

# Hazed and Confused: The Roehm Incident and the Necessity of Hazing Legislation

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“Hazing is an extraordinary activity that, when it occurs often enough, becomes perversely ordinary as those who engage in it grow desensitized to its inhumanity.”<sup>1</sup>

## I. INTRODUCTION

In Fall 2012, the Great Falls School District in Central Montana was shocked by a high school hazing scandal.<sup>2</sup> The perpetrator, senior Alex Mauricio Botina-Roehm (Roehm), was accused of “power gobbling” –a term used to describe an action in which victims are picked up in the shower by their crotch– by freshman members of the Great Falls High School football team.<sup>3</sup> As a result of eventual reporting Roehm was charged with felony sexual intercourse without consent, two counts of sexual assault and faced expulsion from Great Falls.<sup>4</sup> Although Roehm was only sentenced to six months of probation, such incidents serve as an example of the frequency of athletic hazing incidents and the need for deterrence.<sup>5</sup>

Furthermore, the Great Falls school administration was criticized for its two month delay in investigating the incident.<sup>6</sup> Although the administration asserts that it dealt with the matter as soon as it was aware of the incident,

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1. See HANK NUWER, *WRONGS OF PASSAGE* 31-32 (1999) (arguing that group negligence, failure to recognize severity of hazing situations, and misplaced trust are often cause of hazing deaths).

2. See Camerson Smith, *Hazing Scandal Leads To Sexual Assault Charges in Montana*, YAHOO!SPORTS, Dec. 14, 2011, [http://rivals.yahoo.com/highschool/blog/prep\\_rally/post/hazing-scandal-leads-to-sexual-assault-charges-in-montana?urn=highschool,wp9938](http://rivals.yahoo.com/highschool/blog/prep_rally/post/hazing-scandal-leads-to-sexual-assault-charges-in-montana?urn=highschool,wp9938).

3. See *id.* (detailing that, in addition to accusations of “power grabbing”, Roehm also allegedly stuck his thumb up freshman teammate’s rectum).

4. See *id.* (summarizing charges against Roehm and stating that he had plead “not guilty” to all).

5. See *id.* (recounting Roehm’s reduced sentences and defense attorney’s appreciativeness of court’s careful consideration of stated incident).

6. See *id.* (indicating that it was not until grandmother of one victim reported alleged incident to police that school began investigation).

Great Falls Superintendent Cheryl Crawley admitted that hazing prohibitions and reporting requirements are unclear and incomprehensive.<sup>7</sup>

The Great Falls incident exemplifies a gap in the law, which can occur when a law is either ambiguous or conflicts with other laws, such as the child abuse reporting laws in Roehm's case.<sup>8</sup> However, such inconsistencies can also represent a situation in which the law does not explicitly permit or prohibit a given activity.<sup>9</sup> To date, Montana is one of only six states that do not have any legislation against hazing.<sup>10</sup> In order to remove the uncertainty that occurred after the Great Falls incident and deter future criminals like Roehm, Montana and other states that lack anti-hazing adequate legislation must adopt comprehensive regulations immediately.

## II. THE EVOLUTION OF HAZING

### A. The Historical Expansion of Hazing

To haze is to "subject freshmen, newcomers, etc. to abusive or humiliating tricks and ridicule."<sup>11</sup> Today, hazing is an extremely prevalent and troublesome issue, as one study indicated that almost eighty percent of college athletes identified as having engaged in hazing.<sup>12</sup>

The practice of hazing is an ancient tradition and can be traced back to the year 387 B.C.E. when Plato commented on the inhumane nature of the way young boys interacted with each other.<sup>13</sup> Hazing practices even plagued universities throughout the fourteenth and fifteenth centuries.<sup>14</sup> Anti-hazing measures were enacted as a result of widespread penalism, a system of hazing prevalent in Europe during this time period.<sup>15</sup> In fact, German monk Martin

7. See *id.* (concluding that such possible delay was result of unclear reporting procedures that failed to articulate mandatory actions). See also Kay Ross, *GFPS Superintendent Addresses "Hazing" Incident*, Dec. 9, 2011, 3KRTV.COM, <http://www.krtv.com/news/gfps-superintendent-addresses-hazing-incident/#!prettyPhoto/0/> (indicating that because Montana law is unclear, staff were unsure whether matter had to be reported to state police). See Smith (stating ambiguity of child abuse reporting laws).

