

# THE PSYCHOLOGY AND LAW OF HAZING CONSENT

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*For years, the law has grappled with the extent to which an individual can consent to harmful physical contact. This has never been more evident than in the area of hazing. Courts have fallen on both sides of this divide, often enough speculating about the mental state of the alleged hazing victim. The question is often whether the individual had the psychological wherewithal to resist situational or contextual demands placed on him or her. In this article, the authors provide clarity to how the law has thought about this issue and how it should think about it in light of a range of psychological theories and empirical research.*

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## I. INTRODUCTION

On November 19, 2011, Robert Champion, a twenty-six-year-old clarinet player and drum major in Florida A&M University's (FAMU) "Marching 100" band, collapsed on a charter bus parked outside an Or-

lando hotel, following a band performance at a football game between FAMU and Bethune-Cookman.<sup>1</sup> The Georgia native had become anxious, complaining of shortness of breath and failed eyesight, and had apparently been vomiting before ultimately losing consciousness.<sup>2</sup> Champion was nonresponsive when authorities arrived at approximately 9:45 p.m. and was later pronounced dead at a nearby hospital.<sup>3</sup> An initial emergency caller told the dispatcher that Champion had been vomiting and that “[h]is eyes [were] open but [he was] not responding.”<sup>4</sup> A second caller told the dispatcher that Champion was “cold.”<sup>5</sup>

By Tuesday, November 22, rumors had already circulated on the FAMU campus and social media that hazing had played a part in Champion’s death.<sup>6</sup> Law enforcement officials also believed some form of hazing to have occurred before the 911 emergency call was placed.<sup>7</sup> Ultimately, suspicions that hazing played a role in Champion’s death were confirmed when Champion’s death was ruled a homicide by the State Medical Examiner’s Office in Orlando.<sup>8</sup> The Medical Examiner’s Office found that Champion’s death resulted from blunt-force trauma suffered during a hazing incident involving some members of FAMU’s Marching 100.<sup>9</sup> Champion endured such severe blows during the incident that he bled out into his soft tissue, particularly in his back, chest, shoulders, and arms.<sup>10</sup> The autopsy further revealed that Champion had

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1. Freida Frisaro, *Attorney Says Suit Planned in FAMU Band Death*, ASSOCIATED PRESS, Nov. 25, 2011, available at NewsBank, Rec. No. D9R7V2NO0; Brent Kallestad, *Fired FAMU Band Director: Hazing Warnings Ignored*, ASSOCIATED PRESS, Nov. 29, 2011, available at NewsBank, Rec. No. 0ef37ebd103d533dbf5020cbc498970b [hereinafter Kallestad, *Hazing Warnings Ignored*].

2. Paul Flemming, *Autopsy: FAMU Drum Major Died Within One Hour of Hazing*, GANNETT NEWS SERVICE, Dec. 22, 2011, available at ProQuest, Doc. No. 912380698; *Autopsy: Fla. A&M Drum Major’s Death a Homicide*, GANNETT NEWS SERVICE, Dec. 16, 2011, available at ProQuest, Doc. No. 912012529 [hereinafter *Autopsy*].

3. Kallestad, *Hazing Warnings Ignored*, *supra* note 1.

4. Mike Schneider & Gary Fineout, *Vomit in FAMU Student’s Mouth Before He Dies*, ASSOCIATED PRESS, Dec. 1, 2011, available at NewsBank, Rec. No. c502d9622d494a9935508b79be7f82eb.

5. *Id.*

6. Jordan Culver, *Hazing Rumors Surround Death of Fla. Student*, GANNETT NEWS SERVICE, Nov. 22, 2011, available at ProQuest, Doc. No. 905839615.

7. Frisaro, *supra* note 1.

8. Flemming, *supra* note 2; *Autopsy*, *supra* note 2.

9. *Autopsy*, *supra* note 2.

10. Flemming, *supra* note 2; Mike Schneider, *13 Charged in Hazing Death of Fla. Band*

been vomiting profusely and died within an hour from the time he suffered the injuries.<sup>11</sup> Toxicology tests revealed no traces of drugs or alcohol in Champion's system.<sup>12</sup>

Immediately following Champion's death, FAMU President James Ammons suspended all of the Marching 100's appearances and performances, and the band's immediate future became unclear.<sup>13</sup> Four days after Champion's death, Ammons fired band director Julian White who was later reinstated and placed on administrative leave after the Florida Department of Law Enforcement requested that the university put a hold on any disciplinary actions during its investigation into Champion's beating death.<sup>14</sup> White argued that he had repeatedly tried to take measures against hazing within the FAMU Marching 100 and had not been backed by the university's administration.<sup>15</sup> Ultimately, White retired when it was discovered that many of the Marching 100's members (three of whom were allegedly involved in Champion's hazing death) were not students at FAMU and were not enrolled in any band classes.<sup>16</sup> Several weeks later, Ammons suspended all of the Marching 100's appearances and performances and addressed some 2,000 FAMU students, reaffirming FAMU's commitment to ending the "conspiracy of silence" that surrounds hazing practices at the school.<sup>17</sup> Petitions pledging to end

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*Member*, ASSOCIATED PRESS, May 2, 2012, available at NewsBank, Rec. No. f6a3310a4251b062a27873387f42151f.

11. Flemming, *supra* note 2.

12. *Id.*

13. Culver, *supra* note 6; Schneider, *supra* note 10. Initially following Champion's death, Ammons vowed to convene an independent task force to investigate successful anti-hazing policies at other colleges and universities and make recommendations as to how to eliminate hazing on the FAMU campus. See *FAMU President Postpones Work of Hazing Task Force*, ASSOCIATED PRESS, Dec. 2, 2011, available at NewsBank, Rec. No. D9RC6CQO0. In December, however, Ammons decided to postpone the task force so that "the school could fully cooperate with investigations by the Florida Board of Governors, Orange County Sheriff's Office and Florida Department of Law Enforcement." *Id.* In February of 2012, the FAMU board of trustees appointed seven experts to the independent task force. Jennifer Portman, *Florida A&M Selects Anti-Hazing Committee*, GANNETT NEWS SERVICE, Feb. 9, 2012, available at ProQuest, Doc. No. 920882621.

14. Bill Cotterell, *Gov. Scott Repeats Call for Florida A&M President to Step Aside*, GANNETT NEWS SERVICE, Dec. 18, 2011, available at ProQuest, Doc. No. 912012484.

15. Frisaro, *supra* note 1; Kallestad, *Hazing Warnings Ignored*, *supra* note 1.

16. Gary Fineout, *Florida A&M President Resigns in Wake of Scandal*, ASSOCIATED PRESS, July 12, 2012, available at NewsBank, Rec. No. 0d5debc3da823324c335e16f5261279b; Jennifer Portman, *3 Charged in Hazing Death Were Not Enrolled at Florida A&M*, GANNETT NEWS SERVICE, May 8, 2012, available at ProQuest, Doc. No. 1011642906.

17. Culver, *supra* note 6; Brent Kallestad, *FAMU Student Leaders Call for an End to Hazing*, ASSOCIATED PRESS, Dec. 6, 2011, available at NewsBank, Rec. No. D9REO1700

hazing were circulated throughout the audience.<sup>18</sup>

Hazing within the FAMU Marching 100 is said to have begun as early as the 1950s and has generally been associated with entry into sub-groups within the band rather than entry into the band itself.<sup>19</sup> In 1998, clarinet player Ivery Luckey was hospitalized after being hit approximately 300 times with a wooden paddle.<sup>20</sup> Luckey's beating occurred during initiation to a band clique known as "The Clones."<sup>21</sup> Twenty or so "band members were suspended, and Luckey sued the state Board of Regents," ultimately settling out of court.<sup>22</sup> Three years later, Marcus Parker was hospitalized after suffering kidney damage resultant from being beaten with a wooden paddle.<sup>23</sup>

Just weeks before the hazing incident that resulted in Champion's death (October 31, 2011, and November 1, 2011), Bria Shante Hunter was beaten so severely during her initiation into the "Red Dawg Order," a band clique for Georgia natives, that she could barely walk.<sup>24</sup> According to authorities, Hunter's pain became so unbearable that she went to the hospital where she was told she had a broken thighbone and blood clots in her legs.<sup>25</sup> Hunter was a freshman clarinet player and, like Champion, a leader in the FAMU band and graduate from Southwest DeKalb High School in Georgia.<sup>26</sup> She was beaten in two separate incidents.<sup>27</sup> The first, she said, occurred when leaders of the "Red Dawg Order" suspected that she was trying to get out of a group meeting.<sup>28</sup> The second incident occurred when she was unable to accurately answer questions regarding the history of the clique.<sup>29</sup> Both times, Hunter was struck across the legs with fists, metal rulers, and notebook binders.<sup>30</sup>

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[hereinafter Kallestad, *FAMU Student Leaders*].

18. Kallestad, *FAMU Student Leaders*, *supra* note 17.

19. Culver, *supra* note 6; Schneider, *supra* note 10.

20. Greg Bluestein & Gary Fineout, *Attorney: FAMU Student Hazed Could Barely Walk*, ASSOCIATED PRESS, Dec. 13, 2011, available at NewsBank, Rec. No. D9RJTGMOO; Frisaro, *supra* note 1; Kallestad, *Hazing Warnings Ignored*, *supra* note 1.

21. Bluestein & Fineout, *supra* note 20.

22. Frisaro, *supra* note 1.

23. *Id.*

24. Bluestein & Fineout, *supra* note 20; John Tkach, *Three FAMU Band Members Charged*, USA TODAY, Dec. 13, 2011, at C11, available at ProQuest, Doc. No. 910500964.

25. Tkach, *supra* note 24.

26. Bluestein & Fineout, *supra* note 20.

27. Tkach, *supra* note 24.

28. Bluestein & Fineout, *supra* note 20.

29. *Id.*

30. *Id.*

Asked about why band members took part in hazing rituals, Hunter answered, “[s]o we can be accepted . . . [i]f you don’t do anything, then, it’s like you’re lame.”<sup>31</sup> After Champion’s death, three band members were arrested and charged for Hunter’s beating, which occurred off-campus at the apartment of James Harris who claimed to have, at one point, stopped the other two men from beating Hunter.<sup>32</sup> Harris was charged with hazing.<sup>33</sup> The other two men, nineteen-year-old Aaron Golson and twenty-three-year-old Sean Hobson were charged with hazing and battery.<sup>34</sup>

The lawsuit against thirteen members of the famed FAMU Marching 100 described two kinds of hazing that took place on the bus.<sup>35</sup> First, in the ritual known as “Crossing Bus C,” students ran down the aisle from the front of the bus to the back while other students stood on the sides beating, slapping, and kicking them.<sup>36</sup> Students who fell were kicked and stomped and then dragged back to the front of the bus to start over.<sup>37</sup> According to one witness, large band members positioned themselves at the back of the bus to make the victim’s final steps the most difficult.<sup>38</sup> The other ritual, called “the hot seat,” involved a pillowcase being placed over the victim’s nose and mouth while he was forced to answer questions.<sup>39</sup> Correct answers garnered a moment of relief; incorrect answers meant another question with no chance to breathe in between.<sup>40</sup>

According to Champion’s friends and family, he was a strong opponent to hazing within the Marching 100.<sup>41</sup> His high school classmate and mentee, Bria Hunter, said Champion told her not to let anyone touch

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Schneider, *supra* note 10.

36. David Ariosto, *FAMU Pledges Reforms After Report on Hazing*, CNN WIRE, Jan. 24, 2013, available at NewsBank, Rec. No. 1359053358; Kyle Hightower & Mike Schneider, *Band Mates Say FAMU Victim Volunteered to Be Hazed*, ASSOCIATED PRESS, May 23, 2012, available at NewsBank, Rec. No. 90333c02d7e6ce06e77e129b20233957; Schneider, *supra* note 10.

37. Schneider, *supra* note 10.

38. Hightower & Schneider, *supra* note 36.

39. Schneider, *supra* note 10.

40. *Id.*

41. Hightower & Schneider, *supra* note 36.

her.<sup>42</sup> However, interviews with defendants and other band members released in late May suggested that Champion had volunteered to go through the hazing rituals.<sup>43</sup> Champion sought to be the leader of the Marching 100, leading others who had already “Cross[ed] Bus C,” and some band members felt that meant Champion had to go through with the beating.<sup>44</sup> According to defendant Caleb Jackson, “If you go to that bus that’s saying that you wanted to do it.”<sup>45</sup>

Although band members sign a pledge vowing not to participate in hazing, Champion and two other band members went through the ritual on the night of his death.<sup>46</sup> According to defendant Jonathan Boyce, Champion said he intended to go through with it.<sup>47</sup> Ryan Dean, a drummer who regularly rode Bus C, said that Champion told him earlier in the week he would “see [them] on the bus.”<sup>48</sup> According to Boyce, “Champion was in the back, getting kicked and punched” by the time he arrived, and Boyce and co-defendant Shawn Turner tried to shield Champion from the blows and get him to the back to end the ritual quickly.<sup>49</sup>

Ultimately, when Champion’s parents brought a lawsuit against FAMU, the university, in its defense, insisted that it was Champion, not the school, who bore the ultimate responsibility for his hazing death because he consented to the hazing activities.<sup>50</sup> Arguing that the judge should dismiss the lawsuit, the university argued that “[n]o public university or college has a legal duty to protect an adult student from the result of their own decision to participate in a dangerous activity while off-campus and after retiring from university-sponsored events.”<sup>51</sup>

While the Robert Champion hazing death is in the context of collegiate band initiation rites, it provides a recent example of the broader context within which collegiate hazing often takes place—i.e., fraternities and sororities. Accordingly, in this Article, we explore whether fra-

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42. Blayne Alexander, *Hazing Victim: ‘I Was Made an Example of,’* GANNETT NEWS SERVICE, Dec. 14, 2011, available at NewsBank, Rec. No. 45904888.

43. Hightower & Schneider, *supra* note 36.

44. Ariosto, *supra* note 36; Hightower & Schneider, *supra* note 36.

45. Hightower & Schneider, *supra* note 36.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. ASSOCIATED PRESS, *Florida: University Holds Drum Major Responsible for His Death in Hazing*, N.Y. TIMES, Sept. 12, 2012, at A21.

51. *Id.*

ternity and sorority pledges can consent to hazing. There has been some divergence on the topic in the law. Most state hazing statutes have remained silent on the issue, and only a few courts have squarely addressed the issue.<sup>52</sup> Among the latter, courts presume that the psychological will of the hazing victim has been overborn.<sup>53</sup> However, these cases provided little in the way of engagement with psychological theory or research. As such, in this Article, we investigate a range of psychological theories that may explain why hazing victims persist in their hazing experiences. In Part I, we explore how victims' consent is addressed in criminal, tort, and hazing case law and statutes. In Part II, we highlight several psychological theories which courts should consider when determining the extent to which, if at all, a hazing victim's psychological will has been overcome.

