WHEN MARCHING TO THE BEAT OF THE DRUM MEANS BEATING THE DRUMMER: AN ANALYSIS OF HAZING IN UNIVERSITY MARCHING BANDS

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The prevalence of hazing in universities is not a novel issue. For both fraternities and sororities, it has become a key part of the initiation process for new members. Yet, what happens when hazing occurs in other university contexts? This has increasingly become a concern as the prevalence of hazing in university marching bands continues to make itself known. Traditional laws regulating and punishing hazing in the university setting typically focus on the nexus of the hazing to a student's direct involvement in the university sponsored activity. Many of those laws only protect against physical injuries that result from the hazing conduct in initiation-type settings. This leaves many students who are subject to hazing without remedy when the conduct occurs following their initiation into an organization, or when it constitutes emotional or mental trauma rather than physical. This Note seeks to evaluate the effectiveness of existing state anti-hazing statutes and their application in the context of university marching bands. It will look at the historical approaches the law takes in its attempts to regulate hazing, and consider the core theories of recovery that plaintiffs can pursue against universities to hold them liable. This Note will recommend that states remove exclusions for entire groups, that hazing should encompass acts that occur at any time relating to membership in an organization, and that hazing that results in mental or emotional trauma should be treated the same as that which produces physical trauma. Finally, courts need to establish a standard for university liability for hazing that occurs in university marching bands by modifying the Third Circuit's three-factor approach in Kleinknecht v. Gettysburg College *to adequately protect all marching band members from reasonably foreseeable harms resulting from hazing.*

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I. INTRODUCTION

By now these types of stories, though tragic, are no longer surprising. Everyone should be familiar with how they end. Robert Champion, a student at Florida A&M University, was subjected to a hazing ritual known as "Crossing Bus C" on November 19, 2011.[1] During this ritual,

1. Lizette Alvarez, *A University Band, Chastened by Hazing, Makes Its Return*, N.Y. TIMES (Sept. 6, 2013), http://www.nytimes.com/2013/09/07/us/a-university-band-chastened-by-hazing-makes-its-return.html.

Champion was required to walk from the front to the back of a bus stopped in a hotel parking lot as fellow students and friends repeatedly kicked, punched, and beat Champion with hard objects.[2]

Champion collapsed on the bus following this beating and died within the hour[3] of hemorrhagic shock, which occurs as a result of large amounts of internal bleeding, caused by blunt force trauma.[4] Champion's death was ruled a homicide.[5] The autopsy demonstrated the severity of the vicious beating Champion received, revealing "muscle damage commonly seen in such events as car accidents, prolonged seizures, child abuse and torture . . . ."[6]

Another story involves an organization at the Ohio State University, which had a longstanding culture that fostered frequent hazing of a sexual nature, and involved alcohol abuse.[7] This group hazed students by forcing them to "mimic sex acts, march down the aisle of a bus while others tried to pull their clothes off, and march on the football field in their underwear."[8] The culture of "alcohol use and abuse"[9] contributed to two separate sexual assaults by members in 2013.[10] There are countless other examples of similar forms of egregious conduct by these Ohio State University students.[11] Both the Florida A&M University and the Ohio State University incidents led to the removal or voluntary departure of people in charge of these organizations.[12]

If the themes of these stories are not surprising, then what is? Both of these incidents took place not in fraternities,[13] but in university[14] marching bands.

Robert Champion was a twenty-six-year-old drum major in the famous Florida A&M "Marching 100."[15] The second group is the Ohio State marching band, which refers to themselves as "The Best Damn Band in the Land", or TBDBITL for short.[16] This co-ed group is made up

2. *Id.*

3. Michael Martinez, *Expert: Autopsy of Florida A&M Drum Major Shows Badly Beaten Muscles*, CNN (Dec. 22, 2011, 11:57 AM), http://www.cnn.com/2011/12/21/justice/florida-am-investigation/.

4. Alvarez, *supra* note 1.

5. *Id.*

6. Martinez, *supra* note 3.

7. Richard Pérez-Peña, *Ohio State Fires Marching Band Director After Finding Tradition of Sexual Hazing*, N.Y. TIMES (July 24, 2014), http://www.nytimes.com/2014/07/25/us/ohio-state-fires-marching-band-director-after-finding-tradition-of-sexual-hazing.html.

8. *Id.*

9. OFFICE OF UNIV. COMPLIANCE & INTEGRITY, INVESTIGATION REPORT: COMPLAINT AGAINST JONATHON WATERS, DIRECTOR OF THE OSU MARCHING BAND 12 (2014) [hereinafter OSU REPORT], *available at* http://www.osu.edu/assets/pdf/Investigation-Report.pdf.

10. *Id.* at 12n.7.

11. *See id.* at 4–13.

12. Alvarez, *supra* note 1; Pérez-Peña, *supra* note 7.

13. *See infra* notes 20–21, 33 and accompanying text.

14. I use the terms "university" and "college" interchangeably throughout this Note when referring to higher education facilities.

15. Alvarez, *supra* note 1.

16. *Marching Band*, THE OHIO ST. UNIV. MARCHING & ATHLETIC BANDS, https://tbdbitl.osu.edu/marching-band (last visited May 18, 2016).

of 225 students, about 21% of which are women.[17] It is not entirely clear how the law does, or should, treat hazing in groups such as university marching bands. An especially important aspect of this type of hazing is the potential liability of the universities involved.

Part II of this Note will examine historical approaches the law has taken in attempts to regulate and punish hazing, particularly in the university setting. This discussion will cover both legislative actions, especially at the state level, and judicial responses to attempts to hold universities liable for harms to students. There are a number of distinct eras of judicial trends regarding university liability to students, as well as a core of theories of recovery that plaintiffs repeatedly call upon in their suits against universities.

Part III then applies these different legislative and judicial responses to hazing within the context of university marching bands, comparing and contrasting the applicability and effectiveness of each approach. The incidents described in this Introduction will serve as representative, but not exhaustive, examples of how these principles can be applied to the marching band context.[18]

Part IV recommends that states reexamine their current anti-hazing statutes and make three substantive changes to such statutes. First, states should remove exclusions for entire groups, such as athletic organizations. Second, hazing should include acts that occur at any time relating to membership in an organization, not just in connection with initiation into that organization. Third, hazing resulting in mental or emotional trauma should be treated the same as hazing that produces physical or bodily harm.

Additionally, courts should develop a standard for university liability for hazing that occurs in university marching bands by modifying the Third Circuit's three-factor approach in *Kleinknecht v. Gettysburg College*[19] to ensure that all students selected to be members of a marching band are protected from reasonably foreseeable harm resulting from hazing connected with their role as student-marching-band members.

17. OSU REPORT, *supra* note 9, at 2.

18. Robert Champion's parents have sued Florida A&M University, among others, for wrongful death and negligence. Christina Ng, *Robert Champion's Parents Sue FAMU for Hazing Death*, ABC NEWS (July 11, 2012), http://abcnews.go.com/US/famu-drum-major-robert-champions-parents-sue-school/story?id=16755193. Criminal charges were also filed against fifteen student-marching-band members, although many settled before trial. Alvarez, *supra* note 1. This Note, however, is not intended to track the real-world progress of these civil and criminal proceedings. Therefore, the facts surrounding Robert Champion's death are used to apply theories of liability to understand how hazing in marching bands fits, or does not fit, in the scheme of established jurisprudence rather than question what will happen in the family's case against Florida A&M University under Florida or other relevant law.

19. 989 F.2d 1360, 1366 (3d Cir. 1993).

II. BACKGROUND

Both legislatures and courts have attempted to address the problems that hazing poses through a variety of approaches. Additionally, victims of hazing sometimes seek to recover damages from those they believe responsible for hazing or for not preventing it, including universities. This Part explores the development of, and attempts to criminalize and punish hazing, as well as how courts approach the problem of university liability for acts of hazing that occur within the student body in a variety of contexts.

A. Hazing Throughout History

Although hazing is generally associated with college fraternities and sororities,[20] the practice of hazing extends far back in history.[21] This history ranges from older students at universities requiring younger students to act as servants for them during the Middle Ages[22] to more intensive forms of hazing, such as the ancient Greek military requiring its soldiers to demonstrate their loyalty by enduring physical punishment and pain.[23] A typical explanation for these and other forms of hazing is that it "occurs as a 'formal introduction into some position or club . . . , which signifies that the beginner has been given some new knowledge.'"[24]

Hazing has persisted and changed throughout time. Today, hazing is used in many diverse groups, both on and off college campuses.[25] A development in hazing not seen in its ancient forms, though, is the "form and degree of violence involved in hazing practices[, which] is unique to the United States,"[26] as well as its link with alcohol consumption.[27] Clear-

20. *See* Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 112–13 (1991) ("The literature shows that hazing is not unique to fraternal organizations, yet hazing by these groups seems to dominate the attention given the subject.") (footnote omitted); Michael John James Kuzmich, Comment, In Vino Mortuus*: Fraternal Hazing and Alcohol Related Deaths*, 31 MCGEORGE L. REV. 1087, 1094 (2000); Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1423–24 (2003) (footnotes omitted).

21. Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . and Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C.& U.L. 361, 368–69 (1998).

22. Kuzmich, *supra* note 20, at 1094.

23. *See* 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).

24. Halcomb Lewis, *supra* note 20, at 113 (quoting Micheal Olmert, *Points of Origin*, *in* SMITHSONIAN 151 (1983)).

25. *See, e.g.*, Kuzmich, *supra* note 20, at 1094 (listing a variety of groups in which hazing occurs, including, among others, the military, oil rig workers, and professional sports teams).

26. Rutledge, *supra* note 21, at 369; *see also* Jamie Ball, *This Will Go Down on Your Permanent Record (But We'll Never Tell): How the Federal Education Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 SW. U. L. REV. 477, 480 (2004) (explaining that this trend can be traced to increased fraternity membership among young veterans who brought the "military tradition" with them). Ball argues that hazing soldiers in ancient Greece "may have served a legitimate purpose in preparing the recruit for battle, [but] in modern social organizations, there is no such legitimate purpose served by hazing." *Id.*

27. *See* Rutledge, *supra* note 21, at 370; Kuzmich, *supra* note 20, at 1092–93 (describing how prevalent drinking is in the Greek system across colleges and the interaction between alcohol and hazing in fraternities).

ly the risks of hazing extend beyond fraternities and sororities. As the previously discussed instances demonstrate, university bands face similar problems, and many of the same trends affect these bands. In order to deal with issues of hazing, legislatures have attempted to prohibit hazing and punish those who perpetrate it. These legislative actions have varied dramatically in application and effectiveness.