8. See NICHOLAS BUNNIN, BLACKWELL REFERENCE ONLINE (2004), available at [http://www.blackwellreference.com/public/tocnode?id=g9781405106795\\_chunk\\_g978140510679513\\_ss1-19](http://www.blackwellreference.com/public/tocnode?id=g9781405106795_chunk_g978140510679513_ss1-19) (articulating such gaps fail to identify legal issues and prevent conflict resolutions).

9. See *id.* (stating alternative definition of gap in law).

10. See *State Anti-Hazing Laws*, STOPHAZING.ORG, <http://www.stophazing.org/laws.html> (last visited Sept. 3 2012) (reporting AK, HI, MT, NM, SD and WY lack hazing legislation).

11. See *Hazing*, DICTIONARY.COM UNABRIDGED, <http://dictionary.reference.com/browse/hazing?s=t> (last visited Sept. 9, 2012).

12. See Elizabeth Allan and Mary Madden, *Hazing in View: College Students at Risk*, UNIVERSITY OF MAINE: COLLEGE OF EDUCATION AND HUMAN DEVELOPMENT, March 11, 2008, [http://www.hazingstudy.org/publications/hazing\\_in\\_view\\_web.pdf](http://www.hazingstudy.org/publications/hazing_in_view_web.pdf) (reporting that of over 325,000 athletes surveyed, 255,637 were hazed).

13. See HANK NUWER, *THE HAZING READER 1* (2004).

14. See *id.* (reporting that hazing practices were extremely frequent during era).

15. See HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING 117* (1990) (describing how, under this system, "older students regarded newcomers as savages who needed to undergo hardships to prove themselves worthy of admission into the company of educated

Luther hazed new students at the University of Wittenberg in 1539.<sup>16</sup> Fortunately, penalism has died out.

Hazing in America was undocumented until 1682, when a Harvard student was expelled for hazing.<sup>17</sup> Few incidents were recorded again until 1873, when the New York Times published an article exposing hazing practices at West Point.<sup>18</sup> The article acknowledges that similar practices occurred throughout the country in both military and non-military institutions.<sup>19</sup>

### *B. Hazing in Greek Life*

Although American Greek life was first established in the late eighteenth century, hazing did not occur until more than a century later.<sup>20</sup> The first documented hazing incident occurred in 1873 at Cornell University when a young man pledging the fraternity Kappa Alpha fell off of a cliff to his death.<sup>21</sup> Hazing practices were frequent during this era and often involved physical abuse, as opposed to pressures involving alcohol.<sup>22</sup> Although hazing decreased significantly during World War I and II, since the end of World War II and the resulting return of a significant portion of the male population, hazing has steadily risen.<sup>23</sup>

### *C. Hazing in Athletics*

The history of hazing in athletics in the United States is far less documented and comprehensive.<sup>24</sup> Although many consider athletic hazing to be a rite of passage in good spirit, other individuals and organizations are dedicated to eradicating such practices.<sup>25</sup> Staunch opponents argue that it

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men.”).

16. *See id.* at 118 (indicating that Luther is even quoted as telling his pupils, “You’ll be subjected to hazing all your life . . . so this test is only a symbol of human life and in its misfortunes . . .”).

17. *See* MASSACHUSETTS HISTORICAL SOCIETY, SIBLEY’S HARVARD GRADUATES: 1678-1689 302 (1885) (discussing how Joseph Webb was accused of hazing after freshmen complained that Webb demanded personal favors of them and subjected them to physical abuse).

18. *See Hazing at the Academy—an Evil that Should be Routed Out—A plea for the Strangers*, NY TIMES, June 6, 1873.

19. *See id.* (stating “there is probably not [a] large school in the country, either civil or military, where hazing does not exist to some extent.”).

20. *See id.* (stating when fraternities were established).

21. *See id.* at 119 (reporting that pledge was blindfolded and taken for a walk). *See id.* After the blindfold was removed, the pledge was ordered to find his way back to campus, at which time he and his hazers fell off a cliff and the pledge suffered severe injuries that lead to his death. *See id.*

22. *See, e.g.*, HANK NUWER, BROKEN PLEDGES: THE DEADLY RITE OF HAZING 119.