## II. THE LAW OF CONSENT

This Part presents a brief summary of ways consent is viewed and addressed in criminal, civil, and hazing statutes. Criminal law largely rejects consent as a defense in most cases, except in those areas of activity deemed appropriate by courts.<sup>54</sup> Civil law permits consent as a defense, particularly where the victim assumed the risk of the activity in which they were harmed, or the injury was a foreseeable risk of participating in the activity.<sup>55</sup> Hazing statutes often bar use of the victims' consent as a defense by making it irrelevant.<sup>56</sup> Others explicitly bar the defense or apply a presumption against consent or that hazing activity is per se forced.<sup>57</sup>

### A. *Consent in Criminal Law: A General Approach*

Consent in criminal law has undergone a shift in its approach to rights and interests of the victim. Prior to the seventeenth century, common law reflected the Roman law principle “*volenti non fit injuria*” (“to a willing person, no injury is done”) that allowed “individuals to consent to harm-causing acts,”<sup>58</sup> making consent a complete bar to pros-

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52. See *infra* notes 133–35 and accompanying text.

53. See *infra* notes 177–78, 188–91 and accompanying text.

54. See *infra* Part II.A.

55. See *infra* Part II.B.

56. See *infra* notes 139–41 and accompanying text.

57. See *infra* notes 136–38 and accompanying text.

58. Ryan G. Fischer et al., *From the Legal Literature*, 45 CRIM. L. BULL. 1137, 1145 (2009) (quoting *Randolf v. de Richmond*, Y.B. 33 Edw., fol. RS 7-11, Mich., pl. 6, at 6–9

education.<sup>59</sup> During the 1600s, criminal systems shifted from interests in the victims and their rights to a centralized judicial structure focused on the public good.<sup>60</sup> “[A]cts that had been considered violations of a particular victim’s interests came to be viewed as . . . a ‘disturbance of the society,’” a view still echoed in today’s case law.<sup>61</sup> This shift resulted in the state becoming the “ultimate victim and the sole prosecutor of [the] criminal act” and the removal of the actual victim from the criminal process.<sup>62</sup> As such, “an individual lost the power to consent to what the state regarded as harm to itself.”<sup>63</sup>

Much of the literature on consent in criminal law centers on cases involving contact sports,<sup>64</sup> sexual assault and rape,<sup>65</sup> and sadomasochism.<sup>66</sup> Today, criminal law commonly rejects consent as a defense to most criminal assaults.<sup>67</sup> However, the Model Penal Code (MPC) and other case law make exceptions “for assaults resulting in little or no injury, sports, medical treatment, and body modification.”<sup>68</sup> Even with these exceptions, criminal law favors a public policy in which “a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.”<sup>69</sup> Courts have often found that consent is not a valid defense

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(1305) (Eng.) (“to a willing man no injury is done”); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 171–72 (2007).

59. Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 683, 686 (2008).

60. *Id.*; Fischer et al., *supra* note 58, at 1145.

61. Fischer et al., *supra* note 58, at 1145 (quoting Bergelson, *supra* note 58, at 172); *see also* Bergelson, *supra* note 59, at 686.

62. Bergelson, *supra* note 59, at 686.

63. *Id.*

64. *See, e.g.*, Christo Lassiter, *Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport*, 22 ST. JOHN’S J.L. COMMENT. 35, 55 (2007); Ben Livings, *A Different Ball Game—Why the Nature of Consent in Contact Sports Undermines a Unitary Approach*, 71 J. CRIM. L. 534, 534 (2007); Jeffrey Standen, *The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence*, 99 J. CRIM. L. & CRIMINOLOGY 619, 620–21 (2009).

65. *See, e.g.*, Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004).

66. *See, e.g.*, Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 239 (2001).

67. Fischer et al., *supra* note 58, at 1145; *see generally* MODEL PENAL CODE § 2.11 (1985).

68. Fischer et al., *supra* note 58, at 1139 (quoting Kelly Egan, Comment, *Morality-Based Legislation Is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex*, 70 ALB. L. REV. 1615, 1625 (2007)); *see also* MODEL PENAL CODE § 2.11(2).

69. Fischer et al., *supra* note 58, at 1138 (quoting *People v. Jovanovic*, 700 N.Y.S.2d 156,



when criminal assaults are injurious to a person *and* constitute breach of public peace.<sup>70</sup>

In *Taylor v. State*, the court divided criminal assault into the two classes: one which breaches the public peace generally and the other “which is not accompanied by the threat of serious hurt or breach of the public peace,” and “is treated as a crime against the person.”<sup>71</sup> There, the court found that there is no defense of consent when the criminal assault “tends to bring about a breach of the public peace” because the crime is treated as crime against the general public.<sup>72</sup> However, where a criminal assault “is not accompanied by the threat of serious hurt or breach of the public peace . . . the consent of the person assaulted is held to be a good defense, since the absence of consent is an essential element of the offense.”<sup>73</sup>

The court in *Wright v. Starr* similarly noted that the law punishes for criminal assault “even if consent is given . . . because consent to a battery is illegal as against the state, on account of the breach of public peace involved.”<sup>74</sup> Likewise, a New Mexico court favored the public’s “stronger and overriding interest in preventing and prohibiting” violent acts over victims of crimes who “have so little regard for their own safety as to request injury.”<sup>75</sup>

The MPC’s view on consent serves as the basis for the law in the majority of states.<sup>76</sup> “The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.”<sup>77</sup> For offenses that involve bodily harm, consent is not a defense even if it negatives an element of the offense.<sup>78</sup> Instead, consent is a defense to conduct which “causes or threatens bodily injury,” or “the infliction of

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168 n.5 (App. Div. 1999)).

70. Fischer et al., *supra* note 58, at 1138, 1145–46.

71. *Taylor v. State*, 133 A.2d 414, 415 (Md. 1957).

72. *Id.*

73. *Id.*

74. *Wright v. Starr*, 179 P. 877, 878 (Nev. 1919).

75. *State v. Fransua*, 510 P.2d 106, 107 (N.M. Ct. App. 1973).

76. Bergelson, *supra* note 59, at 687 & n.29 (“Thirteen states explicitly recognize a general defense of consent in their statutes.”).

77. MODEL PENAL CODE § 2.11(1) (1985); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.5 (2d ed. 2003).

78. Bergelson, *supra* note 59, at 687 (“This general rule, however, does not apply to offenses involving bodily harm.”).

such injury” under the MPC in specific instances: (1) when “the bodily injury consented to or threatened by the conduct consented to is not serious;” (2) “the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law;” (3) the consent establishes a justification such as protection of property and self-protection; and (4) when bodily harm is inflicted for “a recognized form of treatment” to improve a patient’s mental or physical health.<sup>79</sup> Assent does not constitute consent if: (1) the assenter is “legally incompetent to authorize the conduct charged to constitute the offense;” (2) the assenter is “unable to make a reasonable judgment as to the nature or harmfulness of the conduct;” (3) “it is induced by force, duress or deception of [the] kind” the law is trying to prevent; or (4) “it is given by a person whose improvident consent” the law is trying to prevent.<sup>80</sup>

Consent as a defense is viewed by some legal scholars as more permissible in certain contexts than in others, often based on the definition and interpretation of a “serious” injury.<sup>81</sup> Bodily injury is “serious” according to the MPC and similarly worded statutes if it “creates a substantial risk of death or . . . causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”<sup>82</sup> Bergelson posits that “courts habitually exaggerate the seriousness of injury or pain and the risk of death in order to condemn an unwanted activity.”<sup>83</sup> Cases involving assaults seem more permissible in cases of religious flagellation and serious injuries resulting from contact sports because of the perceived social utility associated with such activities.<sup>84</sup>

Commentary to MPC acknowledges that assessment of seriousness is impacted by “moral judgments about the iniquity of the conduct involved.”<sup>85</sup> Courts also suggest “that there is a variance in the way that [offenses] are viewed within and [outside] the context of sport,” possibly resulting in “a higher threshold that must be reached before liability is

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79. MODEL PENAL CODE §§ 2.11(2), 3.08(4)(a); *see generally id.* § 3 (providing justifications for conduct that would otherwise be a criminal offense).

80. *Id.* § 2.11(3).

81. *See* Livings, *supra* note 64, at 534.

82. MODEL PENAL CODE § 210.0(3).

83. VERA BERGELSON, VICTIMS’ RIGHTS AND VICTIMS’ WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW 20 (2009).

84. Fischer et al., *supra* note 58, at 1147.

85. MODEL PENAL CODE § 2.11 cmt. n.8.

imposed for [behavior] on the sports field.”<sup>86</sup> In essence, if a harmful act is not athletic or medical, it may be criminal unless the injury is not serious.<sup>87</sup> Thus, determining seriousness of an injury, as well as the court’s perception of the social utility of the activity in question, influences the outcomes of cases involving consensual harm.<sup>88</sup>

### *B. Consent in Civil Law: A General Approach*

The First Restatement of Torts defines the tort of battery as an act with intent to bring about “a harmful or offensive contact,” without consent or privilege.<sup>89</sup> However, it was unclear from the First Restatement whether lack of consent was an element of a prima facie case for battery, and the corollary, whether consent was an affirmative defense to the claim.<sup>90</sup> The Second Restatement worked to resolve this ambiguity by stating that when the defendant has a reasonable belief that the plaintiff has consented to the act, the defendant has apparent consent and is therefore entitled to a complete affirmative defense and is absolved of liability.<sup>91</sup>

The Second Restatement clearly establishes that one who consents to an act “cannot recover . . . for the conduct or for harm resulting from it”; furthermore, any consent only applies to the conduct it is specifically related to, and any conduct beyond that covered by the consent can be the basis for tort recovery.<sup>92</sup> The evolution of the defense of consent in battery torts has altered the role of consent as a successful defense, but ambiguities still exist in the policy and contractual nature of provided consent, which case law better illuminates.

The issue of consent is especially common in battery torts arising from medical treatment.<sup>93</sup> While additional issues of informed consent and intent arise in these circumstances, the basic principles of consent are still applicable in medical battery. The court in *Bradford v. Winter* analyzed consent broadly, noting that consent can be express or im-

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86. Livings, *supra* note 64, at 541.

87. Bergelson, *supra* note 59, at 691.

88. *See id.*

89. Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1605 (2012) (quoting RESTATEMENT (FIRST) OF TORTS § 13(a) (1934)).

90. Moore, *supra* note 89, at 1605, 1612.

91. *Id.* at 1605 & n.112.

92. RESTATEMENT (SECOND) OF TORTS § 892A (1979).

93. *See id.* § 892A cmt. c, illus. 2; Moore, *supra* note 89, at 1646–49.

plied.<sup>94</sup> In *Bradford*, a patient signed a form giving express consent to a doctor to complete a bronchoscopy, and additionally, to allow the doctor to perform “any other procedure that his or their judgment may dictate.”<sup>95</sup> The patient brought suit for battery after learning that the doctor removed a specimen for biopsy during the bronchoscopy.<sup>96</sup> The district court found that this was a normal procedure incident to the bronchoscopy and was within the bounds of the express consent given by the patient, and the appeals court affirmed.<sup>97</sup> The broad consent given by the patient applied to a whole host of possible discretionary actions by the doctor and was therefore a complete bar to recovery by the patient.<sup>98</sup>

In sports, participation is often conditioned on the player giving consent and waiving any claims for injury.<sup>99</sup> Agreements may cover injuries arising under normal circumstances in the sport, or a whole host of anticipated or unanticipated occurrences.<sup>100</sup> Often these agreements, termed “releases,” are meant to eliminate any duty an organizer of an event has to the participant.<sup>101</sup> However, they often do not speak of a duty owed by fellow participants.<sup>102</sup> In *Levine v. Gross*, a karate student granted consent to release the karate studio from “some risk of personal injury” which covered “all liability in said course of instruction.”<sup>103</sup> The student asserted that “some risk” did not cover the detached retinas he suffered that required surgery on both eyes.<sup>104</sup> The court determined that the release was broad enough to cover those injuries and dismissed the action.<sup>105</sup> The court noted that the contract must be “clear, unequivocal, and unambiguous,” and that it must cover all incurred injuries that are claimed in the tort suit.<sup>106</sup> The court made note of two important factors in its decision: first, that the participant was aware of the potential

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94. *Bradford v. Winter*, 30 Cal. Rptr. 243, 246 (Cal. Dist. Ct. App. 1963).

95. *Id.* at 244, 246.

96. *Id.* at 245.

97. *Id.* at 246.

98. *Id.*

99. *See Livings, supra* note 64, at 547.

100. Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 8–9 (1997).

101. *Id.* at 2, 8.

102. *See id.* at 8.

103. *Levine v. Gross*, 704 N.E.2d 262, 263 (Ohio Ct. App. 1997).

104. *Id.* at 263–64.

105. *Id.* at 264.

106. *Id.*

risks that could result from participating in karate because he had previously suffered, among other injuries, dislocated fingers, a knee injury that required surgery, and corneal abrasion; second, that reckless misconduct by a fellow participant may be a basis for a tort action.<sup>107</sup> The plaintiff's general knowledge of the potential for injury inherent in karate had eliminated any ambiguity in the assumption of risk in the release.<sup>108</sup> The court noted that "the standard of care rises as the inherent danger of the sport falls," when examining the duty owed by participants to each other.<sup>109</sup> In this case, the dangers inherent in karate were apparently so high as to warrant a limited duty of care by the participants.<sup>110</sup>

The question naturally arises whether an act committed, which the injured party did not expressly consent to, can be the basis for a battery tort claim. In such circumstances, the impact of intent in the battery claim is of utmost importance. Some scholars have advocated for battery to require single intent, to cause unwanted or offensive contact.<sup>111</sup> Others have argued that there must be a dual-intent element to battery: (1) the intent to cause the unwanted touch, and (2) the intent to cause harm or pain.<sup>112</sup> This additional intent requirement could filter out cases where there was no consent, but the act that caused injury was not intended to produce such a result. In these circumstances, even where an injury were to occur outside of the normal playing time in a sport, without intent to actually cause harm, no action could lie.

Many courts have sidestepped this issue and focused on the consent of the injured party.<sup>113</sup> Instead of searching for express consent, they find actual or implied consent, or assumption of risk.<sup>114</sup> However, while these two doctrines are separate and distinct in tort jurisprudence, courts often ambiguously use both terms and hold the injurer not liable for the injury.<sup>115</sup> In *Thompson v. Park River Corp.*, a child taking swim-

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107. *Id.*

108. *Id.*

109. *Id.* (quoting *Thompson v. McNeill*, 559 N.E.2d 705, 709 (Ohio 1990)).

110. *Levine*, 704 N.E.2d at 264.

111. Moore, *supra* note 89, at 1637.

112. *See id.* at 1632–37.

