazing in Arkansas is a Class B misdemeanor); ALA. CODE § 16-1-23(c) (2003) (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 high and aggravated nature." *See* GA. CODE ANN. § 16-5-61 (2002). In Illinois, "hazing is a Class A misdemeanor, except hazing that results in death or great bodily harm is a Class 4 felony." 720 ILL. COMP. STAT. 720/10 (2003). In Virginia, hazing is "a Class 1 misdemeanor." VA. CODE ANN. § 18.2-56 (Michie 2003).

78. *See generally id.*; *see also* Rosner & Crow, *supra* note 14, at 288.

on school personnel to report hazing: Alabama, Arkansas, Massachusetts, New Hampshire, South Carolina and Texas.<sup>79</sup> Moreover, just three states – Ohio, Rhode Island and Texas – impose a duty on school personnel to implement measures to prevent hazing.<sup>80</sup>

Although there is a recent movement among some states to improve criminal hazing law, the legislative process is slow. Notably, on December 21, 2003, the State of Michigan introduced a bill, which if passed would make Michigan the twenty-eighth state to impose criminal penalties for high school hazing.<sup>81</sup> If passed, this bill would make Michigan a leader in criminally sentencing hazers, allowing twenty-year prison terms for the most serious hazing crimes.<sup>82</sup> Nevertheless, even this proposed statute fails to address school personnel responsibility.<sup>83</sup>

## B. Civil Law

Much like criminal law, American civil law is also inadequate at addressing hazing.<sup>84</sup> While some hazing victims opt against filing civil lawsuits,<sup>85</sup> victims that proceed civilly may seek relief under three bodies of law: anti-hazing statutes, tort law, and United States Constitutional law.<sup>86</sup>

79. In Alabama, Arkansas, New Hampshire, South Carolina and Texas failing to report hazing is a misdemeanor. See ALA. CODE § 16-1-23 (c-d) (2003); ARK. CODE ANN. § 6-5-2002(B)(1-2) (Michie 2003); N.H. REV. STAT. ANN. § 631:7 (2003); S.C. CODE ANN. §§ 16-3-510 & 16-3-530 (Law. Co-op. 2003); TEX. EDUC. CODE ANN. § 37.152(a)(4) (Vernon 2004). In Massachusetts, failing to report hazing is a violation. See MASS. ANN. LAWS ch. 269, § 18 (Law. Co-op. 2003).

80. See OHIO REV. CODE ANN. § 2903.31(B)(2) (West 2003); R.I. GEN. LAWS § 11-21-2 (2003); TEX. EDUC. CODE ANN. § 37.152(a)(4) (Vernon 2004).

81. See 2003 Mich. Pub. Acts 5378. If passed, this bill would also make the State of Michigan the forty-fourth state overall to outlaw hazing. *Id.*

82. *Id.*

83. See generally *id.*

84. 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 (7th ed. 1996). For several centuries, tort law was the single civil outlet for remedies; however, according to the Institute of Civil Justice, tort law today comprises just seven percent of total compensation for economic loss in nonfatal accidents in the United States today. See *id.*

85. Specifically, some victims opt out of filing civil lawsuits based on the emotional nature of reliving abuse. See Andrea Fine, *Another Rising Menace in Schools: Hazing*, CHRISTIAN SCI. MONITOR, June 1, 1999, at 3.

86. See generally Rosner & Crow, *supra* note 14, at 279-97.

### 1. *Civil Anti-Hazing Statutes*

Like their criminal counterparts, civil anti-hazing statutes vary significantly among the states.<sup>87</sup> In some states, civil anti-hazing statutes stem directly from criminal law.<sup>88</sup> In other states, civil anti-hazing statutes exist independently.<sup>89</sup>

Where states apply civil anti-hazing statutes, these statutes often provide specific grounds for relief.<sup>90</sup> For example, according to Ohio's civil anti-hazing statute, "Any person who is subjected to hazing [may sue for] damages, including mental and physical pain and suffering, that result from the hazing."<sup>91</sup> 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 efforts to prevent it."<sup>92</sup>

A few other states' civil anti-hazing statutes also allow victims to sue school personnel for failing to follow statutory requirements. For example, an Arizona civil statute, adopted in 2003, requires every public school to "adopt, post and enforce" an anti-hazing prevention policy.<sup>93</sup> According to the Arizona statute, each school must print its policy in a student handbook and distribute it to the parents.<sup>94</sup> Likewise, a Minnesota civil anti-hazing statute requires each school board to adopt a written policy governing student and staff hazing.<sup>95</sup> An Oklahoma

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87. See NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 124 (2d ed. 2002). In thirty-five states, civil anti-hazing laws mirror their criminal counterpart, albeit with different burdens of proof. In two states, civil anti-hazing statutes are broader than their criminal counterpart statutes. In six states, civil anti-hazing statutes exist on a stand-alone basis.

