

**HAZING AS CRIME:  
AN EMPIRICAL ANALYSIS OF CRIMINOLOGICAL ANTECEDENTS**

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<b>INTRODUCTION</b> .....	<b>1</b>
<b>I. BGLOs AND THE CRIME OF HAZING</b> .....	<b>6</b>
<b>II. TOWARD A CRIMINOLOGICAL MODEL OF HAZING</b> .....	<b>20</b>
<b>A. Personality</b> .....	<b>20</b>
<b>B. Impulsivity</b> .....	<b>28</b>
<b>C. Sanction Awareness</b> .....	<b>34</b>
<b>III. SURVEY DATA</b> .....	<b>45</b>
<b>A. Methods</b> .....	<b>46</b>
1. Sample.....	46
2. Measures.....	46
3. Procedure.....	48
<b>B. Results</b> .....	<b>48</b>
<b>CONCLUSION</b> .....	<b>49</b>
<b>APPENDIX</b> .....	<b>52</b>

## INTRODUCTION

In the past couple of years, major periodicals—e.g., *Rolling Stone* and *The Atlantic*—have done in-depth exposés on the dark side of college fraternities and sororities.<sup>1</sup> However, little research has been conducted on this topic in recent years, at least by legal scholars. This is surprising given the persistent hazing incidents on college campuses and the recent hazing deaths of individuals, like Robert Champion at Florida A&M University and George Desdunes at Cornell University—both incidents having resulted in criminal prosecutions of alleged hazers.<sup>2</sup> This article seeks to fill that

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<sup>1</sup> Caitlin Flanagan, *The Dark Power of Fraternities*, THE ATLANTIC, Feb. 19, 2014, at 72; Janet Reitman, *Confessions of an Ivy League Frat Boy: Inside Dartmouth's Hazing Abuses*, ROLLING STONE, Mar. 28, 2012, at 44, available at <http://www.rollingstone.com/culture/news/confessions-of-an-ivy-league-frat-boy-inside-dartmouths-hazing-abuses-20120328>.

<sup>2</sup> Christina Ng, *FAMU Hazing Brings Charges Against 13 in Drum Major Robert Champion's Death*, ABC NEWS (May 2, 2012), <http://abcnews.go.com/US/thirteen-charged->

void by exploring hazing as a criminal legal issue and the extent to which social science helps elucidate why hazing persists and the factors that may militate against it.

The regulation of hazing as a crime has been done by both statute and case law. Anti-hazing legislation in the United States has only gained momentum over the past few decades,<sup>3</sup> despite its documented existence since the 1600s.<sup>4</sup> The first wave of anti-hazing legislation has been linked to the passage of the Family Educational Rights and Privacy Act (FERPA), which shifted responsibility for the well-being of students away from the institutions and universities they attended and onto the students themselves.<sup>5</sup> The most significant wave of legislation came as part of the second wave, which brought the number of states with anti-hazing legislation into the dozens.<sup>6</sup> This second wave followed an increase in student deaths attributable to fraternity-related incidents.<sup>7</sup> Parents whose children had suffered injury or death caused by hazing mobilized anti-hazing campaigns and brought numerous lawsuits against individuals, fraternities, and universities.<sup>8</sup> These campaigns contributed to at least five additional states passing anti-hazing laws.<sup>9</sup> The final wave has seen three additional states pass anti-hazing legislation since the year 2000, mostly from continued parental involvement in lawsuits and anti-hazing campaigns.<sup>10</sup>

All forty-four states that have passed anti-hazing legislation have criminalized hazing, making the act punishable at least as a misdemeanor when a specific mens rea is associated with the act.<sup>11</sup> For example, New Jersey's Anti-Hazing Act, which was passed in 1980 following the death of a pledge at Monmouth College, criminalized hazing where the perpetrator "knowingly or recklessly organizes, promotes, facilitates or engages in any

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famu-hazing-drum-major-robert-champions/story?id=16260053; Michael Winerip, *When a Hazing Goes Very Wrong*, N.Y. TIMES, Apr. 12, 2012, available at [http://www.nytimes.com/2012/04/15/education/edlife/a-hazing-at-cornell.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/04/15/education/edlife/a-hazing-at-cornell.html?pagewanted=all&_r=0).

<sup>3</sup> SHASHI MARLON GAYADEEN, RITUALIZING SOCIAL PROBLEMS: CLAIMSMAKERS IN THE INSTITUTIONALIZATION OF ANTI-HAZING LEGISLATION 6 (2012).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 8.

<sup>9</sup> GAYADEEN, *supra* note 3, at 8.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> Richard J. Reddick et al., *The Harms and Hazards of Hazing: Medical, Sociocultural, and Legal Perspectives*, in ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE 279, 294 (Gregory S. Parks & Stefan M. Bradley eds., 2011) [hereinafter ALPHA PHI ALPHA], as cited in Gregory S. Parks et al., *Belief, Truth, and Positive Organizational Deviance*, 56 HOW. L.J. 399, 409 (2013).

conduct”<sup>12</sup> that causes another person to be placed in danger of bodily injury.<sup>13</sup> Evidencing the increasing criminalization of hazing, some states have made hazing a felony depending on the seriousness of the harm.<sup>14</sup> For example, Utah and Indiana consider hazing to be a felony where there is serious bodily injury or the use of a deadly weapon.<sup>15</sup> Felony charges carry significant punishments. For example, a charge of felony hazing in Utah could result in imprisonment for up to fifteen years.<sup>16</sup> Notably, while these statutes classify hazing as criminal acts, many do not foreclose the possibility of prosecuting the offenders under other applicable criminal statutes.<sup>17</sup>

While some form of criminalization of hazing is widespread amongst the states, not all statutes effectively address the wide variety of circumstances under which hazing appears. Many hazing statutes include education-based language, foreclosing on hazing prosecution in the athletic, work-related, or military contexts.<sup>18</sup> Statutes also vary as to whether they cover humiliation and other mental or emotional injuries,<sup>19</sup> as well as whether consent is a viable defense,<sup>20</sup> as it is in some assault statutes.<sup>21</sup>

The increased criminalization of hazing is also demonstrated by states’ efforts to ensure that incidents of hazing are reported and prosecuted. Because hazing is often a part of initiation into a group that the victim seeks to be accepted by, organizational loyalty sometimes deters victims or witnesses from reporting occurrences of hazing.<sup>22</sup> Some states have addressed concerns of organizational loyalty by criminalizing the failure to report hazing incidents.<sup>23</sup> Arkansas, for example, deems it hazing for a person to fail to “report promptly his knowledge or any reasonable information

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<sup>12</sup> N.J. STAT. ANN. § 2C:40-3(a) (West 2005).

<sup>13</sup> Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey’s Anti-Hazing Act*, 26 QUINNIPIAC L. REV. 305, 319 (2008).

<sup>14</sup> ALPHA PHI ALPHA, *supra* note 11, at 294, *as cited in* Parks et al., *supra* note 11, at 409.

<sup>15</sup> IND. CODE ANN. § 35-42-2-2.5 (West 2012) (effective July 1, 2014); UTAH CODE ANN. § 76-5-107.5 (West Supp. 2004).

<sup>16</sup> UTAH CODE ANN. § 76-3-203(2) (West 2004).

<sup>17</sup> See e.g., Acquaviva, *supra* note 13, at 319 (discussing New Jersey’s Anti-Hazing Act).

<sup>18</sup> GAYADEEN, *supra* note 3, at 10.

<sup>19</sup> Nicole Somers, Note, *College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J.C. & U.L. 653, 656–58 (2007).

<sup>20</sup> *Id.* at 658; see also Gregory S. Parks & Tiffany Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 10–24 (2013).

<sup>21</sup> Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 384–86 (2002).

<sup>22</sup> *Id.* at 381.

<sup>23</sup> *Id.* at 382.

. . . of the presence and practice of hazing in the state to an appropriate administrative official of the school, college, university, or other educational institution.”<sup>24</sup> Other states, such as North Carolina and Indiana, have attempted to reach a similar result by explicitly protecting those who would testify in hazing trials from being implicated by reason of their testimony.<sup>25</sup>

Anti-hazing statutes with criminal penalties serve two clear purposes: to deter future incidents of hazing, and to facilitate prosecution of persons who participate in acts of hazing.<sup>26</sup> To those effects, the statutes have seen some success, most notably in Florida where eleven Florida A&M University students were charged with felony hazing for the beating and the death of a fellow band member.<sup>27</sup> The statutes have also been interpreted to apply in non-traditional settings. For example, in New York, the family court confirmed that the state’s hazing statute applied to an initiation into a high school gang.<sup>28</sup> In affirming the family court’s interpretation, a New York state appellate court confirmed that the statute’s “any organization” language was intended to have a broad meaning.<sup>29</sup>

In addition, these statutes have seen applications that go beyond criminal prosecution. Multiple states have recognized that violations of criminal hazing statutes, which are designed to protect human life, are *prima facie* evidence of negligence.<sup>30</sup> In Ohio, a pledge that suffered quadriplegia during a fraternity initiation event used the criminal hazing statute to bring suit against Kent State University, Delta Upsilon Fraternity, and a number of individuals for common law negligence.<sup>31</sup> The fraternity’s insurance company was forced to settle with the plaintiff.<sup>32</sup>

Despite some notable successes, criminal hazing statutes have faced a number of challenges in litigation. Many statutes failed to explicitly include or preclude a consent defense, leading to arguments over whether the defense should be available to hazing defendants.<sup>33</sup> This led at least sixteen state legislatures to amend their anti-hazing statutes to include “con-

<sup>24</sup> *Id.* (quoting ARK. CODE ANN. § 6-5-202(b) (West 2009)).

<sup>25</sup> *Id.*

<sup>26</sup> See Acquaviva, *supra* note 13, at 331 (discussing the intended effects of strengthening anti-hazing statutes).

<sup>27</sup> *Last of 11 Charged with Felony Hazing in FAMU Case Turns Herself In*, CNN (May 7, 2012, 5:31 AM), <http://www.cnn.com/2012/05/06/justice/florida-famu-hazing/>.

<sup>28</sup> *In re Khalil H.*, 80 A.D.3d 83, 88 (N.Y. App. Div. 2010).

<sup>29</sup> *Id.* at 89.

<sup>30</sup> *Nisbet v. Bucher*, 949 S.W.2d 111, 117 (Mo. Ct. App. 1997); *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1198 (Ill. App. Ct. 1987).

<sup>31</sup> *Landmark Ins. Co. v. Cincinnati Ins. Co.*, No. 2000-P-0093, 2001 WL 1216986, at \*1 (Ohio Ct. App. Oct. 12, 2001), *cause dismissed*, 773 N.E.2d 1052 (Ohio 2002).

<sup>32</sup> *Id.* at \*2.

<sup>33</sup> *Pelletier*, *supra* note 21, at 384–86.

sent notwithstanding” provisions.<sup>34</sup> Many statutes have faced constitutional challenges. In *McKenzie v. State*, for example, the appellants argued that the Maryland anti-hazing statute unconstitutionally restricted free speech and expressive conduct on the basis of content.<sup>35</sup> The court of appeals analogized anti-hazing statutes to hate crimes statutes, holding that the state had a justifiable interest in the slight infringement of free speech or expressive conduct.<sup>36</sup> In Illinois, an anti-hazing statute that failed to specify a culpable mental state was upheld under the Illinois Criminal Code’s default provision, which allowed any mental state if no particular mental state was specified.<sup>37</sup> Numerous overbreadth and void for vagueness challenges have been brought where hazing statutes have failed to define mental or emotional harm.<sup>38</sup>

Whether due to a statutory deficiency regarding the context or harm of a hazing incident, a state’s lack of criminal hazing legislation, or perhaps an effective hazing statute that does not preclude other criminal charges, prosecutors have a number of alternatives under which hazing may be criminalized and prosecuted. States have variously used charges of involuntary manslaughter,<sup>39</sup> assault and battery,<sup>40</sup> criminal sexual assault,<sup>41</sup> and unlawful restraint.<sup>42</sup> While these can be effective means of prosecuting and punishing perpetrators, some hazing activities can fall through the cracks. For example, an Illinois case involving the death of a lacrosse team member resulted only in a guilty charge for providing alcohol to a minor and a sentence of community service.<sup>43</sup>

Despite the trending criminalization of hazing, incidents of hazing remain prevalent.<sup>44</sup> Scholars argue that all fifty states need broad anti-hazing legislation with uniform principles that include criminal consequences.<sup>45</sup> This will allow law enforcement much greater freedom to prevent further harm from hazing activities in a wide variety of contexts and

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<sup>34</sup> *Id.* at 386.

<sup>35</sup> *McKenzie v. State*, 748 A.2d 67, 77 (Md. Ct. Spec. App. 2000).

<sup>36</sup> *Id.* at 78–79.

<sup>37</sup> Pelletier, *supra* note 21, at 388–89.

<sup>38</sup> *Id.* at 389–93.

<sup>39</sup> *Id.* at 409–10.

<sup>40</sup> Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 698 (2001).

<sup>41</sup> Pamela Jones, *Five Plano High Students Charged over Possible Hazing Incidents*, CBS (Aug. 28, 2013, 2:12 PM), <http://chicago.cbslocal.com/2013/08/28/five-plano-high-students-charged-over-possible-hazing-incidents/>.

<sup>42</sup> *Id.*

<sup>43</sup> GAYADEEN, *supra* note 3, at 12.

<sup>44</sup> Pelletier, *supra* note 21, at 377–78.

<sup>45</sup> *Id.* at 413.

scenarios.<sup>46</sup> In this article, the authors investigate hazing as a crime, and explore the extent to which various criminological correlates explain the extent to which hazing persists within a particular group of collegiate-based fraternities and sororities—black Greek-letter organizations (BGLOs). In section I, the authors provide a history of BGLOs and recount a number of BGLO hazing incidents that resulted in criminal sanctions. In section II, the authors discuss three criminological theories—personality, impulsivity, and awareness of sanctions—that may explain BGLO hazing. In section III, the authors empirically test these theories within a national sample of BGLO members. In the conclusion, the authors reconcile the empirical findings with the growing body of empirical scholarship on BGLO hazing.

### I. BGLOS AND THE CRIME OF HAZING

Black Greek-letter organizations have existed for over 100 years.<sup>47</sup> The founding of the nine major BGLOs largely occurred as a result of shared feelings of discontent with the racial status quo of early 20th Century America. Founded by seven men on the campus of Cornell University in 1906, Alpha Phi Alpha Fraternity was the first black Greek-letter fraternity.<sup>48</sup> The fraternity formed from a Social Study Club that was organized in order for African American students to forge closer connections and networks with each other outside of the classroom.<sup>49</sup> Attending a predominantly white university and not having the opportunity to live on campus, the founders felt excluded from campus life and wanted to form an academic and social group focused on the advancement of all African Americans.<sup>50</sup>

In 1908, Alpha Kappa Alpha Sorority, the first black Greek-letter sorority, was founded on Howard University's campus by nine black college women, led by Ethel Hedgeman, who is considered the “moving spirit” of the sorority.<sup>51</sup> The establishment of Alpha Kappa Alpha coincides

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<sup>46</sup> *Id.*

<sup>47</sup> Among the first BGLOs were the fraternities Alpha Kappa Nu (University of Indiana-Bloomington, 1903), Sigma Pi Phi (Philadelphia, 1904), and Gamma Phi (Wilberforce University, 1905). For a history of those organizations, see Michael H. Washington & Cheryl L. Nuñez, *Education, Racial Uplift, and the Rise of the Greek-Letter Tradition: The African American Quest for Status in the Early Twentieth Century*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION 141 (Tamara L. Brown et al. eds., 2d ed. 2012) [hereinafter AFRICAN AMERICAN FRATERNITIES AND SORORITIES]; see also William H. Harris, *The Grand Boulé at the Dawn of a New Century: Sigma Pi Phi Fraternity*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra*, at 103.

<sup>48</sup> André McKenzie, *In the Beginning: The Early History of the Divine Nine*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION 183 (Tamara L. Brown et al. eds., 2005).