113. *See, e.g., Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 32 (N.Y. 1989) (discussing assumption of the risk); *Turcotte v. Fell*, 502 N.E.2d 964, 968–70 (N.Y. 1986) (discussing implied consent); *Arbegast v. Bd. of Educ.*, 480 N.E.2d 365, 371 (N.Y. 1985) (discussing implied assumption of the risk); *Vendrell v. Sch. Dist. No. 26C*, 376 P.2d 406, 414 (Or. 1962) (discussing assumption of the risk).

114. *See, e.g., Levine*, 704 N.E.2d at 264.

115. *See, e.g., Benitez*, 541 N.E.2d at 32; *Turcotte*, 502 N.E.2d at 968–70; *Arbegast*, 480

ming lessons was injured when he was pushed into the swimming pool by another child who was also taking lessons.<sup>116</sup> The court found that even though the child had acted outside of the rules of the swimming lessons, he was not liable for two reasons.<sup>117</sup> First, the act was not done recklessly or intentionally, and was therefore lacking the requisite intent to injure for the battery claim to be sustained.<sup>118</sup> Second, the injured child had assumed the risk of being injured because children's swimming lessons often involve an inherent amount of "rambunctious behavior."<sup>119</sup>

The final circumstance that must be examined is in activities with rules that are intentionally broken in order to cause harm. The court in *Avila v. Citrus Community College District* analyzed a sports-injury battery claim.<sup>120</sup> There, a baseball pitcher threw an inside pitch and hit the batter in the head, apparently in retaliation for his team's batter being struck in a previous inning.<sup>121</sup> The court recognized that the rules of the game, which all participants had consented to, as well as the inherent risks in baseball, include the risk of being intentionally struck.<sup>122</sup> The court cited precedent in acknowledging that intentional or reckless acts "totally outside the range of the ordinary activity involved in the sport" are not covered by assumption of the risk or implied consent.<sup>123</sup> However, the court held that even if the pitch was intentional, the act did not fall completely outside of the purview of normal activity in the sport to warrant liability.<sup>124</sup> The court reasoned that it is up to the umpires to enforce the rules of the sport, and any judicial remedy for acts within the sport would have a chilling effect on the conduct of the game.<sup>125</sup> On the issue of consent, the court equated the injury arising from the intentional striking of the batter with a pitch to a boxer accepting the risk of his opponent's jabs.<sup>126</sup>

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N.E.2d at 371; *Vendrell*, 376 P.2d at 414.

116. *Thompson v. Park River Corp.*, 830 N.E.2d 1252, 1255 (Ohio Ct. App. 2005).

117. *Id.* at 1265–66.

118. *Id.*

119. *Id.* at 1265.

120. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 385–86 (Cal. 2006).

121. *Id.*

122. *Id.* at 394.

123. *Id.* (quoting *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992)).

124. *Avila*, 131 P.3d at 394.

125. *Id.*

126. *Id.* at 395.

### C. Consent in Hazing Law

The act of “hazing” can be traced as far back as ancient Greece, where soldiers were forced to endure pain and punishment as a sign of their loyalty to the military.<sup>127</sup> These hazing activities have since made their way into the United States and have become prevalent in military barracks, colleges, and high schools.<sup>128</sup> Unfortunately, state legislatures have struggled to define criminal “hazing” because “[h]azing means many different things to different people.”<sup>129</sup> However, the term has been broadly defined as “the act of putting another in a ridiculous, humiliating, or disconcerting position as part of an initiation process,”<sup>130</sup> or as “any humiliating or dangerous activity expected . . . to join a group, regardless of . . . willingness to participate.”<sup>131</sup> Nevertheless, in 1901, Illinois became the first state to pass an anti-hazing law when it enacted a statute criminalizing conduct “whereby any one sustains an injury to his [or her] person therefrom.”<sup>132</sup> As of today, all but six states have followed suit and enacted criminal or civil statutes that prohibit and punish hazing.<sup>133</sup> Despite this move by states’ legislatures, scholars have found that there are several obstacles that impede the effectiveness of state anti-hazing statutes, and, in turn, these obstacles have spurred changes in legislation to overcome such barriers.<sup>134</sup>

To remove the need for subjective inquiry into the facts of hazing

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127. 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, 310–11 (2008).

128. *Id.* at 311–16 (noting that hazing has become more common in high schools, particularly among student-athletes).

129. NADINE C. HOOVER, ALFRED UNIV., NATIONAL SURVEY: INITIATION RITES AND ATHLETICS FOR NCAA SPORTS TEAMS 24 (1999), available at [http://www.alfred.edu/sports\\_hazing/docs/hazing.pdf](http://www.alfred.edu/sports_hazing/docs/hazing.pdf).

130. Acquaviva, *supra* note 127, at 308–09 (quoting Frank J. Wozniak, Annotation, *Validity, Construction, and Application of “Hazing” Statutes*, 30 A.L.R.5th 683, 683 (1995)).

131. Acquaviva, *supra* note 127, at 309 (omission in original) (quoting NADINE C. HOOVER & NORMAN J. POLLARD, ALFRED UNIV., INITIATION RITES IN AMERICAN HIGH SCHOOLS: A NATIONAL SURVEY 4 (2000), available at [http://www.alfred.edu/hs\\_hazing/docs/hazing\\_study.pdf](http://www.alfred.edu/hs_hazing/docs/hazing_study.pdf)).

132. Acquaviva, *supra* note 127, at 311–12 (alteration in original) (quoting 1901 Ill. Laws 145; Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 118–19 (1991)).

133. Acquaviva, *supra* note 127, at 313. States without anti-hazing statutes are Alaska, Montana, South Dakota, Hawaii, New Mexico, and Wyoming. *State Anti-Hazing Laws*, STOPHAZING.ORG, <http://stophazing.org/laws.html> (last visited Sept. 24, 2013).

134. See, e.g., Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 387 (2002).

cases, the legislatures of sixteen states have added provisions in anti-hazing statutes that bar the victim-consent defense.<sup>135</sup> Some states take the approach of applying a presumption against consent or a presumption that hazing activity is per se forced activity. For example, Pennsylvania law applies a presumption against consent by providing that any activity that fits within the statutory definition of hazing is “presumed to be ‘forced’ activity, the willingness of an individual to participate in such activity notwithstanding.”<sup>136</sup> Oklahoma’s anti-hazing statute states that all hazing activities are “presumed to be a forced activity, even if the student willingly participates in such activity.”<sup>137</sup> Utah’s anti-hazing statute also has a similar prohibition against the victim-consent defense by assuming that victims under the age of twenty-one are more vulnerable to peer pressure, thus prohibiting any consent to hazing by such persons.<sup>138</sup>

Several states include in their anti-hazing statute a provision that makes the victim’s consent irrelevant. For example, Iowa’s anti-hazing statute defines “forced activity” as “any activity which is a condition of initiation or admission into, or affiliation with, an organization, *regardless of a student’s willingness to participate in the activity.*”<sup>139</sup> Georgia’s anti-hazing statute also contains a provision that forced activity is prohibited “regardless of a student’s willingness to participate in such activity.”<sup>140</sup> Wisconsin’s anti-hazing statute similarly states that “forced activity” is prohibited “regardless of a student’s willingness to participate in the activity.”<sup>141</sup>

Perhaps an even stronger mechanism employed by a number of states is an explicit prohibition against the victim-consent defense in hazing cases. Nevada’s anti-hazing statute provides that “[c]onsent of a victim of hazing is not a valid defense to a prosecution conducted [under the anti-hazing statute].”<sup>142</sup> Missouri has a similar provision, which

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135. *Id.* at 386 & n.75.

136. *Id.* at 386 (citing 24 PA. STAT. ANN. § 5352 (West 1992)). Similarly, Delaware’s anti-hazing statute mimics the same language, stating that any activity within the statutory definition of “hazing” is “presumed to be ‘forced’ activity, the willingness of an individual to participate in such activity notwithstanding.” DEL. CODE ANN. tit. 14, § 9302 (2007).

137. OKLA. STAT. tit. 21, § 1190 (2002).

138. Pelletier, *supra* note 134, at 386 (citing UTAH CODE ANN. § 76-5-107.5(2) (LexisNexis 1999)).

139. IOWA CODE ANN. § 708.10 (West 2003) (emphasis added).

140. GA. CODE ANN. § 16-5-61 (2011).

141. WIS. STAT. § 948.51 (2011–2012).

142. Pelletier, *supra* note 134, at 386–87 (quoting NEV. REV. STAT. ANN. § 200.605(2)).



states that “[c]onsent is not a defense to hazing.”<sup>143</sup> Vermont’s anti-hazing statute states that “[i]t is not a defense . . . that the person against whom the hazing was directed consented to or acquiesced in the hazing activity.”<sup>144</sup> Maryland’s anti-hazing provision also explicitly states that “[t]he implied or express consent of a student to hazing is not a defense.”<sup>145</sup>

Indiana provides the most explicit bar against the victim-consent defense by stating that hazing involves the act of “forcing or requiring another person . . . *with or without the consent* of the other person.”<sup>146</sup> West Virginia’s statute also provides a strong bar against the victim-consent defense in any manner, stating that “the implied or expressed consent or willingness of a person or persons to hazing shall not be a defense under this section.”<sup>147</sup>

By including these various provisions in their anti-hazing statutes, these sixteen states have removed the subjective inquiry of consent from consideration, thus presumably allowing courts to effectively and properly adjudicate hazing cases. Courts, however, have addressed the issue of consent in a limited number of instances. For example, a mere handful of courts have found that fraternity pledges did not necessarily have their psychological will overpowered and were thus able to consent to the hazing they experienced.

In *Jones v. Kappa Alpha Order, Inc. (Ex parte Barran)*, Jason Jones was an Auburn University student who chose to pledge the fraternity of Kappa Alpha.<sup>148</sup> Jones claimed he was subjected to numerous hazing incidents, such as jumping into ditches filled with water, urine, and feces; withstanding physical abuse; and appearing nightly at the fraternity house for two a.m. meetings to be hazed in a variety of ways.<sup>149</sup> When Jones was suspended from school for poor academic performance, he brought suit against the fraternity for negligence, assault and battery, and the tort of outrage.<sup>150</sup> The fraternity asserted the defense of assump-

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(LexisNexis 2001)).

143. MO. ANN. STAT. § 578.365 (West 2011).

144. Vt. Stat. Ann. tit. 16, § 140b (2004).

145. MD. CODE ANN., CRIM. LAW § 3-607 (LexisNexis 2012).

146. IND. CODE ANN. § 35-42-2-2 (LexisNexis 2009) (emphasis added).

147. W. VA. CODE ANN. § 18-16-2 (LexisNexis 2012).

148. *Jones v. Kappa Alpha Order, Inc. (Ex parte Barran)*, 730 So. 2d 203, 204 (Ala. 1998).

149. *Id.* at 204–05.

150. *Id.* at 205.

tion of risk, alleging Jones voluntarily engaged in the hazing activities.<sup>151</sup> Jones claimed his participation was “not necessarily voluntary.”<sup>152</sup>

The Supreme Court of Alabama sided with the fraternity and remanded the case with instruction for the trial court to grant their motion for summary judgment on the negligence claim.<sup>153</sup> The supreme court found significant the facts that Jones (1) knew “between 20% and 40%” of his class had withdrawn from pledging, (2) knew of the hazing practices yet continued to show up for hazing events, and (3) covered up the hazing incidents to school officials and his doctors even though he knew the hazing would continue to occur.<sup>154</sup> The court did not find persuasive Jones’s argument that “a coercive environment hampered his free will to the extent that he could not voluntarily choose to leave the fraternity.”<sup>155</sup>

More recently, in *Yost v. Wabash College*, freshman Brian Yost suffered physical and mental injuries and was forced to drop out of school due to an incident that occurred in connection with the Phi Psi fraternity.<sup>156</sup> Yost, a Phi Psi pledge, decided to throw an upperclassman into a creek to celebrate his birthday.<sup>157</sup> The friendly horseplay escalated until an upperclassman put Yost in a chokehold, at which time Yost lost consciousness.<sup>158</sup>

Yost filed a personal injury action against the fraternity, the college, and the upperclassman.<sup>159</sup> However, the court determined that since the incident was instigated by Yost, he was not coerced into any action, and, thus, the incident was not hazing.<sup>160</sup> As such, the defendants breached no duty to Yost as a matter of law.<sup>161</sup>

*Jones* and *Yost* are outliers, however, when compared to other states’ case law. For example, the issue of consent was addressed by a New York court in the case of *People v. Lenti (Lenti I)*.<sup>162</sup> In *Lenti I*, the defendants were charged under the New York criminal hazing statute

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151. *Id.*

152. *Id.* at 205–06.

153. *Id.* at 208.

154. *Id.* at 206–07.

155. *Id.* at 207.

156. *Yost v. Wabash Coll.*, 976 N.E.2d 724, 728 (Ind. Ct. App. 2012).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 735.

161. *Id.* at 745.

162. *People v. Lenti (Lenti I)*, 253 N.Y.S.2d 9, 15 (Nassau Cnty. Ct. 1964).

for “[willfully], wrongfully and knowingly” assaulting victims by “striking them about the body and face with clenched fists, open hands, forearms and feet.”<sup>163</sup> The defendants asserted the victim-consent defense, but the court dismissed such a defense and noted that in order for consent to be a successful defense, there must have been an affirmative act by the alleged victim which was not induced through either fraud or deceit and “that the act performed should not exceed the extent of the terms of consent.”<sup>164</sup> The *Lenti I* court went on to note that even if the victim consented, “consent is not a carte blanche license to commit an unabridged assault.”<sup>165</sup>

In *People v. Lenti (Lenti II)*,<sup>166</sup> the court expounded on the victim-consent defense, explaining that “[c]onsent of the pledges certainly should not be a bar to prosecution” and that the victim-consent defense was not applicable in cases where “the public conscience and morals are shocked.”<sup>167</sup> In addressing this issue of victims’ consent, the court in *Lenti II* proposed that the New York legislation amend the criminal hazing statute to include explicit language barring such defenses in hazing cases in the state of New York.<sup>168</sup> Several other courts have followed the reasoning laid out by the court in *Lenti I* and *Lenti II* and have refused to allow consent to serve as a defense in hazing cases,<sup>169</sup> yet in cases where there is no explicit statutory language barring the use of consent as a defense, hazing cases usually turn on the facts of the case and whether a jury decides that the victim-pledge voluntarily participated in the hazing activities.<sup>170</sup>

In *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, William Quinn brought a negligence suit against Beta Theta Pi Fraternity after

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163. *Id.* at 11.

164. *Id.* at 15.

165. *Id.*

166. *People v. Lenti (Lenti II)*, 260 N.Y.S.2d 284 (Nassau Cnty. Ct. 1965).

167. *Id.* at 287.

168. *Id.* at 287–88.