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

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

90. See *infra* notes 93-98.

91. OHIO REV. CODE ANN. § 2307.44 (West 2004).

92. *Id.*

93. ARIZ. REV. STAT. § 15-2301(A) (2004).

94. 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).

95. MINN. STAT. § 121A.69, subd. 3 (2004). Further, according to the Minnesota statute, "[t]he policy must apply to student behavior that occurs on or off

anti-hazing statute requires "a copy of the policy or the rules and regulations of the [school] which prohibits hazing [to] be given to each student."<sup>96</sup>

Addressing hazing through civil statutes alone is often inadequate. Civil statutory enforcement fails mainly because some states fail to legislate civil anti-hazing law.<sup>97</sup> Moreover, even many states that have anti-hazing laws still do not extend liability to school personnel.<sup>98</sup>

## 2. Tort Law

A second civil method to address hazing is tort law.<sup>99</sup> Under tort law, hazing victims may bring intentional tort claims against their hazers and negligence claims against supervising school personnel.<sup>100</sup>

Intentional tort claims are a conventional way for hazing victims to recover money damages from hazers.<sup>101</sup> Under intentional tort law, all that a victim must show is an intentional wrongdoing by the defendant, which causes an identifiable harm.<sup>102</sup>

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school property and during and after school hours. The policy must include reporting procedures and disciplinary consequences for violating the policy." *Id.*

96. OKLA. STAT. tit. 21, § 1190(C) (2004).

97. Seven states lack anti-hazing statutes.

98. *But see* OHIO REV. CODE ANN. § 2307.44 (West 2004). (The Ohio civil statute is one of the few that properly imposes liability on school personnel that knew or should have known about hazing). *See id.* 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.*

99. *See* ESSEX, *supra* note 87, at 135.

100. An intentional tort results from a deliberate act committed against another person. *See id.* 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. Negligence torts exist when one fails to exercise a reasonable standard of care, which facilitates harm or injury to another person. *See id.* at 135.

101. *See generally id.*

102. *See generally id.*

Negligence claims, meanwhile, are less predictable. One difficulty with negligence claims is showing that school personnel breached a duty of care.<sup>103</sup> To show a 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*.<sup>104</sup> According to *in loco parentis*, parents implicitly delegate certain rights and responsibilities over their children to school personnel in exchange for school personnel accepting limited parental responsibilities.<sup>105</sup> Although the duty varies according to state common law,<sup>106</sup> ultimately whether school personnel breach this duty is a factual issue for a jury to decide.<sup>107</sup>

Even where a jury concludes that school personnel breached their duty, negligence claims are further complicated by two affirmative defenses.<sup>108</sup> One defense, "assumption of risk," recognizes that individuals generally accept an element of risk when they participate in known dangerous activities.<sup>109</sup> For example, a high school soccer player assumes the risk that he will sprain an ankle while running for a loose ball.<sup>110</sup>

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.<sup>111</sup> Fortunately, this view is in the minority, as recent case law such as *Siesto v. Bethpage Union Free School District*,<sup>112</sup> has struck down the

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103. *See id.* at 140-42.

104. *See* Rosner & Crow, *supra* note 14, at 293.

105. *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").

106. The need to supervise is greater with young students and where students are likely to engage in known, dangerous conduct. *See* ESSEX, *supra* note 87, at 148.

107. *See id.* at 148.

108. *See generally id.* at 143-54.

109. *See id.* at 144-45.

110. *See id.* Recent courts have become more skeptical of the assumption of risk defense in hazing cases. *See* R. Brian Crow, *Hazing*, in DOYCE COTTEN ET AL., LAW FOR RECREATION AND SPORTS MANAGERS 253 (2d ed. 2001).

111. *See generally* ESSEX, *supra* note 87, at 144-46.

112. *Siesto v. Bethpage Union Free Sch. Dist.*, N.Y. L.J., Dec. 30, 1999, at 21 (N.Y. Sup. Ct.).

view that hazing victims can assume this sort of risk.<sup>113</sup> Nonetheless, a few states, which have not yet addressed "assumption of risk" with regard to hazing, still may find the defense applicable. A second affirmative defense, "sovereign immunity,"<sup>114</sup> emerges from legislative intent to shield government employees from liability when performing government functions.<sup>115</sup> Under most definitions of "sovereign immunity," public school personnel are considered government employees and are therefore shielded.<sup>116</sup>

While some states abrogate sovereign immunity where government employees act recklessly, other states extend immunity to government functions as long as no actual malice is involved.<sup>117</sup> For example, in the 1998 court opinion *Caldwell v. Griffin*, 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 that hazing was occurring under their supervision.<sup>118</sup> *Caldwell* is often cited by anti-hazing activists as the epitome of tort law's failure to adequately address hazing.<sup>119</sup>

### 3. Constitutional Law

The most tenuous civil method to address hazing is via Constitutional law.<sup>120</sup> Although the United States Constitution does not speak directly to hazing, victims occasionally allege that they may state a claim under the Due Process Clause of the

113. Specifically, in *Siesto*, the court stated, "while 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." COTTEN, *supra* note 110, at 259.