23. *See id.* at 121. (stating hazing incidents may have increase after war a as a result of the physically strenuous conditions of war. *See id.*

24. *See* Matt Burt, *Your Call: What’s Your Take on Hazing Rituals in Sports?*, TSN, July 26, 2010, <http://www.tsn.ca/nfl/story/?id=328549> (stating lack of information available on athletic hazing). Hazing has “been around forever”; therefore, the focus of the discussion should be what can be done about it. *See id.* (stating that, although not necessarily reported, hazing is prevalent).

25. *See id.* (contrasting athletes who view hazing as comical with organizations and

detracts from the enjoyment of the game, as well as seriously affects personal growth in younger athletes.<sup>26</sup> Furthermore, athletic hazing, like fraternal hazing, has the potential to cause physical injury.<sup>27</sup>

Not only is hazing common in professional sports, but it is also a serious issue in collegiate athletics. In 1999, Alfred University (“Alfred”) conducted one of the largest and most comprehensive studies on collegiate athletic hazing to date.<sup>28</sup> The study concluded that more than a quarter million individuals experienced some form of hazing while joining a college athletic team.<sup>29</sup> Interestingly, under the definition of hazing that the study employed, only forty-five percent of respondents reported that they had heard of or knew about hazing on his or her campus.<sup>30</sup> However, when asked about the athletes’ own experiences, eighty percent reported being subject to behavior typical of hazing.<sup>31</sup> As a result, the survey concluded that athletes tend to be reluctant in articulating personal experiences as hazing.<sup>32</sup>

The study also determined that one in five collegiate athletes have been subject to unacceptable and potentially illegal hazing.<sup>33</sup> As far as alcohol involvement, the study concluded that half of the athletes were required to participate in drinking related activities or hazing involving alcohol.<sup>34</sup> Furthermore, the Alfred study concluded that engaging in mild forms of hazing was a good indication of more serious hazing practices, as more than eighty percent of athletes subjected to questionable hazing activities were found to also engage in unacceptable activities.<sup>35</sup> In fact, a staggering two-thirds of athletes surveyed were subjected to humiliating hazing, while only one in five responded that they engaged in positive initiations.<sup>36</sup>

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websites that focus solely on eliminating hazing from athletics).

26. *See id.* (arguing that hazing tends to have disparate effect on youth, whose body types and athletic abilities range significantly leaving some to be more likely to be victims of hazing).

27. *See id.* (indicating that this is particularly pertinent to sport of football).

28. *See* Dr. Nadine Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams*, ALFRED UNIVERSITY, Aug. 30, 1999, [http://www.alfred.edu/sports\\_hazing/docs/hazing.pdf](http://www.alfred.edu/sports_hazing/docs/hazing.pdf). Alfred University, with the assistance of the NCAA, conducted a national survey involving a random sample of 3,000 NCAA coaches and 10,000 athletes from 224 NCAA institutions. *See id.* (defining scope).

29. *See id.* (reporting statistics on prevalence of athletic hazing).

30. *See id.* Defining hazing as, “any activity expected of someone joining a group that humiliates, degrades, abuses or endangers, regardless of the person’s willingness to participate.” *See id.*

31. *See id.* (adding that only twelve percent had reporting being hazed for athletics, which contrasts sharply with eighty percent acknowledging hazing practices in team initiations).

32. *See id.* (stating that although students acknowledge hazing behavior, they were reluctant to label such practices as “hazing,” possible due to fear of reprisal).

33. *See* Dr. Hoover (defining “questionable hazing”). The Alfred study defined “questionable hazing” acts as: “Being yelled, cursed or sworn at; piercing, head shaving, or branding; participating in calisthenics not related to a sport; . . .” *See id.*

34. *See id.* (adding that two in five athletes surveyed consumed alcohol on recruitment visits).

35. *See* Dr. Hoover, *supra* note 3335 (detailing “questionable hazing” behavior). *See also* Dr. Hoover, *infra* note 38 (defining “humiliating hazing” practices).

36. *See* Dr. Hoover (describing “humiliating hazing”). The Alfred study defines these

The Alfred University survey unearthed a previously poorly-documented and understood facet of the college athlete experience.<sup>37</sup> As a result, many no longer view hazing as confined to Greek life or the military.<sup>38</sup> Such findings should not, and are likely to not, be ignored.

