TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 38 | Number 4 Article 12

2023

Proceed with Caution: Criminal Responsibility for Non-participating Actors in University Hazing Incidents

Charlie Penrod

PROCEED WITH CAUTION: CRIMINAL RESPONSIBILITY FOR NON-PARTICIPATING ACTORS IN UNIVERSITY HAZING INCIDENTS

Charlie Penrod[*]

ABSTRACT

Hazing in university fraternities has become an epidemic. Most hazing involves new pledges who are coerced to endure physical, emotional, or psychological harm to prove themselves worthy of admission to the group. Sadly, many students suffer severe injuries from hazing, up to and including death. Many states have passed specific laws banning hazing and expanded the universe of persons guilty of hazing to possibly include non-participants who aided the hazing. In 2020, a Florida appellate court broadened this further, potentially holding a fraternity president responsible for hazing for making the mistake of allowing liquor at an off-campus party. The fraternity president in that case did know hazing would occur and was not present when it occurred. In light of this holding and the broad wording of state statutes across the country, this Article sets forth recommended practices to minimize the likelihood of criminal prosecution for hazing for fraternity presidents. The impact on the culture of the fraternity may be significant; however, these recommendations will further the twin goals of reducing hazing incidents and minimizing criminal responsibility for those who are non-participants of the hazing.

[*] Charlie Penrod is an Associate Professor of Legal Studies at the University of West Florida.

I. INTRODUCTION

Imposing guilt on actual perpetrators of a crime is an unremarkable proposition. Those who commit crimes with intent should be punished, and those free from any wrongdoing should not be prosecuted. Of course, there are always exceptions. Typically, if someone was not involved in a crime—was not aware of its existence, did not intend for or desire it to happen, and encouraged others not to engage in the crime—that person does not bear any criminal liability.

Consider the following example: suppose John, a twenty-five-year-old man, has a twenty-year-old sister named Jane. When John was eighteen years old, he developed an affinity for drinking beer, but had trouble finding a retail establishment willing to violate the law to sell it to him.[1] One day, John went to a convenience store he believed would sell him alcohol. John calmly retrieved a six-pack of beer and placed it on the counter. The clerk noticed that John appeared underage, but he said nothing. John routinely returned to that store to purchase beer in violation of underage alcohol purchasing laws.[2]

Jane is well aware that John bought alcohol as an underage person and wants to be able to do the same. Jane tells John that she needs to get a few snacks and other items from the same convenience store John frequented. He suspects that Jane might want to buy beer as well but says nothing. John takes her to the store and drops her off there. Jane tells John that she is meeting a friend there and will get a ride home from her. After John leaves, Jane purchases beer from the store. Unbeknownst to Jane, a police officer is in the store at the time and notices the illegal sale. The store owner is charged with the selling of beer to someone under the age of twenty-one.

There is nothing unusual about the story at this point. But, now let us assume that John is also charged with the same crime—the selling of alcohol to an underage individual. The premise of the charge is that John is a principal to the crime in that he either aided and/or otherwise procured the offense to be committed.[3] Despite John's lack of

---

[1] *See, e.g.,* FLA. STAT. § 562.11(1)(a) (2022) (stating that, "[a] person may not sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or permit a person under 21 years of age to consume such beverages on the licensed premises").

[2] *Id.*

[3] *See* FLA. STAT. § 777.011 (2022) (stating that anyone who "aids, abets, counsels, hires, or otherwise procures such offense to be committed . . . is a principal in the

knowledge of Jane's plans or any involvement or planning, John is charged as a principal simply because he knew that this particular convenience store, in the past, had served alcohol to underage individuals.

Most people would likely scoff at the idea that someone so unaffiliated and unconnected with a crime could be held just as criminally responsible as the actual perpetrator of the crime. John's culpability exists solely because of previous knowledge he had about a third party. Without a nexus to the actual criminal behavior, including any knowledge of the crime to be committed, it seems patently unfair to criminalize his behavior at all, or at the very least on the same level as the store owner who actually sold the alcohol.