<sup>49</sup> *Id.* at 182.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 184.

with the founding of the Beta chapter of Alpha Phi Alpha at the same university.<sup>52</sup> The members of Alpha Kappa Alpha were very involved in many aspects of campus life including academic, social, and public service areas.<sup>53</sup>

Kappa Alpha Psi Fraternity was founded by black undergraduate men at Indiana University who “looked to form an organization as a way to address the racial inequities and social isolation they faced as students at the predominantly white, mid-western institution.”<sup>54</sup> Very similar to the founders of Alpha Phi Alpha, the founders of Kappa Alpha Psi found themselves excluded from many aspects of campus life due to segregationist practices.<sup>55</sup> Edler Watson Diggs and Byron K. Armstrong led the group of ten founders in establishing the foundation for the fraternity.<sup>56</sup> The group knew from an early stage that the organization would spread to other states and would be incorporated.<sup>57</sup> Under its original name, Kappa Alpha Nu, the fraternity was incorporated in May 1911, but was first denied a charter at Indiana University.<sup>58</sup> Kappa Alpha Nu became Kappa Alpha Psi in April 1915.<sup>59</sup>

In 1911, Omega Psi Phi Fraternity was the first black Greek-letter fraternity founded on an African American college campus.<sup>60</sup> It was different from Alpha Phi Alpha and Kappa Alpha Psi in that it was not formed primarily as a way to cope with segregation and racial codes.<sup>61</sup> Reportedly, Edgar A. Love, Oscar Cooper, and Frank Coleman established the fraternity in response to the growing elitism of the Beta chapter of Alpha Phi Alpha on Howard University’s campus.<sup>62</sup> The three young men found a great mentor in Professor Ernest E. Just who helped them research and construct the foundation for the organization.<sup>63</sup> The fraternity was incorporated in October 1914 after two years of challenges from college administration.<sup>64</sup>

In January 1913, twenty-two dissatisfied Alpha Kappa Alpha members founded Delta Sigma Theta Sorority at Howard University.<sup>65</sup> The founders of Delta Sigma Theta separated from Alpha Kappa Alpha because

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 185.

<sup>54</sup> McKenzie, *supra* note 48, at 186.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 188.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> McKenzie, *supra* note 48, at 188.

<sup>61</sup> *Id.* at 189.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 190.

<sup>65</sup> *Id.* at 191.

they reportedly wanted a more service-oriented organization that focused on pertinent social issues.<sup>66</sup> With hopes of expanding the traditional social Greek organization, these women also wanted to form an organization that would become national in scope and bring together college women from different parts of the country.<sup>67</sup>

A. Langston Taylor arrived at Howard University with the idea to create a new fraternity already in his mind; he did not establish it until 1914 when he helped form Phi Beta Sigma Fraternity.<sup>68</sup> Phi Beta Sigma was active in various parts of campus life and had the best equipped fraternity house on campus, which housed both a library and an art gallery that were open to the public.<sup>69</sup> Kappa Alpha Psi offered to merge fraternities with Phi Beta Sigma, but the offer was declined.<sup>70</sup>

Charles Robert Samuel Taylor created the idea of a sister organization for his fraternity, Phi Beta Sigma, in the form of a sorority.<sup>71</sup> His girlfriend, Arizona Cleaver, followed his advice and formed Zeta Phi Beta at Howard University.<sup>72</sup> While establishing the new sorority was difficult due to the presence of two other sororities on campus, Cleaver found enough members among young women who were not offered an invitation to join Alpha Kappa Alpha or Delta Sigma Theta.<sup>73</sup> The founding ladies of Zeta Phi Beta wanted to form a sorority “that would address more substantive issues germane to society in general, and the black community in particular.”<sup>74</sup>

Sigma Gamma Rho Sorority is the only black Greek-letter sorority not founded at Howard University and is also the youngest of the four.<sup>75</sup> Mary Lou Allison was a teacher in Indianapolis who was taking classes at Butler University.<sup>76</sup> Originally, the organization began as a sisterhood for teachers in the area but then expanded to allow membership for other young women regardless of their profession.<sup>77</sup> Seven years after its founding, Butler University granted Sigma Gamma Rho a charter in December 1929.<sup>78</sup>

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<sup>66</sup> McKenzie, *supra* note 48, at 191.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 193–94.

<sup>69</sup> *Id.* at 194–95.

<sup>70</sup> *Id.* at 195.

<sup>71</sup> *Id.*

<sup>72</sup> McKenzie, *supra* note 48, at 196.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 198.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 198–99.

<sup>78</sup> McKenzie, *supra* note 48, at 199.

A half a century after the founding of Alpha Phi Alpha, Iota Phi Theta Fraternity was founded on the campus of Morgan State College in 1963.<sup>79</sup> The founders set out to create a new BGLO whose purpose was “the development and perpetuation of scholarship, leadership, citizenship, fidelity, and brotherhood among men.”<sup>80</sup> The establishment of a new black Greek-letter fraternity reflected the social issues of the Civil Rights Movement that were occurring at the same time.<sup>81</sup> The founders wanted to address social issues and social inequalities in the area and work towards social justice and equal opportunity for all.<sup>82</sup>

Despite this history, information about BGLOs has largely been confined to their own internal texts.<sup>83</sup> Not until the mid-1990s did scholars begin to investigate these organizations. Even then, that work was largely academic and narrowly focused on student affairs issues.<sup>84</sup> It took almost another decade for public works on BGLOs to finally appear.<sup>85</sup> Shortly thereafter, a proliferation of scholarship on BGLOs, in the form of scholarly books and peer-reviewed journal articles, began to be published.<sup>86</sup> While

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<sup>79</sup> *Id.* at 200.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 201.

<sup>82</sup> *See id.*

<sup>83</sup> Each continuous, intercollegiate BGLO has an internal history book. *See, e.g.*, OLA ADAMS, ZETA PHI BETA SORORITY: 1920-1965 (1965); WILLIAM L. CRUMP, THE STORY OF KAPPA ALPHA PSI: A HISTORY OF THE BEGINNING AND DEVELOPMENT OF A COLLEGE GREEK LETTER ORGANIZATION, 1911-1991 (4th ed. 1991); HERMAN DREER, THE HISTORY OF OMEGA PSI PHI FRATERNITY: A BROTHERHOOD OF NEGRO COLLEGE MEN, 1911 TO 1939 (1940); MARJORIE H. PARKER, ALPHA KAPPA ALPHA: IN THE EYE OF THE BEHOLDER (1979); W. SHERMAN SAVAGE & L. D. REDDICK, OUR CAUSE SPEEDS ON: AN INFORMAL HISTORY OF THE PHI BETA SIGMA FRATERNITY (1957); JOHN D. SLADE, THE CENTAUR RISING: IOTA PHI THETA FRATERNITY, INC. (1999); MARY ELIZABETH VROMAN, SHAPED TO ITS PURPOSE: DELTA SIGMA THETA—THE FIRST FIFTY YEARS (1965); CHARLES H. WESLEY, THE HISTORY OF ALPHA PHI ALPHA: A DEVELOPMENT IN COLLEGE LIFE (1975); PEARL SCHWARTZ WHITE, BEHIND THESE DOORS—A LEGACY: THE HISTORY OF SIGMA GAMMA RHO SORORITY (Lillie Wilkes ed., 1974); LULLELIA W. HARRISON, TORCHBEARERS OF A LEGACY: A HISTORY OF ZETA PHI BETA SORORITY, INC. 1920-1997 (1998). *But see* PAULA J. GIDDINGS, IN SEARCH OF SISTERHOOD: DELTA SIGMA THETA AND THE CHALLENGE OF THE BLACK SORORITY MOVEMENT (1988) (discussing Delta Sigma Theta's public history).

<sup>84</sup> *See* Walter M. Kimbrough, *The Membership Intake Movement of Historically Black Greek-Letter Organizations*, 34 NASPA J. 229 (1997); Walter M. Kimbrough, *Self-Assessment, Participation, and Value of Leadership Skills, Activities, and Experiences for Black Students Relative to Their Membership in Historically Black Fraternities and Sororities*, 64 J. NEGRO EDUC. 63 (1995).

<sup>85</sup> *See, e.g.*, LAWRENCE C. ROSS, JR., THE DIVINE NINE: THE HISTORY OF AFRICAN-AMERICAN FRATERNITIES AND SORORITIES IN AMERICA (2000). Given that the respective BGLO histories, *see supra* note 83, have been treated as quasi-secret documents, non-members have had limited access to those works. Ross's book became the first publicly accessible book on these organizations.

<sup>86</sup> *See, e.g.*, ALPHA PHI ALPHA, *supra* note 11; BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY: OUR FIGHT HAS JUST BEGUN (Gregory S. Parks ed., 2008)

this scholarship has been interdisciplinary in its approach, only within the past couple of years has this work focused on the intersection of BGLOs and the law.<sup>87</sup>

The subject of hazing has been one such juncture where BGLOs and the law meet. Of note, in 2011, Ricky Jones, professor at the University of Louisville<sup>88</sup> and author of the book *Black Haze: Violence, Sacrifice, and Manhood in Black Greek-Letter Fraternities*,<sup>89</sup> served as an expert witness in the hazing case of *Ellison v. Delta Sigma Theta Sorority, Inc.*<sup>90</sup> Delta Sigma Theta's legal counsel instructed Dr. Jones during his deposition to refer to his report where he noted that BGLOs "have developed a particularly intense brand of physical and psychological abuse when initiating members."<sup>91</sup> Jones went on to underscore what he noted in his report.<sup>92</sup> Jones assumption has been born out in a number of recent empirical stud-

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[hereinafter BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY]; BLACK GREEK-LETTER ORGANIZATIONS 2.0: NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES (Matthew W. Hughey & Gregory S. Parks eds., 2011) [hereinafter BLACK GREEK-LETTER ORGANIZATIONS 2.0]; DEBORAH ELIZABETH WHALEY, DISCIPLINING WOMEN: ALPHA KAPPA ALPHA, BLACK COUNTERPUBLICS, AND THE CULTURAL POLITICS OF BLACK SORORITIES (2010); ELIZABETH C. FINE, SOULSTEPPING: AFRICAN AMERICAN STEP SHOWS 69, 143 (2003); RICKY L. JONES, BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES (2004); WALTER M. KIMBROUGH, BLACK GREEK 101: THE CULTURE, CUSTOMS, AND CHALLENGES OF BLACK FRATERNITIES AND SORORITIES (2003). While the growing number of peer-reviewed journal articles would be too numerous to mention, it is of note that two such journals—the *Journal of African American Studies* and *Ethnic and Racial Studies*—published special issues in 2012 on black and ethnic fraternal orders.

<sup>87</sup> See, e.g., Govan, *supra* note 40; ALPHA PHI ALPHA, *supra* note 11, at 279; Gregory S. Parks, *Belford Vance Lawson, Jr.: The Life of a Civil Rights Litigator*, 12 MD. L.J. RACE, RELIGION, GENDER & CLASS 320 (2012); Parks et al., *supra* note 11; Gregory S. Parks et al., *Complicit in Their Own Demise?* 39 LAW & SOC. INQUIRY 938 (2014); Gregory S. Parks, *Midnight in the Moral Order*, T. MARSHALL L. REV. (forthcoming 2015); Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 U. C. IRVINE L. REV. 217 (2013); Gregory S. Parks, *Social Networking and Leadership Accountability in (Quasi) Secret Organizations*, 2 WAKE FOREST L. REV. COMMON LAW 39 (2012), available at <http://wakeforestlawreview.com/2012/11/social-networking-and-leadership-accountability-in-quasi-secret-organizations/>; Gregory S. Parks et al., *Victimology, Personality, and Hazing: A Study of Black Greek-Letter Organization*, 16 N.C. CENT. L. REV. 36 (2013).

<sup>88</sup> Ricky Jones, Ph.D., Professor & Chair, UNIV. OF LOUISVILLE, <http://louisville.edu/panafricanstudies/faculty-and-staff/ricky-l-jones-ph-d-associate-professor.html> (last visited Feb. 27, 2014).

<sup>89</sup> RICKY L. JONES, BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES (2004).

<sup>90</sup> Deposition of Ricky L. Jones at 1, *Ellison v. Delta Sigma Theta Sorority, Inc.*, No. 10-CI-00311, 2010 WL 7926571 (Ky. Cir. Ct. May 23, 2011), 2011 WL 7862849 at \*1.

<sup>91</sup> *Id.* at 22.

<sup>92</sup> *Id.* at 23.

ies,<sup>93</sup> and arguably, BGLOs' violent brand of hazing could lead to more criminal sanctions for members.

Dating back to the 1980s, there have been numerous BGLO hazing incidents that have resulted in criminal sanctions. On November 14, 1989, Earl McKenzie and five other Kappa Alpha Psi pledges at Fort Valley State College were beaten with canes and paddles as part of a "pledge line."<sup>94</sup> McKenzie received blows to his chest, kidneys, and back over a period of five hours and was hospitalized as a result, requiring three units of blood due to internal bleeding.<sup>95</sup> The hazing began in earnest on November 6 to punish McKenzie and other pledges for failing to memorize fraternity history and rap songs praising the active members.<sup>96</sup> The pledges had their shirts ripped off, were slammed to the ground, punched, and forced to eat raw eggs.<sup>97</sup> The beatings continued on November 14.<sup>98</sup> When one of the active members said that he was going to "put somebody in the hospital tonight," the pledges fled to McKenzie's parents' house.<sup>99</sup> This decision, however, led to an even worse punishment the following evening when the pledges were locked inside the fraternity house and pummeled with canes, kicks and fists.<sup>100</sup> McKenzie felt dizzy and sick from the abuse, but the active members thought he was faking and continued striking him.<sup>101</sup> As a result, McKenzie and another pledge, Brian Beeler, were hospitalized at Peach County Hospital.<sup>102</sup> McKenzie's kidneys were on the verge of failure and Beeler was treated for a sprained back, bruised buttocks and sore kidneys.<sup>103</sup> Six members of Kappa Alpha Psi were charged with battery.<sup>104</sup>

James Bush, Jr., a twenty-year-old sophomore pledging Omega Psi Phi at Clark Atlanta University, was hospitalized on November 17, 1991 after being hit with a wooden paddle in the buttocks and kidney area during

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<sup>93</sup> Gregory S. Parks, "[A] Man and a Brother": *Intersectionality, Violent Hazing, and the Law*, 71–89 (Wake Forest Univ. Legal Studies, Working Paper No. 2409764, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2409764](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409764).

<sup>94</sup> Steven Goldberg, *5 in Fort Valley Frat Charged as Hazing Injures Pledges*, ATLANTA J. CONST., Nov. 22, 1989, at A1, available at NEWSBANK, Rec. No. 891102577.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Goldberg, *supra* note 94.

<sup>101</sup> *Id.*

<sup>102</sup> Steven Goldberg, *Six at Fort Valley Charged as Hazing Injures Two*, ATLANTA J. CONST., Nov. 22, 1989, at A11, available at NEWSBANK, Rec. No. 891104230.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

an off campus hazing activity.<sup>105</sup> Three members took Bush and ten other pledges to a high school football field and beat them with paddles.<sup>106</sup> Bush suffered kidney damage, bruised kidneys, and “raw” buttocks as a result of the incident.<sup>107</sup> The pain was so bad that Bush was “trembling and biting into the ground” while he crawled on his stomach under bleachers of the baseball field, receiving blows to his back and legs delivered by hands, fists, rubber tires, and wood.<sup>108</sup> Three fraternity members ultimately pleaded guilty to misdemeanor battery and hazing charges.<sup>109</sup> The members were sentenced to three months community service and ordered to pay Bush’s medical expenses, which totaled \$5,500.<sup>110</sup>

At an unofficial meeting of pledges on February 8, 1998, leaders of the Kappa Alpha Psi Fraternity at the University of Maryland Eastern Shore told Marquez Polk and Dwayne Motley that they would be beaten as part of their initiation.<sup>111</sup> If the men did not submit to the hazing, they were told that they would not enjoy the benefit of full membership privileges.<sup>112</sup> Over the next two months, Polk and Motley were caned, beaten, spanked, and paddled innumerable times, so savagely that the canes and paddles often broke during the beatings.<sup>113</sup> As a result of this abuse, Polk and Motley were hospitalized with subcutaneous bleeding in the buttocks.<sup>114</sup> They underwent surgery requiring large amounts of tissue extraction and skin grafts to remedy conditions which, if neglected, could potentially have been fatal to the young men.<sup>115</sup> Jon-Mikael McKenzie and Vaughn Green were active members of the fraternity, and both men were charged with second-degree assault, hazing, and reckless endangerment against the victims.<sup>116</sup> McKenzie was convicted at trial on the hazing charges and sentenced to ninety days, a fine, and eighteen months’ probation.<sup>117</sup>

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<sup>105</sup> John Blake, *Clark Atlanta Student Hospitalized For Kidney Injury In Alleged Hazing*, ATLANTA J. CONST., Nov. 20, 1991, at D3, available at NEWSBANK, Rec. No. 913520423.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Holly Morris, *Three Plead Guilty In Hazing: Student at CAU Tells of Blows to Kidneys, Arms*, ATLANTA J. CONST., Feb. 9, 1992, at E8, available at NEWSBANK, Rec. No. 920410005.

<sup>109</sup> John Blake, *Three Plead Guilty To Fraternity Hazing*, ATLANTA J. CONST., Feb. 20, 1992, at E8, available at NEWSBANK, Rec. No. 920520137.

<sup>110</sup> *Id.*

<sup>111</sup> *McKenzie v. State*, 748 A.2d 67, 69 (Md. Ct. Spec. App. 2000).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *McKenzie*, 748 A.2d at 69.