B. Legislative Response

The legislative response to hazing has, like hazing itself, shifted over time. In 1874, Congress first acted to deal with hazing in the military, specifically in the Naval Academy.[28] Although there was some resistance to the enactment of such a law,[29] Congress deemed the law necessary because "the defense[s] [for why hazing was beneficial were] but a pretense for the practice of [receiving] amusement by giving pain."[30] Twenty-seven years later, in 1901, Illinois became the first state to enact criminal anti-hazing legislation.[31] By 1990, only about half of the states had passed anti-hazing legislation.[32] Of those states, only one called for punishment for hazing in a non-university and non-fraternity setting.[33] Although most commonly associated with fraternities, hazing does occur in many other contexts.[34] Statutes that do not address, or in some instances exclude, hazing outside universities[35] do not account for the variety of contexts in which hazing occurs, thus leaving some victims without protection or recourse.

Today, forty-four states and the District of Columbia have some form of anti-hazing statute in force.[36] Although the majority of states have enacted anti-hazing legislation, there is some inconsistency between them that can lead to different outcomes under similar facts.[37] The differences between statutes are many, including how hazing is defined;[38]

28. *See* Halcomb Lewis, *supra* note 20, at 117; Rutledge, *supra* note 21, at 371.

29. *See* Rutledge, *supra* note 21, at 371.

30. Halcomb Lewis, *supra* note 20, at 117 (quoting *Hazing*, 53 THE INDEPENDENT 51–52 (1901)).

31. *Id.* at 119 (defining hazing in Illinois in 1901 as "any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others."); *see also* 720 ILL. COMP. STAT. ANN. 5/12C–50 (West 2016) (current codification).

32. Halcomb Lewis, *supra* note 20, at 119.

33. *Id.*

34. *See* Acquaviva, *supra* note 23, at 310–11; Halcomb Lewis, *supra* note 20, at 112n.8 (describing corporate hazing, non-fraternity college hazing, and hazing in the Boy Scouts); Gregory S. Parks & Tiffany F. Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 15 (2013) ("[Hazing has] become prevalent in military barracks, colleges, and high schools.").

35. *E.g.*, W. VA. CODE § 18-16-2 (2015).

36. *See States with Anti-Hazing Laws*, STOP HAZING, http://www.stophazing.org/states-with-anti-hazing-laws/ (last visited Sept. 7, 2016). The six states currently without hazing regulation are Alaska, Montana, South Dakota, Hawaii, New Mexico, and Wyoming. *Id.*

37. *See* Sussberg, *supra* note 20, at 1437–38 ("[There is] extreme variation throughout the country."); *see also* Ball, *supra* note 26, at 483–84; Rutledge, *supra* note 21, at 372.

38. *See, e.g.*, Amie Pelletier, Note, *Regulation of Rights: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 378–79 ("Each definition

whether hazing is a criminal offense,[39] and whether that offense constitutes a misdemeanor or a felony;[40] whether hazing can consist of mental harm as well as physical harm;[41] if civil remedies are authorized;[42] and if consent is available as a defense to hazing charges.[43]

The wide variation among state anti-hazing statutes has been well documented.[44] A particularly salient example comes from South Carolina's anti-hazing statute,[45] which defines hazing as

> the wrongful striking, laying open hand upon, threatening with violence, or offering to do bodily harm by a superior student[, meaning "a student who has attended a state university . . . longer than another student or who has an official position giving authority over another student,"[46]] to a subordinate student [meaning "a person who attends a state university . . . who is not defined as a 'superior student,'"[47]] with intent to punish or injure the subordinate student, or other unauthorized treatment by the superior student of a subordinate student of a tyrannical, abusive, shameful, insulting, or humiliating nature.[48]

No other states have similar provisions that would seem to exempt instances of one "superior" student hazing another superior student, or even a subordinate student hazing a superior student.[49]

Other statutes, though they provide somewhat lengthier definitions, are not necessarily more instructive. Some exclude certain groups from coverage or limit coverage only to physical harm.[50] For example, Arkansas prohibits, in part, any acts by a student against another "done for the purpose of intimidating the student attacked by threatening him or her with social or other ostracism or of submitting such student to ignominy, shame, or disgrace among his or her fellow students, and acts calculated to produce such results";[51] "[t]he playing of abusive or truculent tricks . . . to frighten or scare him or her";[52] any acts "against any other student done for the purpose of humbling the pride, stifling the ambition, or impairing the courage of the student attacked or to discourage him or her

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of hazing is tailored slightly to the group for which it was designed, making it difficult to apply a universal definition.").

39. *See* Halcomb Lewis, *supra* note 20, at 120.

40. *See id.* at 120–21.

41. *See id.* at 123; Rutledge, *supra* note 21, at 372.

42. *See* Rutledge, *supra* note 21, at 372.

43. *See id.* For a more complete discussion of the role of consent in hazing both psychologically and in the law, *see generally* Parks & Southerland, *supra* note 34.

44. *See, e.g.*, Halcomb Lewis, *supra* note 20, at 120–24 (providing examples of some differences between state statutes).

45. S.C. CODE ANN. § 59-101-200 (West 2016).

46. *Id.* § 59-101-200(a)(2).

47. *Id.* § 59-101-200(a)(3).

48. *Id.* § 59-101-200(a)(4).

49. *See* Sussberg, *supra* note 20, at 1438.

50. *See infra* Part III.A.

51. ARK. CODE ANN. § 6-5-201(a)(1) (West 2016).

52. *Id.* § 6-5-201(a)(2).

from remaining in that school";[53] or "seriously offering, threatening, . . . attempting to[, or to in fact] strike, beat, bruise, or maim; . . . to do physical violence to any student."[54] Arkansas includes more examples of specific acts that can be punished under the statute,[55] but does little to elucidate the core of what hazing is.

Furthermore, under Arkansas' statute, hazing "[i]s limited to those actions taken and situations created in connection with initiation into or affiliation with an organization, extracurricular activity, or sports program,"[56] meaning an act will not be considered hazing if it occurs after initiation proceedings. Arkansas' definition is broad in some places, yet oddly specific in others. Some states are equally specific in other ways; Florida prohibits "branding" and "whipping."[57] Would these activities be prohibited under the Arkansas statute?[58] It is not entirely clear what the impetus for the enactment of these specific clauses are or why certain states contain them while others do not.

Although anti-hazing statutes have existed for over a century in various states, and most states today currently have such legislation, these statutes vary greatly. The statutes differ in a number of ways, including the degree of punishment, what acts constitute hazing, who is covered under the statute, and whether mental as well as physical harm is covered. Courts as well as legislatures have faced the problem of hazing. Of particular importance is how courts treat universities when students sue their school to recover for hazing injuries.

C. Judicial Eras of University Liability

Judicial attitudes toward the relationship between universities and their students, specifically in regard to what, if any, duty of care universities owe to students, have shifted dramatically throughout the last century. There are several important eras of liability for universities, which will be explained in detail below.

1. In Loco Parentis

Until approximately 1960, American universities stood *in loco parentis* to students,[59] meaning literally "in place of the parents."[60] Under

53. *Id.* § 6-5-201(a)(3).

54. *Id.* § 6-5-201(a)(4).

55. *Id.* § 6-5-201(a)(1)–(4) (including assaults committed for the purpose of producing the aforementioned results).

56. *Id.* § 6-5-201(b)(2).

57. FLA. STAT. ANN. §1006.63(1) (West 2016).

58. *Cf.* Halcomb Lewis, *supra* note 20, at 122–23 ("[T]he language utilized by the respective state legislatures to achieve that abolition is often neither identical nor clearly effective in achieving the respective legislative ends.").

59. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY 17 (1999); R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN'S L. REV. 87, 93 (2002).

the doctrine of *in loco parentis*, universities were responsible for the well-being of their students[61] "concerning . . . physical and moral welfare and mental training . . . ."[62] This would naturally seem to include student safety.[63] As a result, *in loco parentis* allowed universities to exert large amounts of control over student behavior.[64] This included the authority to "make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."[65]

In the 1960s, society and the law began to shift their view on the relationship between universities and students, which lead to the downfall of *in loco parentis*.[66] Students were viewed as adults who did not need the protection of universities acting as their parents.[67] Indeed, eighteen-year-old college freshmen became possessed of "an expansive bundle of individual and social interests."[68] In *Bradshaw v. Rawlings*, the Third Circuit noted that although "[a]t one time, exercising their rights and duties *in loco parentis*, colleges were able to impose strict regulations . . . . today['s] students vigorously claim the right to define and regulate their own lives."[69]

This vast change was in part a result of the Civil Rights Movement and other important social movements in the 1960s and 1970s, in which both college students and college campuses played major roles.[70] By the 1970s, the doctrine *in loco parentis* essentially no longer mandated that student safety was the charge of the universities they attended.[71] As the *in loco parentis* era waned, a new era arose where universities had no duty to protect students,[72] sometimes called the "bystander era."[73]

60. Crow & Rosner, *supra* note 59, at 93.

61. *Id.*; Nicole Somers, Note, *College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J.C. & U.L. 653, 660 (2007).

62. Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913).

63. Crow & Rosner, *supra* note 59, at 93; Somers, *supra* note 61, at 660. *But see* BICKEL & LAKE, *supra* note 59, at 28–33 (arguing that *in loco parentis* was one part of a larger doctrine that insulated universities from the law, not a doctrine designed for student safety).

64. Crow & Rosner, *supra* note 59, at 93.

65. *Gott*, 161 S.W. at 206; *see also* John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) ("[S]o long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.").

66. *See* BICKEL & LAKE, *supra* note 59, at 35; Somers, *supra* note 61, at 660.

67. Crow & Rosner, *supra* note 59, at 93; Somers, *supra* note 61, at 660. Some argue that the notion that *in loco parentis* was developed for the protection of students is an inaccurate interpretation of later cases discussing the era of *in loco parentis*. *See* BICKEL & LAKE, *supra* note 59, at 28 ("This [incorrect] belief that *in loco parentis* was a basis of tort *duty* to students to provide their safety . . . was reinforced by certain cases in what we call the bystander era . . . . Those cases linked no-duty/no liability *results* to the rejection of *in loco parentis*.").

68. Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979).

69. *Id.* at 140.

70. *See* BICKEL & LAKE, *supra* note 59, at 35.

71. Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991) ("The concept of university control based on the doctrine of in loco parentis has all but disappeared in the face of the realities of modern college life . . . .").

72. *See* Crow & Rosner, *supra* note 59, at 93; Somers, *supra* note 61, at 660.

73. *See* BICKEL & LAKE, *supra* note 59, at 49.