This is exactly the scenario, however, that could unfold at university[4] fraternities.[5] The public's perception of university fraternities is one of constant partying and alcohol abuse.[6] The allure of social acceptance in the formative early adult years compels some incoming pledges to accept otherwise unacceptable pain and humiliation.[7] To combat this problem, forty-three states have passed legislation specifically criminalizing hazing among university students.[8] Hazing can lead to significant mental distress, physical pain, embarrassment, humiliation, or at its worst, death.[9] Even though hazing remains at an

---

first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense").

[4] The term "university" is used throughout this Article to denote all institutions of undergraduate higher education, including colleges, junior colleges, state colleges, and technical colleges.

[5] While hazing exists in a wide variety of arenas, both inside and outside universities, this Article will focus its analysis solely on hazing within exclusively social fraternities on campuses, which includes both fraternities and sororities. *See generally* A. Catherine Kendrick, *Ex Parte Barran: In Search for Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407 (2000) (noting that hazing is "closely linked with college fraternities").

[6] Shane Kimzey, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 461 (1997) (noting the stereotypical Animal House depiction of alcohol-infused parties "holds true for many people").

[7] Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1115 (La. Ct. App. 1999).

[8] *States With Anti-Hazing Laws*, STOPHAZING, https://stophazing.org/policy/state-laws (last visited Oct. 19, 2022).

[9] *See* Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 418 (2014) (noting that hazing can involve verbal or psychological abuse in addition to humiliating sexual acts); *see also* William C. Terrell, *Pledging to Stay Viable: Why Fraternities and Sororities Should Adopt*

epidemic level among university students, prosecutors rarely charge perpetrators with hazing.[10] One scholar has suggested that stronger criminal penalties should be enacted for the fraternal organizations and their host institutions, given the influence they have over fraternity operations.[11]

No one seriously contends that students who physically harm others through hazing should be immune from prosecution. However, small steps have been taken to legislatively expand the universe of those who could be charged with hazing, such as holding those responsible who conspire to execute a hazing incident or aid those who haze.[12] If those in authority work toward ending the unnecessary and often debilitating hazing rituals embedded in university fraternities, a trickle-down effect could eventually change the culture within those organizations.

In *State v. Petagine*,[13] the Florida District Court of Appeals introduced the possibility of prosecution for any student fraternity president.[14] In *Petagine,* for the first time in any recorded judicial opinion, the court held that a university fraternity president who knew of a party where alcohol would be served could potentially be guilty of principal to hazing.[15] Petagine did not plan the event at which the hazing incident occurred, did not intend to engage in alcohol-induced hazing, and was involved in attempts to inform all members to refrain from all hazing behaviors.[16] Further, Petagine was not involved in the hazing

---

Arbitration as a Response to the Litigation Dilemma, 43 U. MEM. L. REV. 511, 521 (2012) (noting that litigation has skyrocketed because of the number of hazing related deaths).

[10] Skylar Reese Croy, *When the Law Makes the Lords of Discipline Actual Lords: Lessons on Writing Criminal Hazing Statutes*, 39 U. LA VERNE L. REV. 224, 226 (2018).

[11] Justin J. Swofford, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, 45 J.C. & U.L. 296, 321-22 (2020) (arguing that criminal fines should not be statutorily capped and strict liability should be imposed for criminal hazing). *Id*. at 325.

[12] WASH. REV. CODE § 28B.10.901(1) (2022) (making it illegal to "conspire to engage in hazing"); TEX. EDUC. CODE § 37.152(a)(2) (2022) (making it illegal when a person "solicits, encourages, directs, aids, or attempts to aid" hazing).

[13] 290 So. 3d 991 (Fla. Dist. Ct. App. 2020).

[14] *Id.*

[15] *Id.* at 996.