In February 1994, the Southeast Missouri State chapter of Kappa Alpha Psi took on five pledges for initiation, one of whom was Michael Davis.<sup>118</sup> Between February 7 and 14, Keith Allen and other fraternity members subjected the pledges to repeated physical abuse.<sup>119</sup> The young men were slapped on their necks and backs, caned on their buttocks and feet, and beaten with heavy books and cookie sheets.<sup>120</sup> The pledges were also kicked, punched, and body slammed by the active members.<sup>121</sup> After two of the five pledges had dropped out, the remaining three were put through a seven-station circle of physical abuse on February 14.<sup>122</sup> At some point during this activity, Michael Davis passed out.<sup>123</sup> His fellow fraternity brothers thought he was playing a joke, so they decided to carry him to his dorm.<sup>124</sup> Once at his dorm, the fraternity brothers stripped Davis of his bloodied clothes and left him on his bed.<sup>125</sup> He would never regain consciousness, dying the following day.<sup>126</sup> The autopsy revealed that Davis had suffered broken ribs, a lacerated kidney, a lacerated liver, and multiple bruises.<sup>127</sup> A pathologist stated that the cause of death was a subdural hematoma of the brain.<sup>128</sup> Keith Allen was charged with five counts of hazing, which is a misdemeanor offense in Missouri.<sup>129</sup> A jury found Allen guilty on all five counts.<sup>130</sup> Besides Keith Allen, fifteen other members of Kappa were also arrested.<sup>131</sup> Eric Keys,<sup>132</sup> Terrence Rogers, Ronald Johnson, Tyrone D. Davis, Karl E. Jefferson, Larry H. Blue, Eric A. Massey,<sup>133</sup> and Isaac Sims III<sup>134</sup> were all arrested, but all either plead out<sup>135</sup> or were re-

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<sup>118</sup> State v. Allen, 905 S.W.2d 874, 875 (Mo. 1995).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Tim Bryant, *Kick Sent Victim Down, Fraternity Brother Says*, ST. LOUIS POST DISPATCH, Aug. 26, 1994, at 02C, available at 1994 WLNR 691388.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Allen, 905 S.W.2d at 875.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *2 More Alumni Are Charged in Hazing Death*, N.Y. TIMES, Feb. 24, 1994, at A18, available at 1994 WLNR 3537667 (stating that 16 men with ties to the fraternity were charged with the hazing of Davis).

<sup>132</sup> *Id.*

<sup>133</sup> Susan K. Brown, *6 More Arrested in Hazing: 13 Now Charged in Ritual at Southeast Missouri State*, ST. LOUIS POST DISPATCH, Feb. 19, 1994, at 01B, available at 1994 WLNR 668054.

<sup>134</sup> Tim O'Neil & Marianna Riley, *Student Dies in Hazing: University City Man, 25, Beaten During Initiation*, ST. LOUIS POST DISPATCH, Feb. 17, 1994, at 01A, available at 1994 WLNR 658995.

leased.<sup>136</sup> The other five members, however, did end up serving jail time. Vincent L. King received the longest sentence, five years for involuntary manslaughter.<sup>137</sup> Michael Q. Williams reached a deal with prosecutors and agreed to five years probation and ninety days.<sup>138</sup> Mikel Giles, Cedric Murphy, Carlos Turner all received thirty days in jails and five years probation for their involvement.<sup>139</sup>

Sherdene Brown was a twenty-six year old black woman who was a graduate student at Kent State.<sup>140</sup> Brown had agreed to assist in pledging a new line of candidates for the Alpha Kappa Alpha Sorority in 1991.<sup>141</sup> Brown inflicted or assisted in the abuse of these pledges, the bulk of which took place during the final stage of initiation known as “the Goddess stage.”<sup>142</sup> The pledges were slapped on the face and hands, punched, pushed, and paddled (known as “taking wood”).<sup>143</sup> The paddling involved anywhere from a dozen to more than a hundred blows from “the enforcer,” a special paddle wrapped in silver duct tape.<sup>144</sup> Past and present pledges testified to the severity of the abuse by Brown.<sup>145</sup> Girls suffered black eyes, nosebleeds after coerced headstands, and passed out after being struck on the temple.<sup>146</sup> Some pledges suffered bruised and bleeding buttocks from the paddling, and two of the girls received permanent scars which cannot be surgically repaired.<sup>147</sup> Brown testified that she did not want to hurt anyone.<sup>148</sup> Rather, she claimed that she was told this process was the only way a black woman could gain respect in her community.<sup>149</sup> Brown was convicted at trial on one count of complicity to hazing and one count of complicity to assault, both misdemeanors.<sup>150</sup>

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<sup>135</sup> Mike Wells, *Hazing death brought charges against 16*, SOUTHEAST MISSOURIAN, Feb. 15, 2004, available at <http://www.semissourian.com/story/131134.html> (stating that Sims III “pleaded guilty and served 30 days in jail for hazing and was placed on probation for manslaughter”).

<sup>136</sup> See Brown, *supra* note 133 (stating that Rogers, Johnson, Davis, Jefferson, Blue, and Massey were released after posting bond).

<sup>137</sup> *Two Fraternity Members Sentenced in Death*, L.A. TIMES, Oct. 30, 1994, at 18, available at 1994 WLNR 4213549.

<sup>138</sup> *Id.*

<sup>139</sup> *Two Fraternity Brothers Plead Guilty in Hazing Death of Pledge*, DENV. ROCKY MTN. NEWS, Aug. 31, 1994, at 26A, available at 1994 WLNR 546961.

<sup>140</sup> *State v. Brown*, 630 N.E.2d 397, 399 (Ohio Ct. App. 1993).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 400.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Brown, 630 N.E.2d 397 at 400.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

Over a period of four weeks in 1993, Joseph Snell was beaten by members of the University of Maryland chapter of Omega Psi Phi with a hammer, horsehair whip, broken chair leg, and brush.<sup>151</sup> The beatings sometimes took place in a fraternity member's apartment and other times behind a school at night.<sup>152</sup> Pledges were made to eat vomit and received concussions and broken ribs, and six pledges suffered serious injuries ranging from a ruptured spleen to a fractured ankle.<sup>153</sup> In addition to the beatings, the members once put a space heater next to Snell's face to darken his skin because he was "not 'black' enough."<sup>154</sup> As a result of the abuse, Snell called a suicide hotline and was hospitalized.<sup>155</sup> Snell alleged he was assaulted and battered by the fraternity's members and they intentionally and/or negligently inflicted emotional distress.<sup>156</sup> The defendants argued the abuse did not occur, but if it did they did not authorize the beatings, and that Snell consented to the abuse by continuing to return to the fraternity house.<sup>157</sup> In July 1997, a jury awarded Snell a \$375,000 verdict against Omega Psi Phi, with \$300,000 of the award in the form of punitive damages and \$75,000 for physical and emotional injuries.<sup>158</sup> Twenty three members of the fraternity were charged with beating new members, but they avoided trial by agreeing to apologize to Snell, pay his medical bills, and some members performed anywhere from 100 to 150 hours of community service.<sup>159</sup>

In 1996, three Phi Beta Sigma members at the University of Georgia pleaded guilty to hazing and battery charges in the paddling of football player Roderick Perrymond.<sup>160</sup> Perrymond was hospitalized after receiving at least seventy blows.<sup>161</sup> The Sigmas had a chapter advisor in place to urge moderation.<sup>162</sup> That very advisor, however, was a participant in the illegal hazing lineup.<sup>163</sup> Perrymond filed a personal injury lawsuit seeking

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<sup>151</sup> Lisa Frazier, *Former Student at U-MD Wins Hazing Lawsuit*, WASH. POST, July 12, 1997, at B1, available at 1997 WLNR 7368045.

<sup>152</sup> *Id.*

<sup>153</sup> Thomas W. Waldron, *Fraternity Members In Hazing Must Perform Volunteer Service*, BALT. SUN, June 29, 1994, at B4, available at 1994 WLNR 847746.

<sup>154</sup> Frazier, *supra* note 151.

<sup>155</sup> *Id.*

<sup>156</sup> See Verdict & Settlement Statement, *Snell v. Omega Psi Phi Fraternity*, CAL95-14509 (Md. Cir. Ct. July 1997), 1997 WL 1037386, at \*1.

<sup>157</sup> *Id.*

<sup>158</sup> Frazier, *supra* note 151.

<sup>159</sup> Waldron, *supra* note 153.

<sup>160</sup> Joan Stroer, *Greeks Under Fire: Hazing In Spotlight After Death*, ATHENS-BANNER HERALD (Ga.), Apr. 9, 2000, at 7C, available at NEWSBANK, Rec. No. 45b41525135ced4d535cc96396326f1ee7de9f.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

damages for pain and suffering, mental and emotional anxiety and distress, punitive damages, and payment of his medical bills.<sup>164</sup> Perrymond claimed that the fraternity adviser “verbally threatened to kill [him] before the paddling began,” and he was also told he would be hit in the head with bricks and the paddle if he resisted.<sup>165</sup> In criminal proceedings, three members of the fraternity pleaded guilty to charges of battery and hazing and were sentenced to twenty four months’ probation, \$1,200 fines, and 150 hours of community service.<sup>166</sup>

Braylan Curry suffered serious injury as a result of hazing activities during his initiation into the Alpha Phi Alpha Fraternity at Southern Methodist University in 2003.<sup>167</sup> The defendants, who were older members of the fraternity, forced Curry to drink large quantities of water under threat of physical violence at a Dallas apartment between 1 AM and 5 AM on November 15, 2003.<sup>168</sup> Curry lost consciousness, yet continued to be forced to drink more water while he was being punched in the stomach by the fraternity members.<sup>169</sup> As a result, Curry suffered hyponotrima Hypoxia and convulsions, slipped into a coma,<sup>170</sup> and was taken to the intensive care unit of a Dallas hospital.<sup>171</sup> The court held on appeal that the defendants could be prosecuted under felony aggravated assault instead of misdemeanor hazing charges for knowingly, intentionally, or recklessly causing serious bodily injury.<sup>172</sup>

Five members of Phi Beta Sigma at SIU-Edwardsville face felony hazing charges for paddling Prentice Motley.<sup>173</sup> Motley was beaten with a wooden paddle throughout March and April.<sup>174</sup> After one session in a

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<sup>164</sup> Jim Thompson, *Ex-UGA Pledge Files Fraternity Hazing Suit*, FLORIDA TIMES-UNION, Oct. 26, 1996, at B2, available at NEWSBANK, Rec. No. JFTU30244.

<sup>165</sup> *Id.*

<sup>166</sup> Rebecca McCarthy, *UGA Reduces Suspensions in Hazing Case—The Three Men Who Paddled a Pledge Also Were Convicted on Criminal Charges*, ATL. J. CONST., Aug. 23, 1997, at E5, available at NEWSBANK, Rec. No. 972360049.

<sup>167</sup> *Ex parte Smith*, 185 S.W.3d 887, 889–90 (Tex. Crim. App. 2006); *Ex parte Smith*, 152 S.W.3d 170, 171 (Tex. App. 2004).

<sup>168</sup> *Smith*, 185 S.W.3d at 890, n.8.

<sup>169</sup> Associated Press, *SMU students expelled over hazing incident*, LAREDO MORNING TIMES (Laredo, Tex.), Feb. 22, 2004, available at <http://madmax.lmtonline.com/textarchives/022204/s14.htm>.

<sup>170</sup> *Id.*

<sup>171</sup> *Smith*, 185 S.W.3d at 890.

<sup>172</sup> *Id.* at 892; *Ex parte Berhe*, No. 05-04-00922-CR, 2004 WL 2633922 (Tex. App. Nov. 19, 2004); *Ex parte Bowie*, No. 05-04-00964-CR, 2004 WL 2805264 (Tex. App. Nov. 23, 2004).

<sup>173</sup> Brian Brueggemann, *Frat Members Face Felony Charge – Recruit Hospitalized After Being Paddled*, BELLEVILLE NEWS-DEMOCRAT, May 31, 2002, at 1A, available at NEWSBANK, Rec. No. 0205310021.

<sup>174</sup> *Id.*

wooded area off campus, Motley was taken to the hospital with internal bleeding.<sup>175</sup> Motley, who entered the hospital complaining of fever and severe pain, stayed four days in the hospital.<sup>176</sup> Initial reports that his kidney was ruptured proved to be false.<sup>177</sup> He filed a civil suit against the fraternity for \$50,000, “citing severe and permanent injuries from the paddling.”<sup>178</sup> Three fraternity members received a year of probation for the incident, and a fourth member was allowed to plead guilty to misdemeanor disorderly conduct.<sup>179</sup> The civil suit against Phi Beta Sigma was ultimately settled out of court.<sup>180</sup>

Terry Hall, twenty, was pledging Phi Beta Sigma at the University of South Carolina in 2006.<sup>181</sup> On October 9, 2006, Hall was subjected to a hazing ritual where he was hit more than one hundred times with fists and hands.<sup>182</sup> Hall was choked with a tee shirt, blindfolded, and struck multiple times with a wooden paddle, baseball bat, and belt.<sup>183</sup> As he was being beaten, Hall lost control of his bowels and nearly lost consciousness.<sup>184</sup> He later went to the hospital for treatment because of the resulting injuries.<sup>185</sup> Hall sustained bruises to his upper arms, chest, feet, back and buttocks during the incident and was punched an estimated sixty times that evening.<sup>186</sup> The beating continued until Hall was gasping for air through his bleeding nose.<sup>187</sup> The university subsequently suspended Phi Beta Sigma and seven members were arrested and charged with hazing, a misdemeanor punishable by a maximum of one year in prison and a \$500 fine.<sup>188</sup>

Every night for nearly a month during the summer of 2003, Phi Beta Sigma members at St. John’s University took pledge Brian Chambers to

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Steve Horrell, *Trial Date Is Set in SIUE Hazing Case*, EDWARDSVILLE INTELLIGENCER, July 22, 2004, available at NEWSBANK, Rec. No. 217429.

<sup>178</sup> Elizabeth Donald, *SIUE Hazing Victim Sues Fraternity*, BELLEVILLE NEWS-DEMOCRAT, Mar. 11, 2003, at 3B, available at NEWSBANK, Rec. No. 0303110033.

<sup>179</sup> Steve Horrell, *SIUE Hazing Suit Settled*, EDWARDSVILLE INTELLIGENCER, Apr. 15, 2005, available at NEWSBANK, Rec. No. 248759.

<sup>180</sup> *Id.*

<sup>181</sup> Lee Higgins, *7 USC Students Accused of Hazing*, THE STATE (Columbia, S.C.), Apr. 27, 2007, at B1, available at NEWSBANK, Rec. No. 0610150025.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *N. Charleston Man Charged in Hazing: 7 USC Students Accused of Beating Pledge During Fraternity Initiation*, POST & COURIER (Charleston, S.C.), Apr. 27, 2007, at B3, available at NEWSBANK, Rec. No. MERLIN\_4383523.

<sup>188</sup> *Id.*

Kissena Park.<sup>189</sup> The members would pound Chambers with a two pound paddle in the chest, back, and buttocks so severely that Chambers felt like his back was being tightened “in a vise” after the beatings.<sup>190</sup> On one occasion, Chambers “was smacked 100 times with a foot long wooden paddle”<sup>191</sup> so hard that he had to take a step backward to avoid toppling over after each blow.<sup>192</sup> When he wasn’t being struck with the paddle, he was subjected to “thunder and lightning”—open hand slaps to the chest and stomach.<sup>193</sup> Chambers was eventually hospitalized for fourteen days, suffering bruises, acute renal failure, seizures, and temporary blindness in both eyes.<sup>194</sup> He had woken up that night and noticed he was urinating blood, and Chambers had “Crayola box purple” bruises from his lower back to his upper thighs upon checking into Brooklyn’s Victory Memorial Hospital.<sup>195</sup> Three members of Phi Beta Sigma were charged were with second-degree assault.<sup>196</sup> All three men were acquitted by a court in Queens after two days of deliberation following a five week trial.<sup>197</sup>

Cedrick Smith, a twenty year old sophomore at the University of Arkansas at Monticello, was beaten in an off-campus hazing incident by Phi Beta Sigma members on April 30, 2000.<sup>198</sup> Smith suffered broken ribs, internal bleeding, and lost consciousness for about thirty minutes.<sup>199</sup> He received dialysis treatments in the hospital’s intensive care unit, necessitated by a blood vessel burst caused by the paddling.<sup>200</sup> Smith and another pledge had been taken off campus to the Monticello Social Club, where they were paddled in an initiation rite called “crossing over.”<sup>201</sup> After the paddling, Smith was taken to a member’s home where he kept going in and out of

<sup>189</sup> Scott Shifrel, *Xtreme Hazing Trial to Begin. Three Face Seven Years for Severe Injuries*, N.Y. DAILY NEWS, Nov. 14, 2000, at 38, available at NEWSBANK, Rec. No. 1308162.

<sup>190</sup> *Id.*; Alex Ginsberg, *Hellish Hazing: Pledge Tells of Vicious Beating*, N.Y. POST, Nov. 17, 2004, at 24, available at NEWSBANK, Rec. No. NYPO20041117594964.

<sup>191</sup> Ginsberg, *supra* note 190.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Shifrel, *supra* note 189.