169. *See, e.g., Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 667 N.Y.S.2d 650, 651–53 (Sup. Ct. 1997). In *Oja*, the court held that consumption of alcohol by a pledge during college fraternal organization “hazing” or initiation ritual may be considered not to be voluntary. *Id.* Thus, survival action for conscious pain and suffering of a pledge who suffers fatal injuries as a result of ingestion is not barred, where drinking is imposed upon pledges, and their obedience extracted, as an express or implied condition of membership. *Id.* However, if consumption is voluntary, the estate may only recover for any resulting economic loss. *Id.*

170. Pelletier, *supra* note 134, at 386; *see, e.g., Jones v. Kappa Alpha Order, Inc. (Ex parte Barran)*, 730 So. 2d 203, 206–07 (Ala. 1998); *see also supra* notes 148–55 and accompanying text.

he suffered neurological damage to his hands and arms following a night of drinking.<sup>171</sup> Quinn alleged that, as an eighteen-year-old freshman pledge, he was directed to drink a forty-ounce pitcher of beer without removing it from his lips, was brought to a tavern and instructed to drink from an eight-ounce whiskey bottle, and was placed on a hardwood floor to sleep after becoming unconscious.<sup>172</sup> Quinn asserted that he was left asleep for fourteen hours before he awoke, went to a hospital, and registered a .25 blood-alcohol content (BAC).<sup>173</sup> He was informed that, at its peak, his BAC was likely at near fatal levels.<sup>174</sup>

In his complaint, Quinn alleged that the fraternity did more than simply furnish him with alcohol, but rather required him to drink past the point of intoxication to be initiated into the fraternity.<sup>175</sup> The court agreed and held that the “plaintiff was coerced into being his own executioner.”<sup>176</sup> The court continued:

It is true that [Quinn] could have avoided the situation by walking away from the fraternity. In that respect, [Quinn’s] actions in participating in the ceremony were voluntary. Yet, as the complaint alleges, membership in the defendant fraternity was a “much valued status.” It can be assumed that great social pressure was applied to [Quinn] to comply . . . perhaps to the extent of blinding [Quinn] to any dangers he might face. To the extent that [Quinn] acted willingly, liability can be transferred to him under principles of comparative negligence.<sup>177</sup>

In finding that Quinn had a cause of action against the fraternity, the court noted that “the social pressure that exists” when a student pledges a fraternity “is so great that compliance with initiation requirements places him or her in a position of acting in a coerced manner.”<sup>178</sup>

In *State v. Brown*, Sherdene Brown was found guilty of complicity to hazing under Ohio’s hazing statute.<sup>179</sup> Brown was a member of Alpha Kappa Alpha at Kent State University when she “physical[ly] disci-

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171. *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1195 (Ill. App. Ct. 1987).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1197.

176. *Id.*

177. *Id.*

178. *Id.* at 1198.

179. *State v. Brown*, 630 N.E.2d 397, 399 (Ohio Ct. App. 1993).

pline[d]” pledges by forcing them to stand on their heads, beating them with paddles, and smacking and striking pledges in the face and head.<sup>180</sup> Brown was subsequently indicted by a grand jury for complicity to hazing.<sup>181</sup> Brown appealed the indictment.<sup>182</sup>

Brown argued that the pledges knew the pledging process involved physical discipline.<sup>183</sup> Brown attempted to draw an analogy between the pledge process and “ordinary physical conduct incident to high contact sports,” where physical interaction is permitted due to consent of the participants.<sup>184</sup> The court rejected this argument on two grounds: (1) the pledges did not consent to the *degree* of physical discipline used, and (2) the state of Ohio’s hazing statute did not include consent as a valid defense.<sup>185</sup>

In *Nisbet v. Bucher*, Michael Nisbet died after consuming alcohol as part of the initiation process for the St. Pat’s Board, a campus organization at the University of Missouri at Rolla.<sup>186</sup> His parents’ wrongful death action was dismissed by the trial court for failure to state a cause of action, but they appealed alleging that to gain membership on the St. Pat’s Board their son was coerced into chugging excessive amounts of alcohol and was denied medical assistance once he became unconscious.<sup>187</sup>

The Missouri Court of Appeals agreed with the Illinois Court of Appeals’ reasoning in *Quinn*.<sup>188</sup> The court stated that Nisbet was pressured into drinking alcohol “for the specific purpose of inducing intoxication,” and such consumption was a requirement of his induction into the St. Pat’s Board.<sup>189</sup> The court also recognized that even though Nisbet could have walked away, he was “blinded to the danger he was facing” by the great social pressure applied by the St. Pat’s Board.<sup>190</sup> The court concluded that “[i]t is a question for the trier of fact as to what degree [he] was coerced by defendants to consume excessive quan-

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180. *Id.* at 400.

181. *Id.*

182. *Id.*

183. *Id.* at 404.

184. *Id.*

185. *Id.*

186. *Nisbet v. Bucher*, 949 S.W.2d 111, 113 (Mo. Ct. App. 1997).

187. *Id.* at 113–14.

188. *Id.* at 116.

189. *Id.*

190. *Id.*

tities of alcohol and as to what extent his will to make a conscious decision about his alcohol consumption was overcome.”<sup>191</sup>

In *Carpetta v. Pi Kappa Alpha Fraternity*, Charles Carpetta was a University of Toledo student pledging the Pi Kappa Alpha fraternity when fraternity members ridiculed him by yelling and swearing at him; requiring him to go on a scavenger hunt to an adult bookstore, a gay bar, and a brothel; forcing him to sit alone in a dark room for extended periods of time; and forcing him to kneel in rats’ blood.<sup>192</sup> When Carpetta quit the pledge process and dropped out of school, he brought suit against the fraternity under Ohio’s hazing statute.<sup>193</sup> The defendant fraternity filed a motion for summary judgment alleging that the statute’s term “acts of coercion” was unconstitutionally vague.<sup>194</sup>

The court found that the term was not unconstitutionally vague because “coercing” simply meant any act that caused another person to engage in any act of initiation.<sup>195</sup> The court ultimately held that Carpetta could recover for any physical harm inflicted by the acts of initiation, but not for any mental or emotional harm.<sup>196</sup>

In *Meredith v. Montgomery*, Chad Meredith was a freshman at the University of Miami and was pledging the Epsilon Beta Chapter of the Kappa Sigma fraternity when he drowned while swimming across Lake Osceola.<sup>197</sup> On the night of his death, he attended a party with the fraternity’s grand master of ceremonies and the fraternity’s president.<sup>198</sup> The two fraternity officers decided they were going to swim in the lake and asked Meredith if he was going to as well.<sup>199</sup> Meredith skeptically asked if they were serious, but attempted the crossing and subsequently drowned.<sup>200</sup>

Meredith’s family brought suit, and the two defendants sought sum-

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191. *Id.*

192. *Carpetta v. Pi Kappa Alpha Fraternity*, 718 N.E.2d 1007, 1011 (Ohio Ct. C.P. Lucas Cnty. 1998).

193. *Id.*

194. *Id.* at 1016.

195. *Id.* at 1017.

196. *Id.* at 1017, 1019.

197. Plaintiff’s Memorandum of Law in Opposition to Defendant Travis Montgomery’s Motion for Summary Judgment and Defendant David May’s Joinder Therein at 2–3, *Meredith v. Montgomery*, No. 02-1135, 2004 WL 5913350 (Fla. Cir. Ct. Feb. 17, 2004), 2003 WL 25969631, at \*1–2 [hereinafter Plaintiff’s Memorandum].

198. Plaintiff’s Memorandum, *supra* note 197, at 2.

199. *Id.*

200. *Id.* at 2–3.

mary judgment, arguing “[t]here is no duty to protect another adult from the consequences of his own voluntary acts.”<sup>201</sup> The plaintiffs argued Meredith’s acts were not truly voluntary, citing a deposition by Joel Epstein (founder of the U.S. Department of Education’s Higher Education Center for Alcohol & Other Drug Prevention) in which Epstein admitted pledging causes the “pledges to do things that they would otherwise be unwilling to do.”<sup>202</sup> “The exercise of peer pressure, whether direct and confrontational or subtle and more disguised is particularly effective when it comes from the fraternity president . . . .”<sup>203</sup> Presumably relying on Epstein’s deposition, the jury found in favor of Meredith and awarded his parents nearly seven million dollars each for their pain and suffering.<sup>204</sup> The jury found that the defendants were each forty-five percent at fault, and Meredith was ten percent at fault.<sup>205</sup>

As noted, most criminal law cases tend to reject consent as a defense, except where the activity is deemed appropriate by courts.<sup>206</sup> The civil law, on the other hand, permits consent as a defense, especially when the victim assumed the risk of the activity in which they were harmed or where injury was a foreseeable risk of participating in the activity.<sup>207</sup> Of the forty-four state anti-hazing statutes, about one-third of them bar the use of the victim-consent defense by explicitly barring the defense, applying a presumption against consent, or applying a presumption that hazing activity is per se forced.<sup>208</sup>

### III. HAZING CONSENT: A PSYCHOLOGICAL PERSPECTIVE

Few courts, if any, reference psychological theories related to why

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201. *Id.* at 4 (quoting Defendant, Travis Montgomery’s Motion for Summary Judgment at 7, Meredith v. Montgomery, No. 02-1135, 2004 WL 5913350 (Fla. Cir. Ct. Feb. 17, 2004), 2003 WL 25969630, at \*4).

202. Plaintiff’s Memorandum, *supra* note 197, at 5 n.1 (quoting Affidavit of Joel Epstein at 3, Meredith v. Montgomery, No. 02-1135, 2004 WL 5913350 (Fla. Cir. Ct. Feb. 17, 2004), 2003 WL 25969483, at \*2).

203. Affidavit of Joel Epstein, *supra* note 202, at 3.

204. Meredith v. Montgomery, No. 02-1135, 2004 WL 5913350, at \*1 (Fla. Cir. Ct. Feb. 17, 2004).

205. Defendant, Travis Montgomery’s, Motion to Set Aside Verdict and Final Judgment and to Enter Judgment in Accordance with Motion for Directed Verdict at 2, Meredith v. Montgomery, No. 02-1135, 2004 WL 5913352 (Fla. Cir. Ct. Mar. 24, 2004), 2004 WL 5913714, at \*1.

206. *See supra* Part II.A.

207. *See supra* Part II.B.

208. *State Anti-Hazing Laws*, *supra* note 133; *see also* Pelletier, *supra* note 134, at 386 & n.75 (indicating that sixteen states have anti-hazing statutes).

hazing victims may persist to participate in hazing activities. Thus, courts fail to fully evaluate (1) the degree to which victims consented and (2) the extent to which victims' psychological will was truly overcome during the hazing experience. This Part explores the psychological theories that may explain why hazing victims consent to the range of hazing activities.

#### A. Escalation of Commitment

The phenomenon of escalation of commitment refers to situations where decision-makers commit additional resources to a failing course of action.<sup>209</sup> An escalation of commitment situation is characterized by three essential features: costs of continuing the same course of action, opportunities for withdrawal, and uncertainty about the consequences of persistence and withdrawal.<sup>210</sup> Researchers have found that escalation effects persist in group as well as individual decision processes.<sup>211</sup> A variety of theories have been advanced to explain escalation of commitment. A synopsis of some theories is below.

For example, self-justification theory, which is based on Festinger's theory of cognitive dissonance, is the most prominent explanation for escalation behavior.<sup>212</sup> Self-justification theory posits that decision makers are reluctant to admit that their earlier decisions were incorrect and thus invest additional resources in an attempt to demonstrate the correctness of those decisions.<sup>213</sup> According to Staw and Ross, escalation tendencies are greatest when the decision maker is personally responsible for the failed course of action.<sup>214</sup>

The effect of personal responsibility has since been investigated under a variety of situations, with the results generally supportive of Staw and Ross's proposition. For example, Whyte's 1993 study hypothesized,

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209. See Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 ACAD. MGMT. REV. 39, 39-40 (1992) (providing a review of the theoretical variations on the escalation of commitment).

210. See *id.* at 40.

211. E.g., Glen Whyte, *Escalating Commitment in Individual and Group Decision Making: A Prospect Theory Approach*, in 54 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 430, 430 (1993).

212. See Brockner, *supra* note 209, at 43-49 (reviewing escalation research and finding support for the self-justification hypothesis).

213. *Id.* at 40, 43.

214. See Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations: Antecedents, Prototypes, and Solutions*, in 9 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39, 50-51 (1987).



*inter alia*, that “[e]scalating commitment to a failing project will occur in individual and group decision making regardless of personal responsibility” for sunk costs.<sup>215</sup> Whyte found that although personal responsibility was not strictly necessary, it did significantly increase escalation.<sup>216</sup>

The 1994 study by Bobocel and Meyer offered greater empirical insight on the impact of personal responsibility (operationalized as choice) and justification on escalation of commitment.<sup>217</sup> Bobocel and Meyer noted that most previous research confounded personal responsibility and public justification.<sup>218</sup> The purpose of their study was to separate the effects of choice, private justification, and public justification on the decision of whether or not to persist in a failed course of action.<sup>219</sup> Results showed that choice exerts no significant effect on escalating commitment but that both private and public justification significantly increases escalation of commitment to the same extent.<sup>220</sup> At first blush, it would seem that the desire to appear consistent—either to others or oneself—is a powerful motive for escalation behaviors. However, because escalation of commitment occurred even when individuals did not justify their behavior to anyone else, Bobocel and Meyer concluded that “public justification is not necessary for escalating commitment and that private justification is sufficient.”<sup>221</sup>

Escalation tendencies may also be partly explained by expectancy theory, which asserts that decision makers assess the subjective expected utility of allocating additional resources based on estimates of the value of goal attainment (i.e., rewards minus costs) and the probability that additional resources will help attain that goal.<sup>222</sup> Accordingly, “if the reasons for the negative feedback [are perceived to be] unstable rather than stable,” then the decision maker would consider the probability of goal attainment to be more favorable and would therefore be more likely to commit additional resources.<sup>223</sup>

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215. Whyte, *supra* note 211, at 437.

216. *Id.* at 445–46.

217. D. Ramona Bobocel & John P. Meyer, *Escalating Commitment to a Failing Course of Action: Separating the Roles of Choice and Justification*, 79 J. APPLIED PSYCHOL. 360, 360 (1994).

218. *Id.*

219. *Id.*

220. *Id.* at 362.