### III. HAZING LEGISLATION: THE ESSENTIAL ELEMENTS

Currently, state anti-hazing statutes are woefully inadequate in addressing recent outbreaks of hazing incidents. One of the most significant deficiencies in anti-hazing legislation is the lack of provisions that apply to athletics, specifically. Many other statutes fail to provide language that adequately addresses the mental health effects of hazing, while other states have not included provisions that outlaw consent as a defense to hazing acts. Finally, many states have not granted discretion to universities or school districts to enforce hazing provisions, a step which can deter hazing both on college campuses and in secondary education. On the other hand, states that have incorporated all or most of the above provisions, such as Vermont, have faced few hazing issues.<sup>39</sup> Although it is important to note that even in states with comprehensive statutes hazing may still occur, each element of the statute serves an important deterrence function. Therefore, in order to most effectively discourage and adequately address hazing issues, states such as Montana should adopt the above-mentioned criterion into its hazing statute.

#### *A. Inclusion of “Athletic Teams” in Hazing Prohibitions*

Statutory provisions that specifically proscribe athletic teams from hazing are a fundamental element in thorough hazing legislation, but one that is frequently overlooked. Not only do some states fail to articulate such language,

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types of hazing as: “Destroying or stealing property; engaging in or simulating sexual acts; being tied up, taped, or confined in small space; being paddled, whipped, beaten, kicked; . . .” *See id.*

37. *See* Tom Farrey, *Athletes Abusing Athletes*, ESPN, June 3, 2002, <http://espn.go.com/otl/hazing/monday.html> (stating hazing in collegiate athletics was exposed from survey). Although progress has been made, some athletic directors have disregarded the credibility of the survey, insisting that hazing only occurs in Greek organizations. *See id.*

38. *See id.* (stating that hazing is now recognized part of athletics). The article announces that, “After decades, perhaps even a century, of hazing of athletes by athletes is getting its first thorough public examination. Once seemingly the province of fraternities and the military, hazing has emerged from the shadows. A series of initiation-related incidences gone wrong has forced the world of sports to look inward to quantify and address any problems.” *See id.*

39. *See* VT. STAT. ANN. tit. 16 § 140a. Vermont’s anti-hazing statute is one of the most comprehensive. *See id.* First, the act outlaws hazing conducted by a “. . . fraternity, sorority, athletic team, association, corporation, order, society, corps, cooperative, club, or other similar group, whose members primarily are students at an educational institution, and which is affiliated with the educational institution.” *See id.* (finding that Vermont’s statute applies specifically to athletics). It also states that consent is not a defense to hazing. *See also id.* at § 140b (West 2012) (defining hazing to include mental effects and excluding consent as defense). Finally, Vermont requires that “Each school board shall develop, adopt, ensure the enforcement of and make available . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the commissioner.” *See also id.* at § 570 (West 2012) (concluding Vermont grants discretion of hazing enforcement to schools).

but such omissions are likely intentional, as demonstrated by inclusions of similar organizations.

Like many states, Florida's anti-hazing statute does not specifically apply to athletic teams.<sup>40</sup> In one of the more widely publicized hazing incidents in recent history, Florida A&M drum major Robert Champion was killed.<sup>41</sup> After performing at the Florida Classic, Champion was required to "cross" the bus, during which time he received beatings by fellow band-members that ultimately resulted in his death.<sup>42</sup> If the Florida anti-hazing statute included a provision specifically aimed at athletic teams, not only could this have helped save Champion's life by better informing athletic team members of the legal ramifications of hazing, but it could have resulted in an easier suit against Champion's harassers.<sup>43</sup> Moreover, because Florida's law is relatively comprehensive otherwise, it is precisely the inclusion and enforcement of an anti-hazing provision directly applied to athletics that may have prevented this tragedy.

Most alarmingly, some states, such as Connecticut's, specifically exempt athletic practice or competitions from hazing laws.<sup>44</sup> Such exceptions are an implicit acquiescence of hazing confined to stated circumstances. In fact, Connecticut has experienced many hazing issues, such as one incident at Trumbull High School where the wrestling team subjected newcomers to extreme physical abuse.<sup>45</sup> Just as with the Florida anti-hazing statute, the Connecticut anti-hazing statute could be more effective if broadened to cover athletic practice. In essence, by specifically exempting hazing in this context, the Connecticut law has provided hazing with a loophole in the athletic environment.

Contrarily, states such as North Carolina specifically outlaw athletic teams

40. See FLA. STAT. ANN. § 1006.63 (West 2012). Under Florida law, hazing includes any "... initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution." See *id.* (noting statute does not apply to athletic organizations).