<sup>195</sup> Ginsberg, *supra* note 190.

<sup>196</sup> Shifrel, *supra* note 189.

<sup>197</sup> Scott Shifrel, *Three Cleared in Hazing*, N.Y. DAILY NEWS, Dec. 14, 2004, at 38, available at NEWSBANK, Rec. No. 1325025.

<sup>198</sup> Patty Wooten, *Alleged Hazing Incident Under Investigation at UAM*, PINE BLUFF COM. (Ark.), May 6, 2000, available at NEWSBANK, Rec. No. 5c19afe5f1697b63c74fb8d493a6fdd37f92ba.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; Patty Wooten, *Students Plead Guilty to Paddling*, PINE BLUFF COM. (Ark.), Feb. 14, 2001, available at NEWSBANK, Rec. No. ed48ae55948b6c772edad61e1481b491978e6017.

<sup>201</sup> Patty Wooten, *Charges To be Filed In Alleged Hazing Incident at UAM*, PINE BLUFF COM. (Ark.), July 20, 2000, available at NEWSBANK, Rec. No. 86421babccfd0d6a11c569668bf84d1fa96bdc.

consciousness before emergency workers were called.<sup>202</sup> Six UAM students pleaded guilty to third degree battery charges from Smith's hazing, and they were ordered to pay forty thousand dollars in medical bills.<sup>203</sup>

Brent Whiteside filed a suit against Eastern Kentucky University after suffering kidney failure from hazing rituals in the school's Kappa Alpha Psi chapter.<sup>204</sup> Whiteside alleged that members beat him on multiple occasions between January 29, 2008, and March 7, 2008.<sup>205</sup> Whiteside was hospitalized from the assaults and still suffers migraine headaches and other injuries as a result.<sup>206</sup> Three members had struck Whiteside with their fists, a paddle, and a cane causing kidney failure.<sup>207</sup> Whiteside said his tormentor even had a "personal cane" he used on Whiteside so aggressively that it snapped during a February 23, 2008 beating.<sup>208</sup> Three members of the fraternity pleaded guilty to fourth degree assault charges from the incidents in January 2009, and they were sentenced thirty days home incarceration.<sup>209</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> Wooten, *supra* note 200.

<sup>204</sup> Brian Smith, *EKU Hazing Victim Files Suit Against Fraternity*, RICH. REG. (Ky.), Feb. 4, 2009, available at NEWSBANK, Rec. No. 274f9ab609b88627219f3bdee2b1d4ce8dacd1.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Ashlee Clark, *EKU Suspends Fraternity: 8-Year Ouster Comes After Allegations of Hazing*, LEXINGTON HERALD-LEADER, June 25, 2008, at A1, available at NEWSBANK, Rec. No., 0625hazing.

<sup>208</sup> Heather Harris, *Hazing Defendants To Stand Trial*, RICH. REG. (Ky.), Aug. 27, 2008, available at NEWSBANK, Rec. No. 5b35c1d51f80e14cf58642c2f18eabc1629cee43.

<sup>209</sup> Smith, *supra* note 204.

## II. TOWARD A CRIMINOLOGICAL MODEL OF HAZING

Criminology is the scientific study of the correlates and causes of criminal behavior, and the societal response to such behavior.<sup>210</sup> Criminology is an interdisciplinary field in that it draws from the fields of biology, psychology, and sociology.<sup>211</sup> Consistent with this interdisciplinary focus, a variety of theories have been proffered to explain why individuals engage in behavior that is in violation of the criminal law.<sup>212</sup> Those rationales include endogenous characteristics such as personality, impulsivity, as well as awareness of and beliefs about sanctions.<sup>213</sup>

### A. Personality

Personality refers to the manner in which individuals think, feel, and behave.<sup>214</sup> Personality has a biological basis, and is influenced by one's social environment as well.<sup>215</sup> It is relatively stable across the life course, meaning that individuals tend to maintain their rank order over time.<sup>216</sup> That is, individuals who are higher (or lower) on a given trait relative to others of the same age tend to remain higher (or lower) throughout the life course. As Miller and Lynam have argued, the study of how personality is related to criminal behavior is important because it can provide insights into why some individuals engage in a large amount of criminal behavior, others a moderate amount, while still others rarely commit criminal acts.<sup>217</sup> Moreover, personality also helps explain other known facts dealing with criminal behavior, such as the stability of criminal (and related antisocial) behavior over the life course and the versatility of criminal behaviors committed by offenders.<sup>218</sup> In addition, the effect of personality on criminal behavior is robust: this relationship has been found to exist across methods

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<sup>210</sup> LARRY J. SIEGEL, *CRIMINOLOGY: THE CORE* 21 (4th ed. 2011).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 7.

<sup>213</sup> *Id.*

<sup>214</sup> Joshua D. Miller & Donald Lynam, *Structural Models of Personality and Their Relation to Anti-Social Behavior: A Meta-Analytic Review*, 39 *CRIMINOLOGY* 765, 765 (2001).

<sup>215</sup> Brent W. Roberts et al., *The Kids Are Alright: Growth and Stability in Personality Development from Adolescence to Adulthood*, 81 *J. PERSONALITY & SOC. PSYCHOL.* 670, 670 (2001).

<sup>216</sup> Brent Roberts & Wendy F. DeVecchio, *The Rank-Order Consistency of Personality Traits from Childhood to Old Age: A Quantitative Review of Longitudinal Studies*, 126 *PSYCHOL. BULL.* 3, 20 (2000).

<sup>217</sup> Miller & Lynam, *supra* note 214, at 784.

<sup>218</sup> *Id.* at 784–85.

(self-reports and other reports of personality; official versus self-reports of offending), countries, sex, and race.<sup>219</sup>

Han Eysenck published findings in 1977 supporting the idea that there were three biological dimensions of human personality that explained individual differences in human behavior.<sup>220</sup> He proposed that the interaction of the traits he defined as (1) psychoticism (the tendency to be self-centered, impulsive, and emotionally cold), (2) extraversion (being outgoing, gregarious, and social), and (3) neuroticism (the extent to which one is emotionally unstable) (PEN) contributed to the formation of antisocial behavior.<sup>221</sup> Antisocial behavior, as discussed in this context, refers to violations of law. Eysenck's studies, backed by those of his successors, suggested that people with antisocial behavior were more likely to commit future crimes than those who did not possess antisocial behavior.<sup>222</sup> Eysenck's research suggested that high levels of all three traits were indicative of criminal behavior and tendencies.<sup>223</sup> Psychoticism, however, tended to be the most significant predictor while extraversion was the least significant.<sup>224</sup> Other models followed Eysenck's three trait model of personality by expanding it to include five broad dimensions, often referred to as the Big Five: (1) conscientiousness (being reliable, organized, and deliberative), (2) agreeableness (friendly, trusting, straightforward), (3) neuroticism (emotional stability), (4) openness to experience (willing to try new things, openness to different values and ideas), and (5) extraversion (sociable, outgoing).<sup>225</sup> It is interesting to note that Mills and colleagues found that the presence of antisocial behavior was highly suggestive of criminal behavior and tendencies, but the absence of antisocial behavior was not necessarily suggestive of the absence of criminal behavior and tendencies.<sup>226</sup> This has

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<sup>219</sup> Avshalom Caspi et al., *Are Some People Crime-Prone?: Replications of the Personality-Crime Relationship Across Countries, Genders, Races, and Methods*, 32 *CRIMINOLOGY* 163, 185 (1994).

<sup>220</sup> Joan A. Reid, *Crime and Personality: Personality Theory and Criminality Examined*, 3 *STUDENT PULSE* 1, 3 (2011), <http://www.studentpulse.com/articles/377/crime-and-personality-personality-theory-and-criminality-examined>.

<sup>221</sup> Jane L. Ireland & Carol A. Ireland, *Personality Structure Among Prisoners: How Valid Is the Five-Factor Model, and Can It Offer Support for Eysenck's Theory of Criminality?*, 21 *CRIM. BEHAV. & MENTAL HEALTH* 35, 36 (2011).

<sup>222</sup> Alexander M. Holsinger, *Assessing Criminal Thinking: Attitudes and Orientations Influence Behavior*, 61 *CORRECTIONS TODAY* 22–25 (1999), as cited in Daniel Boduszek et al., *Eysenck's Personality Model and Criminal Thinking Style Within a Violent and Nonviolent Offender Sample: Application of Propensity Score Analysis*, 34 *DEVIANT BEHAV.* 483, 483 (2013).

<sup>223</sup> Reid, *supra* note 220, at 3.

<sup>224</sup> Boduszek et al., *supra* note 222, at 484.

<sup>225</sup> Reid, *supra* note 220, at 24.

<sup>226</sup> Jeremy F. Mills et al., *The Measures of Criminal Attitudes and Associates (MCAA): The Prediction of General and Violent Recidivism*, 31 *CRIM. JUST. BEHAV.* 717 (2004), as cited in Boduszek et al., *supra* note 222, at 484.

led to future studies that seek to examine the impact that environment and social factors have on trait interaction.<sup>227</sup>

Boduszek and colleagues used the trait approach of the Big Five to determine what percentage of individual variance in criminal behavior and thinking was explained by the Big Five.<sup>228</sup> Boduszek first provided previous results on Eysenck's PEN Model. The researchers cited previous studies that found that those exhibiting criminal behavior tended to score high on psychoticism, as the trait was strongly related to being "cold, hostile, aggressive, and insensitive to the needs of others."<sup>229</sup> Secondly, they provided that extraversion was often in question as to its effectiveness in predicting criminal behavior.<sup>230</sup> This paralleled Eysenck's previous finding that extraversion was the least significant predictor of criminal behavior.<sup>231</sup> Lastly, Boduszek noted that neuroticism was a weaker predictor of criminal behavior but a stronger prediction of recidivism.<sup>232</sup>

Several conflicting theories regarding extraversion have been produced, perhaps explaining the variances in results about the strength of extraversion as a predictor of criminal behavior. Eysenck proposed that the confinement of incarcerated persons, who were generally used for criminal behavior studies, led to skewed results on the extraversion portion of the test.<sup>233</sup> This has subsequently been referred to as the "prisonization" of criminal identity, where criminals who live together interact more and increase their levels of extraversion as a result.<sup>234</sup> In contrast, Boduszek and colleagues noted the limitations of relying on self-reported trait levels; the interactions between criminals incarcerated together may not be reflective of their interactions in the outside world.<sup>235</sup>

In Boduszek and colleagues' work, they administered two self-report questionnaires to violent-recidivist and nonviolent-recidivist males between the ages of twenty and sixty-six.<sup>236</sup> The Measure of Criminal Attitudes and Associates (MCAA) measured criminal thinking style and association with criminal friends; the other questionnaire, the Measure of Criminal Social Identity, measured criminals' self-reported levels of criminal

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<sup>227</sup> Boduszek et al., *supra* note 222, at 484.

<sup>228</sup> *Id.* at 483.

<sup>229</sup> *Id.* at 484.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Boduszek et al., *supra* note 222, at 484.

<sup>234</sup> *Id.* at 491.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 485 (noting that the researchers matched violent and nonviolent offenses to try to minimize the effect of other variables).

social identity.<sup>237</sup> Using a post-matching multiple regression analysis, the researchers found that five factors significantly explained 49% of the variance in individuals with criminal thinking style and criminal behavior.<sup>238</sup> These five factors were (1) psychoticism, (2) extraversion, (3) neuroticism, (4) criminal social identity, and (5) association with criminal friends.<sup>239</sup> Of these five factors, psychoticism was the strongest predictor of criminal thinking style and behavior, consistent with the results from Eysenck's PEN model and other studies of the Big Five Personality traits.<sup>240</sup>

Boduszek and colleagues also found association with criminal friends and criminal social identity to be significant predictors of criminal thinking and behavior.<sup>241</sup> Association with criminal friends can be linked to extraversion, paralleling Eysenck's findings that high levels of extraversion are indicative of criminal behavior.<sup>242</sup> Consistent with prior findings on the weakness of the relationship between extraversion and criminal behavior, association with criminal friends was also found to be a weak predictor of criminal behavior.<sup>243</sup>

Wallinius found that high rates of psychopathy, a personality disorder characterized by antisocial behavior and a lack of remorse and empathy, was related to criminal behavior.<sup>244</sup> Wallinius also found that besides being predictive of criminal behavior, antisocial behavior was also predictive of recidivism.<sup>245</sup> This provides further support for the link between antisocial behavior and criminal behavior, but goes further than prior studies in suggesting that those who possess antisocial personality traits are more likely to be repeat criminal offenders than those who do not.

While the majority of research on the relationship between personality and criminal behavior has been retrospective, some prospective studies have found support for the relationship. In one study, researchers administered two tests longitudinally to around 2,000 boys in an attempt to examine the development and progression of antisocial behavior and to see if it led to criminal behavior.<sup>246</sup> Two tests, one measuring cognitive ability and the other the Five-Factor Inventory to measure the levels of the Big

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<sup>237</sup> *Id.* at 486.

<sup>238</sup> *Id.* at 489.

<sup>239</sup> Boduszek et al., *supra* note 222, at 489.

<sup>240</sup> *Id.* at 489–90.

<sup>241</sup> *Id.* at 491.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Märta Wallinius et al., *Facets of Psychopathy Among Mentally Disordered Offenders: Clinical Comorbidity Patterns and Prediction of Violent and Criminal Behavior*, 198 *PSYCHIATRY RES.* 279, 282 (2012).

<sup>245</sup> *Id.*

<sup>246</sup> René Möttus et al., *Longitudinal Associations of Cognitive Ability, Personality Traits and School Grades with Antisocial Behavior*, 26 *EUR. J. PERSONALITY* 56, 56 (2012).

Five, were administered to sixth, eighth, tenth, and twelfth grade boys bi-annually for six years.<sup>247</sup> At the end of the six years, univariate and multivariate analyses were performed to see whether cognitive ability, determined by grade point average, and any personality traits significantly contributed to the development of antisocial and criminal behavior.<sup>248</sup>

Researchers separated misdemeanors, defined here as breaches of public order and minor traffic offenses, and criminal offenses that involved a serious fine or imprisonment, in attempts to examine the effect of personality on criminal behavior.<sup>249</sup> Using univariate analysis, researchers found that criminal offenses were positively and significantly related to neuroticism and were negatively related to agreeableness, conscientiousness, and cognitive ability.<sup>250</sup> When GPA was added, cognitive ability and conscientiousness lost their significant values.<sup>251</sup> Researchers also found that antisocial behavior itself was not significantly indicative of criminal behavior.<sup>252</sup> To explain GPA's lack of a significant effect on criminal behavior, researchers theorized that GPA may be a separate result of personality; it may be affected by personality but not lead to criminal behavior.<sup>253</sup> This theory is supported by other research analyzing the effects of comorbid symptoms and different effects of personality on behavior other than criminal behavior.<sup>254</sup> The researchers noted that their findings paralleled that of other studies in that low agreeableness and conscientiousness combined with high neuroticism was indicative of criminal behavior.<sup>255</sup> This parallels Eysenck's PEN theory, as conscientiousness and agreeableness are often combined into the one trait of psychoticism when the PEN theory is used.<sup>256</sup> Therefore, the researchers prospectively found that high neuroticism and high psychoticism are predicative of future criminal behavior.

Recent studies have added nuance to our understanding of personality's factor structure.<sup>257</sup> For example, a 2011 study investigated inmates to compare the Five-Factor Model of Personality to Eysenck's original PEN model to determine whether one test was a stronger predictor of criminal behavior than the other.<sup>258</sup> Researchers cited Eysenck for his groundbreaking theory on antisocial behavior and the genetic and biological fac-

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<sup>247</sup> *Id.* at 58.

<sup>248</sup> *Id.* at 59.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Möttus et al., *supra* note 246, at 59.

<sup>253</sup> *Id.* at 60.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Ireland & Ireland, *supra* note 221, at 38.

<sup>257</sup> *See id.*

<sup>258</sup> *Id.* at 37.

tors that predisposed one to criminal behavior.<sup>259</sup> Researchers stressed the importance of genetics, and not social and environmental factors, in the development of criminal behavior.<sup>260</sup>

Researchers used two groups of prisoners; one was administered the International Personality Item Pool Big Five-Factor Markers, and one was administered Eysenck's original PEN test.<sup>261</sup> Results were compared using a multiple regression analysis.<sup>262</sup> Very inconsistent results were found amongst the two samples and compared to previous studies.<sup>263</sup>

The lack of significant results lead researchers to change their model to a 7-Factor Model to try to explain the results found in the samples and to create a test that was a stronger indicator of criminal behavior than either of the two primarily used tests.<sup>264</sup> Using the data collected from sample group one, researchers tried to explain the results using seven factors: (1) understanding/empathy, (2) emotional stability, (3) extraversion, (4) general agreeableness, (5) intellect/openness, (6) organization/positive behavior, and (7) organization/calmness.<sup>265</sup>

Using the seven-factor test that researches developed from the results in sample group one, researchers then used the test to examine the relationship between personality traits and criminal behavior in sample group two.<sup>266</sup> This seven-factor test, however, turned out to be a poor fit, with several of the factors often overlapping with each other in the questions they applied to and the behaviors they described.<sup>267</sup> Researchers then tried to improve fit by using regression weights and found that five main (core) traits explained the majority of the variance in individual levels of criminal behavior with significantly less overlap.<sup>268</sup> These five traits closely mirrored the Big Five and were defined as (1) extraversion, (2) neuroticism, (3) openness to new experience, (4) agreeableness (defined as empathy/understanding), and (5) calmness.<sup>269</sup> Researchers then tested this "new" test on sample one and found an acceptable fit between the test administered and the variance between individual behaviors.<sup>270</sup>

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<sup>259</sup> *Id.* at 36.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 38–39.