[16] *Id.* at 994-95, 999. Specifically, Petagine was never alleged to have pressured or coerced pledges to consume alcohol. *Id.* at 1002-03.

because he did not attend the party where the alleged hazing took place.[17] Despite these facts, the court found that a charge of hazing was viable if the prosecution was able to prove all of these facts laid out in its statement of particulars.[18]

Just as the idea in the introductory scenario of John's guilt for the sale of alcohol to Jane might seem outlandish, Petagine's potential criminality is equally suspect. The *Petagine* court seemingly made fraternity presidents responsible for acts outside their knowledge and presence.[19] While this ruling is only binding authority in Florida, fraternity presidents across the country should be aware that the principal to hazing theory could easily become the rule in any other state with an anti-hazing statute.[20] Because fraternity presidents can be principals to hazing, the position of fraternity leadership is a perilous one. Under the reasoning of *Petagine,* any fraternity president who unwittingly allows an event to take place where hazing occurs could face felony hazing charges.[21] In light of this potential for criminal exposure, this Article recommends that any fraternity president (and especially those in the state of Florida) must be hyper-vigilant on best practices, including subscribing to a risk-averse strategy of organizational management. This could include making significant cultural changes to the operation of the group, including but not limited to banning off-campus parties and the practice of pairing older members with new incoming members. If the alternative to implementing these changes is jail time, fraternity presidents simply have no other viable options.[22]

Part II of this Article explores the history of hazing in fraternities in the United States, including a discussion of the root causes of

---

[17] *Id.* at 995.
[18] *Id.* at 996.
[19] *Id.* (holding that the State "presented sufficient facts that Mr. Petagine committed felony hazing by aiding and counseling actions and situations that recklessly or intentionally endangered the physical health or safety of the victim, which resulted in his death").
[20] The First District Court of Appeals in Florida is the only District Court of Appeals ("DCA") to render a dispositive ruling on this issue and thus is binding on all trial courts in Florida. *See* Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (holding that a single DCA decision binds all trial courts in the state where no other DCA or Supreme Court case on the issue exists).
[21] *Petagine*, 290 So. 3d at 996.
[22] Although this Article is confined to an exploration of social fraternities, other clubs and organizations engaging in similar hazing behavior would likely be equally affected by an expansive principal to hazing rule.

the harms that thousands of students experience every year. Part III focuses on *Petagine*, including its rationale and potential errors in its analysis. Part IV analyzes the state of anti-hazing statutes in the U.S., including a summary of the overall trends in hazing laws leading to the expansion of the categories of persons potentially responsible for hazing.[23] Finally, Part V concludes with a list of recommended practices in light of the risks fraternity presidents face.[24]

II. BACKGROUND

Hazing on university campuses is an endemic problem in the United States.[25] While hazing has become more common, accounts of hazing in the U.S. date as far back as the seventeenth century.[26] With fraternity membership growing, opportunities for hazing are more prevalent.[27] As of 2016, the total undergraduate membership in university fraternities numbered at least 385,000 students, a fifty percent increase from the previous ten years.[28] Nearly seventy-three percent of all members in social fraternities reported at least one occurrence of hazing behavior.[29]

Hazing is traditionally defined as any activity or conduct that is expected from a new pledge that "humiliates, degrades, abuses, or endangers" a person in an organizational setting.[30] An important element of hazing that distinguishes it from other forms of abuse is that

---

[23] This Article addresses only the application of *criminal* responsibility for hazing and does not explore civil liability for such incidents.

[24] For ease of discussion, this Article uses the word "president" in the place of all leadership positions whose officeholders make decisions that could potentially encourage or foster a hazing environment.

[25] Elizabeth J. Allan & Mary Madden, *The Nature and Extent of College Student Hazing*, 24 INT'L J. ADOLESCENT MED. HEALTH 83, 89 (2012) (finding that hazing among American university students is "widespread").

[26] Helene Bruckner, *Students Fall Victim to Hazing Epidemic: Unity at What Cost?*, 34 TOURO L. REV. 459, 466 (2018) (noting that hazing has been reported as far back as the year 1657 at Harvard University).

[27] Katie Reilly, *College Students Keep Dying Because of Fraternity Hazing. Why is it So Hard to Stop?*, TIME (Oct. 11, 2017, 6:00 AM), https://time.com/4976836/fraternity-hazing-deaths-reform-tim-piazza/.