114. Sovereign immunity emerges from the old common law view that the king can do no wrong. See *Essex*, *supra* note 87, at 147.

115. See *id.*

116. See *id.*

117. See *id.* See also *Caldwell v. Griffin Spalding County Bd. of Educ.*, 503 S.E.2d 43, 44 (1998).

118. See *Caldwell*, 503 S.E.2d at 44.

119. See Rosner & Crow, *supra* note 14, at 296-97.

120. Even law professors Scott Rosner and Brian Crow, who took great lengths to discuss Constitutional law claims related to hazing in their article *Institutional Liability for Hazing in Intercollegiate Sports*, concede that "courts have been reluctant to hold schools liable for hazing under [Constitutional law theory]." Rosner & Crow, *supra* note 14, at 283.



Fifth and Fourteenth Amendments,<sup>121</sup> which provides for freedom from bodily restraint and punishment.<sup>122</sup>

Constitutional law is an innovative approach to circumvent shortcomings of state anti-hazing law. However, in practicality, any Constitutional theory of hazing liability is wrong.<sup>123</sup> Most courts have held that states lack an affirmative duty to protect citizens unless they are taken into custody.<sup>124</sup> Although most high school students are required by law to attend school, school attendance requirements do not amount to custody.<sup>125</sup> Therefore, failure by school personnel to protect students from hazing does not violate the United States Constitution.

### III. Exploring Moral Inadequacies of American Anti-Hazing Law

American legislative failure to adequately address hazing becomes more evident when considering moral reasoning theory.<sup>126</sup> "Moral reasoning theory," according to criminal law professor Joshua Dressler, "is of two types."<sup>127</sup> One version focuses on "actions as a means to good ends."<sup>128</sup> This is known as utili-

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121. There are two types of due process: procedural and substantive. See *ESSEX*, *supra* note 87, at 63. Procedural due process means that where a person is deprived of life, liberty or property, the government must follow a proscribed constitutional process. See *id.*

122. See, e.g., *Hilton v. Lincoln-Way High Sch.*, No. 97C3872, 1998 WL 26174 (N.D. Ill. Jan. 14, 1998); *Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) (stating that a state owes an individual rudimentary duty of safekeeping in certain circumstances).

123. The Supreme Court states so much in its decision, *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1988)

124. *DeShaney*, 489 U.S. at 199-200.

125. *Id.* at 200, stating that

in the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

126. See generally Kent Greenawalt, *Punishment*, in JOSHUA DRESSLER, *CASES AND MATERIAL ON CRIMINAL LAW: SECOND EDITION* 30-31 (2d ed. 1999).

127. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 13 (2d ed. 2001).

128. *Id.*

tarianism.<sup>129</sup> The other focuses on “actions as ends in themselves.”<sup>130</sup> This is known as retribution.<sup>131</sup>

### A. Utilitarianism

Utilitarian justice (utility) is a forward-looking theory. According to classical utilitarianism, the purpose of all laws is to maximize net happiness in society.<sup>132</sup> Therefore, the pain inflicted by punishment is justifiable only to the extent that it results in reducing the pain of a crime, which would otherwise occur.<sup>133</sup> Modern utilitarianism permits only punishments that serve a beneficial, forward-looking purpose.<sup>134</sup> According to modern utilitarian theory, punishment may serve four different forward-looking purposes – general deterrence, specific deterrence, incarceration and reform.<sup>135</sup>

#### 1. General Deterrence

General deterrence is the forward-looking purpose most commonly cited for punishment.<sup>136</sup> It involves inducing society to forgo undesirable behavior by using punishment as an object lesson for the rest of the community.<sup>137</sup> 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.<sup>138</sup> For general deterrence to succeed, the would-be-wrongdoer needs to have certain cognitive abilities. These abilities

129. *Id.*

130. *Id.*

131. *Id.*

132. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 14. See also THOMAS DONALDSON & THOMAS W. DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACT APPROACH TO BUSINESS ETHICS 12 (1999).

133. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 14.

134. See generally Greenawalt, *supra* note 126, at 34-35.

135. See *id.*

136. See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 19.

137. See *id.* See also Greenawalt, *supra* note 126, at 34-35.

138. See Greenawalt, *supra* note 126, 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.*

include the capacity to know the law, understand the law, and draw conclusions based on the punishment of others.

In the case of high school hazing, many state laws fail to generally deter hazing because they only punish student-hazers – a group without these prerequisite 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.<sup>139</sup>

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

## 2. *Specific Deterrence*

A second forward-looking purpose, specific deterrence, focuses on dissuading past wrongdoers from repeating their misconduct.<sup>140</sup> Upon the expiration of punishment, specific deterrence achieves its results by reminding wrongdoers that if they return to crime, they will experience recurring punishment.<sup>141</sup>

Specific deterrence emerges from a theory of instrumental conditioning,<sup>142</sup> which was first developed by psychologists Edward Thorndike and B.F. Skinner.<sup>143</sup> According to instrumental conditioning, behavior changes occur based on a system of response and reward.<sup>144</sup> Applying response and reward to the legal context, in order to deter a past wrongdoer from repeating

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139. This may be based on hazers' earlier experiences as hazing victims.