41. See Lizette Alvarez, *Hazing Ritual of a Band is Described in Documents*, NY TIMES, May 23 2012, available at <http://www.nytimes.com/2012/05/24/us/documents-describe-fatal-hazing-ritual-at-florida-am.html>.

42. See *id.* At least fifteen band-members participated in the beatings. See *id.*

43. See Robbie Brown, *Charges Are Planned in Florida A&M Hazing Death*, NY TIMES, May 1 2012, available at [http://www.nytimes.com/2012/05/02/us/florida-am-hazing-death-charges-planned.html?\\_r=0](http://www.nytimes.com/2012/05/02/us/florida-am-hazing-death-charges-planned.html?_r=0) (reporting criminal charges filed against perpetrators after investigation).

44. See CONN. GEN. STAT. ANN. § 53-23a (West 2012). Connecticut's anti-hazing act does not apply to "an action sponsored by an institution of higher education which requires any athletic practice, conditioning, or competition or curricular activity." Furthermore, the law provides an exemption for athletic practices including "conditioning", which creates a gap in which hazing could legally occur. See *id.* (arguing that the exemption creates room for hazing).

45. See Robert McFadden, *Hazing Scandal At High School Horrifies Town in Connecticut*, NY TIMES, Feb. 25 2000, available at <http://www.nytimes.com/2000/02/25/nyregion/hazing-scandal-at-high-school-horrifies-town-in-connecticut.html?pagewanted=all&src=pm> (reporting hazing act). In one particular incident described as "nightmarish," a fifteen year old was shoved into a wall and tied-up in a locker-room while teammates forced a plastic knife into his rectum. See *id.*

from hazing.<sup>46</sup> As a result, the few hazing incidents that have occurred in North Carolina are uncertain, such as one event at Johnson C. Smith University.<sup>47</sup> Here, a number of students were suspended and sanctioned for assaulting other students in a hazing ritual.<sup>48</sup> However, the students were found guilty on very little evidence after the burden was placed on the accused to prove his or her innocence.<sup>49</sup> Some were even convicted by the judicial board for *being* hazed or witnessing hazing and failing to report the conduct to officials.<sup>50</sup>

Therefore, despite the fact that hazing still occurs in North Carolina, the harsh punishments and ambiguous accusations indicate that the state's specific hazing ban against athletes may have a deterrent effect. On the other hand, such provisions may only decrease the likelihood of hazing rather than prevent it, especially in light of the fact the North Carolina's statute lacks the remaining three criterion of a successful anti-hazing statute.<sup>51</sup>

### *B. Protections Against the Psychological Effects of Hazing*

Statutory language that includes protections against mental health effects is essential to ensuring the comprehensibility of hazing legislation, but is a provision that many states lack. Indiana law, for example, only proscribes actions that "create a substantial risk of bodily injury to another person."<sup>52</sup> Therefore, Indiana's high level of hazing incidents could be attributed to its narrow definition of hazing. In one incident involving the Reitz Memorial High School varsity cheerleading team, upperclassmen forced new teammates

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46. See N.C. GEN. STAT. ANN. § 14-35 (West 2012). Hazing is defined as: "to subject another student to physical injury as part of an initiation, or as a prerequisite to membership, into any organized school group, including any society, athletic team, fraternity or sorority . . ." See *id.*

47. See Kristy Etheridge, *Sixteen Students in Trouble From Alleged Hazing Incident in Charlotte*, WBTV.COM, Feb. 8 2012, <http://www.wbtv.com/story/16774962/16-students-in-trouble-from-alleged-hazing-incident-in-charlotte> (describing alleged hazing incident in Charlotte, NC).

48. See *id.* (describing accusations). Cureton, one of the accused, stated that he had been considering pledging Alpha Phi Alpha fraternity and had not begun pledging when he received a letter from the administration. See *id.* (suggesting accusations were false or premature).