221. *Id.*

222. Brockner, *supra* note 209, at 40.

223. *Id.*

Prospect theory has been proposed as an alternative explanation to self-justification for the behavior associated with escalation of commitment in individual and group settings.<sup>224</sup> Prospect theory describes how people actually behave when confronted with loss situations.<sup>225</sup> According to this theory, individuals are risk seeking when choosing between two losing options but risk averse when choosing between two winning options.<sup>226</sup> Thus, the action one takes may depend upon how the problem is framed.<sup>227</sup> If the decision is perceived to be in the positive direction (i.e., it will generate gains), then individuals typically react in a risk averse manner.<sup>228</sup> Thus, in this paradigm, a decision maker would prefer “a sure win of \$50 over a 50 percent chance to win \$100 and a 50 percent chance to win \$0.”<sup>229</sup> By contrast, if the decision is perceived to be in the negative direction (i.e., it will generate losses), then individuals will react in a risk-seeking manner.<sup>230</sup> Thus, decision makers in this paradigm would prefer “to take a 50 percent chance on losing \$100 and a 50 percent chance of losing \$0 than to accept a sure loss of \$50.”<sup>231</sup>

In his 1993 study, Whyte contends that prospect theory provides a more compelling justification for escalation behaviors than does self-justification theory.<sup>232</sup> Whyte’s contention is premised on the assumption that individuals facing an escalation dilemma are loss averse.<sup>233</sup> Thus, according to Whyte, individuals facing escalation situations prefer to allocate additional resources and increase the probability of a larger loss, rather than to accept the sure loss if they declined to allocate additional resources.<sup>234</sup>

Professor Bowen’s decision dilemma theory has also been offered to explain escalation behaviors.<sup>235</sup> Bowen suggested that in previous esca-

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224. *Id.* at 50.

225. *Id.*

226. *Id.* (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979)) (noting that unlike the traditional model’s assumption of risk neutrality, people tend to be risk averse in the domains of gains, risk seeking in the domains of losses, and more risk sensitive to losses than to gains).

227. Brockner, *supra* note 209, at 50.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Whyte, *supra* note 211, at 448.

233. *Id.* at 433.

234. *Id.*

235. Brockner, *supra* note 209, at 52 (citing Michael G. Bowen, *The Escalation Phenom-*

lation research, including Staw's seminal study in 1976, decision makers received equivocal, rather than negative, feedback about their initial resource allocation.<sup>236</sup> Accordingly, decision dilemma theory posits that people escalate not in response to negative feedback, but in response to feedback that can be interpreted in multiple ways.<sup>237</sup> As such, escalation behavior is more of a response to a dilemma than it is an act of error because investing additional resources may allow additional opportunities for a strategy to work, or allow the collection of more information and the passage of time, which may lead to greater understanding of the situation.<sup>238</sup>

Self-presentation theory is yet another explanation for escalating commitment. Self-presentation theory focuses on the effects of an on-looking audience on escalation.<sup>239</sup> Proponents of this theory contend that decision-makers escalate commitment to failed courses of action because they want to be perceived as able to reach suitable choices.<sup>240</sup> Thus, they respond to escalation dilemmas by allocating additional resources because departing from a previous pursuit may compromise credibility.<sup>241</sup>

Proponents of self-presentation theory also maintain that organizational culture influences escalating commitment.<sup>242</sup> Studies on employees and organizational culture have found that employees typically act in a manner that is consistent with the organizational values, which is in part a reflection of a self-presentation motive.<sup>243</sup> Thus, escalation is more likely to occur in organizations that have a culture that makes people unwilling to admit failure or that values consistency in behavior.<sup>244</sup> However, escalation is less likely in organizations where people are free to admit errors or that values experimentation.<sup>245</sup>

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*enon Reconsidered: Decision Dilemmas or Decision Errors?*, 12 ACAD. MGMT. REV. 52 (1987)).

236. Bowen, *supra* note 235, at 52; Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORG. BEHAVIOR & HUM. BEHAV. 27 (1976); Staw & Ross, *supra* note 214, at 52–54.

237. Brockner, *supra* note 209, at 54.

238. *Id.* at 53–54.

239. *Id.* at 56.

240. *See id.*

241. *See id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

### B. Groupthink

Street and Anthony posit a theoretical relationship between groupthink and escalation of commitment models.<sup>246</sup> Groupthink is a deficient group decision-making process that has a high probability of producing poor decisions with disastrous consequences.<sup>247</sup> Groupthink occurs when “concurrency-seeking becomes so dominant in a cohesive [in-group] that it tends to override realistic appraisal of alternative courses of action.”<sup>248</sup> There are three antecedent conditions to groupthink behavior: (1) group cohesiveness; (2) a provocative situational context; and (3) structural faults of the organization.<sup>249</sup> The first, and most important, antecedent condition of groupthink is cohesiveness—i.e., deindividuation.<sup>250</sup> A moderate to high level of group cohesion is necessary, though insufficient by itself, for the development of groupthink.<sup>251</sup>

The second antecedent condition, a provocative situational context, arises when the group has low group self-esteem and is required to make consequential decisions under high stress.<sup>252</sup> Low group self-esteem is induced by the group’s previous failing decisions that raise questions about the group’s competence and moral standards.<sup>253</sup> High stress results from external threats, with little chance of the group developing better decisions than the ones that led to previous failures.<sup>254</sup> External threats, such as navigating a crisis situation, are said “to increase the likelihood of concurrency-seeking behavior[.]”<sup>255</sup>

The third antecedent condition for the development of groupthink concerns structural faults of the organization.<sup>256</sup> These structural faults

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246. Marc D. Street & William P. Anthony, *A Conceptual Framework Establishing the Relationship Between Groupthink and Escalating Commitment Behavior*, 28 SMALL GROUP RES. 267, 268–69 (1997).

247. See *id.* at 270 (citing Irving L. Janis, *Groupthink*, PSYCHOL. TODAY, Nov. 1971, at 43, 43).

248. Street & Anthony, *supra* note 246, at 270 (alteration in original) (quoting Janis, *supra* note 247, at 43).

249. Street & Anthony, *supra* note 246, at 270–72.

250. *Id.* at 270.

251. *Id.*

252. *Id.* at 272.

253. *Id.*

254. *Id.*

255. *Id.* (citing Paul ‘t Hart, *Irving L. Janis’ Victims of Groupthink*, 12 POL. PSYCHOL. 247, 257–59 (1991); Chris P. Neck & Gregory Moorhead, *Jury Deliberations in the Trial of U.S. v. John DeLorean: A Case Analysis of Groupthink Avoidance and an Enhanced Framework*, 45 HUM. REL. 1077, 1077–80 (1992)).

256. Street & Anthony, *supra* note 246, at 272.

involve: (1) insulation from critical evaluation and analysis by other significant group members; (2) inadequate decision-making procedures, to include the absence of procedures for searching for information, investigating consequences, and proposing alternative actions; (3) a lack of impartial leadership; and (4) a lack of diversity in backgrounds or ideologies.<sup>257</sup>

Street and Anthony put forward four assumptions that underlie the alleged theoretical link between groupthink and escalation of commitment.<sup>258</sup> First, they redefine the concept of group cohesion. Previous researchers have maintained that cohesion is comprised of three dimensions: interpersonal attraction, pride in or desire for group membership, and task cohesion.<sup>259</sup> The definition put forth by Street and Anthony consists of only the first two dimensions (interpersonal attraction and pride in group membership).<sup>260</sup>

Second, they assume that the group is cohesive in the way defined above and simultaneously “suffers from one of the other two sets of antecedent conditions in the groupthink model before [being] exposed to an escalation situation.”<sup>261</sup> Third, citing the 1993 study by Glenn Whyte, they assume that escalation behaviors can and do occur at the group level.<sup>262</sup> Fourth, they assume that group cohesion, as defined in the first assumption, increases the tendency to escalate commitment to failing courses of action.<sup>263</sup>

Next, Street and Anthony put forth three propositions, each of which combines variables from the groupthink model with a corresponding set of escalation variables.<sup>264</sup> Each proposition assumes that the group is cohesive as defined by the first assumption, above.<sup>265</sup> The first proposition concerns a group with moderate to high levels of cohesion that is “suffering from conditions consistent with the provocative situational context . . . before it is exposed to an escalation situation.”<sup>266</sup> Thus, the cohesive group is suffering from “stress from external events,

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257. *See id.*

258. *Id.* at 276–79.

259. *Id.* at 276.

260. *Id.* at 277.

261. *Id.*

262. *Id.* at 278 (citing Whyte, *supra* note 211, at 430).

263. Street & Anthony, *supra* note 246, at 279.

264. *Id.* at 279–86.

265. *Id.*

266. *Id.* at 280.

low levels of self-esteem, and pressures for concurrence-seeking actions among members prior to being exposed to an escalation situation.”<sup>267</sup> According to Street and Anthony, the escalation situation increases stress levels, exacerbating the group’s low self-esteem, and thereby increases the group’s concurrence-seeking tendencies.<sup>268</sup> Relying on the self-justification and face-saving theories of escalating commitment, Street and Anthony posit that the group will respond to this precarious situation by escalating commitment to their failing course of action.<sup>269</sup> Street and Anthony explain, in essence, that the group’s behavior is a defense mechanism for coping with decisional stress.<sup>270</sup> For those reasons, Street and Anthony’s first proposition contends that cohesive groups suffering from high stress or low self-esteem are more likely to escalate commitment to failed actions than are cohesive groups not suffering from those conditions.<sup>271</sup>

The second proposition concerns a highly cohesive group that is subject to various elements of the structural faults group of antecedent conditions in the groupthink model before being exposed to an escalation situation.<sup>272</sup> The presence of any one of the four structural faults is said to reduce the probability of the group engaging in a rational assessment of its alternatives before making a decision.<sup>273</sup> Street and Anthony contend that this phenomenon is greater when a group faces an escalation situation.<sup>274</sup> They explain that while the lack of structural constraints within the organization alone retards rational assessment, the additional presence of the psychological and social determinants that urge escalation behaviors further increases the probability that the group will arrive at a decision based upon irrational considerations (i.e., considering sunk costs).<sup>275</sup> This interaction between the structural faults, “the self-justification, information-processing distortion, and face-saving” variables ultimately increases commitment to previous bad decisions.<sup>276</sup>

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267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 280–81.

271. *Id.* at 282.

272. *Id.*

273. *Id.* at 284. For the four types of structural faults, *see supra* note 257 and accompanying text.

274. Street & Anthony, *supra* note 246, at 284.

275. *Id.*

276. *Id.* at 285.

Street and Anthony's second proposition asserts that cohesive groups operating with structural faults are more likely to escalate commitment to failed decisions than groups not operating with structural faults.<sup>277</sup>

To summarize briefly, the first proposition concerned the interactive effects of group cohesion and a provocative situational context, while the second proposition focused on the interactive effects of group cohesion and structural faults. According to Street and Anthony, those two propositions demonstrated the relationship between the two sets of antecedent variables and the concomitant social and psychological determinants in the escalation model.<sup>278</sup> They ultimately contended that groups characterized by those antecedent conditions are more likely to escalate commitment to failed courses of action than groups not characterized by those antecedent conditions.<sup>279</sup>

Street and Anthony's third proposition was simply a combination of the previous two.<sup>280</sup> It asserts that cohesive groups characterized by the presence of all of the antecedent conditions of groupthink are more likely to escalate commitment to failed actions than are cohesive groups who are not characterized by all of the antecedent conditions of groupthink.<sup>281</sup>

### C. Evolutionary Psychology

Spoor and Kelly's 2004 article situates the phenomenon of group members developing shared moods and emotions (collectively referred to under the umbrella term of "affect" or "group affect") in the context of evolutionary history.<sup>282</sup> Spoor and Kelly suggest that affect in groups has primarily served as a coordination function.<sup>283</sup> This coordination function can take one of two forms.<sup>284</sup> "First, group members' various affective reactions can quickly provide information about the environment, group structure, and group goals to other group members . . . ."<sup>285</sup>

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277. *Id.*

278. *Id.* at 286.

279. *Id.*

280. *Id.* at 286–87.

281. *Id.* at 286.

282. Jennifer R. Spoor & Janice R. Kelly, *The Evolutionary Significance of Affect in Groups: Communication and Group Bonding*, 7 *GROUP PROCESSES & INTERGROUP REL.* 398, 398 (2004).

283. *Id.* at 401.

284. *Id.*

285. *Id.*

In other words, shared affect coordinates group members through a communication function. Second, shared affect can mobilize efforts toward group goals through fostering group bonds and group loyalty.<sup>286</sup> “These two functions of group [affect] are closely related and mutually reinforcing.”<sup>287</sup>

Spoor and Kelly contend that the development of mechanisms such as emotional contagion and interaction synchrony have been advantageous for group survival throughout evolutionary history.<sup>288</sup> Emotional contagion refers to the automatic processes through which individuals mimic and synchronize their facial expressions, vocalizations, posture, and movements with those of other individuals in the group.<sup>289</sup> One consequence of such mimicry is the “convergence [of] mood and emotions across group members,” resulting in a homogenous emotional state throughout the group.<sup>290</sup>

Spoor and Kelly also use an evolutionary perspective to explain the differing adaptive benefits of positive and negative affective states.<sup>291</sup> Communication of positive affective states had the effect of promoting cooperation within groups, while communicating negative affective states had the effect of promoting collective action in response to negative aspects in the environment.<sup>292</sup> Thus, because negative emotional states typically “conveyed critical survival information about the environment, group members may be particularly aware of the presence of negative emotions within the group.”<sup>293</sup>

Spoor and Kelly also contend that group members profited from the development of affect regulation and control mechanisms that maintain the level of affect that is appropriate for a desired outcome.<sup>294</sup> Such explicit affect regulation strategies can function to communicate the group’s status hierarchies, as well as its larger group goals.<sup>295</sup> This aspect of the communicative function highlights the importance of both homogenous and heterogeneous levels of affect within the group. Homog-

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286. *Id.*

287. *Id.*

288. *See id.* at 401–02.

289. *Id.* at 402.

290. *Id.*

291. *Id.* at 402–03.

292. *Id.* at 402–03, 405.

293. *Id.* at 403.

294. *Id.* at 404.

295. *Id.*



enous levels of affect in a group might be important for the pursuit of specific group goals.<sup>296</sup> By contrast, affect regulation to communicate status differences stresses the importance of heterogeneous levels of affect within groups.<sup>297</sup>

Spoor and Kelly propose that the second primary function of shared affect in groups is to coordinate group action through facilitating the development of group member bonds and group loyalty.<sup>298</sup> In explaining group affect, Spoor and Kelly focus on two constructs: group cohesion and group rapport.<sup>299</sup> Group cohesion is a “multi-dimensional construct that includes positive interpersonal interaction, task commitment, and group pride.”<sup>300</sup> Ultimately, “the development of group cohesion serves to create bonds between group members, loyalty to the groups, and positive feelings toward tasks that the group completes together.”<sup>301</sup>

Group rapport is similar to group cohesion and has three components: “mutual attention and involvement, coordination among participants in the interaction, and positive affect.”<sup>302</sup> Spoor and Kelly contend that developing group rapport is beneficial to group survival for several reasons.<sup>303</sup> First, experiencing group rapport makes members “more attentive and easily influenced by each other,” suggesting that the development of group rapport influences group members’ susceptibility to emotional contagion.<sup>304</sup> Second, the coordination component of group rapport is identical to interaction synchronization, suggesting that “group rapport can be indexed by regulation of the interaction that coordinates the behavior of participants and provides predictable patterns of behavior.”<sup>305</sup> Third, “[t]he final component of group rapport, positive affect, is closely tied to group cohesiveness” and affects group stability.<sup>306</sup> Taken together, the group cohesion and rapport determine the strength of the social bonds within a group and in turn the group’s ability or ina-

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296. *See id.* at 405.