140. See Greenawalt, *supra* note 126, at 34-35.

141. See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 20.

142. Instrumental conditioning is otherwise known by some psychologists as operant conditioning. See HENRY GLEITMAN, PSYCHOLOGY 115 (4th ed. 1995).

143. See *id.* at 118.

144. See *id.* at 119. Given a positive response, rewards appear either in the form of positive reinforcement, where a response produces an appetitive stimulus,

wrongful conduct, the punishment (an aversive stimulus) needs sufficient severity to outweigh the benefits of again committing that wrong.<sup>145</sup>

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.<sup>146</sup> Nevertheless, as the average age of hazers declines, specific deterrence may garner a more significant role in curbing hazing behavior before it reaches very dangerous levels.<sup>147</sup> Additionally, in the few states where hazing law applies to school personnel, specific deterrence may persuade new school personnel to change their behavior.

### 3. Incarceration

A third forward-looking purpose, incarceration, removes wrongdoers from society by placing them in prison.<sup>148</sup> 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.<sup>149</sup>

Incarcerating hazers is unlikely to solve America's hazing problem because it is difficult for our legal system to detect hazers, especially absent assistance from 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

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or negative reinforcement, where a response produces an aversive stimulus. See *id.* (defining "appetitive stimulus" and "aversive stimulus").

145. See Greenawalt, *supra* note 126, at 34-35. According to individual deterrence theory, repeat offenders warrant more severe punishment because the first penalty has shown itself ineffective from the standpoint of initial deterrence. See *id.*

146. See generally NUWER, *supra* note 12, at 45 (discussing the impact of peer pressure).

147. See Marsa & Hogan, *supra* note 31, at 80 (discussing the declining average age of hazers and hazing victims).

148. See Greenawalt, *supra* note 126, at 34-35.

149. See *id.*; see also DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 20.

themselves) still may propagate hazing cycles in accordance with traditional patterns of wrongdoing.<sup>150</sup>

#### 4. *Reform*

A final forward-looking purpose is to reform wrongdoers.<sup>151</sup> Reform involves altering wrongdoers' basic characteristics in order to make them less anti-social.<sup>152</sup> Reform advocates prefer to use the correctional system to change behavior, rather than to secure compliance through fear and punishment.<sup>153</sup>

Under the rubric of reform, various psychological therapies are designed to curb hazing tendencies.<sup>154</sup> However, there is no formidable evidence that these theories succeed on the merits.<sup>155</sup> Without formidable evidence that reform succeeds, there is no basis to conclude that reform adequately addresses society's hazing problem.<sup>156</sup>

#### B. *Retribution*

In juxtaposition to utilitarian justice, retributive justice (retribution) is a backward-looking theory of moral reasoning.<sup>157</sup> Retributive justice is based on the principal that people who commit wrongs deserve to be punished.<sup>158</sup> To an uncompromis-

150. See NUWER, *supra* note 12, at 21, 26 (describing the hazing cycle).

151. Sometimes reform is also referred to as rehabilitation. See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 20.

152. See *id.*

153. See generally *id.*

154. According to Dressler, "[t]he methods of reformation will vary from case to case, but could consist of, for example, psychiatric therapy, lobotomy, or academic or vocational training." DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 22.

155. See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 36 (2d ed. 1999). [hereinafter DRESSLER, CASES AND MATERIALS]. According to Dressler:

The conventional wisdom is that past efforts to rehabilitate convicted offenders were mostly 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.*

156. See generally *id.*

157. See *id.* at 32.

158. See *id.*

ing retributivist, the wrongdoer deserves punishment, whether or not it will result in crime reduction.<sup>159</sup>

According to retribution, the right to administer punishment stems from the right of a sovereign nation as the supreme power, to inflict pain based on those that engage in wrongdoing.<sup>160</sup> Retribution recognizes that a sovereign may never administer punishment merely to promote another good.<sup>161</sup> However, a sovereign may inflict punishment because the individual on whom punishment is inflicted has committed a moral wrong.<sup>162</sup> According to the forefather of retribution, Immanuel Kant, "justice would cease to be justice if it were bartered away for any consideration."<sup>163</sup>

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 are warranted.<sup>164</sup>

According to these principles, retribution also would permit school personnel to suffer punishment for failing to act affirmatively against hazing as long as society perceives their conduct as morally wrong. Modern society generally perceives moral wrongs where school personnel do not report hazing or protect students from hazing.<sup>165</sup> This view was stated by the Pennsylvania grand jury, which found the Mephram coaching staff morally, albeit not legally, responsible for the training camp hazings.<sup>166</sup> This view is also shared by many families in the Bellmore-Merrick Central High School District, who have called for the ouster of the Mephram coaching staff.<sup>167</sup>

Retribution in the hazing context would also reject the affirmative defenses of "assumption of risk" and "sovereign immunity." Under retribution, "assumption of risk" is a weak defense

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159. See DRESSLER, CASES AND MATERIALS, *supra* note 155, at 16.