49. See *id.* (finding punishments unjust). In fact, "According to Cureton, the evidence against him was flimsy, mainly based around two anonymous emails and a photo of a bruise that did not show any faces." See *id.* A judicial board found all fifteen students guilty. See *id.* Two were suspended and the remaining students lost scholarships, campus housing, and were fined. See *id.*

50. See *id.* Cureton indicated he was accused of *being* hazed and never witnessed hazing. See *id.* (suggesting punishment is undeserved). The University stood by all punishments. See *id.* It is likely that the University's reaction was harsh in light of Florida A & M hazing death. See *id.*

51. See N.C. GEN. STAT. ANN. § 14-35 (West 2012). The statute does not protect against mental effects, grant discretion to universities or state that consent to hazing is not a defense. See *id.*

52. See IND. CODE ANN. § 35-42-2-2 (West 2012). Hazing is defined as inflicting "serious bodily injury on another person . . ." See *id.* (noting statute does not outlaw psychological harm).

to strip and perform lap dances while the veterans critiqued the victims.<sup>53</sup> Many of the girls continued to be upset weeks later, indicating not only psychological stress but also the ineffectiveness of Indiana's anti-hazing statute in outlawing such abuse.<sup>54</sup>

Similarly, California law also does not protect against the psychological effects of hazing, which contributes to California's high rates of hazing.<sup>55</sup> In fact, because it is widely known that one can receive strict repercussions for causing physical harm to others, such knowledge increases "soft" hazing, or behavior that affects others psychologically.<sup>56</sup>

Conversely, states such as Rhode Island have anti-hazing statutes that include conduct that causes extreme mental effects.<sup>57</sup> This may contribute to the few reported hazing incidents in Rhode Island, especially those involving psychological effects.<sup>58</sup> At the University of Rhode Island, for example, hazing in Greek life has decreased dramatically from the 1980s and 1990s due to a "symphonic cultural change, with an underlying melody of student leadership and responsibility."<sup>59</sup> Such change is especially important to deter hazing in light of the fact that most hazing injuries are mental, not physical.<sup>60</sup> Thus,

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53. See Barry Petchesky, *Indiana Cheerleader Hazing*, DEADSPIN, Aug. 30 2012 <http://deadspin.com/indiana-cheerleader-hazing/> (describing context of hazing incident). The upperclassmen insulted the rookies, calling them fat and ugly. See *id.* One of the girls even peed herself because she was so frightened. See *id.* (concluding those hazed were extremely upset).

54. See *id.* Many girls were harassed in the following weeks, especially those who reported the incident to school officials. See *id.* (suggesting explanation for continued psychological effects).

55. See CAL. PENAL CODE § 245.6 (West 2012). California outlaws acts likely "to cause serious bodily injury to any former, current, or prospective student of any school . . ." See *id.* (noting hazing law does not proscribe psychological effects). See also Scott Semmler, *Nonviolent Hazing Still Happens at SJSU Greek Organizations, Source Says*, THE SPARTAN DAILY, Dec. 6 2011, <http://spartandaily.com/44828/hazing-at-sjsu> (describing increase in hazing). However, one fraternity member at SJSU stated that recent hazing incidents, such as a 2005 event at Chico State University in which a pledge died from being forced to drink water, have made Greek life reluctant to haze. See *id.* (indicating possible explanation for decrease in hazing).

56. See *id.* As one fraternity member states, hazing acts are "Not violent anymore. They're more along the lines of messing with them mentally." See *id.* (arguing psychological hazing is more prevalent). Pledges are no longer forced to drink, although it looks better if pledges go "above and beyond" what is required. See *id.* (suggesting some coercion may still occur).

57. See R.I. GEN. LAWS § 11-21-1 (West 2012). In Rhode Island, hazing is defined as conduct that "endangers the physical or mental health of any student . . ." See *id.* Such conduct cannot subject an individual "to extreme mental stress" See *id.* (noting statute proscribes mental effects).

58. See Wendy Roworth, *Greek Life-Back on Track*, UNIVERSITY OF RHODE ISLAND, <http://www.uri.edu/news/releases/index.php?id=3491> (last visited Oct. 7 2012) (stating low prevalence of hazing). Vice President of the University of Rhode Island Thomas Dougan stated that "Hazing is an issue that we continue to address vigorously through education and zero tolerance enforcement." See *id.* (indicating possible explanation for decrease in hazing).

59. *Id.* Possible explanations include: a \$4.3 million grant from the National Institute on Alcohol Abuse and Alcoholism; the fact that all fraternities became substance-free in 2005; Greek houses now have live-in advisors; freshmen orientation now has a component on hazing . . . See *id.*

60. See Hayley Beitman, *Next Wave: Anti Hazing Laws*, MICHIGAN STATE UNIVERSITY, Apr. 6 2012, <http://news.jrn.msu.edu/bullying/2012/04/06/united-states-hazing-laws/>.