[28] *Id.*

[29] Elizabeth J. Allan & Mary Madden, *Hazing in View: College Students at Risk*, NAT'L STUDY OF STUDENT HAZING (Mar. 11, 2008), https://stophazing.org/wp-content/uploads/2020/12/hazing_in_view_study.pdf.

[30] Allan & Madden, *supra* note 25, at 83.

the victim might be willing to participate.[31] Many victims of hazing knowingly consent to abuse by older members of the group as a way to prove their worthiness for the fraternity.[32] Many students weigh the costs and benefits of hazing and consciously prefer to endure an act of hazing into the group rather than not have a sense of belonging and fit.[33]

A culture of hazing is prevalent in American universities.[34] The message is clear that new members of a fraternity need to withstand the sometimes horrific abuses to be truly incorporated within the group.[35] A cycle of subservience develops within the group—new members who lost their dignity from a hazing incident become future perpetrators in an attempt to restore that lost dignity.[36] Those who participate in hazing do not necessarily have malicious intent; indeed, many perpetrators of hazing see hazing as a positive way to promote intergroup unity.[37]

Another cultural concern is the nonchalant view towards hazing, which is reflective of a mindset that it is a minor inconvenience or a matter of having a little light-hearted fun. Both new and initiated fraternity members may internalize hazing as something that is non-abusive and perhaps even funny. In fact, there are more students who perceive positive outcomes from hazing than those who perceive negative outcomes.[38]

There are numerous news reports of hazing within organizations that cast these incidents in a humorous tone that belies the underlying dangers. For example, a recent news article discussed National Football League ("NFL") quarterback Tom Brady and his propensity to engage in the hazing of rookie football players for the New England

---

[31] Bruckner, *supra* note 26, at 485 (reporting that some students are "happy and willing to undergo hazing" at the time).
[32] *Id.* at 483-84 (noting that the culminating result of hazing is recognized acceptance through an initiation ceremony).
[33] *Id.* at 483.
[34] Allan & Madden, *supra* note 25, at 89.
[35] Nicole Somers, *College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J. COLL. & U.L. 653, 654 (2007).
[36] Marc Edelman, *Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act on School Personnel*, 25 PACE L. REV. 15, 18 (2004).
[37] Allan & Madden, *supra* note 25, at 83.
[38] Allan & Madden, *supra* note 29, at 26.

Patriots.[39] According to the story, it was expected that rookies would pay the bill at expensive restaurants for players like himself.[40] Brady then allegedly ordered exorbitantly priced wine, took only one sip, and then left, forcing rookies to pay large sums of money.[41] The story's overall tone and tenor is one of jest, with the author writing that Tom Brady is "one of the best at hazing rookies."[42] Another article jokingly advises athletes as to how to "properly haze your rookies."[43] The article purports to offer a "fun and effective guide" for hazing, which includes acts of embarrassment and humiliation.[44] Admittedly, these acts of hazing do not involve physical pain, excessive alcohol consumption, or the performance of sexual acts, but nonetheless still constitute unwanted and unnecessary embarrassment as a precondition to be fully accepted on the team.[45]

Hazing can involve a wide range of abusive conduct, including mental, emotional, social, and physical harm.[46] It includes any behavior or act that causes discomfort, undue stress, humiliation, or embarrassment to a new member of the fraternity.[47] In 2008, the most frequently reported hazing behaviors included drinking games, embarrassing coerced singing or chanting in public places, forced social exclusion, alcohol consumption, sleep deprivation, or being yelled

---

[39] John Breech, *Tom Brady Had a Savage Way of Hazing Patriots Rookies, According to One of His Ex-Teammates in New England*, CBS SPORTS (June 22, 2022, 12:06 PM), https://www.cbssports.com/nfl/news/tom-brady-had-a-savage-way-of-hazing-patriots-rookies-according-to-one-of-his-ex-teammates-in-new-england/.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Dan Carson, *How to Properly Haze Your Rookies*, BLEACHER REP. (Aug. 14, 2013), https://bleacherreport.com/articles/1737929-how-to-properly-haze-your-rookies.