297. *See id.*

298. *Id.*

299. *Id.* at 405–06.

300. *Id.* (citing Brian Mullen & Carolyn Cooper, *The Relation Between Group Cohesiveness and Performance: An Integration*, 115 PSYCHOL. BULL. 210, 220–21, 225 (1994)).

301. Spoor & Kelly, *supra* note 282, at 406.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

bility to effectively coordinate the pursuit of group goals.<sup>307</sup>

The 2007 study by Peters and Kashima provides further insight on the communication function of shared affect by examining the role of emotional sharing (i.e., the social sharing of emotional social talk).<sup>308</sup> Results of their study revealed that emotional sharing can perform a function (affecting what they call the “social triad”) by creating links between people, informing them about their shared position in the environment, and coordinating social action.<sup>309</sup> In other words, the simple act of sharing an emotional experience can create unique bonds between the audience and the narrator, and in turn foster a shared understanding of the world.<sup>310</sup> This shared understanding of the world can be used to unite previously separate groups in coordinated social action.<sup>311</sup>

#### D. Ingroup-Outgroup Dynamics

Bosson and colleagues conducted an empirical test on the folk belief that shared positive feelings—as opposed to shared negative feelings—facilitate stronger bonds between two people.<sup>312</sup> Contrary to folk wisdom, they proposed that two people sharing a dislike of a target person would promote closeness more readily than sharing a liking for that target.<sup>313</sup> The power of shared negativity in friendship formation was tested by measuring and manipulating the extent to which people shared specific negative and positive attitudes about others.<sup>314</sup> Study 1 and Study 2 required participants to list the positive and negative attitudes that they shared with their closest friends.<sup>315</sup> Results revealed that people tend to recall a larger proportion of shared negative than positive attitudes

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307. *See id.*

308. Kim Peters & Yoshihisa Kashima, *From Social Talk to Social Action: Shaping the Social Triad with Emotion Sharing*, 93 J. PERSONALITY & SOC. PSYCHOL. 780, 780 (2007).

309. *Id.* at 780, 786, 790 (reporting and discussing results of Study 1 and Study 2, which focused on the three simultaneous consequences of emotion sharing).

310. *Id.* at 791–92 (reporting and discussing the results of Study 3, which extended the two previous studies to confirm that the creation of the shared worldview was in fact due to emotion sharing).

311. *See id.* at 793–95 (reporting and discussing the results of Study 4, which extended the three previous studies to confirm that emotion sharing does in fact lead to the creation of coalitions).

312. Jennifer K. Bosson et al., *Interpersonal Chemistry Through Negativity: Bonding by Sharing Negative Attitudes About Others*, 13 PERSONAL RELATIONSHIPS 135, 135 (2006).

313. *Id.*

314. *Id.* at 137.

315. *Id.*

about others.<sup>316</sup>

Study 3 examined the causal link between the discovery of shared negatives about others and interpersonal attraction.<sup>317</sup>

Participants first indicated both a positive and a negative attitude toward a fictitious target person and then learned that they shared either their positive or their negative attitude about the target with another participant whom they believed they would soon meet. Participants then rated their feelings of closeness to the other participant.<sup>318</sup>

Results showed that discovering a shared negative attitude about a target person predicted liking for a stranger more strongly than discovering a shared positive attitude, but only when attitudes were weak.<sup>319</sup> In other words, when people discovered that they shared a *strong* attitude about the stranger, they felt close to the stranger regardless of whether the attitude was positive or negative.

Taken together, these results suggest that a strong negative attitude about a target can be a powerful bonding agent during friendship formation. Bosson and colleagues posited that their findings suggest that one of the functions of negative attitudes is the establishment of ingroups and outgroups.<sup>320</sup> In the context of their study, this means that the discovery of a shared dislike for another person fosters a sense of ingroup solidarity that meets people's fundamental need for connectedness and belonging.

Dion's 1973 study presented the question of what is responsible for ingroup bias.<sup>321</sup> Dion hypothesized that "ingroup cohesion would increase discrimination toward an outgroup" and, extending past prior researchers, proposed that this relationship may be explained in terms of the intergroup relations theories propounded by Sherif and Tajafel.<sup>322</sup>

Sherif's theory posits that competition between groups leads to in-

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316. *Id.* at 140.

317. *Id.* at 143.

318. *Id.*

319. *Id.* at 146.

320. *Id.* at 137.

321. Kenneth L. Dion, *Cohesiveness as a Determinant of Ingroup-Outgroup Bias*, 28 J. PERSONALITY & SOC. PSYCHOL. 163, 163–64 (1973).

322. *Id.*; see also Muzafer Sherif, *Superordinate Goals in the Reduction of Intergroup Conflict*, 63 AM. J. SOC. 349 (1958); Henri Tajfel, *Experiments in Intergroup Discrimination*, SCI. AM., Nov. 1970, at 96.

tragroup cohesion and intergroup hostility.<sup>323</sup> Further, subsequent research on Sherif's theory suggested that competition produced outgroup hostility because highly cohesive groups became more frustrated by competition than groups with low cohesion.<sup>324</sup> Tajafel's theory contends that discrimination toward the outgroup was a product of a "generic" group norm that one ought to favor the ingroup over the outgroup.<sup>325</sup>

Results failed to support Dion's hypothesis that increasing group cohesiveness would increase exploitation and devaluation of the outgroup.<sup>326</sup> Dion conceded that the results of his study do not necessarily contradict Sherif's theory; rather, he suggested that the inconsistent result was due to the fact that the inferences he drew from Sherif's theory and subsequent empirical studies were inapplicable to his experimental design.<sup>327</sup> He explained that if intergroup bias were a product on a "generic" ingroup-outgroup norm, then it would necessarily follow that increasing cohesion would lead to greater conformity to the "generic" norm and, in turn, greater exploitation and devaluation of the outgroup.<sup>328</sup>

Dion's study also investigated "whether persons in highly cohesive groups exhibit greater cooperativeness and admiration toward their [group members] than do those in less cohesive groups," as well as "whether the differential bias toward ingroup versus outgroup [members] is more accentuated in highly cohesive groups than in less cohesive ones."<sup>329</sup> The results showed that members of high-cohesive groups exhibit differential biases toward ingroup and outgroup in that high levels of cohesion produced significantly greater cooperation toward the ingroup than toward the outgroup.<sup>330</sup> Moreover, members of high-cohesive groups evaluated their fellow members more positively than they did members of an outgroup.<sup>331</sup> Members of low-cohesive groups did not as strongly exhibit either of these biases toward ingroup favorit-

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323. Dion, *supra* note 321, at 163; Sherif, *supra* note 322, at 350.

324. Dion, *supra* note 321, at 163 (noting a study "finding that persons in highly cohesive groups are more overtly hostile toward a frustrating agent than individuals in less cohesive groups" (citing Albert Pepitone & George Reichling, *Group Cohesiveness and the Expression of Hostility*, 8 HUM. REL. 327, 336 (1955))).

325. Dion, *supra* note 321, at 164; Tajfel, *supra* note 322, at 98-99.

326. Dion, *supra* note 321, at 168.

327. *Id.* at 169.

328. *Id.*

329. *Id.* at 164.

330. *Id.* at 166.

331. *Id.*

ism.<sup>332</sup>

Dion interpreted the results as supporting a cognitive differentiation hypothesis.<sup>333</sup> That is, “high cohesiveness leads group members to cognitively differentiate their ingroup from the outgroup,” while low-cohesion group members fail to perceive themselves and their fellow members as comprising an ingroup.<sup>334</sup>

Karawasa hypothesized that cohesion facilitates social comparison, which in turn increases ingroup favoritism.<sup>335</sup> Results largely supported this hypothesis.<sup>336</sup> Inferiority significantly decreased ingroup favoritism in groups with low cohesion, whereas inferiority increased ingroup favoritism in groups with high cohesion.<sup>337</sup> Thus, the effect of feelings of inferiority on intergroup behavior is dependent upon the level of cohesion in the group.

In groups with low cohesion, members respond to knowledge of ingroup inferiority by cognitively denying their membership and ultimately derogating and departing from the ingroup.<sup>338</sup> According to Karasawa, this low ingroup enhancement motivation (i.e., the lack of a desire to rate the ingroup positively in response to an identity threat) is experienced because members do not strongly identify with the group.<sup>339</sup> By contrast, groups with high cohesion respond to knowledge that their ingroup is inferior on a certain dimension by enhancing their ingroup evaluations on a different dimension.<sup>340</sup> It is important to note that these effects are only observed when the outgroup is a relevant comparator for the ingroup.<sup>341</sup>

Karasawa interpreted the results as suggesting that cohesiveness of the ingroup can “buffer” the impact of threats (e.g., knowledge of ingroup inferiority) on ingroup evaluations.<sup>342</sup> That is, facilitating identification with the group can protect low-status group members from in-

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332. *Id.*

333. *Id.* at 169.

334. *Id.*

335. Minoru Karasawa, *Effects of Cohesiveness and Inferiority upon Ingroup Favoritism*, 30 JAPANESE PSYCHOL. RES. 49, 49 (1988).

336. *Id.* at 54–55.

337. *Id.* at 55–56.

338. *Id.* at 57.

339. *Id.*

340. *Id.* at 51, 58.

341. *Id.* at 51.

342. *Id.* at 58.

group devaluation and promote their ingroup enhancement motivations.<sup>343</sup>

A recent study by Castano and colleagues merges insights from Terror Management Theory (TMT) and social identity theory to argue that ingroup members identify more with ingroup when they were reminded of the inevitability of their own death.<sup>344</sup> Results yielded support for this proposition.<sup>345</sup> The results also “showed that ingroup bias was associated both with ingroup identification and ingroup entitativity,” confirming previous studies that examined these relationships more directly.<sup>346</sup>

Castano and colleagues interpreted this finding as providing evidence for the hypothesis that entitativity and identification are distinct though related concepts.<sup>347</sup> Identification with the group is said to provide psychological protection against the fear engendered by knowledge of personal mortality.<sup>348</sup> Perceived entitativity allegedly allows one to transcend notions of personal mortality by shifting from a personal to a social identity, because, in contrast to personal identity, social identity is not subject to mortal fate.<sup>349</sup>

Ellemers, Spears, and Doosje investigated how ingroup identification affects fidelity to the group.<sup>350</sup> Social identity and self-categorization perspectives suggest that fidelity to one’s group is determined by the group’s status, the need for esteem, and the objective availability of alternatives.<sup>351</sup> Ellemers, Spears, and Doosje proposed, however, that fidelity to one’s group was a function of psychological commitment stemming from the importance of that particular group to the member’s identity.<sup>352</sup> This perspective differed from previous research on individual mobility because it proposed that ingroup identification is a cause, rather a consequence, of one’s inclination to engage in

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343. *Id.*

344. Emanuele Castano et al., *I Belong, Therefore, I Exist: Ingroup Identification, Ingroup Entitativity, and Ingroup Bias*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 135, 136–37 (2002).

345. *Id.* at 138–40.

346. *Id.* at 141.

347. *Id.* at 140.

348. *Id.*

349. *Id.*

350. Naomi Ellemers, Russell Spears & Bertjan Doosje, *Sticking Together or Falling Apart: In-Group Identification as a Psychological Determinant of Group Commitment Versus Individual Mobility*, 72 J. PERSONALITY & SOC. PSYCHOL. 617, 617 (1997).

351. *Id.* at 617–18.

352. *Id.* at 618.

individual or intergroup behaviors.<sup>353</sup>

Ellemers, Spears, and Doosje conducted two experiments designed to test the effects of ingroup identification on perceived intragroup homogeneity, group commitment, and the desire for individual mobility.<sup>354</sup> In the first experiment, the participants were members of a low-status ingroup, with either permeable (i.e., flexible group memberships) or impermeable boundaries (i.e., fixed group memberships).<sup>355</sup> Low identifiers perceived the group as less homogenous, were less committed to the group, and had more of a desire for individual mobility to the status group.<sup>356</sup> The exact opposite result was observed for high identifiers.<sup>357</sup>

The second study investigated the minimal conditions that are needed for the emergence of ingroup identification effects.<sup>358</sup> Thus, in this condition, the relative status of the group was unknown to the participants.<sup>359</sup> Results revealed that even in the absence of an identity threat, low identifiers were less likely to see the group as homogenous, had less commitment to the group, and had a stronger desire for individual mobility than high identifiers.<sup>360</sup> These results added further support to the claim that the psychological factors, as opposed to the objective structural features, determine commitment to one's group.<sup>361</sup>

These results suggest that identification with the ingroup is a powerful determinant of the desire for individual social mobility, irrespective of threats to one's social identity.<sup>362</sup> High identifiers see the group as a homogenous unit and remain committed even when it would be personally profitable to abandon the group.<sup>363</sup> Low identifiers, by contrast, emphasize the differences of individual group members and, at best, exhibit indifference to continued group membership under both threatening and more neutral (i.e., uncertain status) conditions.<sup>364</sup>

In a 1999 article, Ellemers and colleagues analyzed and distinguished

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353. *Id.*

354. *Id.*

355. *Id.* at 619, 621.

356. *Id.* at 621.

357. *Id.*

358. *Id.* at 622.

359. *Id.* at 623.

360. *Id.* at 624.

361. *Id.* at 624–25.

362. *Id.* at 625.

363. *Id.*

364. *Id.*

the components of social identity.<sup>365</sup> Social identity, as defined by Tajfel, is “that part of an individual’s self-concept which derives from his knowledge of his membership of a social group (or groups) together with the value and emotional significance attached to that membership.”<sup>366</sup> According to Ellemers and colleagues, this definition suggests that three separate components contribute to one’s social identity: “a *cognitive* component (a cognitive awareness of one’s membership in a social group—self-categorisation), an *evaluative* component (a positive or negative value connotation attached to this group membership—group self-esteem), and an *emotional* component (a sense of emotional involvement with the group—affective commitment).”<sup>367</sup>

Next, Ellemers and colleagues argued that each aspect of social identity is differentially affected by specific group characteristics or the social context, namely relative group size, relative group status, and whether membership in the group was assigned as opposed to achieved or self-selected.<sup>368</sup> To test this assumption, they manipulated assignment criteria (self-selected v. assigned), membership status (high v. low), and the relative size (majority v. minority) of artificially created groups.<sup>369</sup>

Results confirmed that the evaluative component of social identity, group self-esteem, is only affected by the relative status of the ingroup.<sup>370</sup> Self-categorization, the cognitive dimension of social identity, is solely dependent upon the relative size of the ingroup.<sup>371</sup> Members of minority groups report both strong self-categorization as group members and strong personal identification.<sup>372</sup> Ellemers and colleagues explained that the fact that strong group identity can be observed even when the group purportedly has low value connotation suggests that self-categorization and group self-esteem are relatively independent and that group self-esteem does not necessarily lead people to avoid self-categorization.<sup>373</sup>

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365. Naomi Ellemers et al., *Self-Categorisation, Commitment to the Group and Group Self-Esteem as Related but Distinct Aspects of Social Identity*, 29 EUR. J. SOC. PSYCHOL. 371, 371 (1999).