2. *"No Duty" Rule or "Bystander" Era*

Following the fall of *in loco parentis*, universities were not held responsible for controlling student behavior and safety, nor given the freedom to regulate students as much as a parent would.[74] Thus, when a student sued her university to recover for injuries she sustained on a school-sponsored outing, the Utah Supreme Court concluded that "colleges and universities are educational institutions, not custodial . . . . It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students."[75]

By the 1970s and 1980s, courts had cemented that universities were simply responsible for providing education for their students and were no longer the caretakers of students, now viewed as adults.[76] Because the main goal of universities was to educate their students, the courts were not eager to force additional responsibility onto universities because "babysit[ting] each student . . . . would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment."[77] As such, universities were remarked as being simple "bystander[s]" to the activities of students.[78]

This movement toward "no duty" for universities related, in part, to the notion that universities simply could not control students who had recently gained the total legal freedom of adulthood during the 1960s.[79] This change, however, was not permanent. Courts began carving out exceptions to the "no duty" rule, creating pockets of liability for universities in certain situations. One of the earliest such examples was *Furek v. University of Delaware*.[80]

3. *Exception to the "No Duty" Rule*

Although courts generally held that universities did not have a special duty to keep their students safe,[81] there were certain situations in which courts were willing to impose liability in spite of the "no duty" era. One of the most famous cases to do so was *Furek v. University of Delaware*.[82] In *Furek*, a student who was pledging a fraternity sustained serious injuries during a hazing incident in which his fellow fraternity members poured oven cleaner onto his body.[83] Furek sued both the local chapter and the national organization of his fraternity; a fellow fraternity

74. *See supra* notes 68–70 and accompanying text.
75. Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986) (citations omitted).
76. *See* Somers, *supra* note 61, at 660.
77. *Beach*, 726 P.2d at 419 (noting also that "babysit[ting]" students requires more resources than universities have).
78. *See* BICKEL & LAKE, *supra* note 59, at 49.
79. *See id.* at 49–50.
80. 594 A.2d 506 (Del. 1991).
81. *See, e.g.*, *Beach*, 726 P.2d at 420.
82. 594 A.2d 506.
83. *Id.* at 509–10.

member; and the university he attended.[84] Although a jury awarded Furek $30,000 for damages against both the member who poured the oven cleaner on Furek and the University of Delaware, the trial court entered a judgment notwithstanding the verdict for the University, meaning that it had zero liability to Furek.[85]

On appeal, the Delaware Supreme Court noted that though "[t]he university is not an insurer of the safety of its students nor a policeman of student morality [because it does not stand *in loco parentis* to students], nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property."[86] The *Furek* court emphasized that the University had knowledge of both past and ongoing hazing practices within the fraternity and had even attempted to regulate such activity.[87] As such, the court found that the University had a duty to regulate reasonably foreseeable activities that took place on its property,[88] and reversed the trial court's grant of a motion notwithstanding the verdict.[89]

Furek demonstrated that universities did have a duty to students in certain situations. Some of the main theories of recovery that plaintiffs suing universities rely on are described in more detail below.

D. Plaintiffs' Main Theories of Recovery

When victims of hazing sue the college which houses the hazing organization, be it a fraternity, athletic team, marching band, or other campus organization, there are several tort theories of recovery on which plaintiffs tend to rely. These theories stem from negligence.[90] Under the basic negligence theory, a plaintiff claims that the university was negligent in supervising the organization in which the hazing incident occurred.[91]

A plaintiff must establish the four *prima facie* elements of negligence: (1) a duty of care by the defendant—in these types of cases, the university—to the plaintiff; (2) a breach of that duty by the defendant, which is both the (3) proximate and but-for cause, of an (4) injury or some other harm to the plaintiff.[92]

Many hazing cases against universities hinge upon the first element of the *prima facie* case: establishing the duty of care.[93] To prove that a university owed a student a duty of care, plaintiffs can rely on a number

84. *Id.* at 509.
85. *Id.*
86. *Id.* at 522.
87. *Id.* at 521–22.
88. *Id.* at 522.
89. *Id.* at 523 (remanding solely on the issue of liability).
90. Rutledge, *supra* note 21, at 372.
91. *Id.*
92. *See* Crow & Rosner, *supra* note 59, at 92–93 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 164–65 (5th ed. 1984)); Somers, *supra* note 61, at 659–60.
93. *See* Crow & Rosner, *supra* note 59, at 93; Somers, *supra* note 61, at 660.

of specialized theories of recovery within the realm of negligence.[94] Three such specialized theories of recovery are explored below, along with relevant case law demonstrating plaintiffs' attempts at recovery under those theories.

1. Landowner-Invitee

Plaintiffs have attempted to use a variation of landlord-tenant theories known as landowner-invitee. Essentially, these plaintiffs allege that their university, due to its status as a landlord or landowner, owes students a duty to protect them from hazards:[95] "A landowner who knows or should know of an unreasonably dangerous condition or use of his property has a duty to invitees to safeguard the invitee against [those] hazards."[96] Thus, this theory requires the university to protect its students, who are invitees on its property, from dangerous conditions which it knows, or should know, about.

Plaintiffs have also alleged that a university's duty as a landowner extends to protection even against criminal acts of third parties.[97] In *Mullins v. Pine Manor College*, the Supreme Court of Massachusetts noted that because students live on campus for a limited time during the school year, and a university may have regulations that prohibit the installation of locks or security systems, students "lack the incentive and capacity to take corrective measures" against the criminal acts of third parties.[98] When a female student was raped by an assailant who gained access to her dormitory late at night despite security measures the College put in place, the *Mullins* Court stated that the College was the sole party who could have taken action to initiate better security measures on campus in the dormitories in this situation.[99]

Some courts have further extended this duty to events that occur off-campus.[100] When a student at the University of Nebraska was hazed and injured by members of his fraternity, he sued the fraternity as well as the University.[101] The fraternity was off-campus but was subject to uni-

94. *See* Crow & Rosner, *supra* note 59, at 92–93; Rutledge, *supra* note 21, at 368; Somers, *supra* note 61, at 372–73, 659–60.

95. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991); Stockwell v. Bd. of Trs. of Leland Stanford Junior Univ., 148 P.2d 405, 408–09 (Ca. Ct. App. 1994) (asking whether "the evidence constituted a dangerous condition against which the university negligently failed to protect its invitees.").

96. *Furek*, 594 A.2d at 520.

97. *See, e.g.*, *id.* ("A landowner who knows or should know of an unreasonably dangerous condition or use of his property has a duty to invitees to safeguard the invitee against such hazards including the conduct of third parties."); *cf.* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 333–36 (Mass. 1983).

98. *Mullins*, 449 N.E.2d at 333–36.

99. *Id.* at 335.

100. *See, e.g.*, Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. 1999). The Nebraska Supreme Court later abrogated this decision, but on grounds that determinations of foreseeability are for the trier of fact, not legal questions. A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

101. *Knoll*, 601 N.W.2d at 760.

versity housing regulations.[102] Furthermore, the abduction to the off-campus fraternity, which is where the student was ultimately injured, occurred on university property.[103] The Nebraska Supreme Court therefore determined that the University owed the student a duty as an invitee on university property.[104] As such, the University had a duty to protect the student from reasonably foreseeable acts of hazing.[105] The court reasoned that because the University had knowledge of other instances of hazing, even though those instances did not involve the fraternity in question, further instances of hazing were reasonably foreseeable.[106]

The Nebraska Supreme Court's analysis suggests that even harm that occurs off-campus may be subject to liability, so long as the hazing was reasonably foreseeable to a university.[107] Such a standard "can be easily satisfied if there has been a tradition of hazing at the university."[108] The Nebraska Supreme Court went so far as to state that "[e]ven one such prior incident may be enough" to determine whether an event was reasonably foreseeable.[109] Although the standard employed by the Nebraska Supreme Court allows plaintiffs more flexibility, the possibility of recovery is limited by where the hazing occurs and whether it is considered university property, or at least under university control.[110]

Despite the prevalence of these theories,[111] plaintiffs have had little success recovering from universities under landowner-invitee theories.[112] That is not to say, however, that a plaintiff cannot, under any circumstances, hold a university liable for hazing incidents that occur on university property under a theory of landowner-invitee.[113] But because of this difficulty, plaintiffs often turn to one of several other theories of recovery under which they may have more success.

2. Voluntary Assumption of a Duty

The second theory often relied upon is based on the voluntary assumption of a duty. The Restatement (Second) of Torts § 323 provides the following:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise

102. *Id.* at 764.
103. *Id.* at 762.
104. *Id.*
105. *Id.*
106. *Id.* at 764–65.
107. *See* Crow & Rosner, *supra* note 59, at 95.
108. *Id.*
109. *Knoll*, 601 N.W.2d at 764.
110. *See* Crow & Rosner, *supra* note 59, at 95–96.
111. *See, e.g.*, Walls v. Oxford Mgmt. Co., 633 A.2d 103 (N.H. 1993).
112. *See* Rutledge, *supra* note 21, at 374 ("Plaintiffs have yet to win in a case where the court imposed liability solely or primarily because of the defendant's status as a landlord.").
113. *See Knoll*, 601 N.W.2d at 757.

> reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[114]

A number of cases have taken up the idea that a university might be liable to a student for injuries because the university undertook a voluntary duty to protect students from such injuries.[115]

In *Mullins v. Pine Manor College*, a student sued the College after she was raped on campus.[116] The court analyzed the plaintiff's claim that the College undertook a voluntary duty to protect students from just this kind of harm.[117] Importantly, the court recognized that in order to be liable, the injury must have occurred due to the student's reliance on the College's voluntary undertaking.[118] The court noted that it was "quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students."[119] This is true generally, and the court found it applicable in *Mullins* in large part because of testimony from College administrators indicating that they were aware of the possibility of criminal acts taking place on campus and outlining steps they took to prevent such acts from occurring.[120] Indeed, "[t]he risk of such a criminal act was not only foreseeable but was actually foreseen" by the College prior to the rape.[121]

This decision received attention from the Supreme Court of Delaware in *Furek v. University of Delaware*.[122] The *Furek* Court believed that Section 323 provided a "persuasive rationale for University liability" when the University "assumes direct responsibility for the safety of another through the rendering of services in the area of protection."[123] Recall that the plaintiff in *Furek* was a student who was injured in a hazing incident that occurred at his fraternity.[124]

The court noted the University's policy on hazing and ongoing communications with fraternities regarding the dangers of hazing when the University argued it never assumed a duty to protect the plaintiff or others similarly situated.[125] The court used this information to reach the conclusion that it was "[t]he University's policy against hazing" which

114. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

115. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983). Note that some of these cases involved multiple theories of recovery, including both landowner-invitee and voluntary assumption of duty. *See supra* notes 92–94 and accompanying text.

116. *Mullins*, 449 N.E.2d at 333.

117. *Id.* at 336.

118. *Id.*

119. *Id.*

120. *Id.* at 337.

121. *Id.*

122. 594 A.2d 506 (Del. 1991).

123. *Id.* at 520.

124. *Id.* at 509–10.

125. *Id.* at 520.

"constituted an assumed duty" that the University owed to the plaintiff.[126]

The *Furek* decision gave students suing their school yet another theory of recovery on which to rely, and contributed to the confusion surrounding university liability in these situations, especially in cases of hazing.[127]

3. Special Relationships

Students have also argued that universities should be liable for injuries that occur as a result of hazing based on the special relationship that exists between a university and student. Students claim that this relationship creates a special duty of care, which a university subsequently breaches.[128] Some special relationships are well established: innkeeper-guest, parent-child, and common carrier-passenger.[129] The categories of special relationships, however, are not set in stone; they are open to expansion by the courts.[130]

That being said, courts have not often deemed the university-student relationship one that creates a duty of care.[131] This is due, in part, to the demise of the doctrine of *in loco parentis*[132] because "for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past."[133] As the Third Circuit made clear in *Bradshaw v. Rawlings*, today's college student is "an adult, not a child of tender years," and the university can no longer regulate most aspects of students' lives in the name of protection and well-being.[134]

One development under this theory that has seen traction, however, is the relationship between a university and student-athletes.[135] In *Kleinknecht v. Gettysburg College*, the Third Circuit held that the college owed a duty of care to a student-athlete who died during lacrosse practice.[136] The Third Circuit enunciated three main factors establishing this duty between a university and student-athlete. First, the student, a lacrosse

126. *Id.*

127. *Cf.* Jennifer L. Spaziano, Comment, *It's All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 234–35 (1994).