160. Immanuel Kant, *The Philosophy of Law* in DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 37 (2d ed. 1999).

161. See *id.*

162. See *id.*

163. See *id.* at 38.

164. See generally *id.*

165. See *infra*, notes 170-71.

166. See generally Grand Jury Report, *supra* note 1.

167. See Wahl & Wertheim, *supra* note 17, at 72.

because the notion of wrongdoing is supposed to stem from universal normative values, not simply one party's consent.<sup>168</sup> Therefore, even if a hazing victim could provide consent, lawmakers may still punish hazing conduct for its more generalized harm.<sup>169</sup>

Under retribution, "sovereign immunity" is also a weak defense because the moral wrong of failing to prevent hazing is not lessened because the wrongdoer is a government employee.<sup>170</sup>

#### IV. Hazing Law Alternatives

Since the current legal approach does not adequately address hazing, academics have proposed various alternatives. Four of the more common alternatives include: 1) implementing uniform federal anti-hazing law, 2) increasing criminal punishments for hazing, 3) establishing punishments for failure to report/prevent hazing, and 4) requiring school districts to increase their internal punishment of student hazers.

##### A. *Uniform Federal Anti-Hazing Law*

Uniform federal anti-hazing law was recently suggested by two legal scholars.<sup>171</sup> In *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 are incorporated into existing state anti-hazing statutes, . . . hazing will continue to go virtually unchecked by the law."<sup>172</sup> Similarly, in *Shattered Dreams: Hazing in College Athletics*, Joshua Sussberg suggests that, "[t]he time has come for federal regulation to alleviate the disparity among those states that have enacted anti-hazing law [and those that have not]."<sup>173</sup>

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168. See generally DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 16-18.

169. See generally *id.*

170. See generally *id.*

171. Pelletier, *supra* note 16, at 413.

172. *Id.*

173. Sussberg, *supra* note 39, at 1490.

According to both authors, there are clear advantages to implementing uniform federal anti-hazing law.<sup>174</sup> For example, uniform anti-hazing law provides a minimum standard of hazing protection in all states.<sup>175</sup> This prevents hazing from going unpunished in states with weak or no anti-hazing laws.<sup>176</sup> Additionally, uniform anti-hazing law resolves the legal conflicts that emerge when hazers and their victims are domiciled in different states, or when one of the hazing victims is domiciled in a different state from where the misconduct occurred.<sup>177</sup>

Nevertheless, implementing uniform federal anti-hazing law also presents some challenges.<sup>178</sup> For example, many uniform anti-hazing law proposals would violate the United States Constitution's Tenth Amendment,<sup>179</sup> which prevents Congress from commandeering the states.<sup>180</sup> Additionally, many uniform anti-hazing proposals would lead states to uniformly apply bad

174. See *id.*; see also Pelletier, *supra* note 16.

175. See generally Sussberg, *supra* note 39, at 1429; see also Pelletier, *supra* note 16, at 413.

176. Sussberg, *supra* note 39, at 1490.

177. "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 P. CURRIE ET AL., *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 223 (6th ed. 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. *Id.* at 115-222.

178. See *infra* notes 181-83.

179. The U.S. Constitution's Tenth Amendment states that "[t]he 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." U.S. CONST. amend. X. The Tenth Amendment emerged from the principals of federalism, which purposefully divide governmental authority between the state and nation. See GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 149 (3d ed. 1996). The Constitution makes clear that the federal government is limited in power, with most responsibilities left to the states. See generally U.S. CONST. amend. X. Where Congress legislates in a manner limiting states' abilities to regulate residual responsibilities, Tenth Amendment concerns are triggered. See generally *id.*

180. See generally *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). The Supreme Court first recognized this anti-commandeering principle in *New York v. United States*, 505 U.S. 144 (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 v. United States*, 505 U.S. at 167; see also Sussberg, *supra* note 39, at 1465-66.



law.<sup>181</sup> Without adopting law that meets the requirements of moral reasoning theory, uniformity is moot.