366. *Id.* at 372 (emphasis omitted) (quoting Henri Tajfel, *Social Categorization, Social Identity and Social Comparison*, in DIFFERENTIATION BETWEEN SOCIAL GROUPS 61, 63 (Henri Tajfel ed., 1978)).

367. Ellemers et al., *supra* note 365, at 372.

368. *Id.* at 373–75.

369. *Id.* at 377–78.

370. *Id.* at 380.

371. *Id.*

372. *Id.* at 380–81.

373. *Id.* at 385.



Finally, the data on affective commitment, “the emotional aspect of social identification,” showed that group commitment “depend[s] both on the way groups have been formed and on the relative status of these groups.”<sup>374</sup> Commitment to the group was “enhanced when people have self-selected their group membership, *or* when the group [had] relatively high status.”<sup>375</sup> According to Ellemers and colleagues, this result implies that people may display strong commitment to a group with low status if membership is self-selected or achieved, rather than imposed externally.<sup>376</sup>

Finally, Ellemers and colleagues argued that the three dimensions of social identity play different roles as mediators of group level behaviors.<sup>377</sup> As predicted, the data showed that the group commitment aspect of social identity was the only predictor of ingroup favoritism.<sup>378</sup>

Milne and Duckitt “investigated the dimensionality of organizational identification . . . and attitudinal commitment, their interrelationship, and their relationships with hypothesized causes and consequences.”<sup>379</sup> On the basis of previous empirical findings, Milne and Duckitt posited that organizational identification and commitment are concepts that overlap but are also separate and empirically distinguishable.<sup>380</sup> Accordingly, their research was designed to determine the specific dimensions that these concepts have in common and on which they may be distinct.<sup>381</sup>

Results revealed six primary dimensions of organizational identification and commitment: ingroup affect, commitment, ingroup ties, perception of oneness, centrality, and personalization.<sup>382</sup> The commitment factor is predominately related to the construct of organizational commitment.<sup>383</sup> The ingroup affect factor is a product of both organizational commitment and organizational identification.<sup>384</sup> The remaining

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374. *Id.* (emphasis omitted).

375. *Id.*

376. *Id.*

377. *Id.* at 383.

378. *Id.* at 384.

379. Jessica Milne & John Duckitt, *A Multidimensional Approach to Organizational Identification and Commitment*, in PERSONALITY AND SOCIAL PSYCHOLOGY RESEARCH 173, 173 (Bettina P. Reimann ed., 2008).

380. *Id.* at 176–77.

381. *Id.* at 178.

382. *Id.* at 182.

383. *Id.*

384. *Id.*

four factors—ingroup ties, centrality, personalization, and perception of oneness—are products of organizational identification.<sup>385</sup> These findings support the assumption that the primary difference between organizational identification and commitment is that in organizational identification individuals perceive “themselves in terms of their organizational membership, while in commitment they do not.”<sup>386</sup>

In the context of hazing, ingroup-outgroup dynamics may leave fraternity and sorority pledges feeling allied with each other and against big brothers and big sister. With such feelings may come a sense of betrayal for or against the pledge who abandons the pledge group even as the hazing becomes increasingly risky for the pledges.

#### *E. Need for Esteem*

Pyszczynski and colleagues provided an exhaustive theoretical and empirical review of research on why people need self-esteem and what psychological function it serves.<sup>387</sup> Pyszczynski and colleagues found widespread empirical support for the assumption that self-esteem serves an anxiety-buffering function, thus supporting the tenets of Terror Management Theory (TMT) and its explanations of why people need self-esteem.<sup>388</sup> TMT posits, *inter alia*, that a person’s cultural worldview and self-esteem both serve as an anxiety-buffering function in the human predicament of existential terror.<sup>389</sup> TMT defines self-esteem as a sense of personal value that is obtained by believing in one’s worldview and living up to the standards of value prescribed by one’s worldview.<sup>390</sup> TMT predicts that people try to defend their cultural worldview when they are threatened by mortality concerns, particularly if their self-esteem is low.<sup>391</sup> Moreover, although much research has used reminders of mortality (i.e., mortality salience hypothesis) to document the terror management function of self-esteem, such reminders need not be present for people to pursue the protective functions of self-esteem.<sup>392</sup>

Fuller and colleagues conducted an empirical analysis on why con-

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385. *Id.*

386. *Id.* at 193.

387. Tom Pyszczynski et al., *Why Do People Need Self-Esteem? A Theoretical and Empirical Review*, 130 PSYCHOL. BULL. 435, 435, 438 (2004).

388. *Id.* at 436, 438.

389. *Id.* at 436–37.

390. *Id.*

391. *Id.* at 437.

392. *Id.* at 437–39.

strued external image is related to organizational identification.<sup>393</sup> “Organizational identification is ‘a perceived oneness with an organization and the experience of the organization’s successes and failures as one’s own.’”<sup>394</sup> “[O]rganizational identification occurs when an individual’s self-concept is tied to his or her organizational membership.”<sup>395</sup> Several antecedents of organizational identification have been identified, one of which is construed external image.<sup>396</sup> Construed external image, also known as perceived external prestige (PEP), “refers to a member’s beliefs about outsiders’ perceptions of the organization”<sup>397</sup> and “summarizes a member’s beliefs about how people outside the organization are likely to view the member through his or her organizational affiliation.”<sup>398</sup>

Fuller and colleagues investigated the theoretical explanation of the positive relationship between construed external image and organizational identification, and examined the extent to which the need for self-esteem accounts for this relationship.<sup>399</sup> Results confirmed the hypotheses (1) that an organizational member’s construed external image would be positively related to the member’s organizational identification and (2) that this relationship would be moderated by the member’s need for self-esteem.<sup>400</sup> Specifically, the data showed “no significant relationship between construed external image and organizational identification for individuals with low need for self-esteem,” whereas “for individuals with a high need for self-esteem, the relationship [was] strongly positive.”<sup>401</sup> These results are consistent with Fuller and colleagues’ hypothesis that “outsiders’ opinion of the organization is likely to strongly influence” the self-concept of individuals with high need for self-esteem “because

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393. J. Bryan Fuller et al., *Construed External Image and Organizational Identification: A Test of the Moderating Influence of Need for Self-Esteem*, 146 J. SOC. PSYCHOL. 701, 701 (2006).

394. *Id.* (emphasis omitted) (quoting Fred Mael & Blake E. Ashforth, *Alumni and Their Alma Mater: A Partial Test of the Reformulated Model of Organizational Identification*, 13 J. ORGANIZATIONAL BEHAV. 103, 103 (1992)).

395. Fuller et al., *supra* note 393, at 703 (citing Jane E. Dutton et al., *Organizational Images and Member Identification*, 39 ADMIN. SCI. Q. 239, 239 (1994)).

396. Fuller et al., *supra* note 393, at 702.

397. *Id.* at 702, 704 (quoting Dutton et al., *supra* note 395, at 248) (citing Ale Smidts et al., *The Impact of Employee Communication and Perceived External Prestige on Organizational Identification*, 49 ACAD. MGMT. J. 1051, 1051 (2001)).

398. Fuller et al., *supra* note 393, at 704 (quoting Dutton et al., *supra* note 395, at 250).

399. Fuller et al., *supra* note 393, at 705.

400. *Id.* at 708, 710.

401. *Id.* at 711–12.

their feelings of self-worth are strongly dependent on the attention and positive evaluations of other people,” whereas individuals with a low need for self-esteem “are not strongly motivated by the need for others to view them positively.”<sup>402</sup> Fuller and colleagues explained that their results “challenge the assumption in Social Identity Theory that all people share a similar need for self-esteem” and will accordingly seek to establish the positive distinctiveness of their groups in order to meet their own needs for positive self-esteem.<sup>403</sup>

#### F. Obedience to Authority

In his 1963 study, Milgram found that sixty-five percent of participants were willing to obey authority and administer an electric shock to a co-participant (hereinafter the “learner”) who failed to learn word pairs,<sup>404</sup> despite protests from the learner and indications that such shocks were dangerous.<sup>405</sup> Milgram’s findings have gained widespread acceptance within academia, so much so that some researchers contend that Milgram’s findings can help explain the behaviors of others who commit atrocities.<sup>406</sup> Darley “violently object[s],” claiming that there are important distinctions between the behaviors of subjects in the Milgram situation and those who commit atrocities, such as the “Nazi doctors, concentration camp executioners, or Serbian snipers who assassinate children.”<sup>407</sup> He explains that, unlike the former, the latter commit such acts “without supervision of authorities, without external pressure, and they use their intelligence to independently determine how they will do so.”<sup>408</sup> He further contends that the participants in the Milgram situation who continued to administer shocks in accordance with the experimenter’s orders were not, phenomenologically, deciding to harm another

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402. *Id.* at 706.

403. *Id.* at 712–13.

404. See Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J. APPLIED SOC. PSYCHOL. 955, 969 (1999) (citing Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 373–74, 376 (1963)).

405. See John M. Darley, *Constructive and Destructive Obedience: A Taxonomy of Principal-Agent Relationships*, 51 J. SOC. ISSUES, no. 3, 1995 at 125, 125–26 (discussing the design of Milgram’s experiment); Milgram, *supra* note 404, at 373–74.

406. Darley, *supra* note 405, at 126–27 (discussing the acceptance of Milgram’s findings and empirical research generalizing the results to other “agentic situations”).

407. *Id.* at 133.

408. *Id.* at 133–34.

person.<sup>409</sup> Instead, they found themselves torn between two incompatible perspectives as to the meaning of continuing with the experiment.<sup>410</sup> Critical to this analysis is the construction of the participant's meaning of the experimenter's behavior. Darley posits a taxonomy of situations to categorize the behaviors of a person in authority, the principal, and those of a subordinate, the agent, who acts on that authority.<sup>411</sup> Relying on the law of agency, Darley concludes that the responsibility for any harm done in the Milgram situation rests entirely with the experimenter as the principal.<sup>412</sup>

Next, Darley conducted a Milgram-type study involving participants who believed they were in a setting in which they would have to punish someone, although no punishment actually took place.<sup>413</sup> Participants were presented with information they believed the experimenter did not have and in this circumstance chose what Darley calls "constructive obedience," in contrast to the destructive obedience of the Milgram studies.<sup>414</sup> Participants modified their proposed behavior in light of this information while maintaining the overall aims of the experimenter.<sup>415</sup> According to Darley, this result suggests that Milgram's data might be read as implying the same sort of process in those conditions where Milgram left the room.<sup>416</sup> That is, participants might have thought that Milgram would have instructed them differently had he been able to hear the learner's cries.<sup>417</sup>

In 1974, Philip Zimbardo wrote a short article contending that Milgram's experiment provides powerful support for the idea that situational determinants, and not a person's individual characteristics, determine behavior.<sup>418</sup> Commenting on Milgram's research and his own companion research on prison behavior, Zimbardo noted the three major research themes in each:

(a) [T]hat obedience to authority requires each of us to first

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409. *Id.* at 133.

410. *Id.*

411. *Id.* at 135–36, 140 & tbl. 1.

412. *See id.* at 135–36, 138.

413. *See id.* at 142, 147.

414. *Id.* at 141–42, 145–47, 150.

415. *Id.* at 148.

416. *Id.* at 151.

417. *Id.*

418. *See* Philip G. Zimbardo, *On "Obedience to Authority,"* 29 AM. PSYCHOL. 566, 566 (1974).

participate in the myth-making process of creating authority figures who then must legitimize their authority through the evidence of our submission and obedience to them;

(b) that the reason we can be manipulated so readily is precisely because we maintain an illusion of personal invulnerability and personal control, all the time being insensitive to the power of social forces and “discriminable” stimuli within the situation, which are in fact the potent determinants of action; and

(c) that evil deeds are rarely the product of evil people acting from evil motives, but are the product of good bureaucrats simply doing their job.<sup>419</sup>

Zimbardo concluded that we must focus on acquiring more knowledge about the social conditions that cause us to behave in ways that contradict our morals and expectations and that we must “critically reexamine the ethics and tactics of our revered social institutions, which lay the foundation for our mindless obedience to rules, to expectations, and to people playing at being authorities.”<sup>420</sup>

As mentioned above, Zimbardo concluded that it is important to focus on the situational determinants that lead to the uncritical acceptance of authority.<sup>421</sup> Robert Lavine cautions, however, that the emphasis on situational determinants of obedience to authority should not obscure other factors that contribute to this phenomenon.<sup>422</sup> Specifically, Lavine contends that cultural and personality differences may influence obedience to authority, with the caveat that “such traits probably change over time and generations, are subject to situational and historical variables, and interact with individual differences.”<sup>423</sup> Despite the potential interactive effects, Lavine contends that future researchers should develop studies that take into account the potential impact of cultural factors on obedience to authority.<sup>424</sup>

### G. Organizational Prestige

Carmeli’s study proposed and tested a model which links two forms

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419. *Id.*

420. *Id.*

421. *Id.*

422. Robert A. Lavine, *Personality Traits Across Cultures and Research on Obedience*, 64 AM. PSYCHOL. 620, 620 (2009).

423. *Id.*

424. *Id.*

of perceived organizational prestige with employee affective commitment and organizational citizenship behaviors.<sup>425</sup> Organizational prestige refers to an “employee’s own beliefs about how other people outside the organization . . . evaluate the status and prestige of the organization.”<sup>426</sup> Carmeli identified two forms of perceived organizational prestige: “[S]ocial prestige, covering (1) quality of management, (2) quality of products or services, (3) ability to attract, develop, and retain talented people, (4) community and environmental responsibility, and (5) innovativeness; and economic prestige, covering (1) financial soundness, (2) long-term investment value, and (3) use of organization assets.”<sup>427</sup>

Next, Carmeli examined organizational identification. Organizational identification is the “perception of oneness with or belongingness to some human aggregat[ion].” It occurs when one integrates beliefs about one’s organization into one’s identity.<sup>428</sup> Carmeli measured organizational identification in terms of affective commitment, which refers to “positive feelings of identification with, attachment to, and involvement in, the work organization.”<sup>429</sup>

Carmeli put forth three hypotheses: (1) “Both perceived external economic prestige and perceived external social prestige augment employees’ affective commitment to their organization, but perceived external social prestige will have a larger impact”; (2) “[p]erceived external economic prestige and perceived external social prestige will have positive interactive effects on employees’ affective commitment to their organization”; and (3) the relationship between both forms of PEP and citizenship behaviors would be mediated by affective commitment.<sup>430</sup>

The results revealed that both forms of PEP affect employees’ affective commitment to their organization, though perceived external social

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425. Abraham Carmeli, *Perceived External Prestige, Affective Commitment, and Citizenship Behaviors*, 26 *ORG. STUD.* 443, 443–44 (2005).