Rhode Island's minimal hazing incidents could be attributed to the inclusion of mental effects of hazing in its statute.

C. "Consent is Not a Defense" Provision

The exclusion of consent as a defense for hazing offenders is fundamental in deterring hazing incidents, but unfortunately many states lack such language in their statutes. For example, Alabama's anti-hazing statute contains no such provision.<sup>61</sup> Such a deficiency likely played a role in the controversial outcome in *Ex Parte Barran*. In this case, Jason Jones, while pledging a fraternity at Auburn University, was subjected to repeated physical abuse and humiliating behavior.<sup>62</sup> The court, however, held that Jones knew and voluntarily assumed the risks of hazing.<sup>63</sup> If Oklahoma's statute did not allow consent as a defense to hazing, Jones's hazers would have been held liable for their actions.<sup>64</sup> Such an outcome is noticeably inconsistent with case law from states outlawing consent as a defense, demonstrating that such provisions are necessary in order to protect plaintiffs such as Jones.<sup>65</sup>

On the other hand, states such as Ohio have enacted hazing laws that prohibit a consent defense.<sup>66</sup> Unsurprisingly, there are few hazing claims in Ohio. In fact, in 2011 the Ohio Court of Appeals recently dismissed one case because the conduct in question was held to not constitute hazing.<sup>67</sup> Even when hazing incidents do occur, such as one at Youngstown State University, the punishments enacted are severe enough to deter future conduct.<sup>68</sup>

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61. See ALA. CODE § 16-1-23 (2012). Under Alabama law, hazing is defined as "Any willful action taken or situation created . . . which recklessly or intentionally endangers the mental or physical health of any student." See *id.* (noting statute lacks "consent is not defense" provision).

62. See *Ex Parte Barran v. Kappa Alpha Order, Inc.*, 730 So.2d 203, 204-05 (Ala. 1998) (holding plaintiff consented to hazing). Jones was forced to jump into a ditch filled with urine, feces, and vomit; receive paddlings; eat foods such as peppers, hot sauce, and butter; perform chores for fraternity members; appear regularly at 2 a.m. meetings . . . See *id.*

63. See *id.* at 203 (holding consent is not defense). The court stated that "(1) pledge knew and appreciated risks inherent in hazing, and (2) pledge voluntarily exposed himself to hazing, supporting fraternity's assumption of the risk defense." See *id.* (describing holding further).

64. See Kendrick, *supra* note **Error! Bookmark not defined.** (arguing *Ex Parte Barran* was incorrectly decided).

65. See *id.* (indicating court's decision was unreasonable). Most jurisdictions have held that fraternities "may be liable for hazing related injuries or deaths because the fraternity created the danger by requiring certain actions by the pledge, which resulted in injury to the pledge." See *id.* "Few cases have failed to find that a duty of care existed for the [fraternity]. . ." See *id.* at 419-20 (arguing decision is inconsistent with precedent). See also Catherine Kendrick, *Ex Parte Barran: In Search of Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407, 415 (2000) (arguing outcome would be different if judges applied common sense).

66. See OHIO REV. CODE ANN. § 2307.44 (West 2012). In Ohio, "The negligence or consent of the plaintiff or any assumption of the risk by the plaintiff is not a defense . . ." See *id.*

67. See generally *Golden v. Milford Exempted Vill. Sch. Dist. Bd. of Edu.*, 2011 WL 4916588, (Ohio Ct. App. 2011) (holding "teammate's conduct toward student did not constitute hazing, within meaning of civil hazing statute").

68. See *Nine Men Indicted in Ohio Fraternity Hazing Case*, ASSOCIATED PRESS, Mar. 17 2012, <http://www.foxnews.com/us/2012/03/17/men-indicted-in-ohio-fraternity-hazing-case/>

*D. Granting Discretion to Universities*

Mandating that universities establish individual anti-hazing policies increases deterrence and decreases hazing incidents, but unfortunately most states have not adopted such policies. Massachusetts, for example, has no such provision and as a result, was the location of one of the most widely publicized hazing scandals.<sup>69</sup>

Scott Krueger was described as a “reserved, respected achiever,” graduating seventh in his high school class and playing three varsity sports.<sup>70</sup> Krueger began his freshman year at the Massachusetts Institute of Technology and pledged Phi Gamma Delta fraternity.<sup>71</sup> At an initiation party, however, Krueger and other pledges were forced to drink an excessive amount of alcohol, forcing Krueger into a coma from which he never awoke.<sup>72</sup> Sadly, if Massachusetts had established a more comprehensive hazing statute, it is possible that Krueger may still be alive.