<sup>262</sup> Ireland & Ireland, *supra* note 221, at 39.

<sup>263</sup> *Id.* at 47.

<sup>264</sup> *Id.* at 42.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Ireland & Ireland, *supra* note 221, at 45.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 47.

While results of the “new” test closely paralleled that of other Big-Five studies in some aspects, researchers found distinctions in other areas. First, they found that agreeableness was the most commonly reported trait and that it changed across ages and time spent in prison.<sup>271</sup> Several explanations have been offered for this finding. Researchers here proposed that increased interaction with other prisoners in prison strengthened this trait and contributed to increased “prisonization of criminal identity.”<sup>272</sup> Similarly, researchers found that agreeableness increased with age but decreased with time spent in prison; this as well was thought to be explained by the “prisonization of criminal identity.”<sup>273</sup> Researchers also referenced other studies that found emotional stability to be lower amongst the younger prisoners, paralleling prior studies that found younger populations to be less emotionally stable, and higher in neuroticism, in general.<sup>274</sup>

While this study challenged the validity of Eysenck’s PEN model and the Five-Factor Model of Personality, it did support the theory that certain personality traits are indicative of the development of criminal behavior. Secondly, while this study challenged the explanatory validity of the traits historically used, and proposed a seven-trait model, the five core traits found closely paralleled those used under the Five-Factor Model. While this Five-Factor Model may not be perfect in explaining all of the individual variances in criminal behavior, this study provides support for the model. It also provides support for the fact that the five traits most commonly used are the strongest indicators of individual variances in the development of criminal behavior.

Moving away from individual experiments, scholars have employed meta-analyses to quantify the overall effect size of multiple studies aggregated together. Two meta-analyses are worth mentioning. The first was by Miller and Lynam, and included forty-five previous studies.<sup>275</sup> They explored several structural models of personality, including: Costa and McCrae’s Five-Factor Model,<sup>276</sup> Eysenck’s PEN model,<sup>277</sup> Tellegen’s

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<sup>271</sup> *Id.* at 48.

<sup>272</sup> Boduszek et al., *supra* note 222, at 491; Ireland & Ireland, *supra* note 221, at 36; see also Sophie Davison & Aleksandar Janca, *Personality Disorder and Criminal Behavior: What is the Nature of the Relationship*, 25 CURRENT OPINION PSYCHIATRY 39, 40 (2012).

<sup>273</sup> Ireland & Ireland, *supra* note 221, at 47.

<sup>274</sup> Jaana Haapasalo, *Sensation Seeking and Eysenck’s Personality Dimensions in an Offender Sample*, 11 PERSONALITY & INDIVIDUAL DIFFERENCES 84 (1990), as cited in Ireland & Ireland, *supra* note 221, at 47.

<sup>275</sup> Miller & Lynam, *supra* note 214, at 796–98.

<sup>276</sup> See PAUL T. COSTA & ROBERT R. MCCRAE, REVISED NEO PERSONALITY INVENTORY (NEO PI-R) AND NEO FIVE-FACTOR INVENTORY (NEO-FFI) PROFESSIONAL MANUAL (1992).

<sup>277</sup> See H. J. EYSENCK, CRIME AND PERSONALITY (Routledge & Kegan Paul rev. ed. 1977) (1966).

Three-Factor model,<sup>278</sup> and Cloninger's Seven-Factor Model.<sup>279</sup> They summarized their findings within models.<sup>280</sup> From the Five-Factor Model, Agreeableness and Conscientiousness were negatively related to criminal behavior.<sup>281</sup> From the PEN model, psychoticism was positively related to criminal behavior.<sup>282</sup> For the Three-Factor Model, negative emotionality was positively related to criminal behavior, while Constraint was negatively related.<sup>283</sup> The trait of Novelty Seeking from the Seven-Factor Model was positively related to criminal behavior, while the traits of Self-Directedness and Cooperativeness were negatively related.<sup>284</sup> The patterns of results provided a personality profile of the typical offender: someone who is antagonistic, argumentative, aggressive, impulsive, and sensation seeking.<sup>285</sup>

A second meta-analysis performed by Jones, Miller, and Lynam included fifty-three previous studies.<sup>286</sup> It focused exclusively on the Five-Factor Model.<sup>287</sup> Furthermore, they examined traits at the facet-level, which provided a more nuanced profile of an offender's personality.<sup>288</sup> They found that individuals who engage in criminal behavior scored higher on the traits of Angry Hostility, Impulsiveness, and Excitement Seeking.<sup>289</sup> Such individuals scored lower on numerous traits, including Warmth, Trust, Straightforwardness, Altruism, Compliance, Modesty, Competence, Dutifulness, and Deliberation.<sup>290</sup> Collectively, both meta-analyses support the use of the Five-Factor Model of personality as a good means of assessing the relationship between personality and criminal behavior.<sup>291</sup>

It is important to note that, as Davison proposed, personality disorders and antisocial behavior do not completely explain the criminal behaviors, but that there are often comorbid symptoms as well.<sup>292</sup> These symp-

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<sup>278</sup> See Auke Tellegen et al., *Personality Similarity in Twins Reared Apart and Together*, 6 J. PERSONALITY & SOC. PSYCHOL. 1031, 1038 (1988).

<sup>279</sup> See C. Robert Cloninger et al., *A Psychobiological Model of Temperament and Character*, 50 ARCHIVES GENERAL PSYCHIATRY, 975, 975 (1993).

<sup>280</sup> Miller & Lynam, *supra* note 214, at 774–77.

<sup>281</sup> *See id.* at 775.

<sup>282</sup> *See id.*

<sup>283</sup> *See id.* at 776.

<sup>284</sup> *See id.* at 777.

<sup>285</sup> *See id.* at 776–77.

<sup>286</sup> Shayne E. Jones et al., *Personality, Antisocial Behavior, and Aggression: A Meta-Analytic Review*, 39 J. CRIM. JUST. 329, 335–37 (2011).

<sup>287</sup> *Id.* at 330.

<sup>288</sup> *Id.* at 332.

<sup>289</sup> *Id.* at 333.

<sup>290</sup> *See id.* at 332.

<sup>291</sup> *Id.* at 333, 335.

<sup>292</sup> Davison & Janca, *supra* note 272, at 43.

toms can include drug use, social environments, and context.<sup>293</sup> In other words, genetic levels of the Big Five may predispose one towards criminal behavior, but other factors and conditions may make the difference in some exhibiting criminal behavior while others do not. Impulsivity and how one views and evaluates their environment are such possible factors.

## B. Impulsivity

Impulsivity, or impulsive behavior, has slightly varying definitions; however, it is widely defined as “a predisposition toward rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individual or to others.”<sup>294</sup> Criminal behavior and impulsivity research has ranged from focusing on delinquents,<sup>295</sup> incarcerated criminals,<sup>296</sup> gender differences,<sup>297</sup> mental disorders,<sup>298</sup> brain functioning,<sup>299</sup> and sociological factors.<sup>300</sup>

Delinquency has been an important factor in studying the relationship between criminal behavior and impulsivity because researchers are interested in predisposing factors that may contribute to criminal behavior; studying delinquents gives the researcher the opportunity to track the criminal activity of the subject to see if there are commonalities that are correlated with delinquency and subsequent criminal behavior. Delinquency has generally been defined as the behavior of minors that violates the law and leads to direct court action, although not necessarily incarceration.<sup>301</sup> Spe-

<sup>293</sup> *Id.*

<sup>294</sup> F. G. Moeller et al., *Psychiatric Aspects of Impulsivity*, 158 AM. J. PSYCHIATRY 1783, 1784 (2001), as cited in Charles W. Mathias et al., *Behavioral Measures of Impulsivity and the Law*, 26 BEHAV. SCI. & L. 691, 693 (2008) (internal quotes omitted).

<sup>295</sup> See, e.g., Francis J. Kelly & Donald J. Veldman, *Delinquency and School Dropout Behavior as a Function of Impulsivity and Nondominant Values*, 69 J. ABNORMAL & SOC. PSYCHOL. 190, 190 (1964); Michael L. Vitulano et al., *Delinquent Peer Influence on Childhood Delinquency: The Moderating Effect on Impulsivity*, 32 J. PSYCHOPATHOLOGY BEHAV. ASSESSMENT 315, 315 (2010).

<sup>296</sup> See e.g., Irina Komarovskaya et al., *The Role of Impulsivity in Antisocial and Violent Behavior and Personality Disorders Among Incarcerated Women*, 34 CRIM. JUST. & BEHAV. 1499, 1499 (2007).

<sup>297</sup> See, e.g., Greta M. Massetti et al., *Preventing Youth Violence Perpetration Among Girls*, 20 J. WOMEN'S HEALTH 1415, 1415 (2011); Elizabeth A. Yeater et al., *Predictors of Sexual Aggression Among Male Juvenile Offenders*, 27 J. INTERPERSONAL VIOLENCE 1242, 1243 (2011).

<sup>298</sup> See, e.g., Komarovskaya et al., *supra* note 296, at 1500; James A. Seager, *Violent Men: The Importance of Impulsivity and Cognitive Schema*, 32 CRIM. JUST. & BEHAV. 26, 31 (2005).

<sup>299</sup> See Benjamin J. Shannon et al., *Premotor Functional Connectivity Predicts Impulsivity in Juvenile Offenders*, 108 PROC. NAT'L ACAD. SCI. 11241, 11241 (2011).

<sup>300</sup> See Vitulano et al., *supra* note 295, at 315.

<sup>301</sup> Kelly & Veldman, *supra* note 295, at 191.

cifically, delinquent youths have been a targeted group to study because children under the age of fifteen account for about 30% percent of all juvenile arrests in the United States, according to a 2008 study.<sup>302</sup> In addition, delinquent youths “are two to three times more likely to become serious, violent[,] and chronic offenders than adolescents whose delinquent behavior begins in their teens,”<sup>303</sup> encouraging research in this area of individuals.

Studies have found an established relationship between delinquent criminal behavior and impulsivity by finding a positive correlation between the two.<sup>304</sup> One study focusing on male delinquency and school dropout behavior found that deviants are, in fact, more impulsive than non-deviants.<sup>305</sup> Another study concluded that impulsivity and low self-control are consistent predictors of delinquency.<sup>306</sup> Further, “adolescents who exhibit high levels of impulsivity are also likely to demonstrate high levels of delinquency.”<sup>307</sup> Because of the significant and established relationship between delinquent criminal behavior and impulsivity, criminologists believe that research on impulsivity warrants the most attention in studying juvenile delinquency and crime.<sup>308</sup>

The relationship between criminal behavior and impulsivity of incarcerated criminals is often linked to the study of aggression amongst the incarcerated.<sup>309</sup> Aggressive inmates have been found to have higher levels of both anger and impulsivity.<sup>310</sup> Specifically, in male offenders, “impulsivity has been shown to be a strong predictor of institutional aggression [and] violence,”<sup>311</sup> behavior which is often considered criminal. In a study of incarcerated female offenders, researchers found a correlation between higher levels of impulsivity and aggressive behavior.<sup>312</sup> However, there did not seem to be a significant relationship between women incarcerated for violent crimes and impulsivity, as women incarcerated for violent crimes did not demonstrate higher levels of impulsivity compared to nonviolent

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<sup>302</sup> Vitulano et al., *supra* note 295, at 315.

<sup>303</sup> *Id.*

<sup>304</sup> *See, e.g., id.* (finding that “[i]mpulsivity is an individual characteristic that has been found to be positively associated with child delinquency”); Kelly & Veldman, *supra* note 295, at 193 (finding that “deviants are more impulsive than nondeviants”).

<sup>305</sup> Kelly & Veldman, *supra* note 295, at 193.

<sup>306</sup> Komarovskaya et al., *supra* note 296, at 1502.

<sup>307</sup> Vitulano et al., *supra* note 295, at 316.

<sup>308</sup> Shayne Jones & Donald R. Lynam, *In the Eye of the Impulsive Beholder: The Interaction Between Impulsivity and Perceived Informal Social Control on Offending*, 36 CRIM. JUST. & BEHAV. 307, 319 (2009).

<sup>309</sup> Komarovskaya et al., *supra* note 296, at 1501–02.

<sup>310</sup> *Id.* at 1502.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 1513.

female offenders.<sup>313</sup> Researchers explain that the “substantially lower levels of violent offending among women may in part be associated with their lower levels of impulsive behavior.”<sup>314</sup> Additionally, “[t]he relationship between impulsivity and violence among incarcerated women seems to be complicated by the characteristics of female violent offending, which disproportionately involves domestic matters and interpersonal conflict.”<sup>315</sup>

Studies have also revealed other differences between men and women as related to impulsivity.<sup>316</sup> Men have been found to participate in more impulsive and risky behavior, and are responsible for about “76% of all criminal arrests in the United States, committing 89% of homicides and 82% of all violent crime.”<sup>317</sup> In a study looking at the relationship between gender and impulsivity, the results suggest that the differences may be related to “punishment and reward sensitivity.”<sup>318</sup> Specifically, “women’s greater sensitivity to and anxiety about the punishing consequences of risky action that deters them from the same level” of impulsive and criminal behavior as men.<sup>319</sup> This lower level of impulsivity among women likely relates to the greater prevalence of males in criminal behavior, as higher levels of impulsivity have been directly correlated with criminal behavior.<sup>320</sup>

Sexual aggression in men and women has also been studied and, again, impulsivity has been found to play a role.<sup>321</sup> One study found that the differences in impulsivity between males and females “mediate[] the relationship between sex and social representation of aggression.”<sup>322</sup> One study concluded that “a substantial proportion of assaultive behavior is a result of impulsive . . . retaliatory aggression.”<sup>323</sup> Because males tend to have higher levels of impulsivity,<sup>324</sup> it follows that they would also have higher measures of violent behavior, violence rating, assault convictions, and reported fights.<sup>325</sup>

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<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 1509.

<sup>315</sup> Komarovskaya et al., *supra* note 296, at 1513.

<sup>316</sup> *See, e.g.*, Catharine P. Cross et al., *Sex Differences in Impulsivity: A Meta-Analysis*, 137 PSYCHOL. BULL. 97, 97 (2011).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 121.

<sup>319</sup> *Id.*

<sup>320</sup> Jones & Lynam, *supra* note 308, at 316 (finding that “impulsivity is a robust correlate of offending”).

<sup>321</sup> Daniel Strüber et al., *Sex, Aggression and Impulse Control: An Integrative Account*, 14 NEUROCASE 93, 104 (2008).

<sup>322</sup> *Id.* at 103.

<sup>323</sup> Seager, *supra* note 298, at 46.

<sup>324</sup> Komarovskaya et al., *supra* note 296, at 1509.

<sup>325</sup> Seager, *supra* note 298, at 38.

Gender differences have also been found in relation to different mental disorders and psychopathologies as related to criminal behavior and impulsivity, namely, that men are more likely than women to suffer from certain mental disorders that affect impulsivity.<sup>326</sup> Studies have concluded that in comparing the criminal behavior of men and women, “impulsivity has been invoked as an explanatory variable.”<sup>327</sup>

As previously noted, studies have also found a link between personality disorders/psychopathy and impulsivity as related to criminal behavior. The DSM-IV-TR has listed impulsivity as a “behavioral component of several disorders, including attention-deficit/hyperactivity disorder [ADHD], borderline personality disorder, and antisocial personality disorder.”<sup>328</sup> Specifically, children with ADHD tend to be “more susceptible to deviant peer groups” and drug use, which are also related to criminal behavior.<sup>329</sup> Conduct Disorder (CD), a “persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated,” has also been linked to criminal behavior and impulsivity.<sup>330</sup> One study focused on the presence of CD in children and adolescents, finding that “[ad]olescents with [CD] are more impulsive than healthy adolescents.”<sup>331</sup> Research has also found “higher levels of impulsivity among patients with conduct disorder, personality disorders, and substance-abuse disorders.”<sup>332</sup>

Other studies conclude that “[i]mpulsivity is a key component of psychopathy, a form of personality disorder with a specific pattern of interpersonal, affective, and behavioral symptoms characterized by a grandiose, arrogant, callous, superficial, and manipulative interpersonal style.”<sup>333</sup> Studies have supported this assertion by finding that there is a correlation between psychopathy and impulsivity, observing “heightened levels of both impulsive and instrumental aggression” in individuals with psychopathy.<sup>334</sup> As previously mentioned, because impulsivity and criminal behavior have

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<sup>326</sup> Cross et al., *supra* note 316.