426. *Id.* at 444.

427. *Id.* at 446.

428. *Id.* (alteration in original) (citations omitted) (quoting Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 *ACAD. MGMT. REV.* 20, 21 (1989)) (citing Michael G. Pratt, *To Be or Not to Be? Central Questions in Organizational Identification*, in *IDENTITY IN ORGANIZATIONS: BUILDING THEORY THROUGH CONVERSATIONS* 171, 172 (David A. Whetten & Paul C. Godfrey eds., 1998)).

429. Carmeli, *supra* note 425, at 446 (quoting John P. Meyer & Natalie J. Allen, *Testing the “Side-Bet Theory” of Organizational Commitment: Some Methodological Considerations*, 69 *J. APPLIED PSYCHOL.* 372, 375 (1984)).

430. Carmeli, *supra* note 425, at 449–50.

prestige may have a larger effect, confirming the first hypothesis.<sup>431</sup> However, the findings failed to support the second hypothesis that both forms of PEP would produce a positive interactive effect on affective commitment.<sup>432</sup> Carmeli noted that the data on the second hypothesis contradicts previous research and may be due to the nature of the setting in which the sampled employees worked (social workers in health care institutions).<sup>433</sup> Finally, “the mediating hypothesis was supported only for the relationship between perceived external social prestige and altruism.”<sup>434</sup>

Carmeli explained that these results may suggest that organizations may be perceived as prestigious but not in all aspects of the definition.<sup>435</sup> Carmeli interpreted the results as providing support for the more general hypothesis that when members believe that outsiders have positive perceptions of their organization, they identify more with the organization, and this increased identification is translated into altruistic behavior.<sup>436</sup>

Carmeli and colleagues adopted a stakeholder approach to assess the impact of PEP on organizational members’ cognitive identification and affective commitment.<sup>437</sup> Stakeholder theory holds that the organization should be analyzed from the perspective of the organization’s key interest constituents because they affect, and are affected by, the behaviors of the organization.<sup>438</sup> Applying that theory to the study by Carmeli and colleagues involved an evaluation of whether an employee’s personal assessment of how outsiders view the organization fosters cognitive identification and whether such identification ultimately influences an employee’s affective commitment.<sup>439</sup>

Cognitive identification refers to the “perception that one shares[] the experiences, successes[,] and failures of the focal organization, and that these successes and failures apply to and reflect upon the self just as

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431. *Id.* at 453, 454 tbl.1.

432. *Id.* at 455, 459.

433. *Id.* at 459–60.

434. *Id.* at 456.

435. *Id.* at 459.

436. *Id.* at 460.

437. Abraham Carmeli et al., *Perceived External Prestige, Organizational Identification and Affective Commitment: A Stakeholder Approach*, 9 CORP. REPUTATION REV. 92, 93 (2006).

438. *See id.* at 93.

439. *See id.* at 92, 95, 101–02.



they reflect upon the organization.”<sup>440</sup> Affective commitment refers to the “positive feelings of identification with, attachment to, and involvement in, the work organization.”<sup>441</sup> Carmeli and colleagues examined two components of affective commitment: love and joy.<sup>442</sup> The love component is concerned with the member’s “emotional attraction or affection toward the organization as a social category,” while the joy component refers to the happiness that arises from the organization as a social category.<sup>443</sup>

Carmeli and colleagues hypothesized that “[PEP] among competitors, customers and suppliers is positively related [to cognitive] organizational identification,” and that “[c]ognitive organizational identification mediates the relationship between [PEP] and affective commitment.”<sup>444</sup> These hypotheses were tested on a sample of Israeli employees who work for four organizations in the electronics and media industries.<sup>445</sup>

Results showed that high PEP (of competitors, customers, and suppliers) causes employees to develop a higher level of cognitive organizational identification, confirming the first hypothesis.<sup>446</sup> The data on the differences among the three groups of stakeholders was non-significant for the first hypothesis.<sup>447</sup> The second hypothesis was also confirmed, but differential effects were observed among the three groups with respect to the two forms of affective commitment.<sup>448</sup> On the affective commitment-love measure, it was found that employees “who construe the prestige that the competitors and suppliers attribute to their organization as favorable” report greater love for the organization as a social category.<sup>449</sup> No significant effects were observed for customers on this measure.<sup>450</sup> On the affective commitment-joy measure, it was found that when employees “construe the prestige that the competitors and cus-

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440. *Id.* at 94 (alteration in original) (quoting Fred A. Mael & Lois E. Tetrick, *Identifying Organizational Identification*, 52 EDUC. & PSYCHOL. MEASUREMENT 813, 816 (1992)).

441. Carmeli et al., *supra* note 437, at 94 (quoting Meyer & Allen, *supra* note 429, at 375).

442. Carmeli et al., *supra* note 437, at 102.

443. *Id.*

444. *Id.* at 95.

445. *Id.*

446. *Id.* at 97, 98 tbl.2.

447. *Id.* at 102.

448. *Id.*

449. *Id.*

450. *Id.*

tomers attribute to their organization as favorable” report a greater sense of happiness arising from the organization as a social category.<sup>451</sup> No significant relation was observed for suppliers on this measure.<sup>452</sup> With respect to the claim about the mediating role of cognitive organizational identification, the researchers only found support for the assumption that cognitive organizational identification mediates “the relationship between both PEP (competitors) and PEP (suppliers) and affective commitment.”<sup>453</sup>

On the whole, the data suggest that employees attribute consistent care and attention to all reference groups with respect to cognitive organizational identification, but that employees view some stakeholders as more critical to the organization than others with respect to the two forms of affective commitment.<sup>454</sup>

Carmeli and Freund developed and tested a model that explores how perceived organizational prestige influences job satisfaction, affective commitment, and turnover intentions among Israeli social workers in the nonprofit sector.<sup>455</sup> Results of two separate studies showed that high levels of perceived organizational prestige cause employees to develop high levels of commitment and satisfaction<sup>456</sup> and lower levels of intention to leave the organization.<sup>457</sup> This finding is consistent with previous research (such as that discussed above) and further validates the relationship between organizational image and organizational attachment.<sup>458</sup>

#### H. Symbolic Interaction

Symbolic interactionist theory is based in part on the assumption that it is through processing interactions with external objects and other people that individuals develop their sense of self and their understanding of the world.<sup>459</sup> Accordingly, how a person understands others, how

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451. *Id.*

452. *Id.*

453. *Id.* at 101–02.

454. *Id.* at 102–03.

455. Abraham Carmeli & Anat Freund, *Linking Perceived External Prestige and Intentions to Leave the Organization: The Mediating Role of Job Satisfaction and Affective Commitment*, 35 J. SOC. SERVICE RES. 236, 237, 247 (2009).

456. *Id.* at 242, 245, 247.

457. *Id.* at 242–43, 245–46.

458. *Id.* at 247.

459. Stephen Sweet, *Understanding Fraternity Hazing: Insights from Symbolic Interactionist Theory*, 40 J. C. STUDENT DEV. 355, 358 (1999).

others come to understand that person, and how a person comes to understand and identify himself or herself are part of the symbolic interaction process.<sup>460</sup> Charles Cooley explained this phenomenon in terms of a looking glass metaphor, in which we each undergo a similar process to develop a unique self.<sup>461</sup> That is, the sense of self that we each develop is shaped by our interactions with people significant to us.<sup>462</sup> What is different, however, is the group of people we each consider to be significant.<sup>463</sup> In the context of pledging, the identity of aspirants is influenced because members isolate aspirants from their other significant social groups, thereby causing aspirants to ascribe more significance to the fraternity as the relevant reference group.<sup>464</sup> The ultimate implication is that aspirants come to view the fraternity as the reference group from which they must gain social approval.<sup>465</sup>

Another important assumption of symbolic interactionist theory concerns the role that perception and meaning play in an individual's significant interactions.<sup>466</sup> Symbolic interactionism rests on three premises. The first is that individuals "act toward things on the basis of the meanings these things have for them."<sup>467</sup> The second premise is that the meaning of these things is derived from or arises out of the social interaction that one has with one's social counterparts.<sup>468</sup> The third premise is that these meanings are handled and modified through an interpretive process used by the person in dealing with the things he or she encounters.<sup>469</sup>

Applying Blumer's premises, Sweet contends that "hazing is not simply the result of psychologically or morally flawed individuals; but is the result of a confluence of symbols, manipulated identities, and definitions of situations that are organized in the context of fraternity initiation rites."<sup>470</sup> Sweet concludes that in order to understand why aspirants

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460. *See id.*

461. *Id.* at 359 (citing CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1970)).

462. *Id.*

463. *See id.*

464. *Id.* at 359, 361–62 (discussing the theories of role taking and reference groups and applying those theories to hazing).

465. *Id.* at 361.

466. *See id.* at 358.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 358, 362 (citing HERBERT BLUMER, SYMBOLIC INTERACTIONISM:

consent to hazing, one must first understand the subcultural factors that affect their perceptions of hazing situations.<sup>471</sup> Such an understanding, Sweet suggests, will allow one to shape individual's decisions about their conduct in the face of hazing situations.<sup>472</sup>

Jones and Volpe examined organizational identification from the perspective of a symbolic interaction theory.<sup>473</sup> Symbolic interaction theory emphasizes the importance of social relations in organizational identification.<sup>474</sup> Thus, Jones and Volpe examined the influence of social networks on organizational identification processes.<sup>475</sup> To do so, they examined the interactive effects of two categorical antecedents of organizational identification—organizational distinctiveness and organizational prestige<sup>476</sup>—and the general antecedents of social networks—network size, network density, and relationship strength.<sup>477</sup>

Results showed that both organizational distinctiveness and “organizationally affiliated network size positively influenced the strength of individuals’ organizational identification by promoting communication with others” as a way of strengthening commitment to and identification with the organization.<sup>478</sup> Results further indicated that “relationship strength amplified the effect of organizational prestige on organizational identification,” but that “organizational prestige had no direct effect on organizational identification for this sample.”<sup>479</sup> These results highlight the type and structure of specific relationships that influence an individual's organizational identification and ultimately suggest that introducing a social network perspective allows researchers to “better under-

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PERSPECTIVE AND METHOD (1969)).

471. See Sweet, *supra* 459, at 363.

472. *Id.*

473. See Candace Jones & Elizabeth Hamilton Volpe, *Organizational Identification: Extending Our Understanding of Social Identities Through Social Networks*, 32 J. ORGANIZATIONAL BEHAV. 413, 413–14 (2011).

474. *Id.* at 413. Symbolic interaction theory can be contrasted with social identity theory, which focuses on the categorization and comparison processes that inform an individual's perception of the organization and ultimately stimulate identification with the organization. See *id.* at 414.

475. *Id.*

476. *Id.* at 415–16.

477. *Id.* at 416–17.

478. *Id.* at 425 (citing Michael Humphreys & Andrew D. Brown, *Narratives of Organizational Identity and Identification: A Case Study of Hegemony and Resistance*, 23 ORG. STUD. 421, 439 (2002)).

479. *Id.*

stand and predict organizational identification.”<sup>480</sup>

#### IV. CONCLUSION

“It would seem that the old saw about what happens when you ‘assume’ proves again to be quite accurate.”<sup>481</sup> The existence of consent or lack thereof, whether we think about it from the statutory or common law approach, appears to be imbued with a bit of armchair theorizing. There seems to be an assumption that hazing “victims” either can or cannot consent to their ordeal without truly reconciling that assessment with what social science—the study of human behavior—might have to say. In *Yost*, the court assumed that the plaintiff was not coerced.<sup>482</sup> In *Quinn*, the court found the opposite, suggesting that the social pressure that exists within Greek-letter organization pledging culture to comply with initiation procedures is nearly insurmountable.<sup>483</sup> In *Nisbet*, the court noted that while the decedent could have walked away, the social pressure to join blinded him to the dangers he faced.<sup>484</sup> Each of these cases, and the other examples, *supra*, of fraternity hazing may have come to the right conclusion. They, however, appear to leap over what a deeper understanding of the social science might say about hazing consent.

A fraternity or sorority pledge may have begun a pledge process, and once they start down the path of being hazed not realize the stakes associated with the activity, believe that there are not adequate opportunities to quit, and may not know enough about the organization or the pledge experience to properly evaluate the consequences of persisting or quitting. As such, the pledge may perceive that if they stick it out for another day and another day and yet another day, they will finally be a member. But, often, those days may turn into weeks or months of hazing. Such thinking may be particularly pronounced in groups, like pledge classes, where the individual identity is submerged for the sake of the group’s identity and where group members are stressed and hampered in their ability to critically evaluate the situation in which they find themselves. Even more, the hostile environment that big brothers

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480. *Id.*

481. *Swift v. Seidler (In re Swift)*, 198 B.R. 927, 939 n.11 (Bankr. W.D. Tex. 1996).

482. *Yost v. Wabash Coll.*, 976 N.E.2d 724, 735 (Ind. Ct. App. 2012).

483. *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197 (Ill. App. Ct. 1987).

484. *Nisbet v. Bucher*, 949 S.W.2d 111, 116 (Mo. Ct. App. 1997).

or sisters may create for a pledge class may forge a bond between those pledges as a cohesive group in contrast to the big brothers or sisters. Such a bond may be difficult for pledge class members to terminate even for their own self-preservation. And in these contexts where big brothers or sisters exert their authority, pledges may willingly submit to that authority even if being hazed. Where the fraternity or sorority is of high prestige, either on the pledge's respective campus or in society more widely, the pledge may be driven to tolerate being hazed to be a part of such an organization in and of itself but also as a means to enhance his or her own self-esteem. In the end, the pledge may come to gain a deeper understanding of themselves during the pledge process and be unwilling to relinquish that understanding.

While all of this may be true, it is still not universal. For example, a fraternity pledge may come from a long-line of fraternity men or have had a mentor who was a fraternity man. The pledge may have heard "war stories" about what it was like to be on-line. The pledge may have done his homework, before seeking fraternity membership, on fraternity-life and been apprised of what hazing was like. The fraternity may have provided a deep and meaningful education to the pledge on the dangers of hazing—informing him of hazing injuries and deaths with some specificity. A pledge may not "buy into" the notion of submerging the "I" for the sake of the "we." As such, she may not be interested in the goal of the group—completing the pledge process—vis-à-vis her own interest of self-preservation. A pledge may not readily submit to authority or only do so when he perceives the hazing to be mild. A pledge may be interested in joining a sorority but not perceive the organization as being particularly prestigious, and thus her esteem may not be enhanced by membership. Even more, pledges may feel as though they gain little insight into who they are as a result of the pledge process. Courts and legislatures should be mindful of these and other factors and evaluate hazing consent on a case-by-case basis.