### B. *Increasing Prison Sentences*

A second alternative is for states to increase hazers' prison sentences.<sup>182</sup> The movement to increase prison sentences is ongoing in New Jersey and New York, where state legislatures have initiated bills to upgrade certain hazing conduct to felony offenses.<sup>183</sup> The movement is also powerful in the State of Michigan, where legislators recently proposed to implement hazing prison sentences, which would last for twenty years.<sup>184</sup>

From a utilitarian perspective, it would serve limited value to increase hazers' prison sentences.<sup>185</sup> 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 based on the countervailing forces of peer pressure.<sup>186</sup>

From a retributive perspective, however, the movement to increase hazers' punishment provides some potential.<sup>187</sup> As compared to similar kinds of wrongdoing, current punishment for hazing is modest.<sup>188</sup> One of the underlying explanations behind retributive justice is to vindicate victims.<sup>189</sup> According to Professor Jean Hampton, victims are vindicated when society makes "right a wrong."<sup>190</sup> To the extent that hazing punish-

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181. For example, if states simply applied the majority law then the hazing problem would not improve because the majority law lacks sufficient obligations on school personnel. Conversely, if states all adopted the strictest existing requirements, the law would be too harsh to satisfy moral reasoning theory.

182. See *infra* notes 185-86.

183. See N.J. Assemb. B. 1108 (N.J. 2004); see also S.B. 719 (N.Y. 2005).

184. See H.B. 5378, 92d Leg., 1st Reg. Sess. (Mich. 2003).

185. See generally DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 9-10.

186. See generally NUWER, *supra* note 12, at 45.

187. See generally DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 12-13.

188. See generally NUWER, *supra* note 12, at 108-21.

189. See *id.*

190. *Id.* at 13.

ments are brought in line with similar wrongs, society can right some of the wrongs caused by hazing.<sup>191</sup>

C. *Establishing Punishment for Failure to Report Hazing*

As a third alternative to address hazing, some academics suggest increasing the scope of who may be punished criminally for hazing incidents.<sup>192</sup> In the article *Hazing in High Schools: Ending a Hidden Tradition*, author Melissa Dixon suggests that states could more sufficiently prevent hazing by implementing “zero tolerance laws,” which criminally require all witnesses – including both hazing victims and student witnesses – to report their experiences to authorities or face punishment.<sup>193</sup>

Dixon derives her proposal from contemporary 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.<sup>194</sup> Incidentally, Dixon’s proposal also coincides with Texas law, which requires anybody with firsthand knowledge of hazing to report it.<sup>195</sup>

Dixon justifies her universal duty to report hazing by citing to a section of the 2000 Alfred study, which states that sixty-one percent of all students support stricter penalties for hazing.<sup>196</sup> 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.”<sup>197</sup>

Although 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.<sup>198</sup> Student victims are often too ashamed to re-

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191. *Id.* at 13.

192. *See, e.g.*, Dixon, *supra* note 17, at 358-59.

193. *See id.*

194. *Id.* at 360; *see also* N.H. REV. STAT. ANN. § 631:7 (2003).

195. *See* TEX. EDUC. CODE ANN. § 37.152(a), (b) (Vernon 2004).

196. *See* Dixon, *supra* note 17, at 358.

197. *Id.* at 361.

198. In the Alfred Study, forty percent 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. *See id.* Basic psychology, however, suggests that stu-

port hazing, and student witnesses often fear that hazers will retaliate against them if they report.<sup>199</sup> Moreover, society does not generally require adult witnesses to report crimes;<sup>200</sup> why should society hold ashamed and frightened children to a higher standard?

Dixon's proposal, nevertheless, is viable if her duty to report hazing is narrowed to school personnel. Applying a duty to report hazing on school personnel is reasonable because school personnel are in an authoritative position. As authority figures, school personnel do not suffer from the same feelings of fear, shame, peer pressure and futility that justify students' decisions against reporting.

Furthermore, the criminal duty for school personnel to report hazing flows naturally from school personnel's special status as children's supervisors. 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.<sup>201</sup>

#### D. *Requiring Schools to Internally Enforce Anti-Hazing Policies*

Finally, some academics have suggested that hazing is best regulated by schools internally and not through legislation and the courts. Academics that support this view consist mainly of libertarians that are concerned about the costs associated with government regulation.

Considering the importance of reducing government overhead costs, requiring high schools to develop anti-hazing policies alongside conventional legal remedies is logical. School anti-hazing policies encourage school personnel to think critically about curtailing hazing, sometimes leading to creative so-

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dent witnesses would almost never report, for the same reasons that witnesses in general sometimes fail to report crimes.

199. The combination of shame, peer pressure and futility discourage high school students from reporting hazing. See generally NUWER, *supra* note 12, 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.

200. For an example of where society did not report a crime, see DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127 at 121-23 (discussing the 1964 murder of Kitty Genovese).

201. *Id.*

lutions that are less possible under more traditional rulemaking.

Nevertheless, requiring educational institutions to develop anti-hazing policies without also imposing legislation does not suffice.<sup>202</sup> 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.”<sup>203</sup> 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 to develop the exclusive rules to guard against hazing, the possibility that school personnel contribute to (or even exacerbate) hazing is wrongly disregarded.<sup>204</sup>

#### V. The Solution: Federal Anti-Hazing Law with an Affirmative Duty to Act on School Personnel

Although none of the four aforementioned proposals is alone sufficient, a hybrid approach that allows Congress to withhold education funds from states that fail to impose anti-hazing requirements may suffice. Specifically, Congress should withhold education funds from individual states that fail to:

- Impose a duty on school personnel to act affirmatively against hazing<sup>205</sup>
- Impose criminal and civil penalties on school personnel that violate this duty, and
- Bar assumption-of-risk and sovereign immunity as affirmative defenses to hazing violations.