Conversely, states such as Oklahoma grant discretion to universities to establish their own hazing policies that are at least as strict as state legislation.<sup>73</sup> As a result, Oklahoma has suffered from few hazing incidents and has severely punished hazing perpetrators.<sup>74</sup> In fact, after one Oklahoma State University hazing scandal, the administration was criticized for reacting too harshly.<sup>75</sup> Nevertheless, such strict policies are essential to deter hazing.

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(reporting hazing incident). In 2012, nine men were indicted for assaulting two fraternity pledges, resulting in their suspension from the fraternity for fifteen years. One administrator pledged to expel anyone who violated the hazing policy. *See id.* (suggesting severe punishment).

69. *See* MASS. GEN. LAWS ANN. ch. 269 § 17 (West 2012). In Massachusetts, hazing is defined as any “. . . conduct or method of initiation into any student organization, whether on public or private property, which willfully or recklessly endangers the physical or mental health of any student or other person.” *See id.* (suggesting lack of discretion to educational institutions).

70. *See* Carey Goldber, *A Drinking Death Rattles Elite M.I.T.: Latest Fraternity Party Case Underscores Nationwide Problem*, NY TIMES, Oct. 1 1997, available at <http://www.nytimes.com/1997/10/01/us/drinking-death-rattles-elite-mit-latest-fraternity-party-case-underscores.html?pagewanted=all&src=pm> (reporting Krueger’s character).

71. *See* Sarah Wright, *DA Details “Reckless Conduct” by Fraternity in 1997 Krueger Death*, M.I.T. NEWS, Sept. 23 1998, <http://web.mit.edu/newsoffice/1998/da-0923.html>. The pledges were told to gather in a room while collectively drinking a certain amount of alcohol. *See id.*

72. *See id.* (reporting Krueger’s cause of death). Krueger remained in a coma for forty hours until he was pronounced dead on Monday, September 29, 1997. *See id.* The official medical cause of death was acute alcohol intoxication and aspiration, or choking on vomit. *See id.*

73. *See* OKLA. STAT. ANN. TIT. 21, § 1190 (West 2012). Oklahoma law mandates that, “A copy of the policy or the rules and regulations of the public or private school or institution of higher education which prohibits hazing shall . . . be deemed to be part of the bylaws of all organizations . . .” *See id.* (indicating schools have authority to establish hazing policies).

74. *See, e.g.,* Weaver, *infra* note 75 (indicating hazing incident with severe reactions).

75. *See* Patti Weaver, *Lawyer: OSU Ban Will Kill Chapter*, TULSA WORLD, Mar. 17 2007, [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=070317\\_1\\_A13\\_pSTIL74336&r=8640](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=070317_1_A13_pSTIL74336&r=8640) (reporting strong reaction of university to hazing, prompting criticism).

## IV. CONCLUSION

Hazing has become a nationwide epidemic. To combat such abuses, states must adopt legislation that applies to athletics specifically, protects against psychological harm, outlaws consent as a defense for perpetrators and grants discretion to universities. It is important to remember, however, that with each of these elements correlation does not necessarily imply causation. Some state statutes that contain certain elements may nevertheless still experience hazing, while other legislative acts may lack one or more elements, but have relatively little hazing.<sup>76</sup> However, it is imperative that states such as Montana recognize that each of these elements serve an essential function in hazing legislation and that, taken together, they can greatly decrease the likelihood that hazing incidents will occur.

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76. *See, e.g.*, 24 PA. CONS. STAT. ANN. § 5354 (West 2012) (describing Pennsylvania's comprehensive anti-hazing statute). *But see* Lauren Paul Fired in Hazing Inquiry, ESPN.COM, April 12 2012, [http://espn.go.com/college-sports/story/\\_id/7827828/franklin-marshall-coach-lauren-paul-fired-hazing-inquiry](http://espn.go.com/college-sports/story/_id/7827828/franklin-marshall-coach-lauren-paul-fired-hazing-inquiry) (exemplifying hazing incident at Pennsylvania college).