128. *See id.* at 228 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

129. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 314Acmts. b, c (1965)).

130. RESTATEMENT (SECOND) OF TORTS § 314A (1965) ("The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty."); *see* Spaziano, *supra* note 127, at 228.

131. *See* Spaziano, *supra* note 127, at 228.

132. *Id.*

133. Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979).

134. *Id.* at 139–40.

135. *See, e.g.*, Crow & Rosner, *supra* note 59, at 97–101; Somers, *supra* note 61, at 675–77.

136. 989 F.2d 1360, 1369 (3d Cir. 1993).

player, was "actively recruited"[137] by the college for "[the College's] own benefit" both in garnering attention and in recruiting future students.[138]

Second, the injury occurred during a practice for the sport he was recruited by the college to play.[139] Here, the Third Circuit distinguished its famous prior decision in *Bradshaw v. Rawlings*. In *Bradshaw*, a student sued for injuries sustained in a car accident after leaving an off-campus, but school-sponsored, picnic with another student, the driver, who was clearly intoxicated.[140] The student claimed that the University had a duty to protect him from these injuries.[141] Unlike the student in *Bradshaw*, the student lacrosse player in *Kleinknecht* "was not acting in his capacity as a private student when he collapsed," but rather as a member of an "an intercollegiate team of which he was a member."[142] Therefore, if Kleinknecht was injured while playing a flag football game, or even an intramural lacrosse game, the college would not owe him a duty of care.[143]

Third, the *Kleinknecht* Court clarifies to whom within this class a university would owe a duty.[144] Specifically, the risk of unreasonable harm must be foreseeable before the court would impose a duty of care based on the relationship between a university and student-athlete.[145] The Third Circuit noted that since the risk of serious injury or death was reasonably foreseeable, the "College's duty of care required it to be ready to respond swiftly and adequately to a medical emergency."[146]

All of the preceding theories of recovery are potentially applicable in the context of hazing in university marching bands, albeit with differing probabilities of success. These theories will be applied to university marching bands below.

III. ANALYSIS

Hazing is clearly an issue that both legislatures and courts have addressed over the years. The contexts and frameworks in which hazing have been analyzed, however, do not necessarily match up perfectly with hazing in marching bands. Marching bands are factually distinct from other student organizations, such as fraternities, as well as intercollegiate sports teams. These factual differences present intriguing questions about how to apply existing case law and legislation to instances of hazing within the context of university marching bands, or whether new or altered solutions are more appropriate.

137. *Id.* at 1367.
138. *Id.* at 1368.
139. *Id.*
140. *Id.*
141. *Id.* (distinguishing Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)).
142. *Id.*
143. *See id.*
144. *Id.* at 1369.
145. *Id.*
146. *Id.*

Hazing in marching bands can have serious and sometimes deadly consequences. Recall the two examples from Part I: First, Robert Champion, the twenty-six-year-old drum major at Florida A&M University who was killed as a result of the severe beating he received as part of a hazing ritual known as "Crossing Bus C,"[147] second, the many students in the Ohio State University marching band—known as "The Best Damn Band in the Land"—who suffered extended hazing rituals, often combined with alcohol use and abuse, that were sexual and degrading in nature, including forcing siblings to simulate sex acts on each other.[148]

These incidents are representative, but not exhaustive, examples of the types of hazing that occur within university marching bands. As such, they are helpful tools to analyze how current legislation and case law would apply to hazing within marching bands generally.

First, it is helpful to compare hazing in other contexts to hazing in marching bands to have a descriptive understanding of what actually occurs, as well as how these incidents are portrayed in the media. Next, I will focus on how current state anti-hazing statutes apply to hazing in marching bands, focusing especially on areas of tension or inconsistencies that result in the inapplicability of those statutes. Finally, I will apply the main theories of recovery relied on by plaintiffs in hazing litigation generally to determine how hazing in marching bands fits within established jurisprudence.

A. Anti-Hazing Statutes Applied to Marching Bands

It is important to consider whether anti-hazing statutes sufficiently address problems posed by hazing in university marching bands. As previously discussed, anti-hazing statutes are not uniform throughout the country.[149] A number of issues are particularly relevant when considering the effectiveness, and even the applicability, of anti-hazing statutes to instances of hazing in university marching bands.

1. Exclusion of Groups Within the Definition of Hazing

First, and perhaps most importantly, some statutes explicitly exclude punishment of hazing in certain contexts.[150] Arkansas, for example, specifically exempts "customary athletic events or similar contests or competitions" from hazing.[151] This language obviously excludes athletic events, but it is unclear if this statute applies to an athletic team in any capacity.[152] It is even less clear whether a marching band falls under the definition of "similar contests or competitions."[153] So at a very basic level,

147. *See supra* notes 1–6 and accompanying text.
148. *See supra* notes 7–10 and accompanying text.
149. *See supra* Part II.B.
150. *See, e.g.*, ARK. CODE ANN. § 6-5-201 (2016).
151. *Id.* § 6-5-201(b)(1).
152. *See* Sussberg, *supra* note 20, at 1441.
153. ARK. CODE ANN. § 6-5-201(b)(1). *Cf.* Sussberg, *supra* note 20, at 1441.

marching bands start at a tenuous position in some states because hazing within such a student organization may not be punishable at all. That is not the end of the issue with hazing statutes, however.

2. The Initiation Requirement

Arkansas also limits the definition of hazing to "those actions taken . . . in connection with initiation into or affiliation with an organization, extracurricular activity, or sports program."[154] This specific limitation is problematic for members of university marching bands, who typically have to apply to or audition for the marching band before admission. For example, members of the Ohio State Marching Band have to audition to be a part of the band every year.[155] At the end of the two-day audition period, the band director announces all candidates who have been selected for membership in the marching band.[156] Clearly, the hazing does not occur "in connection with initiation into or affiliation with . . ."[157] a marching band because prospective members are selected and admitted into the band by the band director after auditions.[158]

An apt analogy—one that will be revisited throughout this Part—is to college athletic organizations, such as college football or basketball teams. Much like marching bands, "the coach of a college or university team has usually already selected the students who will compete on the team," meaning that hazing cannot be a part of the initiation process because a student is already a member of the team when hazing occurs.[159] Indeed, the hazing in the Ohio State University Marching Band occurred well after the band was formed.[160]

The process of joining a marching band stands in contrast to "fraternities[, which] solicit students who voluntarily pledge and desire to become members typically through initiation activities that many times consist of hazing activities."[161] The distinction is one of timing as well as knowledge; since members are by definition already a part of the organization when hazing generally occurs, members may not know that hazing is a part of the organization's expectations or culture when they are chosen.[162]

Even for Robert Champion and the Florida A&M University Marching Band, this type of statute may be inapplicable. When Robert Champion was hazed, he was already a member of the marching band;

154. ARK. CODE ANN. § 6-5-201(b)(2).

155. *How to Join*, THE OHIO ST. UNIV. MARCHING AND ATHLETIC BANDS, https://tbdbitl.osu.edu/how-join (last visited Sept. 7, 2016) ("The Ohio State University Marching Band consists of 225 brass and percussion instrumentalists who must try out every year.").

156. *Tryout Information*, THE OHIO ST. UNIV. MARCHING AND ATHLETIC BANDS, https://tbdbitl.osu.edu/how-join/tryout-information (last visited Sept. 7, 2016).

157. ARK. CODE ANN. § 6-5-201(b)(2)(2016).

158. *See supra* note 156.

159. Somers, *supra* note 61, at 675.

160. *See* OSU REPORT, *supra* note 9, at 4–12.

161. Somers, *supra* note 61, at 675.

162. *Id.*

indeed, he was participating in the hazing ritual to take on a leadership role within the organization.[163] His hazing, therefore, was a sort of "initiation" into a leadership position. Admittedly, it was a leadership position for an organization of which he was already a member, but that is precisely the point. The Arkansas statute creates ambiguity in this kind of situation and provides little guidance about whether the hazing that Robert Champion and members of the Ohio State University marching band underwent would be included in the State's definition of hazing.

Even though hazing is typically thought of in connection with initiation into an organization, this characteristic should not bar application of anti-hazing statutes to hazing in other situations, or for other reasons.[164] For these reasons, statutes similar to Arkansas' simply do not afford protection to members of marching bands, both because they are excluded by definition and because the initiation requirement ignores periods when much of the hazing in these organizations actually takes place.[165]

3. Physical Injury

Even those statutes that do not exclude certain groups or organizations from their definition of hazing, or those that limit hazing to initiation activities, can prove ineffective in the context of hazing in university marching bands. Many anti-hazing statutes have been passed or modified as a result of hazing incidents in fraternities and sororities.[166] The focus of those statutes was to prevent physical harm to members of these organizations.[167] That goal, which is certainly a noble one, unfortunately "failed to account for other contexts in which hazing has been prevalent."[168] This effort has also failed to take into account other ways or forms in which hazing has been prevalent.

For example, Illinois limits the applicability of its anti-hazing statute to "act[s] result[ing] in bodily harm to any person [covered by the statute]."[169] Although Robert Champion's death would certainly be covered under this type of statute, most of the hazing that occurs in the Ohio State University Marching Band likely would not. The hazing at the Ohio State University included requiring marching band members to march across the football field in their underwear;[170] giving new members highly sexualized nicknames such as "Captain Dildo," "Tits Mcgee," "Ballsaca-

163. *See* William K. Black, *Florida A&M and the Death of Accountability and Caring*, HUFFINGTON POST (Sept. 12, 2012), http://www.huffingtonpost.com/william-k-black/famu-hazing-death_b_1876901.html?utm_hp_ref=tw ("A band member who wished to obtain a leadership position in the band was required by other band members to submit to a violent assault.").

164. *See* Pelletier, *supra* note 38, at 412.

165. *See* Somers, *supra* note 61, at 675.

166. *See* Sussberg, *supra* note 20, at 1442–43 (collecting state anti-hazing statutes).

167. *See id.*

168. *See id.*

169. 720 ILL. COMP. STAT. 5/12C-50 (2013).