[44] *Id.* This included dressing up in costumes, getting uniform haircuts, and requiring players to carry baby dolls. *Id.*

[45] *Id.* (stating that, "as long as there are rookies and pledges in the world, they will be asked to humble themselves and throw on a Smurf outfit—for the team, of course").

[46] Nicholas Bittner, *A Hazy Shade of Winter: The Chilling Issues Surrounding Hazing in School Sports and the Litigation That Follows*, 23 JEFFREY S. MORRAD SPORTS L.J. 211, 235 (2016).

[47] Bruckner, *supra* note 26, at 477-78.

or screamed at by other members.[48] Hazing involving sex acts were more commonly associated with fraternities than sororities.[49] Thirty-eight percent of responses from a hazing survey involved alcohol abuse or consumption in some way.[50] When only social fraternities were considered, that number jumped to seventy-nine percent.[51] This is not surprising since students are drawn to the idea that fraternities offer the best parties on campus and an atmosphere where alcohol is more easily accessible.[52]

The statistics on hazing outcomes are startling. More than 200 students enrolled in a university have died as a result of hazing incidents since 1838, generally from excessive alcohol consumption.[53] This trend continues unabated, with at least forty hazing deaths from 2007 to 2017.[54] An additional seventeen more deaths have been reported from 2019 to 2021.[55] There has been at least one hazing death reported every year from 1959 to 2021.[56] Eighty-two percent of all hazing deaths involve alcohol, a disturbingly high percentage.[57] More concerning than the percentage of alcohol-related hazing deaths is the relative lack of awareness of the dangers of alcohol. Only twenty-nine percent of fraternity leaders reported that they are concerned with

---

[48] Allan & Madden, *supra* note 29, at 17. This was a study of 9,067 college students from fifty-three postsecondary institutions who reported at least one hazing behavior. *Id.* at 8.

[49] *Id.* at 18.

[50] *See id.* at 17. Specifically, twenty-six percent of respondents reported participating in a drinking game and twelve percent reported drinking alcohol to the point of getting sick or passing out. *Id.*

[51] *See id.* at 19. Fifty-three percent of fraternity respondents reported participating in a drinking game and twenty-six percent reported drinking alcohol to the point of getting sick or passing out. *Id.*

[52] Reilly, *supra* note 27.

[53] Hank Nuwer, *Author Page, Hazing Deaths Database*, HANK NUWER UNOFFICIAL HAZING CLEARINGHOUSE, https://www.hanknuwer.com (last visited Oct. 19, 2022).

[54] *Hazing Deaths on American College Campuses Remain Far Too Common,* THE ECONOMIST (Oct. 13, 2017), https://www.economist.com/graphic-detail/2017/10/13/hazing-deaths-on-american-college-campuses-remain-far-too-common.

[55] Hank Nuwer, *U.S. Hazing Deaths Database Part 2: 2000-2022*, HANK NUWER UNOFFICIAL HAZING CLEARINGHOUSE, https://www.hanknuwer.com/hazing-destroying-young-lives (last visited Oct. 19, 2022).

[56] *Id.*

[57] *Alcohol Abuse on College Campuses*, SKYWOOD RECOVERY, https://skywoodrecovery.com/alcohol-abuse-on-college-campuses (last visited Oct. 19, 2022).

alcohol overconsumption by pledges.[58] The logical conclusion that can be drawn here is that fraternity members may not properly appreciate the dangers of alcohol-related hazing. The disconnect between the high prevalence of alcohol in hazing incidents and the low levels of concern from fraternity leaders likely serves as one reason that alcohol-related deaths are occurring more frequently than deaths from physical beatings or abuse.

Clearly, hazing on university campuses is a problem that deserves attention. It is certainly appropriate for the members who inflict harm on impressionable pledges to be punished criminally, even if consent to the harm was given. As noted above, pledges have consistently shown to be unwilling or unable to police this behavior on their own—the coercive social pressures are too great to resist for a wide swath of university-bound students. The bigger question posed by this Article is whether and to what degree fraternity presidents should be punished when they are non-participants who had no knowledge of the hazing nor had any intent to encourage, entice, aid, or support the hazing.