Congress may delegate the specifics of a “duty to act affirmatively” to individual states’ discretion. However, a minimum standard should 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.

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202. See Dixon, *supra* note 17, at 359.

203. *Id.*

204. See *id.*

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

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*.<sup>206</sup> However, recognizing that different states maintain 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.

A. *Why Congress May Impose Uniform Anti-Hazing Law with an Affirmative Duty to Act on School Personnel*

Despite Constitutional concerns about uniform anti-hazing law, this hybrid solution clearly passes muster.<sup>207</sup>

Article I, Section 8, of the United States Constitution states that Congress has the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and General Welfare of the United States. . . ."<sup>208</sup> In interpreting Article I, Section 8, the Supreme Court has held that, "[i]ncident to [the spending power], Congress may attach conditions on the receipt of federal funds to "further broad policy objectives."<sup>209</sup> However, all spending must: serve a general public purpose;<sup>210</sup> allow states to exercise the choice of whether to comply;<sup>211</sup> and relate to a federal interest in specific national projects or programs.<sup>212</sup>

The Supreme Court last considered whether conditions on the receipt of federal funds are permissible in its 1987 opinion *South Dakota v. Dole*,<sup>213</sup> and its 1992 opinion *New York v. United States*.<sup>214</sup> In *Dole*, the Supreme Court upheld a federal statute intended to withhold five percent of federal highway

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206. See NUWER, *supra* note 12, at 122-30.

207. U.S. CONST. art. I, § 8, cl. 1.

208. *Id.*

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

210. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936)).

211. *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

212. *Id.* at 207-08 (citing *Massachusetts v. United States*, 435 U.S. 44, 461 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958)).

213. 483 U.S. at 203.

214. 505 U.S. at 144.

funds from any state that would not create a minimum drinking age of twenty-one.<sup>215</sup> 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.<sup>216</sup>

Conversely, in *New York*, the Supreme Court overruled a federal statute intended to require states to accept responsibility for disposing low-level radioactive waste within their borders.<sup>217</sup> In *New York*, the Supreme 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 it.<sup>218</sup> This choice effectively forced States to follow one of two federal regulations, thus denying them the option not to regulate.<sup>219</sup> According to the *New York* court, since "a choice between two unconstitutionally coercive regulatory techniques is no choice at all," the Congressional statute in *New York* commandeers the states' legislative process.<sup>220</sup>

Based on the Supreme Court's reasoning in both *Dole* and *New York*, it seems a statute that withholds 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.<sup>221</sup> In fact, Congress has a history of applying its general spending power with respect to education.<sup>222</sup>

Moreover, the withholding of state's educational funding does not commandeer the states because states retain a right to

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215. See *Dole*, 483 U.S. at 212.

216. See *id.* at 205, 211-12.

217. See *New York v. United States*, 505 U.S. at 149-51.

218. See *id.* at 176.

219. *Id.*

220. *Id.*

221. See *Dole*, 483 U.S. at 207; see also *New York v. United States*, 505 U.S. at 149-51.

222. In fact, when Congress passed Title IX of the Education Amendments of 1972, it conditioned federal education funding on prohibition of sex discrimination at educational institutions. See 20 U.S.C. §§ 1681-88 (1994); see also Sussberg, *supra* note 39, at 1475. Here, the conditioned federal funding is predicated on anti-hazing legislation rather than gender equality. Nevertheless, the underlying logic is similar.

opt out of anti-hazing law by simply forgoing federal funds.<sup>223</sup> This earnest ability to opt out differentiates a hybrid anti-hazing statute from the *New York* statute, while analogizing it to the *Dole* statute.<sup>224</sup>

B. *Why Congress Should Impose Uniform Anti-Hazing Law with an Affirmative Duty to Act on School Personnel*

Given that Congress may constitutionally withhold education funds from states that do not adopt a "duty to act affirmatively," Congress should do so. It is important for Congress to promote a duty that requires school personnel to act against hazing because school personnel are best positioned to terminate damaging hazing cycles.<sup>225</sup> 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.<sup>226</sup> Failing to act affirmatively may lead to negative consequences not only for the current generation of would-be victims but also for any future generations that might face similarly abusive rituals.<sup>227</sup>

In light of the Mephram tragedy, requiring states to adopt both criminal and civil penalties where school personnel fail to act affirmatively is justified because parents expect school personnel to keep their children safe. Where children are harmed under the supervision of school personnel 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 extra-curricular activities.

Moreover, criminal and civil penalties targeted at school personnel would deter slothful school personnel conduct both

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223. See *New York v. United States*, 505 U.S. at 174-75 (explaining that under the Low-Level Radioactive Waste Policy Amendments, there was no option to opt out of regulation).