170. OSU REPORT, *supra* note 9, at 3.

gawea," and "Twinkle Dick";[171] and conduct on buses en route to games that involved, among other acts, asking new members sexually explicit questions as they boarded the bus using a dildo as a microphone and forcing them to walk to the back of the bus while other members attempted to remove their clothing.[172]

These types of hazing may not result in bodily harm, but it may certainly cause emotional or mental distress.[173] The conduct of the Ohio State University Marching Band was no less coercive than Florida A&M University's Marching Band, and the conduct was just as ingrained in the fabric of the organization.[174] Indeed, "[t]he misconduct described [by the Ohio State University Report] is highly sexual, frequent, and longstanding as part of the Marching Band's culture."[175] Therefore, the chances of a new member of the Ohio State University Marching Band being hazed in a way that does not result in physical injury seems fairly high.

Despite evidence that many forms of hazing may not result in bodily harm and are fairly common,[176] the Illinois Supreme Court has rejected arguments that the State's anti-hazing statute could encompass psychological trauma.[177] The court determined that "[s]uch an interpretation would give the hazing statute the potential to apply whenever a person's feelings are hurt by being ridiculed."[178] This interpretation discounts the significant psychological impact of hazing on victims, which can leave a "lasting mental rather than physical scar."[179] Courts also potentially face problems when applying traditional hazing case law to instances of university marching bands.

B. Main Theories of Recovery Applied to Marching Bands

Plaintiffs have used several theories of recovery in attempts to hold universities liable for injuries they received as a result of hazing. Courts have ruled on the applicability of these theories in a wide range of activities and organizations,[180] but there are no published cases available which

171. *Id.* at 5–6. The OSU Report suggests that readers not familiar with these and other nicknames visit one of "various Internet sites that attempt to define these slang terms," such as www.urbandictionary.com. *Id.* at 5n.4.

172. *Id.* at 4–5.

173. *See* Acquaviva, *supra* note 23, at 316–18 (explaining the psychological and emotional effects of hazing on victims).

174. *See* OSU REPORT, *supra* note 9, at 4–5.

175. *Id.* at 15.

176. *See* Acquaviva, *supra* note 23, at 324–26 ("A nationwide survey of college athletes revealed that seven percent of respondents were 'forced to deprive oneself of food, sleep, or hygiene'; six percent '[e]ngag[ed] in or simulate[ed] sexual acts'; and five percent were 'tied up, taped, or confined in [a] small space.'").

177. State v. Anderson, 591 N.E.2d 461, 466 (Ill. 1992).

178. *Id.*

179. *See* David Villalba, *Matt's Law: Chapter 601 Targets the Epidemic of Hazing in California Educational Institutions*, 38 MCGEORGE L. REV. 94, 104–05 (2007) (citing Marc Edelman, *Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act on High School Personnel*, 25 PACE L. REV. 15, 17–18 (2004)).

180. *See, e.g.*, Kleinknecht v. Gettysburg Coll., 989 F.2d 1360 (3d Cir. 1993) (describing a student lacrosse player who died at practice); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (applying

address whether they can apply directly to hazing in university marching bands.[181]

As such, it is important to consider how the existing framework would treat instances of hazing in university marching bands, such as the death of Robert Champion during a band hazing ritual at Florida A&M University. This will necessarily include discussion of the several eras of judicial attitude toward university liability, but such discussion will be couched within the main theories of recovery used by plaintiffs in cases against universities.

1. Landowner-Invitee

It is clear that universities can be held liable for foreseeable instances of hazing that occur on university property.[182] Unless a harm is foreseeable, however, a university will not have a duty to protect its students against that harm.[183] Some hazing, such as the "Midnight Ramp" for the Ohio State University Marching Band, which entails stripping down to underwear and marching through the football stadium,[184] clearly takes place on university property. Assuming such hazing is foreseeable, the University could be liable for resulting injuries.[185] These cases could be decided neatly under the framework of *Knoll v. Board of Regents of Nebraska University*[186] and *Furek v. University of Delaware*.[187]

Much of the hazing in the Florida A&M and Ohio State University Marching Bands, however, took place not on University-owned property, but rather en route to and from football games.[188] For example, Robert Champion was hazed aboard a bus in Orlando following an away football game at which the Florida A&M Marching Band performed.[189] The bus was operated according to a contract between a bus company and Florida A&M University[190] and was parked outside the hotel where the band

negligence framework to an automobile accident following a sophomore class picnic); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991) (outlining avenues of possible liability for student injured during fraternity hazing); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983) (bringing a negligence action for a student raped on campus).

181. There are a small number of cases which deal with hazing in bands in high schools. *See, e.g.*, Lapp v. Jackson Twp. Bd. of Educ., 2006 WL 1585991 (N.J. Super. Ct. App. Div. 2006); Dutch v. Canton City Sch., 809 N.E.2d 62 (Ohio Ct. App. 2004).

182. *See supra* Part II.D.1.

183. *Cf.* Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757, 762 (Neb. 1999).

184. OSU REPORT, *supra* note 9, at 4–5.

185. *See* Furek, 594 A.2d at 522.

186. *Knoll*, 601 N.W.2d at 762.

187. *Furek*, 594 A.2d at 522.

188. *See* OSU REPORT, *supra* note 9, at 8; *FAMU Says It's NOT Responsible for Drum Major's Hazing Death*, CNN (Sept. 11, 2012), http://edition.cnn.com/2012/09/11/justice/florida-famu-hazing/ [hereinafter *FAMU Says It's not Responsible*] (describing a hazing incident that occurred following a band performance at away football game).

189. *FAMU Says It's NOT Responsible*, *supra* note 188.

190. *Id.*

was to stay the night.[191] Regardless of whether Champion's death was reasonably foreseeable by the university, the incident did not take place on university property.[192] In *Furek*, the hazing at issue occurred in a privately owned fraternity house.[193] That house, however, was situated on university owned land, and because the University made attempts to regulate fraternity conduct, it was properly considered university property.[194] It cannot be said that a parking lot at a privately owned hotel is university property within the meaning of *Furek*.[195]

The *Knoll* Court potentially opened the door to expanding the concept of landowner-invitee duty to events that occur off-campus.[196] This possibility alleviates some of the problems that *Furek* posed for recovery under the landowner-invitee theory. In *Knoll*, the plaintiff was injured during a hazing incident in an off-campus fraternity house after he was abducted from university property.[197] It is clear, then, that the importance of a connection to university property is not entirely disregarded. Significantly, the *Knoll* court also focused on the foreseeability of the harm that occurred, concluding that "the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom,"[198] even if that harm occurs off-campus.[199]

It is possible, then, that Florida A&M University owed Robert Champion a duty of care based on the landowner-invitee theory under the *Knoll* Court's analysis because such off-campus hazing is reasonably foreseeable.[200] Surely, the foreseeability factor of the *Knoll* Court's analysis is satisfied in the Robert Champion case; hazing was widespread in the Florida A&M Marching 100, and the band director had warned twenty years before Champion's death that hazing was a serious problem and that "it would be very difficult for the university and the band should someone become killed or hurt."[201] Because "[e]ven one such prior incident may be enough"[202] to be considered reasonably foreseeable, clearly a recognition of the longstanding issue of hazing in the Marching Band by the band director would satisfy this requirement.

191. Stephen Hudak, *Former FAMU Band Member Guilty of Manslaughter in Robert Champion Hazing Case*, ORLANDO SENTINEL, (Oct. 31, 2014), http://www.orlandosentinel.com/news/famu-hazing-band/os-famu-hazing-robert-champion-verdict-20141031-story.html.

192. *Id.*

193. Furek v. Univ. of Del., 594 A.2d 506, 522 (Del. 1991).

194. *Id.* at 521–22.

195. *Id.*

196. *See* Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757, 764–65 (Neb. 1999); Crow & Rosner, *supra* note 59, at 95–96.

197. *Knoll*, 601 N.W.2d at 764.

198. *Id.* at 765.

199. *Id.* at 764–65.

200. *Id.*

201. Black, *supra* note 163.

202. *Knoll*, 601 N.W.2d at 764.

The proposition that Florida A&M University owed Champion a duty of care stemming from a landlord-invitee relationship seems tenuous, though, because of the location where the hazing occurred and its nexus to university property. Although the Florida A&M University Marching Band's journey likely originated on university property,[203] the same can be said for all university organizations that organize off-campus trips. Similar analysis applies to the several hazing incidents that occurred within the Ohio State University Marching Band on buses to and from games.[204] It is difficult to say that the hazing occurred within the context of the landowner-invitee relationship. This argument has not yet been tested in the courts, so it is unclear what the prospects for recovery against a university might be for a plaintiff.

2. Voluntary Assumption of a Duty

A second theory of recovery seeks to impose a duty of care on a university not because of its status as a landowner, but rather because of a voluntary duty it undertakes. This theory comes from the Second Restatement of Torts, Section 323, and has been applied by courts to hold that a duty voluntarily assumed creates a duty of care.[205] In the college setting, this usually amounts to a claim that a university voluntarily undertook a duty to provide for student safety.[206] When a student relies upon a university's voluntary choice to provide for his or her physical safety, and is injured due to that reliance, that university may have breached the duty of care it owed to students by virtue of voluntarily assuming such duty.[207]

The court in *Furek*, in addition to exploring the possibility of establishing a duty of care based on the landowner-invitee relationship,[208] addressed whether the University had voluntarily assumed a duty to protect students from the dangers of hazing.[209] The court held that the University had assumed such a duty, noting its hazing policy and extensive communications with fraternities on the subject.[210]

Similarly, Florida A&M University required all members of its marching band to sign a "Hazing and Harassment Agreement" in the months before the incident that led to Champion's death, in which students "acknowledged understanding the 'dangers of participating in hazing, either as a hazer or a hazee.'"[211] Furthermore, the University had ig-

203. *Cf. id.* (noting that the plaintiff was abducted on university property).
204. *See* OSU REPORT, *supra* note 9, at 8–11.
205. *See supra* note 115 and accompanying text.
206. *Id.*
207. *See supra* notes 115–117 and accompanying text.
208. Furek v. Univ. of Del., 594 A.2d 506, 520–22 (Del. 1991).
209. *Id.* at 520.
210. *Id.*
211. Christina Ng, *Parents of Hazing Victim 'Appalled' FAMU Blames Son for His Own Death*, ABC NEWS (Sept. 11, 2012), http://abcnews.go.com/US/famu-drum-major-robert-champions-parents-appalled-schools/story?id=17208046.

nored a recommendation to suspend the band just three days before Champion's death.[212]

These acts by Florida A&M University are comparable to those in *Furek* which gave rise to a duty of care under Restatement Section 323.[213] Similar history can be found with regard to the Ohio State University Marching Band. In addition to the University's hazing policy,[214] the Ohio State University Report details a culture of longstanding misconduct that marching band staff and directors addressed.[215] Certainly the statements by the Florida A&M University Marching Band's Director that "it would be very difficult for the university and the band should someone become killed or hurt" in a hazing incident[216] suggests that the hazing that led to Champion's death "was not only foreseeable but was actually foreseen" by Florida A&M University.[217]

Therefore, it is plausible that both Florida A&M University and Ohio State University could be held liable for the hazing injuries on the theory that they breached their voluntarily assumed duty, under Restatement Section 323,[218] to protect students from such harms. This expectation should be tempered somewhat though, since apparently fewer courts cite *Furek* for this proposition than for its analysis alternatively establishing a duty under a landowner-invitee theory.[219] If the existence of a hazing policy is the only evidence on which a plaintiff relies to establish a duty of care, it seems unlikely that this plaintiff would prevail.[220] The result is some uncertainty regarding application of the Restatement's voluntary assumption of duty, although the theory has garnered approval in some courts.[221]

212. Ng, *supra* note 18.

213. *Furek*, 594 A.2d at 520.