<sup>327</sup> See, e.g., *id.* at 97.

<sup>328</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR], as discussed in Matthew S. Stanford & Alan R. Felthous, *Introduction to This Issue: Impulsivity and the Law*, 26 BEHAV. SCI. & L. 671, 671 (2008); Komarovskaya et al., *supra* note 296, at 1501.

<sup>329</sup> Vitulano et al., *supra* note 295, at 316.

<sup>330</sup> DSM-IV-TR, *supra* note 328, at 93, as cited in Mathias et al., *supra* note 294, at 696.

<sup>331</sup> *Id.* at 700.

<sup>332</sup> Komarovskaya et al., *supra* note 296, at 1499 (discussing previous research by Moeller et al. from 2001).

<sup>333</sup> *Id.* at 1502 (discussing previous research by Hare in 1996 and 2006).

<sup>334</sup> Strüber et al., *supra* note 321, at 98.

been found to be correlated, it follows that mental disorders that affect impulsivity affect criminal behavior as well.<sup>335</sup>

Studies have also revealed a connection between impulsivity and brain functioning.<sup>336</sup> Researchers have found a correlation between specific regions of the brain and their effect on impulsivity and, thus, criminal behavior.<sup>337</sup> A study on the relationship between premotor functional connectivity and impulsivity resulted in a finding that more-impulsive incarcerated juveniles tended to have functional connectivity that correlated with areas of the brain “associated with spontaneous, unconstrained, self-referential cognition,” those areas linked with impulsivity, as compared to less-impulsive juveniles.<sup>338</sup>

Another study focusing on the link between aggression and impulsivity observed “strong evidence that structural or functional pre-frontal impairments are associated with a heightened risk of impulsive aggression.”<sup>339</sup> Data further supported a correlation between impulsivity and specific areas of the brain, including: the “lateral [orbitofrontal cortex], the dorsal [anterior cingulate cortex], and the amygdala.”<sup>340</sup>

Researchers have also observed a connection between certain neurotransmitter levels and impulsivity.<sup>341</sup> Low levels of serotonin have “long been associated with increased impulsivity.”<sup>342</sup> Additionally, the relationship between decreased levels of serotonin and impulsivity was stronger in men as compared to women, suggesting different serotonergic functioning in each of the sexes.<sup>343</sup> Cortisol has also been linked to impulsivity, finding that it may “moderate the relationship between impulsive aggression and testosterone in delinquent male adolescents.”<sup>344</sup> As previously mentioned, because of the established correlation between impulsivity and criminal behavior, it follows that if certain areas of the brain affect levels of impulsivity and aggression, these changes likely affect criminal behavior as well.

Several different sociological factors have also been studied in relation to impulsivity and criminal behavior.<sup>345</sup> More specifically, race has

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<sup>335</sup> See Mathias et al., *supra* note 294, at 700, 703.

<sup>336</sup> See, e.g., *id.* at 697; Shannon et al., *supra* note 299, at 11241.

<sup>337</sup> Shannon et al., *supra* note 299, at 11241.

<sup>338</sup> *Id.*

<sup>339</sup> Strüber et al., *supra* note 321, at 97.

<sup>340</sup> *Id.* at 104.

<sup>341</sup> *Id.* at 104, 108.

<sup>342</sup> *Id.* at 104.

<sup>343</sup> *Id.* at 105.

<sup>344</sup> *Id.* at 110.

<sup>345</sup> See, e.g., Rolf Loeber et al., *Findings from the Pittsburgh Youth Study: Cognitive Impulsivity and Intelligence as Predictors of the Age-Crime Curve*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1136, 1138–41 (2012); Vitulano et al., *supra* note 295, at 319.

been found to be moderately related to impulsivity, with researchers finding that minorities tend to exhibit higher levels of impulsivity, in a study of delinquent youths.<sup>346</sup> Intelligence (IQ level) and impulsivity are also correlated with criminal behavior, with researchers finding that male adolescents with low intelligence and high impulsivity tend to have high rates of criminal offense.<sup>347</sup>

Family and social relationships have been associated with impulsivity and criminal behavior, with researchers observing that “impulsivity is more weakly related to offending when parental support is high.”<sup>348</sup> In addition, those with strong pro-social ties in the areas of employment, school, and peers exhibited fewer self-control issues.<sup>349</sup> In another study, researchers found that “social bond and impulsivity correlates were the only two significant re-offending risk factors for juvenile violent probationers.”<sup>350</sup> As such, negative experiences in childhood, such as violence or abuse, are also associated with increased levels of impulsivity.<sup>351</sup> Other factors such as neglect, rejecting/hostile mothers, a chaotic childhood family, and parental reinforcement of immediate gratification have also been correlated with impulsive behavior.<sup>352</sup> These negative experiences often “teach that delayed responses are not rewarded,” which in turn supports impulsive, and often criminal, behavior since there appears to be no advantage or reward in waiting.<sup>353</sup> A relationship between anti-social behavior and impulsivity has also been observed in incarcerated individuals, re-enforcing the idea that those with social ties tend to have lower levels of impulsivity.

Studies have also found a correlation between socioeconomic status as it relates to impulsivity and delinquent criminal behavior, finding that impulsivity has a stronger effect on the delinquency of male adolescent boys from homes with low socioeconomic status.<sup>354</sup> Poor housing has also been considered a predictor of adolescent aggression and teenage violence, and large family size (five or more children) has been used to predict teenage violence and convictions for violence.<sup>355</sup> This study found that the most important predictor of aggression and violence included several elements of

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<sup>346</sup> Vitulano et al., *supra* note 295, at 318.

<sup>347</sup> Loeber et al., *supra* note 345, at 1146.

<sup>348</sup> Jones & Lynam, *supra* note 308, at 308.

<sup>349</sup> *Id.* at 309.

<sup>350</sup> Heng Choon (Oliver) Chan & Wing Hong Chui, *Psychological Correlates of Violent and Non-violent Hong Kong Juvenile Probationers*, 30 BEHAV. SCI. & L. 103, 115 (2012).

<sup>351</sup> Strüber et al., *supra* note 321, at 96.

<sup>352</sup> Seager, *supra* note 298, at 45.

<sup>353</sup> *Id.* at 44.

<sup>354</sup> Jones & Lynam, *supra* note 308, at 309.

<sup>355</sup> David P. Farrington, *Early Predictors of Adolescent Aggression and Adult Violence*, 4 VIOLENCE & VICTIMS 79, 87 (1989).

impulsivity.<sup>356</sup> Further, elements of impulsivity (thrill and adventure seeking, lack of considering of consequences before action, etc.) were “more strongly related to offending among young adults who perceived their neighborhoods as lacking in informal social control.”<sup>357</sup>

Drug use, often considered criminal behavior in itself, has also been associated with impulsivity.<sup>358</sup> In a study focusing on different elements of impulsivity, including urgency, lack of premeditation, lack of perseverance, and sensation seeking, drug use or abuse was found to be a correlate.<sup>359</sup> Lack of premeditation was strongly related to indications of “early substance use and later substance abuse.”<sup>360</sup> Sensation seeking was also related to later alcohol abuse, but not to the same extent as lack of premeditation.<sup>361</sup> Urgency was associated with early marijuana use among men.<sup>362</sup> Overall, the lack of premeditation and sensation seeking elements of impulsivity bore the strongest relationship to criminal behavior.<sup>363</sup> Another study found a positive correlation between hard drug use, the frequency of alcohol and marijuana use, elements of impulsivity, and sexual aggression and harassment.<sup>364</sup> In addition, higher levels of impulsivity have been found amongst those with substance-abuse disorders.<sup>365</sup> In each of the various levels of drug use and abuse studied, some form of impulsivity was found to be linked to the criminal behavior.<sup>366</sup>

### C. Sanction Awareness

Despite the axiom that “ignorance of the law is no excuse,” to be convicted of a crime in our justice system, one must have knowledge that his or her behavior was criminal, in most circumstances.<sup>367</sup> This concept is consistent with the utilitarian theory of punishment, which holds that “the

<sup>356</sup> *Id.* at 97 (finding that the most important predictors at ages 8–10 of aggression and violence includes hyperactivity-impulsivity-attention deficit (psychomotor impulsivity, darning, lack of concentration or restlessness)).

<sup>357</sup> Jones & Lynam, *supra* note 308, at 316.

<sup>358</sup> See, e.g., Donald R. Lynam & Joshua D. Miller, *Personality Pathways to Impulsive Behavior and Their Relations to Deviance: Results from Three Samples*, 20 J.

QUANTITATIVE CRIMINOLOGY 319, 335 (2004).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 336.

<sup>364</sup> Yeater et al., *supra* note 297, at 1250.

<sup>365</sup> Komarovskaya et al., *supra* note 296, at 1499.

<sup>366</sup> See, e.g., *id.*; Lynam & Miller, *supra* note 358, at 335; Yeater et al., *supra* note 297, at 1252.

<sup>367</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 645–48 (1984), as cited in Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 265 (1993).

purpose of punishment is to deter others from committing crimes.”<sup>368</sup> The utilitarian theory rests on the assumption that a negative correlation exists between legal consciousness and criminal behavior. Several studies have analyzed whether knowledge of the law is a true deterrent to breaking the law. A few studies conclude that there is no correlation because our actions are determined by impulse due to our biological make up.<sup>369</sup> However, a greater number of studies conclude that there exists a relationship which is affected by both the type of legal consciousness held by the individual<sup>370</sup> and the type of law applied.<sup>371</sup>

Under a broad definition, legal consciousness is “the way[] people understand and use the law”<sup>372</sup> and the “participation in the process of constructing legality.”<sup>373</sup> The effect that legal knowledge has on deviant behavior depends on an individual’s perception of the law, which is created by his or her life experiences.<sup>374</sup> Erik Fritsvold describes four categories of legal consciousness: Before the Law, With the Law, Against the Law, and Under the Law.<sup>375</sup> He added Under the Law to the first three categories, originally articulated by Patricia Ewick and Susan Silbey.<sup>376</sup> In his work, Fritsvold describes how people within each category react to legal sanctions differently.<sup>377</sup>

As Fritsvold described, individuals with Before the Law Consciousness view the law as “an abstract entity, removed from the everyday experiences of life.”<sup>378</sup> They perceive it as an unbiased, static system that uses rational methods to run society, and views all individuals as equals

<sup>368</sup> Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*, 21 SOC. JUST. RES. 119, 120 (2008).

<sup>369</sup> See Steven K. Erickson, *Blaming the Brain*, 11 MINN. J. L. SCI. & TECH. 27, 69 (2010) (stating that “[b]ehavior generates from discharges of neuronal output which are largely (if not entirely) beyond the influence of consciousness” and referencing that it “is mostly an autonomous process whereby people mechanically respond to stimuli presented to them”). As a result, Erickson argues that understanding behavior should focus on one’s volition and not on one’s knowledge of the law. *Id.* at 69–70.

<sup>370</sup> See Erik D. Fritsvold, *Under the Law: Legal Consciousness and Radical Environmental Activism*, 34 LAW & SOC. INQUIRY 799, 804–07 (2009).

<sup>371</sup> See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 26–30 (2000).

<sup>372</sup> SALLY MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS 5 (1990), *as cited in* Fritsvold, *supra* note 370, at 803.

<sup>373</sup> PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 35 (1998), *as cited in* Fritsvold, *supra* note 370, at 803.

<sup>374</sup> Fritsvold, *supra* note 370, at 804.

<sup>375</sup> *Id.* at 804–07.

<sup>376</sup> EWICK & SILBEY, *supra* note 373, at 35, *as cited in* Fritsvold, *supra* note 370, at 806–07.

<sup>377</sup> *Id.* at 804–07.

<sup>378</sup> *Id.* at 804.

“Before the Law.”<sup>379</sup> Believing that the system is hierarchical, trustworthy, and operating appropriately beyond their control, these individuals are “unlikely to engage in acts of resistance of any sort against the legal system.”<sup>380</sup> A study by Laura Beth Nielsen concluded that most white males fit this description.<sup>381</sup> Her study explored the reasons why different social groups opposed the legal regulation of verbal harassment.<sup>382</sup> The white males in her study disfavored the regulation because they sought to uphold the traditional First Amendment values.<sup>383</sup> Thus, holding a Before the Law Consciousness, these white males continued to “privilege[] law above even their own life experiences.”<sup>384</sup>

Another study by Stephen McG. Bundy and Einer Elhauge described a similar group as the “law abiding” citizens who will likely comply with “what they understand to be their legal obligations”<sup>385</sup> regardless of the sanctions.<sup>386</sup> Scott Shapiro also described this type of consciousness when he explained in the context of his “autonomy assumption” theory.<sup>387</sup> He states that people have a choice to comply with the law and choose to obey “each time they deem the rules applicable.”<sup>388</sup> This theory assumes that “rational” law abiding citizens will choose to obey the law because they feel obligated to do so.<sup>389</sup> However, they will also “never act against the balance of reasons.”<sup>390</sup> Thus, as rational thinkers, they may disobey the law but only when doing so would yield improper or illogical results.

Those who have a With the Law Consciousness break down the superior ideals held by Before the Law Consciousness, and consider the law to be a game that is meant to be strategically won.<sup>391</sup> These individuals attempt to advance their legal proficiency in order to maximize their advantage in the game,<sup>392</sup> but are unlikely to engage in resistance.<sup>393</sup> Women in the Nielsen study, who are more often the victims of verbal harassment,

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<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 818.

<sup>381</sup> Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 *LAW & SOC. REV.* 1055, 1075 (2000).

<sup>382</sup> *Id.* at 1068.

<sup>383</sup> *Id.* at 1085–86.

<sup>384</sup> *Id.* at 1086.

<sup>385</sup> Bundy & Elhauge, *supra* note 367, at 275.

<sup>386</sup> *Id.*

<sup>387</sup> Scott J. Shapiro, *Rationality of Rule-Guided Behavior: A Statement of the Problem*, 42 *SAN DIEGO L. REV.* 55, 59 (2005).

<sup>388</sup> *Id.*

<sup>389</sup> *See id.*

<sup>390</sup> *Id.* at 55.

<sup>391</sup> Fritsvold, *supra* note 370, at 804.

<sup>392</sup> *Id.* at 804.

<sup>393</sup> *Id.* at 818.

fell into this category because they strategically reasoned that regulating verbal harassment “may present them as victims and further undermine their social status,”<sup>394</sup> and thus opposed the regulation.

Bundy and Elhauge’s study described this group as “sanction optimizers” who will base its decision to engage in deviant behavior on “the actual level of expected legal sanctions and [will] give[] no independent weight to the fact that the conduct is legally prohibited.”<sup>395</sup> Bundy and Elhauge further concluded that there are individuals who become more deviant as their knowledge of the law increases.<sup>396</sup> For example, if an attorney gives his client information about the ins and outs of the tax system, “[s]uch advice might, for example, teach clients how to exploit tax loopholes.”<sup>397</sup> This resembles a more deviant version of a With the Law thinker, who uses his or her knowledge to cheat the game instead of playing the game fairly.<sup>398</sup> Another example of this occurs when individuals know there is a small likelihood that they will be caught or punished for their crime, resulting in a greater incentive to commit such acts.<sup>399</sup>

Those in the Against the Law Consciousness category are more likely to engage in resistance to the law because they view the legal system as a “commodity of power” to which they do not have equal access.<sup>400</sup> Nielsen’s study placed African-American males in this group who disfavored the regulation of verbal harassment “because of a distrust of authority and a cynicism about law generally.”<sup>401</sup> Nielsen’s study further supported the conclusion that Against the Law thinkers find the legal system to be inefficient in areas such as welfare, social security, and criminal law, because legal figures ignore the needs of certain groups of people.<sup>402</sup> Thus, Nielsen added the important finding that “being a member of a traditionally disadvantaged group has a significant effect on an individual’s orientation to the law.”<sup>403</sup>

Unlike Before the Law Consciousness, this group believes the law is “unable to effectively resolve disputes, recognize truth, or respond to in-

<sup>394</sup> Nielsen, *supra* note 381, at 1086.

<sup>395</sup> Bundy & Elhauge, *supra* note 367, at 274–75 (stating that “[a]ctors vary not only in their response to legal regulation generally, but also in their response to the choice of particular sanctioning strategies”).

<sup>396</sup> *Id.* at 334.

<sup>397</sup> *Id.* at 288.

<sup>398</sup> See Fritsvold, *supra* note 370, at 804.

<sup>399</sup> Kip Schlegel et. al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 1200–01 (2001).

<sup>400</sup> Fritsvold, *supra* note 370, at 805.