III. STATE V. PETAGINE

The most expansive view of hazing culpability for non-participants lies in the Florida First District Court of Appeals case of *State v. Petagine*.[59] No other statute or case involving hazing goes further to criminalize non-participant behavior than this one. In *Petagine*, the court was tasked with deciding if Florida's hazing statute applied to the case of a fraternity president who was not involved with perpetration of the crime itself.[60] This case was on review on a motion to dismiss, and therefore all of the facts alleged by the prosecution were presumed true, and all inferences were construed in a light most favorable to the state.[61] Essentially, the court is saying that if these facts under these conditions were found to be true, any similarly situated fraternity president would be held responsible as a principal to hazing.

---

[58] *Id.*
[59] *See generally* State v. Petagine, 290 So. 3d 991 (Fla. Dist. Ct. App. 2020).
[60] *Id.* at 993-96.
[61] *Id.* at 993.

Anthony Petagine was the president of Pi Kappa Phi Fraternity ("PKP") at Florida State University.[62] In 2017, PKP held a "Reveal" ritual where incoming pledges were assigned big brothers and were required to attend.[63] That particular year, the Reveal ritual was a party scheduled to be held at an off-campus site.[64] In previous years, this event had led to pledges becoming excessively intoxicated—in fact, this was the expectation.[65] Importantly, Petagine did not attend the party, and the court's opinion never asserts that he either had knowledge of any pledge's plan to become intoxicated or knowledge that any pledge would be pressured into drinking.[66] More specifically, the court's opinion lacks any statement that he had any knowledge of this particular hazing incident or that he was involved in any of the planning, discussion, or implementation of the hazing.[67] Just one week earlier, Petagine attended a meeting during which the dangers of drinking were discussed, with an express instruction that no pledges would be forced to consume alcohol.[68] Specifically, the statement of particulars acknowledged that Petagine was "involved in 'discussing mitigation of risk strategies and instructions that the pledges would not be forced to drink.'"[69]

Petagine's only act that gave rise to the hazing charge was that he made the decision to allow liquor at the party.[70] That decision, along with the knowledge that underaged individuals could possibly consume alcohol, violated state law that prohibits the service of alcohol to those under twenty-one.[71] The court shoehorned this into the definition of hazing, noting that, "underage drinkers are clearly more likely to become dangerously intoxicated in the context of a fraternity party in which that kind of behavior is encouraged and allowed."[72]

Tragically, the victim in this case was given a bottle of bourbon by his newly minted big brothers, who encouraged him to drink all of

---

[62] *Id.* at 994.
[63] *Id.*
[64] *Id.* at 995.
[65] *Id.*
[66] *Id.* at 994-95.
[67] *Id.* at 995.
[68] *Id.* at 994.
[69] *Id.* at 999 (Bilbrey, J., dissenting).
[70] *Id.* at 995-96.
[71] *Id.*
[72] *Id.* at 996.

it.[73] The victim's blood alcohol level was .367 grams per deciliter above the legal limit.[74] The victim died as a result of excessive intoxication, and Petagine was charged as a principal to his hazing death.[75] The statute in Florida prohibiting hazing states:

> (1) As used in this section, the term "hazing" means any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to: (a) Initiation into any organization operating under the sanction of a postsecondary institution; (b) Admission into any organization operating under the sanction of a postsecondary institution; (c) Affiliation with any organization operating under the sanction of a postsecondary institution; or (d) The perpetuation or furtherance of a tradition or ritual of any organization operating under the sanction of a postsecondary institution. The term includes, but is not limited to, pressuring or coercing the student into violating state or federal law; any brutality of a physical nature, such as whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug, or other substance, or other forced physical activity that could adversely affect the physical health or safety of the student; or any activity that would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student. The term does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective. (2) A person commits hazing, a third degree felony, punishable as provided in s. 775.082 or s. 775.083, when he or she intentionally or recklessly commits, solicits a person to commit, or is

[73] *Id.* at 995.
[74] *Id.* In Florida, the blood alcohol limit for purposes of driving under the influence is 0.08. *See* FLA. STAT. § 316.193(1)(b) (2020).
[75] *Petagine*, 290 So. 3d at 995.