214. *See* Student Conduct, *Hazing*, THE OHIO ST. U., http://studentconduct.osu.edu/page.asp?id=53 (last visited Sept. 7, 2016).

215. *See* OSU REPORT, *supra* note 9, at 15. Ironically, one of the times that the (now former) Band director addressed students about the dangers of hazing related to Champion's death at Florida A&M University. *Id.* at 12.

216. Black, *supra* note 163.

217. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983).

218. *Furek*, 594 A.2d at 520.

219. *See* Somers, *supra* note 61, at 663–64 ("[T]he *Furek* court based University liability for Furek's injuries on two premises: (1) the duty of a service provider to render the necessary service to protect another, and (2) the University's duty as a landowner to protect the plaintiff as an invitee against any foreseeable and dangerous conditions on the University property. . . . [T]he second basis is more frequently relied upon than the first . . . .").

220. *Cf.* Pawlowski v. Delta Sigma Phi, No. CV–03–0484661S, 2009 WL 415667, at *4n.4 (Conn. Super. Ct. Jan 23, 2009) ("[Furek] appears to be the only decision in which a court found that a § 323 duty arose to protect a university's student *based solely on the existence of a university policy* . . . . On closer examination, however, the *Furek* court also premised its holding on the pervasiveness of the university's regulation of general security on campus . . . ." (emphasis added)).

221. *See, e.g.*, *Furek*, 594 A.2d at 520; *Mullins*, 449 N.E.2d at 336 ("Colleges generally undertake voluntarily to provide their students with protection from the criminal acts of third parties . . . . [I]t is quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students.").

3. Special Relationship

Although courts have not been willing to say that universities owe a duty of care to students generally,[222] they have been somewhat more receptive to finding a duty to student athletes in certain situations.[223] This application does not necessarily address the problem, however, of student athletes seeking recourse from their university for injuries they sustained specifically during instances of hazing within the team. It is thus important first to consider the implications of student athletes attempting to hold their university liable for team-based hazing and the difficulties they may encounter. It will be useful then to compare and contrast the situation of student members of university marching bands who are hazed by other band members to that of student athletes, using the incidents from the Ohio State University and Florida A&M University as models.

a. Student Athletes

In *Kleinknecht v. Gettysburg College*, the Third Circuit announced three factors that determined whether a university owes a duty of care to a student athlete based on that relationship: (1) the student athlete was actively recruited by the university; (2) the incident occurred while the student athlete was acting in his or her capacity as an athlete, not just as a student; and (3) the risk of harm was foreseeable by the university.[224] The Third Circuit determined that the College owed Drew Kleinknecht, the student who died of cardiac arrest during lacrosse practice, a duty of care "to take reasonable precautions against the risk of death" during school-athletic events, a category into which lacrosse practice falls.[225]

That is not the end of the inquiry, however, when hazing enters the equation. The first factor in the Third Circuit's analysis is recruitment by the university.[226] Commentators have noted that the Third Circuit did not specify what it meant by active recruitment; for example, whether a student athlete must be recruited from his or her high school or if walk-on athletes recruited from within the university's student body are also counted.[227] If only the former is intended to be covered by the Third Circuit's factor of recruitment, then a university would not owe walk-on student athletes a duty of care because they have no special relationship.[228]

222. *See* Crow & Rosner, *supra* note 59, at 97–101.

223. *See* Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1369 (3d Cir. 1993); Crow & Rosner, *supra* note 59, at 97–101; Somers, *supra* note 61, at 675–77; Spaziano, *supra* note 127, at 228.

224. *Kleinknecht*, 989 F.2d at 1367–69.

225. *Id.* at 1370. Technically, the Third Circuit predicted that the Supreme Court of Pennsylvania would hold that there was a duty. *Id.* at 1366 (noting that whether one owes a duty of care is a question of state law). The Third Circuit concluded that whether the college did in fact take reasonable precautions against the possibility of injury or death in intercollegiate activities was a question of fact for a jury on remand. *Id.* at 1372.

226. *Id.* at 1367.

227. Crow & Rosner, *supra* note 59, at 99.

228. *Id.*

It seems unlikely that the Third Circuit would create such an arbitrary standard under which some members of a university athletic team would have a special relationship with the university giving rise to a duty of care whereas others would not, but the possibility remains open for other courts to clarify or refine the standard.[229]

The *Kleinknecht* Court also mentioned briefly that "[w]e cannot help but think that the College recruited Drew for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students."[230] This is the only mention of a benefit to the College in the case, and it is somewhat puzzling. In discussing the nature of recruitment by the College, the court listed many similar instances in which courts have found a duty existed,[231] and in a footnote it explained that the cases listed deal with mainly "public school[s] . . . at the pre-college level."[232] The court concluded that although the duty owed to such high school athletes might seem more compelling than a similar duty owed to student athletes at a private college, the fact that the plaintiff was actively recruited by the College "balance[s] out" this distinction.[233] This conclusion was never explained, apart from the single vague reference to the apparent benefit the College could expect to receive.[234]

Factors of active recruitment aside,[235] a student athlete's largest concern is likely to be whether hazing falls within the category of behavior that occurs while acting in an athletic capacity.[236] The Third Circuit employs a number of seemingly minor, but possibly significant phrasing, variations in describing what constitutes acting in an athletic capacity. It has stated that a special relationship stemmed from "participating in a scheduled athletic practice for an intercollegiate team sponsored by the College under the supervision of College employees";[237] "participating as one of its intercollegiate athletes in a school-sponsored athletic activity";[238] "[acting] in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity";[239] and "occur[ring] during an athletic event involving an intercollegiate team."[240]

Due to these minor, but important, variations in phrasing,[241] it seems that student-athletes would only be able to recover when they are injured

229. *See id.* at 99.
230. *Kleinknecht*, 989 F.2d at 1368.
231. *Id.* at 1367.
232. *Id.* at 1367n.5.
233. *Id.*
234. *See supra* note 225 and accompanying text.
235. *See supra* notes 226–234 and accompanying text.
236. *Kleinknecht*, 989 F.2d at 1368; *see also* Crow & Rosner, *supra* note 59, at 99.
237. *Kleinknecht*, 989 F.2d at 1367.
238. *Id.* at 1373.
239. *Id.* at 1369.
240. *Id.* at 1368.
241. *See* Crow & Rosner, *supra* note 59, at 99–100 & nn.75–79 (describing and quoting inconsistencies in the Third Circuit's language).

while actually participating in their "school-sponsored athletic activity"[242] as a member of "an intercollegiate team."[243] It is difficult to argue that hazing occurs during the course of "school-sponsored athletic activity."[244] Therefore, the Third Circuit's language seems to limit the applicability of this framework to the problem of hazing among student athletes to the exclusion of other contexts.

The Third Circuit does employ other language that describes the role of the student athlete as a participant in an intercollegiate athletic program, rather than solely in his or her active role in an athletic capacity.[245] Examples include "students participating in an intercollegiate athletic program";[246] "participating as an intercollegiate athlete in a sport for which he was recruited";[247] "in his capacity as a school athlete."[248] The description of Kleinknecht "in his capacity as a school athlete"[249] may prove a useful tool for establishing a duty of care.[250] This standard is more forgiving than the other variations the Third Circuit employs, which would require active participation in a "school sponsored athletic activity"[251] because acting as a student athlete encompasses some behavior and time spent outside active participation in these school-sponsored athletic events. More generally, the latter is a subset of activity which fits into the larger conceptual category of "students participating in an intercollegiate athletic program."[252]

Since this status is based on the student athlete's identity *as* a student athlete, rather than being dependent on the athletic activity for which he was recruited, it encompasses all that being a student athlete entails. Hazing in college athletics is all too common: one well-known study conducted by the National College Athletic Association ("NCAA") and Alfred University found that eighty percent of over 325,000 student-athletes surveyed had experienced some form of hazing.[253] This has led some to dub hazing as a "de facto requirement of participating on intercollegiate athletic teams."[254] Thus, the reasoning goes, if it is understood that student-athletes have virtually no choice but to be

242. *Kleinknecht*, 989 F.2d at 1373.
243. *Id.* at 1368.
244. *Id.* at 1373; *see* Crow & Rosner, *supra* note 59, at 100.
245. *See Kleinknecht*, 989 F.2d at 1367 & n.5, 1368, 1372.
246. *Id.* at 1367n.5.
247. *Id.* at 1368.
248. *Id.* at 1372.
249. *Id.*
250. *See* Crow & Rosner, *supra* note 59, at 100 & nn.80–84 (describing and quoting phrases the Third Circuit uses to highlight the student athlete as a participant in an athletic program extending beyond physical participation).
251. *Kleinknecht*, 989 F.2d at 1373.
252. *Id.* at 1367n.5.
253. NADINE C. HOOVER, NATIONAL SURVEY: INITIATION RITES AND ATHLETICS FOR NCAA SPORTS TEAMS 6, 12 (1999) [hereinafter ALFRED UNIVERSITY SURVEY], *available at* http://www.alfred.edu/sports_hazing/docs/hazing.pdf.
254. Crow & Rosner, *supra* note 59, at 100 ("A student-athlete has no choice but to be hazed, and failure to do so may negatively impact his athletic experience due to the numerous social costs that will be imposed.").

hazed, then this hazing occurs in the "capacity as a school athlete."[255] Because to "participat[e] in an intercollegiate athletic program"[256] means going through some form of hazing ritual, universities should owe student athletes a duty of care when it comes to hazing, not just when they are participating in a school-sponsored or supervised athletic event.[257]

Once this duty of care is established, student-athletes will also need to prove that the hazing and resulting injury were foreseeable by the university.[258] Establishing the foreseeability of hazing and the resulting harm for student athletes is a simple task considering the results of the Alfred University study.[259] Therefore, if courts adopt this reading of the Third Circuit's three-factor test, student athletes will have a much better chance of recovering from universities for injuries sustained during hazing rituals done as part of the intercollegiate athletic team.

Although the Third Circuit in *Kleinknecht v. Gettysburg College* believed that the College owed a duty of care to a lacrosse player who died during a team practice,[260] the court did not consider the question of whether such a duty would exist with regard specifically to hazing among university athletic organizations. The Third Circuit announced three factors to determine a duty of care owed by the university.[261] Under different readings of these factors, specifically the second factor regarding acting in the capacity as an athlete at the time of injury,[262] divergent outcomes are possible.