<sup>401</sup> Nielsen, *supra* note 381, at 1086.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 1087.

justice.”<sup>404</sup> Unlike With the Law Consciousness, these individuals do not feel they have an equal opportunity to participate in the legal game, which is dominated by people who use “ruses, tricks, and subterfuges ... to appropriate part of the law's power.”<sup>405</sup> Thus, “[u]nwilling to stand before the law and unable to play with the law, [these] people [retaliate] against the law”<sup>406</sup> with the hopes of costing their untrustworthy oppressors a great deal of money.<sup>407</sup> Such retaliation includes mild forms of resistance such as “foot-dragging, omissions, ploys, small deceits, humor[,] and making scenes.”<sup>408</sup>

Under the Law Consciousness has a similar attitude to that of Against the Law Consciousness, but chooses more radical methods of retaliation.<sup>409</sup> Under the Law thinkers make their point by openly and purposefully challenging the social order.<sup>410</sup> Fritsvold created this category after conducting a study of environmental radicals who fought against environmental injustice through criminal behavior.<sup>411</sup> These four categories of legal consciousness have unique effects on individuals’ choice of deviant behavior.<sup>412</sup> Such behavior is also dependent upon the type of law under which an individual is forming his or her perception.<sup>413</sup>

The question remains as to whether knowledge of different legal forums effects individual’s analysis and behavior. One perspective is the rules versus standards approach; another is the economic<sup>414</sup> analysis versus behavioral analysis approach.<sup>415</sup> According to Larry Alexander, laws come in the form of rules and standards, which are implemented differently and thus have a different effect on behavior.<sup>416</sup> He explains that “standards” are considered to be legal norms that “enjoin us to ‘do the right thing,’” and require each actor to follow rational behavior.<sup>417</sup> However, it is not always

<sup>404</sup> EWICK & SILBEY, *supra* note 373, at 196, *as cited in* Fritsvold, *supra* note 370, at 805.

<sup>405</sup> EWICK & SILBEY, *supra* note 373, at 28, *as cited in* Fritsvold, *supra* note 370, at 805.  
<sup>406</sup> *Id.*

<sup>407</sup> Fritsvold, *supra* note 370, at 816.

<sup>408</sup> EWICK & SILBEY, *supra* note 373, at 196, *as cited in* Fritsvold, *supra* note 370, at 818–19 (stating that “these forms of resistance are relatively mild and they do not adequately represent the forms of resistance regularly employed by [radicals]”).

<sup>409</sup> Fritsvold, *supra* note 370, at 807.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 819 (stating that they are “revolutionaries who routinely break codified law to protect the environment by combatting law enforcement, the state, and the court system”).

<sup>412</sup> *Id.* at 804–07, 818–19.

<sup>413</sup> Korobkin, *supra* note 371, at 26–30.

<sup>414</sup> *See generally id.* at 23; Shapiro, *supra* note 387, at 55.

<sup>415</sup> *See generally* Korobkin, *supra* note 371, at 23.

<sup>416</sup> Larry Alexander, *Introduction to the Symposium on the Rationality of Rule-Following*, 42 SAN DIEGO L. REV. 53, 53 (2005).

<sup>417</sup> *Id.* at 53.

clear to citizens what behavior is acceptable under a standard because the line between right and wrong is drawn on a case by case basis.<sup>418</sup> For example, under “[a] law requiring drivers to travel ‘no faster than is reasonable,’”<sup>419</sup> one may not know if they are driving at a reasonable speed because a reasonable speed will differ depending on the situation.<sup>420</sup>

Rules, on the other hand, are permanent lines drawn in the sand that clearly state what is right or wrong in every scenario.<sup>421</sup> However, because rules do not change based on facts, in some scenarios, they yield unfavorable outcomes that go against fairness or logic.<sup>422</sup> Shapiro explored this dilemma and came to the conclusion that although rules don’t always bring an immediate optimal outcome, the long-term effects have greater benefits, making it a desirable legal form.<sup>423</sup>

Lawmakers must consider the effect rules and standards have on behavior to determine which legal form is more appropriate for the area of law at hand. To do so, lawmakers must understand the analysis a citizen conducts when deciding when and how he or she will abide by the law. The economic analysis and the behavioral analysis are two methods lawmakers use to predict how citizens will behave under certain laws based on their knowledge of the law.<sup>424</sup>

Russell Korobkin found that the economic analysis sometimes predicts a different type of behavior under rules and standards than the behavioral analysis.<sup>425</sup> Both analyses conclude that depending on the scenario, one legal forum may be more preferable than the other.<sup>426</sup> However, which legal forum is preferable will depend on the type of analysis used.<sup>427</sup> Korobkin explains that the economic analysis narrowly focuses on an individual’s process of weighing the cost and benefits associated with following the law.<sup>428</sup> Under this analysis, lawmakers also weigh their own cost and benefits of adjudicating and enforcing the law.<sup>429</sup> Citizens must weigh

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<sup>418</sup> Korobkin, *supra* note 371, at 37–38.

<sup>419</sup> *Id.* at 23.

<sup>420</sup> *Id.* at 37–38.

<sup>421</sup> *See id.*; Alexander, *supra* note 416, at 54.

<sup>422</sup> Alexander, *supra* note 416, at 54.

<sup>423</sup> Shapiro, *supra* note 387, at 58. Shapiro demonstrates an example where the Statute of Frauds would bar admission of video evidence clearly demonstrating that a contract was formed if the contract is for the sale of a good valued at \$499. This rule seems unreasonable in this specific scenario, but over all, it works effectively. *Id.* at 57–58.

<sup>424</sup> Korobkin, *supra* note 371, at 43–44.

<sup>425</sup> *See id.*

<sup>426</sup> *See id.* at 43.

<sup>427</sup> *Id.* at 30.

<sup>428</sup> *Id.* at 30–31.

<sup>429</sup> *Id.* at 39–40.

the cost of spending time or money to understand the law.<sup>430</sup> For example, there is low cost involved with learning the black-letter law of a clear and uncomplicated rule because it can easily be researched and understood.<sup>431</sup> Thus, it will likely be followed more often. However, it will cost an individual more to research and understand, or to pay someone to explain, standards and complex rules containing many exceptions.<sup>432</sup> As a result, they may choose to remain ignorant about the complicated laws and unknowingly disobey them.<sup>433</sup>

Once the law is understood, individuals weigh the costs and benefits of complying with the law to avoid sanctions.<sup>434</sup> This concept echoes Shapiro's theory that individuals have a choice to comply with the law and that "rule-guided behavior is intentional."<sup>435</sup> Korobkin also states that the economic analysis warns adjudicators that they must take care to properly communicate laws.<sup>436</sup> Failing to do so causes people to unknowingly disobey the law or to be overly cautious, both of which lead to greater social costs.<sup>437</sup>

Ideally, bright line rules are implemented with ease, given that they are communicated clearly, applied correctly, and yield the desired results. However, that is not always the case. At times the flaws of rules can "have the perverse result of discouraging desirable behavior or failing to discourage undesirable behavior."<sup>438</sup> Consider Korobkin's example of a nuisance law that prohibits noise greater than 100 decibels in residential neighborhoods after 10 pm.<sup>439</sup> A "self-interested" reveler, who thinks similarly to a sanction optimizer, will unnecessarily play music at 99 decibels knowing that they are still in compliance with the law, but making it impossible for a neighbor to sleep.<sup>440</sup> This law is underinclusive because it fails to regulate certain related undesirable behavior.<sup>441</sup> It becomes a greater problem if

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<sup>430</sup> Korobkin, *supra* note 371, at 35.

<sup>431</sup> *Id.* at 34.

<sup>432</sup> *Id.* at 35 ("Predicting what behaviors are within the law's boundaries might be more costly under a standard than under a rule, but this is likely to depend on the content of the standard.").

<sup>433</sup> *See id.* at 35.

<sup>434</sup> *Id.*

<sup>435</sup> Shapiro, *supra* note 387, at 60 (stating that a "rule constrains non conformity, but it does not compel the intentional action").

<sup>436</sup> *See* Korobkin, *supra* note 371, at 35.

<sup>437</sup> *Id.* at 37–38.

<sup>438</sup> *Id.* at 35.

<sup>439</sup> *Id.* at 36.

<sup>440</sup> *Id.*

<sup>441</sup> *See id.*

knowledge of the underinclusiveness encourages rebels to engage in this undesirable behavior.<sup>442</sup>

On the other hand, overinclusive laws negatively affect desirable behavior that is better left unregulated.<sup>443</sup> For example, a law requiring manufacturers to install certain safety devices is overinclusive if certain manufacturers must bear the installation cost when their products are not a safety risk.<sup>444</sup> Thus, it requires “undesirable actions to achieve compliance with the law.”<sup>445</sup> It is important to note that some overinclusiveness is harmless when the cost is minor. For example, under a law prohibiting littering in a park, trash that is biodegradable posing no risk of harm to the environment makes the law overinclusive.<sup>446</sup> Nonetheless, a clean park is a greater benefit than the cost of someone throwing away environmentally harmless trash. Thus, lawmakers must decide whether it is more beneficial to ban all activity in a category even though some of that activity may not be harmful. Where the cost of doing so is low, a bright line rule, or “pure rule” is suitable. However, where the cost is greater, a complex rule that contains exceptions may be more appropriate. Consequently, the more complex a rule becomes, the more it resembles a standard and requires citizens to undergo a costly, rational analysis to comply.

Bundy and Elhauge’s study came to the same conclusion about the dilemma of over and underinclusive rules and deduced that this flaw can encourage some criminal behavior.<sup>447</sup> They examined crimes requiring a higher burden of proof for a conviction.<sup>448</sup> This requirement resulted in some undesired behavior going unpunished because of forgetful or dishonest witnesses that made it difficult to meet such a burden.<sup>449</sup> Criminals who knew about the imperfection of such sanctions took advantage of it knowing they were less likely to be convicted.<sup>450</sup> The same concept was applied to gang violence as discussed in Ron Levi’s research.<sup>451</sup> Levi explains that the rise of gang control over Chicago neighborhoods was a result of the government’s lack of ability to disperse gang members when they gathered

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<sup>442</sup> Korobkin, *supra* note 371, at 36–37.

<sup>443</sup> *See id.* at 37.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* Additionally, overinclusive rules cause overly cautious behavior that is socially costly. For example, “Citizens’ knowledge that the standard is overinclusive as applied could encourage sub-optimally cautious driving.” *See id.* at 39.

<sup>446</sup> *Id.* at 37.

<sup>447</sup> *See* Bundy & Elhauge, *supra* note 367, at 270–71.

<sup>448</sup> *See id.*

<sup>449</sup> *See id.* at 270.

<sup>450</sup> *See id.* at 298–99.

<sup>451</sup> Ron Levi, *Making Counter-Law: On Having No Apparent Purpose in Chicago*, 49 BRIT. J. CRIMINOLOGY 131, 134 (2009).

in neighborhoods to intimidate citizens.<sup>452</sup> This limitation protected citizens' rights by not allotting arbitrary authority to police officers.<sup>453</sup> Consequently, it failed to protect citizens from the power of gangs.<sup>454</sup> Knowing this, the gang members took advantage of the gap in the law.<sup>455</sup>

The economic analysis focuses on the individual's cost benefit analysis, and indicates that an individual's predicted behavior depends on the sanction applied.<sup>456</sup> Similarly, behavioral analysis, discussed below, does not definitively favor one legal forum over another.<sup>457</sup> However, behavioral analysis is a more complex analysis that "yield[s] richer and more nuanced predictions . . . about how citizens are likely to react to law."<sup>458</sup>

Behavioral analysis indicates that individuals follow a Rational Choice Theory (RCT), which states that they "act so as to maximize their expected utility subject to external constraints, have fixed and stable preferences that are independent of law, and act in their self-interest."<sup>459</sup> Korobkin focuses on three subcategories of RCT. The first, "bounded rationality," states that a number of factors unrelated to the law cause individuals to act in a way that does not maximize their utility.<sup>460</sup> The second, "preference endogeneity," attributes rational choice making to one's knowledge of the law.<sup>461</sup> The third, "norm compliance," attributes the desire to comply with social standards to the decision to comply with the law.<sup>462</sup>

According to Korobkin, bounded rationality suggests that cognitive biases cause people to act irrationally, which has an effect on their compliance with the law.<sup>463</sup> For example, a "self-serving bias" theory states that "individuals are likely to interpret ambiguous information in ways that re-sound to their benefit."<sup>464</sup> Thus, under a standards regime, instead of doing a cost-benefit analysis, "self servers" simply assume their conduct will

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<sup>452</sup> *Id.* at 140 (quoting a Chicago citizen saying that "despite gang members 'hanging out', 'the police would have to leave because there was absolutely nothing they could do', since they 'couldn't do anything about disbursing [sic.] them'").

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *See id.* Levi also mentions that, at one point, in the midst of rising gang violence, there were Before the Law thinkers who still believed that the "law and legality *persisted* as the framework for seeking well-being and security." *Id.* at 146.

<sup>456</sup> *See generally*, Korobkin, *supra* note 371, at 30–43.

<sup>457</sup> *Id.* at 58.

<sup>458</sup> *Id.* at 59.

<sup>459</sup> *Id.* at 44.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> Korobkin, *supra* note 371, at 44.

<sup>463</sup> *Id.* at 46.

<sup>464</sup> *Id.*

comply with the law.<sup>465</sup> This highlights the importance of effectively communicating the law, but also predicts a greater increase in undesirable behavior under standards than the economic analysis does.<sup>466</sup>

Under the Preference Endogeneity analysis, knowledge of rules increases the extent to which citizens feel “endowed” with a legal entitlement.<sup>467</sup> Studies show that “individuals place a higher value on entitlements they have than on entitlements they do not have, but would like to have.”<sup>468</sup> For example, people will place a higher value on clean air if told they have a right to it than if they are told that a manufacturer has a right to pollute the air.<sup>469</sup> Consequently, in private lawmaking, applying this analysis to a pure rule would hinder bargaining between parties because individuals place the value of their rights too high to be negotiable.<sup>470</sup> However, with a standard requiring “reasonable behavior,” it is not clear who has the right to what level of behavior, which encourages negotiation.<sup>471</sup>

Another conclusion drawn from several studies states that rules based on community norms require less work on the part of law abiding citizens because they naturally seek to adhere to what is socially accepted by the community.<sup>472</sup> A study by Kirk Williams, Co-Director of the Robert Presley Center for Crime and Justice Studies, and author Richard Hawkins described these community norms as “extra-legal sanctions,” which, if not followed, result in “loss of interpersonal or community respect and social disapproval.”<sup>473</sup> Korobkin called this concept “norm compliance theory,” which suggests that individuals will sometimes put the customs of society above their own personal desires.<sup>474</sup> This theory centers on the assumption that individuals’ behavior is driven by two major components: “(1) the direct utility that they expect to enjoy from competing behavioral choices and (2) the indirect utility that they expect to enjoy from conforming to community norms.”<sup>475</sup> At times, the benefits of complying with community

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<sup>465</sup> *See id.*

<sup>466</sup> *Id.* at 46–47 (also suggesting that standards will “chill less desirable behavior,” so if “lawmakers are particularly concerned about the chilling effects of a law, the costs of standards may be less vis-à-vis rules than would otherwise be expected”).

<sup>467</sup> *Id.* at 51.

<sup>468</sup> Korobkin, *supra* note 371, at 51.

<sup>469</sup> *Id.*

<sup>470</sup> *See id.* at 52.

<sup>471</sup> *See id.*

<sup>472</sup> *Id.* at 54 (describing community norms as actions that are socially acceptable or those that if not done are seen as unacceptable (for example, removing a hat inside a building)).

<sup>473</sup> Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC’Y REV. 545, 558 (1986).

<sup>474</sup> Korobkin, *supra* note 371, at 54.

<sup>475</sup> *Id.*

norms will outweigh the benefits of advancing personal goals.<sup>476</sup> Thus, those with “norm compliance” ideology will have an added incentive to obey the law if it is rooted in community norms.<sup>477</sup> Regarding rules and standards, bright line rules are more likely to encourage desirable behavior because it is clear what behavior is being valued by the community.<sup>478</sup> On the other hand, standards requiring “reasonable” behavior are not as clear on what type of behavior the community values.<sup>479</sup>

While most of these approaches have been theoretical, social scientists have provided experimental and meta-analytic support for the relationship between risk appraisal and risk behavior.<sup>480</sup> The available research generally supports the assumption that as a person’s “risk perception” rises, his willingness to engage in risky behavior decreases.<sup>481</sup> Risk perception or “risk appraisal” is a person’s belief about his vulnerability to a negative outcome.<sup>482</sup> In one study, researchers examined risk perception in the context of sensation seeking.<sup>483</sup> The study determined that high sensation seekers generally do not view their environment as threatening and leading to negative consequences.<sup>484</sup> Thus, certain individuals might be predisposed to engage in risky actions because they do not appraise situations as threatening, risky, or dangerous in the same way as others do.<sup>485</sup>

In another study, researchers focused in part on the relationship between risk appraisal and criminal behavior.<sup>486</sup> There, the researchers hypothesized that risk appraisal would be negatively related to risky criminal behavior.<sup>487</sup> To test the hypothesis, the researchers examined the relationship between risk appraisal and risky behavior in a variety of situations, such as the crime risk associated with a particular behavior.<sup>488</sup> The results indicated that “[h]igh personal risk appraisal was associated with low levels of risky behavior in the area[]of crime.”<sup>489</sup> The researchers found that the

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<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 55.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

<sup>480</sup> See Paschal Sheeran et al., *Does Heightening Risk Appraisals Change People's Intentions and Behavior? A Meta-Analysis of Experimental Studies*, 140 *PSYCHOL. BULL.* 511, 511 (2014).