224. See *id.*; see also *Dole*, 483 U.S. at 208-09.

225. 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.

226. See generally NUWER, *supra* note 12, at 45.

227. *Id.* at 21 (describing the hazing cycle).

generally and specifically.<sup>228</sup> By imposing criminal and civil penalties for malfeasance, most school personnel would become deterred, both generally and specifically, from disregarding hazing risks.<sup>229</sup>

Indeed, some may argue a “duty to act affirmatively” 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.<sup>230</sup>

Even though common law generally denies criminal liability for failing to protect those outside specific, special relationships,<sup>231</sup> both the United States overall and the fifty states therein may override the presumption against criminal liability for failing to act.<sup>232</sup> For example, the Sarbanes-Oxley Act of 2002 established a new criminal duty on attorneys to report evidence of security law violations to the corporate Board of Directors where necessary to prevent perpetration of fraud.<sup>233</sup> Much as Sarbanes-Oxley imposes an affirmative duty on attorneys to protect America’s financial assets, the aforementioned anti-hazing proposal imposes a similar duty on school personnel to pro-

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228. See generally DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 127, at 10.

229. This is because the punishment for detected hazing would be more undesirable to school personnel than any pleasure they would receive from allowing hazing practices to continue – whether based on sadism or laziness. Similarly, school personnel that previously allowed hazing would become specifically deterred from engaging in the same wrongful behavior again, recognizing that school districts for liability purposes would become unlikely to maintain school personnel with multiple past hazing incidents.

230. See DRESSLER, CASES AND MATERIALS, *supra* note 155, at 121 (citing *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962):

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.

231. *Id.*

232. See *Jones*, 308 F.2d at 310.

233. See Sarbanes-Oxley Act of 2002, § 802(a), 18 U.S.C. § 1348 (2003).



tect our "human assets."<sup>234</sup> 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 is needed to prevent school personnel from avoiding civil liability based on 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.<sup>235</sup> Additionally, unlike on-the-field sports injury, hazing is not the kind of risk that flows naturally from sports involvement.<sup>236</sup> Rather, hazing is completely preventable if school personnel implement diligent risk management policies.<sup>237</sup>

Likewise, "sovereign immunity" is not an appropriate defense because society seeks to discourage individuals incapable of preventing hazing from becoming school personnel.<sup>238</sup> Even though sovereign immunity generally serves the important purpose of protecting state employees from liability, here superior public policy is to discourage individuals that cannot maintain children's safety from entering the field of education.<sup>239</sup>

### Conclusion

High school hazing is a substantial problem, which has garnered newfound attention in the Mephram tragedy aftermath.<sup>240</sup> In recent years, high school hazing has become more violent,<sup>241</sup> afflicted younger students,<sup>242</sup> and involved many preventable situations.<sup>243</sup>

Given America's high school hazing problem, it is evident that our legal approach fails to adequately address hazing.

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234. See generally *id.*

235. See generally ESSEX, *supra* note 87, at 144-45.

236. See COTTEN, *supra* note 110, at 253.

237. See generally *id.*

238. See generally ESSEX, *supra* note 87, at 147.

239. *Id.*

240. For an example of some national anti-hazing articles that authors have written in the Mephram tragedy aftermath, see Wahl & Wertheim, *supra* note 17, at 68-76; Weir, *supra* note 14, at C-1.

241. See Jacobs, *supra* note 45, at 81; Marsa & Hogan, *supra* note 31, at 80; NUWER, *supra* note 12, at 205.

242. See Marsa & Hogan, *supra* note 31, at 80.

243. 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 Mephram High School.

Seven states have no hazing laws at all,<sup>244</sup> and most other states' anti-hazing laws do not adhere to moral reasoning theory.<sup>245</sup> Additionally, contemporary anti-hazing law rarely punishes school personnel, even where the actions of school personnel are both morally wrong and easily deterred.

While most alternative hazing laws would probably fail for similar reasons,<sup>246</sup> a viable alternative is to implement federal law withholding education funds from individual states that do not impose on school personnel a "duty to act affirmatively."<sup>247</sup>

Withholding school funds where states do not impose a duty on school personnel would encourage states to punish irresponsible behavior.<sup>248</sup> It would also enable retribution against school personnel that disregard student safety and deter school personnel from ignoring the risks of hazing.<sup>249</sup>

The Mephram High School tragedy was brutal, and the harm suffered by three Mephram students should never be repeated. Therefore, the Mephram tragedy, if nothing else, should serve as an impetus to re-evaluate anti-hazing law. Upon re-evaluation, it is imperative to impose a duty on school personnel to act affirmatively against hazing. Without this duty, high school hazing will not abate.

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244. *See generally supra* note 71.

245. *See generally supra* Part III.

246. *See supra* Part IV.

247. *See supra* Part V.

248. *Id.*

249. *Id.*