Whether this analysis is applicable to student-marching-band members has not yet been decided by the courts. It first depends on whether a university owes a duty to marching-band members in their active participation in official marching-band activities. Then, a question exists whether the university also owes marching-band members a duty of care for incidents such as hazing that occur because of the role as a participant in the marching band rather than specifically during marching-band activities.

b. Marching Band

The three factors the *Kleinknecht* Court identified that determined whether a university owes a duty of care to a student athlete based on that relationship are: (1) the student athlete was actively recruited by the university; (2) the incident occurred while the student athlete was acting in his or her capacity as an athlete, not just as a student; and (3) the risk

255. *Kleinknecht*, 989 F.2d at 1372.
256. *Id.* at 1367n.5.
257. *See* Crow & Rosner, *supra* note 59, at 100.
258. *See Kleinknecht*, 989 F.2d at 1369 ("[Determining that the College owed a duty of care] does not end our inquiry, however . . . . Foreseeability is a legal requirement before recovery can be had.").
259. *See supra* note 253 and accompanying text. *See also* Crow & Rosner, *supra* note 59, at 90–91.
260. *Kleinknecht*, 989 F.2d at 1369.
261. *Id.* at 1367–69.
262. *Id.* at 1368.

of harm was foreseeable by the university.[263] These factors will be applied, in turn, to student-marching band members to determine if they would be included under the same theory.

First, was a student-marching-band member actively recruited by the university?[264] Universities likely do not recruit marching-band members. Students interested in performing as a member of the Marching Band at both the Ohio State University and Florida A&M University are required to audition.[265] In fact, students interested in being a member of the Marching Band at the Ohio State University are required to audition every year, regardless of whether they were a member the previous year.[266] Clearly, the student-marching-band members at the Ohio State University and Florida A&M University do not satisfy the first factor from *Kleinknecht*.

Second, did the incident occur while the student-marching-band member was acting in his or her capacity as a member of the marching band?[267] As is the trouble for student athletes, hazing of student-marching-band members is unlikely to occur during any school-sponsored activity, such as a performance at a football or basketball game.[268] The hazing incidents described in Part I[269] took place in connection with the marching band, but not during any official performance. It was not during a practice, as was the case in *Kleinknecht*,[270] but rather before and after games or following banquets that these hazing incidents occurred.[271]

Student-marching-band members may therefore have more luck under the more "relaxed" version of the second factor.[272] By taking into account that acting in the capacity as a student-marching-band member encompasses more than simply the official practice and performing time, this standard captures events that occur in connection with membership. Because the culture in marching bands at the Ohio State University and Florida A&M University included hazing, often directed at younger or less-experienced members from upperclassmen[273] or those who wished to obtain leadership positions,[274] it is reasonable to conclude that being a member of these marching bands can lead to hazing. It is not clear

263. *Id.* 1368–69.

264. *See id.* at 1367.

265. *See How to Join*, THE OHIO ST. UNIV. MARCHING & ATHLETIC BANDS, https://tbdbitl.osu.edu/how-join (last visited Sept. 7, 2016); *The Marching "100"*, FAMU, http://www.famu.edu/index.cfm?marching100&INTERESTEDMUSICIAN (last visited Sept. 7, 2016).

266. *See How to Join*, THE OHIO ST. UNIV. MARCHING & ATHLETIC BANDS, https://tbdbitl.osu.edu/how-join (last visited Sept. 7, 2016). Florida A&M University does not specify what their policy for returning band members is on their website.

267. *Kleinknecht*, 989 F.2d at 1367–68.

268. *See supra* notes 241–44 and accompanying text.

269. *See supra* notes 1–12 and accompanying text.

270. *Kleinknecht*, 989 F.2d at 1362.

271. *See supra* notes 1–12 and accompanying text.

272. *See supra* notes 245–59 and accompanying text.

273. *See, e.g.*, OSU REPORT, *supra* note 9, at 15.

274. *See* Black, *supra* note 163 ("A band member who wished to obtain a leadership position in the band was required by other band members to submit to a violent assault.").

whether this is the case for the majority of marching bands across the nation, as it is for student athletes,[275] but given instances of hazing appearing in other university marching bands, there is reason to believe this may be the case.[276] In any event, it seems that members of the marching bands at the Ohio State University and Florida A&M University would satisfy this version of the *Kleinknecht* Court's second factor.

Third, was the risk of harm foreseeable to the university?[277] The "longstanding . . .culture"[278] of hazing in the Ohio State University Marching Band existed for "years, even decades,"[279] and Jonathan Waters, the Marching Band's director, was aware of much of the inappropriate conduct.[280] Indeed, Waters was himself a member of the Marching Band from 1995–1999 and had been involved with the band as a Graduate Assistant, Assistant Director, and Interim Director continuously since that time.[281] Waters directed his staff to oversee the "Midnight Ramp"[282] after a student had alcohol poisoning when staff were not present.[283] Clearly, there was both concern about the possible dangers of this and similar hazing events as well as actual knowledge that there had been harm in the past, making similar future harms foreseeable.

Similarly, the Marching Band director at Florida A&M University warned school administrators over two decades ago that hazing was a serious problem in the Marching Band and that "it would be very difficult for the university and the band should someone become killed or hurt."[284] The University also ignored calls for the suspension of the Marching Band just three days prior to the hazing that lead to Champion's death.[285] This strongly suggests that the types of harm that hazing would lead to were "not only foreseeable but [were] actually foreseen"[286] by Florida A&M University.

Although the risk of harm in these cases was foreseeable, student-marching-band members are not actively recruited by universities. Furthermore, it is debatable whether the harm from hazing occurs in student-marching-band members' capacity as members of the marching band. Hazing would not be included under the narrower version of this standard that requires active participation, meaning essentially either

275. *See supra* notes 253–55 and accompanying text.

276. *See infra* notes 290–91 and accompanying text.

277. *Kleinknecht*, 989 F.2d at 1369.

278. OSU REPORT, *supra* note 9, at 15–16 ("Waters knew about the Marching Band's hostile environment and did not take adequate measures to address it as required.").

279. Pérez-Peña, *supra* note 7.

280. *See* OSU REPORT, *supra* note 9, at 15–16.

281. *Id.* at 2.

282. *Id.* at 4.

283. *Id.* at 5. In June 2014, Waters announced that Midnight Ramp would no longer occur, questioning "whether this tradition was still necessary," and would instead be replaced by a more appropriate tradition. *Id.* Curiously, Waters learned of the University's investigation just several weeks earlier in May 2014. *Id.*

284. Black, *supra* note 163.

285. *See* Ng, *supra* note 18.

286. Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983).

practices or performances. The broader version of the standard that focuses on the status as a participant in the marching band beyond practices or performances would satisfy this participation requirement. For these reasons, victims of hazing at the Ohio State university and Florida A&M University would not be able to prove that their University owed them a duty of care based on the three-factor approach from *Kleinknecht*.[287]

IV. RECOMMENDATION

Hazing in university marching bands is clearly an important and growing problem. In addition to the events described here—the death of Florida A&M University drum major Robert Champion[288] and the extended and sexualized hazing of new band members alongside alcohol use and abuse at the Ohio State University[289]—there are, and have been, instances of marching-band hazing in several other universities, including Michigan State University[290] and Southern University.[291]

In order to ensure that university marching-band students receive adequate protection from hazing, both legislatures and courts will need to act. State legislatures should make three substantive changes to existing or new anti-hazing statutes to ensure that marching-band members are covered. They should: (1) exemptions for entire groups from the definition of hazing, which would otherwise leave marching-band students without any legislative protection; (2) acknowledge that hazing can occur at any time during the course of affiliation with an organization, not just during initiation into it; and (3) afford the same protections for hazing that results in mental or emotional trauma as physical or bodily harm. Additionally, courts should develop a standard for university liability for hazing in university marching bands based on the three-factor test set forth by the Third Circuit in *Kleinknecht v. Gettysburg* for student-athletes.[292]

A. Legislative Response

Legislatures across the country have worked to address the problem of hazing, and forty-four states have some form of anti-hazing law on the books.[293] The statutes, however, are inadequate, especially since there is so much variation between states.[294] The result is that many hazing inci-

287. Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1367–69 (3d Cir. 1993).

288. *See supra* notes 1–6 and accompanying text.

289. *See supra* notes 7–10 and accompanying text.

290. *See* Greenfield v. Trs. for Mich. State Univ., No. 180170, 180425, 1996 WL 33348638 (Mich. Ct. App. Oct. 29, 1996).

291. *See Southern University Band Hazing Victim Sues School*, TIMES-PICAYUNE (Nov. 11, 2009), http://www.nola.com/education/index.ssf/2009/11/southern_university_band_hazin.html.

292. *Kleinknecht*, 989 F.2d at 1367–69.

293. *See supra* note 36 and accompanying text.

294. *See supra* notes 37–43 and accompanying text.

dents do not fall within the scope of anti-hazing statutes.[295] To combat these problems, some commentators have proposed model anti-hazing legislation, often focusing on enacting legislation at the federal level as well as in the states.[296]

Although making changes to the many statutes that currently exist in order to address every facet of hazing is a "daunting task,"[297] state legislatures can make a number of modifications to current anti-hazing statutes which will make them more inclusive for groups such as marching bands as well as more comprehensive in their scope. First, states should remove language that specifically excludes certain groups from the definition of hazing. Second, hazing should encompass actions that occur at any time, not just as a requirement for initiation into a group. Third, statutes should specify that hazing that results in mental or emotional trauma will be prohibited and punished in the same way as hazing that results in physical or bodily harm.

Such modifications are important because they expand the protection of the law to those who suffer from hazing and "keep pace with the ever-devolving nature of hazing activities."[298] Although expanding the scope of anti-hazing laws will necessarily mean that more people, and possibly universities, are punished (assuming that the laws are enforced as expected), the ultimate purpose is to reduce the amount of hazing that occurs at all levels and prevent the suffering it can cause. In sum, the goal "is deterrence, not retribution."[299] Furthermore, that certain conduct is criminalized can give rise to the existence of a legal duty in civil cases.[300] The issue of university liability for hazing injuries is important because we want universities to combat hazing and prevent it when possible. Universities seem to want this too; the widespread existence of anti-hazing policies at colleges speaks to this desire. A necessary part of this mission will be to develop judicial responses to hazing as well. There is currently no approach that deals with the unique needs and circumstances that student-marching band members face.

B. Judicial Action

That hazing is a recurring problem in marching bands underscores the need for intervention from parties who have the most control and power to do so: the universities where these events are happening. If the courts do not hold the universities accountable, however, there will be little incentive for the universities to take any meaningful action. There-

295. Halcomb Lewis, *supra* note 20, at 140.

296. *See, e.g.*, *id.* at 145–54; Sussberg, *supra* note 20, at 1482–90.

297. Sussberg, *supra* note 20, at 1443.

298. Acquaviva, *supra* note 23, at 335.

299. *Id.* at 335–36.

300. *See* Halcomb Lewis, *supra* note 20, at 115 & nn.16–17 ("[A]lthough a legal duty is normally not established through rules and regulations of a university, 'violation of a statute or ordinance designed for the protection of human life or property is prima facie evidence of negligence.'") (quoting Quinn v. Sigma Rho Chapter, 507 N.E.2d 1193, 1998 (Ill. App. Ct. 1987)).

fore, ensuring that the proper framework is applied is essential to holding universities accountable when they ought to be.