<sup>481</sup> *See id.* at 512.

<sup>482</sup> *Id.*

<sup>483</sup> Jonathan W. Roberti, *A Review of Behavioral and Biological Correlates of Sensation Seeking*, 38 *J. RES. PERSONALITY* 256, 257 (2004).

<sup>484</sup> *Id.* at 269.

<sup>485</sup> *See id.*

<sup>486</sup> Paula Horvath & Marvin Zuckerman, *Sensation Seeking, Risk Appraisal, and Risky Behavior*, 14 *PERSONALITY & INDIVIDUAL DIFFERENCES* 41, 44 (1993).

<sup>487</sup> *See id.* at 43.

<sup>488</sup> *See id.* at 44.

<sup>489</sup> *Id.* at 47.

more risky an activity was judged to be, the less likely a person was to engage in the activity, particularly if the negative outcome is clearly defined (such as with criminal penalties).<sup>490</sup>

Other studies indicate the relationship between knowledge and risky behavior might vary amongst individuals.<sup>491</sup> For example, researchers hypothesized, in another study, that “[r]eward bias—the tendency to rate a risky activity as more of a ‘good idea’—increased with age across adolescence before declining in early adulthood.”<sup>492</sup> In their study, the researchers found that this “reward bias was higher in adolescence than in either adulthood or preadolescence,”<sup>493</sup> and that “the relation between reward bias and law-breaking behavior was significantly stronger in middle adolescence than for younger and older age ranges.”<sup>494</sup>

These individual studies fit within the overarching narrative of research in this area. For example, researchers conducted a meta-analysis, a quantitative study using individual studies of how heightening risk appraisal affects individuals’ subsequent behavior in finance, crime, and health as data points.<sup>495</sup> They found that as risk perception increased, there was a reliable impact on behavioral outcomes across the scientific studies.<sup>496</sup> The meta-analysis concluded that risk appraisal plays a causal role in changing behavior; more knowledge of risk decreases the likelihood an individual will perform an action.<sup>497</sup>

### III. SURVEY DATA

Beliefs have been shown to play a significant role in the hazing behavior of BGLO members.<sup>498</sup> Accordingly, while low agreeableness, high extraversion and impulsivity may lead to greater hazing among BGLO members, these variables are likely to be less significant predictors than sanction awareness. This is because awareness of the hazing’s implications are likely to influence BGLO members’ beliefs about hazing’s overall utility as a mechanism for screening potential members and inculcating them with organizational values.

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<sup>490</sup> *Id.* at 50.

<sup>491</sup> Elizabeth Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 LAW & HUM. BEHAV. 412, 419 (2013).

<sup>492</sup> *Id.* at 413.

<sup>493</sup> *Id.* at 416.

<sup>494</sup> *Id.*

<sup>495</sup> Horvath & Zuckerman, *supra* note 486, at 47.

<sup>496</sup> Schulman & Cauffman, *supra* note 491, at 420.

<sup>497</sup> *See id.*

<sup>498</sup> Parks et al., *supra* note 11, at 444.

There are several strengths for this study. First, this is the only large-scale data base assessing hazing behaviors among BGLOs. Second, the sample was quite large. Third, the sample included both sororities and fraternities, members from various geographical regions, and respondents representing various ages. While we make no claim that this sample is nationally-representative, it is very inclusive. Fourth, a variety of measures was included in the study, and included questions that span various fields (i.e., law, psychology, criminology, and sociology).

Of course, with any study, there are also weaknesses. This was an online study. Using this method, we cannot be entirely sure who responded to the survey. The method of self-report was also used, which can be biased. The nature of the questions included in the study was sensitive, and this could have influenced participants to under-report behaviors they perceived as negative. They might have done so to protect themselves, their sorority/fraternity, or BGLOs more generally.

#### A. Methods

##### 1. Sample

The sample was comprised of 1,357 individuals. The majority were female (62%) and African-American (90.9%; followed by Caribbean, 2.8%; African, 1.8%; Caucasian, 1.1%; and “other,” 3.4%), and the greatest percentage were initiated in chapters in the southeast (47.3%; Midwest, 21.0%; Northeast and Washington D.C., 19.3%; Southwest, 5.0%; West, 4.2%; and International, 0.8%). The mean age was 40.04 (standard deviation = 12.87).

##### 2. Measures

*Hazing.* A total of twenty-seven different forms of hazing were examined for this analysis. Participants reported whether any of these twenty-seven acts were required of pledges. Some forms of hazing were relatively mild (e.g., performing calisthenics) while others were more severe (e.g., being paddled). The mean number of acts reported was 14.16 (standard deviation = 8.26). The specific acts (see Appendix) included in the survey were generated by the authors of the current study, with an eye toward being as inclusive as was reasonable. The final scale was developed based on exploratory factor analyses.

*Big Five Inventory (BFI).* The BFI is a forty-four-item measure of general personality designed to assess the Big Five personality traits.<sup>499</sup> Neuroticism assesses the degree of emotional stability and adjustment. The eight-item scale was reliable ( $\alpha = 0.81$ ), and had a mean of 17.61 (standard deviation = 5.59). Extraversion gauges positive emotional adjustment and sociability. The eight-item scale was reliable ( $\alpha = 0.83$ ), and had a mean of 28.74 (standard deviation = 5.72). Openness refers to an interest in culture and new experiences. The 10-item scale was reliable ( $\alpha = 0.75$ ), and had a mean of 38.88 (standard deviation = 5.28). Agreeableness assesses how one approaches interpersonal relationships and interactions. The nine-item scale was reliable ( $\alpha = 0.75$ ), and had a mean of 37.00 (standard deviation = 4.68). Conscientiousness refers to the extent to an individual plans, is organized, and can inhibit impulses. The nine-item scale was reliable ( $\alpha = 0.82$ ), and had a mean of 37.76 (standard deviation = 5.00).

*Impulsivity.* To measure this, the Impulse Control subscale from the Weinberger Adjustment Inventory was used.<sup>500</sup> More precisely, it was reverse coded so that higher scores are indicative of impulse dyscontrol, or higher levels of impulsivity. This was performed by standardizing the variable, and multiplying that by 1.00. Thus, the mean of this standardized variable was 0.00 with a standard deviation of 1.00. The scale was reliable ( $\alpha = .72$ ).

*Knowledge of Rules and Laws.* Participants were asked to indicate the extent of their knowledge about university rules prohibiting hazing, as well as state laws proscribing such behavior. These items were not part of an existing measure, and were developed specifically for this study by the authors. Choices ranged from 1 (“I had no knowledge or awareness of rules/state laws prohibiting hazing”) to 4 (“I had a lot of knowledge or awareness of rules/state laws prohibiting hazing”). These two variables were strongly correlated ( $r = 0.70$ ), and were combined to form a single measure. The mean was 5.83 (standard deviation = 2.00; range 2–8), suggesting some degree of awareness that there are rules and law that proscribe hazing.

*Demographics.* Two demographic variables—sex and age—were used in the analysis as statistical controls. Other demographic measures were assessed in the survey (i.e., race, religion, and sexual orientation), but not used in the following analyses.

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<sup>499</sup> See generally Oliver P. John & Sanjay Srivastava, *The Big-Five Trait Taxonomy: History, Measurement, and Theoretical Perspectives*, in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 102 (Lawrence A. Pervin & Oliver P. John eds., 2d ed. 1999).

<sup>500</sup> See generally Daniel A. Weinberger & Gary E. Schwartz, *Distress and Restraint as Superordinate Dimensions of Self-Reported Adjustment: A Typological Perspective*, 58 J. PERSONALITY 381 (1990).

### 3. Procedure

In order to maximize the number of participants, emails were sent to a variety of listservs. The email list was compiled by one of the authors (beginning in 2003). Organizational directories, Yahoo! Groups, and chapter, district, provincial, and regional websites for Alpha Phi Alpha, Alpha Kappa Alpha, Kappa Alpha Psi, Omega Psi Phi, Delta Sigma Theta, Phi Beta Sigma, Sigma Gamma Rho, and Iota Phi Theta were used to create the email lists. This resulted in a sampling frame of approximately 30,000. The email provided basic information about the study, which indicated that researchers were seeking to learn about the experiences and opinions of historically black colleges and universities. Potential participants were provided with a hyperlink that directed them to the survey.

The survey was created using Qualtrics. Participants were given detailed information about the study and were required to consent before given access to the survey. Participants were allowed to withdraw from the study at any time and without penalty. All responses were anonymous; no names or identifiable information were collected (including IP addresses).

### B. Results

The analyses were conducted in several stages. The first stage included only the BFI domains and demographic controls. The model was significant ( $F_{(7, 1125)} = 29.96$ ,  $p < 0.001$ ; Adjusted  $R^2 = 0.153$ ). The only trait to emerge as significant was Extraversion ( $b = 0.11$ ,  $se_b = 0.04$ ;  $p = 0.01$ ), which demonstrated a modest effect size ( $\beta = 0.08$ ). Those who were more extraverted were more likely to engage in hazing. Agreeableness was close to being significant ( $b = -0.11$ ;  $se_b = 0.06$ ;  $p = 0.06$ ), but it too was modest in effect size ( $\beta = -0.06$ ). In addition, older participants were less likely to report hazing was required ( $b = -0.12$ ;  $se_b = 0.02$ ;  $p < 0.001$ ), while males indicated more hazing ( $b = 5.83$ ;  $se_b = 0.48$ ;  $p < 0.001$ ). Being older and male exerted moderate effect sizes ( $\beta$ s of  $-0.19$  and  $0.35$ , respectively).

The next set of analyses included impulsivity and the demographics. The model was significant ( $F_{(3, 1115)} = 67.37$ ;  $p < 0.001$ ; Adjusted  $R^2 = 0.152$ ). Impulsivity exerted a significant, but modest effect ( $b = 0.52$ ;  $se_b = 0.47$ ;  $p = 0.03$ ;  $\beta = 0.06$ ). Higher scores on impulsivity were related to more hazing activities. Age and sex continued to exert significant (and similar) effects in this model.

The next model included knowledge of rules and the laws. The model was significant ( $F_{(3, 1121)} = 71.77$ ;  $p < 0.001$ ; Adjusted  $R^2 = .159$ ). Knowledge of rules and laws was significant ( $b = -0.52$ ;  $se_b = 0.13$ ;  $p <$

0.001), and demonstrated a modest effect size ( $\beta = -0.13$ ). Greater knowledge of rules and laws against hazing led to less hazing behavior. Age and sex continued to exert significant (and similar) effects in this model.

The final set of analyses included all of the predictors, and was assessed in a stepwise regression model. This model locates the strongest correlate, and then the second strongest correlate, etc., until there are no more significant correlates that contribute to the model. This strategy allows for an examination of which variables are the most statistically important. All model fit indices are significant when using this approach, and therefore will not be reported other than the range in adjusted  $R^2$ . The strongest correlate of hazing was being male ( $\beta = 0.33$ ). The second model added age ( $\beta = -0.20$ ); the third added knowledge of rules and law ( $\beta = -0.13$ ); the fourth added impulsivity ( $\beta = 0.07$ ); the fifth added Extraversion ( $\beta = 0.06$ ); the sixth added Agreeableness ( $\beta = -0.06$ ). In the sixth model, once Agreeableness was added, the effect of impulsivity was no longer significant. The amount of variance accounted for (adjusted  $R^2$ ) ranged from 0.11 to 0.17 across the models.

## CONCLUSION

Black Greek-letter organizations are old and storied American institutions. Their history of hazing is not a new one. What is new, however, is the tension these organizations and their members face with regard to hazing vis-à-vis the legal system. This is particularly the case where members are adjudged criminally responsible for hazing. Even where hazing results in civil liability for members, chapters, universities, and BGLOs, at the heart of the conduct is often criminal behavior.

Criminologists have long-investigated the antecedents of antisocial and criminal behavior. As highlighted in this article, personality, impulsivity, and awareness of sanctions are three variables that scholars have found to be predictive of antisocial and criminal behavior. Herein, we sought to determine the extent to which such variables are predictive of hazing within BGLOs. We found that aside from maleness and youth, low Agreeableness and high Extraversion were predictors of hazing, but were weakly correlated with our outcome measure.

Lack of knowledge of rules and laws and awareness of sanctions was a reasonably good predictor of BGLO hazing. This finding is consistent with a number of theories and empirical scholarship. Heightened risk appraisal is a deterrent to risky behavior in many domains, including criminal behavior. Consistent with Fritsvold's concept of "With the Law

Consciousness” as well as Bundy and Elhauge’s “sanction optimizers,” such BGLO members would haze if they did not expect legal sanctions.<sup>501</sup> Consistent with Fritsvold’s concept of “Against the Law Consciousness,” such actors may simply be rebelling against the law because they do not believe that it adequately recognizes the needs that BGLOs have of their members—e.g., an abiding commitment born of sacrifice via hazing.<sup>502</sup>

Under the rule versus standard analysis, arguably, many BGLO members are ignorant of the legal rules that provide a ceiling on the type of behavior that can be engaged in to bring new members into BGLOs. Even where there are legal rules—e.g., anti-hazing statutes—sometimes those rules are easily converted to mere standards, because the language of the rules is not clear. This is even the case with respect to jurors’ understanding of those statutory provisions in litigation.

Then there is the economic analysis approach versus behavioral analysis approach. Under the economic analysis approach, a BGLO member must weigh the cost and benefit of hazing. Arguably, to many BGLO members, there is a significant benefit to hazing—e.g., a direct benefit to the organization in terms of new members’ organizational commitment and commitment to other members. There is some empirical support for this belief.<sup>503</sup> Where BGLO members have a paucity of knowledge about the costs associated with hazing—direct costs to them in terms of criminal sanctions, for example—it seems more probable that they will haze. Under the behavioral analysis approach, factors outside the law, for example, influence judgment and decision-making. So, a BGLO member may pay more attention to organizational norms and sanctions than legal sanctions, whether they are fully-aware of the legal sanctions or not. Here, BGLO members who believe that hazing is embraced by members of their own organization may haze, especially where organizational sanctions are not likely to be that robust.

As a practical matter, what are BGLOs to do to stem the tide of hazing and concomitant bad press, civil litigation, and rising insurance rates? This article suggests that the major misstep that they have made, and are likely still making, is that they fail to robustly educate their members about the sanctions that may befall members who haze. The authors dare to say that most BGLO members have little knowledge of the numerous BGLO hazing deaths, injuries, incidents, and resulting litigation, both criminal and civil. And BGLOs have done little to augment and enhance their members’ knowledge around these issues. Neither a passing mention about recent hazing incidents at one of these organizations conventions nor a

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<sup>501</sup> Fritsvold, *supra* note 370, at 804; Bundy & Elhauge, *supra* note 367, at 274–275.

<sup>502</sup> Fritsvold, *supra* note 370, at 804; Bundy & Elhauge, *supra* note 367, at 274–75.

<sup>503</sup> Parks et al., *supra* note 11, at 416.

2015]

Hazing As Crime

51

brief workshop will suffice. Black Greek-letter organizations must walk their members and aspiring members through the decades-long tragedy that is hazing within their ranks. Only then can they make meaningful inroads toward stemming the tide of hazing within their ranks.

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**APPENDIX**

The following acts were covered as hazing acts for the purposes of the survey conducted as the basis for this discussion.

Pledges hit by big brothers/sisters with other objects

Pledges hit by big brothers/sisters with hands or feet

Pledges paddled

Pledges required to make gifts for big brothers/sisters

Pledges required to do calisthenics

Pledges required to carry bricks or other symbolic objects

Pledges required to do community service

Pledges required to dress alike

Pledges required to greet big brothers/sisters

Pledges required to learn information about line brothers

Pledges required to learn poems

Pledges required to perform skits

Pledges referred to by line number

Pledges required to be celibate

Pledges required to eat unpalatable food or drink (e.g., ginger root, garlic, hot sauce, vinegar)

Pledges given a restrictive diet (e.g., no candy, fried food, etc.)

Pledges required to take road trips to visit other chapters

Pledges required to run errands for big brothers/sisters

Pledges required to speak in unison with other pledges

2015] Hazing As Crime 53

Pledges required to adhere to study hours during which they did their schoolwork

Pledges required to walk in a single file line

Pledges required to sing fraternity/sorority songs

Pledges yelled at or cursed at by big brothers/sisters

Pledges required to disassociate from non-pledges and non-fraternity/sorority members

Pledges deprived of sleep

Pledges stranded in unfamiliar locations

Pledges required to endure harsh weather