1. Inapplicable Approaches

The landowner-invitee theory is unlikely to be effective in combatting hazing in university marching bands. Application of the landowner-invitee theory is strongest, and most logically consistent, when the hazing takes place on university property. Much of the hazing in university marching bands, however, takes place away from university property.[301] Stretching such a theory to cover hazing harms that occur far from campus does not seem practicable, nor is it desirable from a doctrinal perspective.

The theory of voluntary assumption of a duty is also inadequate. Plaintiffs typically assert that the university voluntarily assumed a duty by instituting an anti-hazing policy or requiring students to sign an anti-hazing pledge.[302] Such acts, however, can only be said to be weakly related to a voluntary undertaking by the university. Courts have recognized this and focus more on other theories of recovery.[303] In fact, when an anti-hazing policy is the only evidence suggesting voluntary assumption of a duty, a plaintiff is not likely to succeed.[304] Furthermore, if universities will owe students a duty of care based on such basic actions, they may choose to not regulate student organizations at all,[305] regulate student organizations "rigorously,"[306] or even ban certain organizations altogether, which some schools have already done.[307] Because such outcomes are not desirable and it is unclear whether this theory will prevail, it is not the best choice for student-marching-band members. Clearly, another approach is needed to address the problem of hazing in university marching bands.

2. Modified Three-Factor Kleinknecht *Test*

The Third Circuit developed a framework for holding universities accountable for harm to student athletes through application of a special relationship between university and student athlete in *Kleinknecht v. Gettysburg College*.[308] It is doubtful, however, that the Third Circuit three-factor test would establish a duty of care by a university to student-marching-band members, and specifically hazing within those marching bands.[309] The *Kleinknecht* test serves as a good model, but needs to be

301. *See supra* notes 188–92 and accompanying text.
302. *See supra* Part III.B.2.
303. *See supra* note 219 and accompanying text.
304. *See supra* note 220 and accompanying text.
305. *See* Spaziano, *supra* note 127, at 235–40 (examining pros and cons of a hands-off approach).
306. *See id.* at 240–44 (examining requirements and merits of a controlling approach).
307. *See id.* at 214 & n.10 (noting that several universities have banned all fraternities from campus).
308. 989 F.2d 1360, 1367–69 (3d Cir. 1993).
309. *See supra* Part III.B.3.b.

modified to accommodate the differences between student athletes and student-marching-band members.

The first factor—that a student was actively recruited[310]—should instead reflect that a student was selected to be a member of the marching band. The second factor—that the incident occurred while the student was acting in his or her capacity as a student athlete[311]—should be altered to make clear that it is used in the broader sense than the *Kleinknecht* Court used it to encompass all actions that occur in connection with membership in an organization rather than the narrower sense that focuses solely on active participation in the activity.[312] The foreseeability requirement,[313] however, need not be changed; a student should only be able to claim that a duty existed when an unreasonable risk of harm was foreseeable.[314]

a. Membership

First, the active requirement factor should be changed to ask whether a student was selected to be a member of the university's marching band. University marching bands select their members each year based on auditions, rather than recruiting students before they arrive at the university.[315] That students are selected to be a member of the band rather than being actively recruited does not, however, change the relationship between student-marching-band members and the university.[316]

The *Kleinknecht* Court also mentioned that the university recruited student-athletes "for its own benefit . . . [because it] would bring favorable attention and so aid the College in attracting other students,"[317] a fact that supposedly gave weight to the proposition that active recruitment suggested the existence of a duty.[318] Although the court did not explain this proposition further, marching bands generally benefit the university by attracting favorable attention even though members are not actively recruited. The Ohio State University touts its band, "The Best Damn Band in the Land," as the largest band of its type in the world and proclaims that approximately ten million people have viewed their halftime show tribute to Michael Jackson.[319]

Similarly, Florida A&M University credits their marching band, "The Marching 100," with creating at least thirty techniques that many

310. *Kleinknecht*, 989 F.2d at 1367–69.
311. *Id.* at 1369.
312. *See supra* notes 236–57.
313. *Kleinknecht*, 989 F.2d at 1369.
314. *Id.* at 1369–70.
315. *See supra* notes 264–66 and accompanying text.
316. This is similar to the arbitrary distinction the *Kleinknecht* Court seems to draw between recruited student athletes and walk-on student athletes, which would protect some members of a team but not others in the same situation. *See supra* notes 226–29 and accompanying text.
317. *Kleinknecht*, 989 F.2d at 1368.
318. *See supra* notes 230–34 and accompanying text.
319. THE OHIO ST. UNIV. MARCHING & ATHLETIC BANDS, *supra* note 16.

other high school and college bands have adopted,[320] making them "The Most Imitated Marching Band in America."[321] Certainly the fact that these student-marching-band members were not actively recruited does nothing to dilute the benefit they bring to their universities. As such, courts should focus on the fact that student-marching-band members were chosen to participate, not on whether they were recruited.

b. Capacity as a Student-Marching-Band Member

Second, courts should focus on students' role as student-marching-band members, and all that role entails, which is more than just practicing and performing. Robert Champion was hazed following an away football game on a bus outside the hotel where the Marching 100 were to stay the night.[322] The Ohio State University Report detailed events that student-marching-band members had to attend and different actions they had to take, such as "Midnight Ramp." There students had to march onto the field in their underwear following a semi-formal event;[323] "tricks," which involved new band members performing some act related to the nickname they received, which was often sexual in nature;[324] and "rookie introductions," wherein new band members were asked questions, which were sometimes sexual or involved dirty jokes, using a dildo as a microphone as they loaded on to the bus for away games.[325] Clearly these instances occurred due to the members' status as a member and their involvement in the marching band even though they did not occur during active participation in marching-band practices or performances.

These incidents demonstrate the need to allow for recovery of injuries sustained due to a student's status as a marching-band member, including those that are a result of hazing. This test would not be too broad because it would not allow recovery for injuries that occurred in contexts that took students outside their roles as marching-band members. A university would not owe the student a duty of care because of that student's participation in a marching band if the injury did not occur as a result of or extension from participation in the marching band, such as an injury sustained during an intramural athletic game[326] or from a bicycle accident

320. *The Marching "100"*, FAMU, http://www.famu.edu/index.cfm?marching100&AbouttheBand (last visited Sept. 7, 2016).

321. *History Time Line*, FAMU, http://www.famu.edu/index.cfm?marching100&HistoryTimeLine (last visited Sept. 7, 2016).

322. Hudak, *supra* note 191.

323. OSU REPORT, *supra* note 9, at 4.

324. *Id.* at 7.

325. *Id.* at 8.

326. This example is used to support the same proposition for student athletes, *see* Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1368 (3d Cir. 1993) ("There is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests . . . . Had Drew been participating in a fraternity football game, for example, the College might not have owed him the same duty or perhaps any duty at all."), although the court did not decide this issue. *Id.* at 1368–69. Nonetheless, the example holds just as true for student-marching-band members as for student athletes. Indeed, any private interest

on the way to class. In these instances, the student would not be acting in his or her role as a member of the marching band, but rather just as a student.

As a consequence of the demise of the era of *in loco parentis*, universities no longer have a special relationship with students which gives rise to a duty of care.[327] Although at one time "[a] special relationship [existed] between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. . . . [a] dramatic reapportionment of responsibilities and social interests of general security took place" which resulted in the university not owing to the student any general duty.[328] Therefore, unless a student can demonstrate that a special duty exists, as in the case of a student athlete or a student member of the marching band acting in his or her capacity as a part of that organization, he or she will have the same protections as any other student; no more, no less. Consequently, the student-marching band member injured while participating in intramural athletics will not be able to rely on his or her status as a member of the marching band to establish a duty that the university owed. He or she will be in the same position as any other student and will have to establish that the university owed him or her a duty in some other fashion. Therefore, this does not lead to abuse of the special duty, nor does it unnecessarily increase risk for universities.

c. Foreseeability

Third, the requirement that the risk of harm be foreseeable by the university[329] should remain unaltered. Whether or not statistics about how widespread hazing in university marching bands will be similar to those of student athletes, as investigated by the Alfred University study[330] remains to be seen, but widespread hazing in most marching bands across the countries is not necessary to determine whether hazing is foreseeable at a particular university. For example, the record of marching bands at both Florida A&M University and the Ohio State University suggest that further hazing would be reasonably foreseeable by either university.[331] There is no reason to alter the foreseeability requirement when it comes to hazing in marching bands. If a harm is not reasonably foreseeable to a university, a court can decide that they did not owe a student a duty of care in that case.

In sum, when dealing with hazing in university marching bands, courts should adopt a modified version of the three-factor test created by

not related to participation in the marching band (or sports team, as the case may be) would satisfy this condition.

327. *See* Bradshaw v. Rawlings, 612 F.2d 135, 139–41 (3d Cir. 1979).

328. *Id.* at 139–40.

329. *Kleinknecht*, 989 F.2d at 1369.

330. *See supra* notes 253–57 and accompanying text.

331. *See supra* notes 273–80 and accompanying text.

the *Kleinknecht* Court. This modified test should determine whether a university owes student-marching-band members a duty of care by asking: (1) whether this student was selected to be a member of the marching band by the university;[332] (2) did the hazing (or other incident) occur while the student-marching-band member was acting in his or her capacity as a student-marching-band member;[333] and (3) was the risk of harm foreseeable to the university?[334]

V. CONCLUSION

Hazing is not unique to fraternities and sororities, and it is important to have legal structures in place that allow for resolution of hazing issues, both criminal and civil, in those unique and differing contexts. There is a lot of work to be done to understand the causes of hazing, both social and psychological,[335] in order to prevent the harms that result from hazing. Courts and legislatures can help deter those in positions to haze and punish those that take advantage of those positions. Marching bands pose a challenge to existing state anti-hazing laws which seek to punish and prevent hazing as well as judicial approaches to determining university liability for hazing injuries.

In order to address these issues, legislatures should modify their anti-hazing statutes to ensure that marching band members are not excluded, that hazing is not limited solely to initiation activities, and that mental and emotional trauma is included. Courts should also develop a framework for dealing with hazing in marching bands based on the Third Circuit's three-factor test in *Kleinknecht v. Gettysburg* for student athletes.[336] This framework should focus on whether the student was selected to be a member of the marching band, whether the harm from hazing occurred while the student was acting in his or her capacity as a student-marching-band member, and whether the risk of harm was foreseeable to the university.

332. *See supra* Part IV.B.2.a.

333. *See supra* Part IV.B.2.b.

334. *See supra* Part IV.B.2.c.

335. *See, e.g.,* Benjamin Ganellen & Jennifer K. Robbennolt, *University Marching Bands and the Psychology of Hazing*, MONITOR ON PSYCHOL., Feb. 2015, 24, at 24.

336. 989 F.2d 1360, 1367–69 (3d Cir. 1993).