> actively involved in the planning of any act of hazing as defined in subsection (1) upon another person who is a member or former member of or an applicant to any type of student organization and the hazing results in a permanent injury, serious bodily injury, or death of such other person.[76]

Petagine's conduct clearly falls outside the ambit of this statute, despite the court's attempt to argue otherwise.[77] Subsection (1) of Florida Statute 1006.63 requires an action or situation that endangers the health of a student for the purpose of initiation.[78] Here, Petagine's action of lifting the liquor ban was not for the purpose of initiation and, furthermore, is not one contemplated by the statute.[79] The examples of hazing include "pressuring or coercing" a student to violate the law, the "forced" consumption of alcohol, or "extreme embarrassment."[80] Petagine did not pressure or force anyone to do anything; rather, he simply allowed alcohol to be present.[81] And, he specifically was involved in the discussion encouraging students not to drink.[82] Petagine did not lift the liquor ban for the purpose of initiation into the fraternity; it simply was done to allow students the option to drink.[83] He

---

[76] FLA. STAT. § 1006.63(1)-(2) (2020). This statute was held to be constitutional by the Florida Supreme Court. *See* State v. Martin, 259 So. 3d 733, 735 (Fla. 2018). In *State v. Martin*, the defendant was charged with actively participating in an alleged hazing incident involving an intense physical assault. *Id.* at 737. The court held that the statute that criminalizes First Amendment-protected speech or conduct was not facially overbroad. *Id.* at 740.

[77] *Petagine*, 290 So. 3d at 995-96.

[78] FLA. STAT. § 1006.63(1) (2020). Initiation into, admission into, affiliation with a postsecondary organization, or perpetuation or furtherance of a tradition or ritual with a postsecondary organization are hereinafter termed "initiation" for ease of the reader, given that the differences in those terms are irrelevant for the analysis herein. *Id.*

[79] *Id.*

[80] *Id.*

[81] *Petagine*, 290 So. 3d at 1001.

[82] *Id.* at 999. Albeit in a civil case, a court in Louisiana held that no liability was present for the fraternity organization where the dangers of hazing were routinely discussed and prohibited, and no one from the national organization was present at the hazing nor had any knowledge of the incidents. *See* Walker v. Phi Beta Sigma Fraternity (Rho Chapter), 706 So. 2d 525, 529 (La. Ct. App. 1997).

[83] *See Petagine*, 290 So. 3d at 999, 1002 (in his dissent, Judge Bilbrey noted that it was never alleged that Petagine ordered the victim to drink to be initiated into the fraternity).

also did not lift the ban to pressure or coerce a student to violate the law—there was no pressure imposed and certainly no evidence of any intent on the part of Petagine to expressly or tacitly encourage a student to violate Florida's underage drinking laws.[84]

Subsection (2) of Florida Statute 1006.63 requires that the state must prove that the defendant either "intentionally or recklessly commits, solicits a person to commit, or is actively involved in the planning" of a hazing act "upon another person."[85] Petagine did none of these. The hazing act was the coercion and consumption of the bourbon, and Petagine played no part in that.[86] The dissenting opinion notes that Petagine did not order the forced consumption of the bourbon, but had he done so, that would have given rise to a hazing charge.[87] The phrase "upon another person" implies that the hazing must be directly connected to the person, as the drinking of bourbon clearly was.[88] The lifting of the liquor ban was not "upon another person," as required by the statute.[89] The phrase "upon another person" implies a targeted intent towards the victim; instead, Petagine's act was a generically applicable party policy put in place for all of-age attendees.[90]

Beyond this, it is clear when the statute is read as a whole, the true impact of the statute is to prohibit traditional hazing acts such as forced consumption or direct physical attacks.[91] The illustrative list of hazing acts makes this clear—all of the listed acts involve direct contact with the victim, which led directly to the harm.[92] Petagine's action was quite attenuated from the perpetrators' actions and no allegation of an intent to harm was mentioned by the court. The legislative history behind the bill authorizing Florida's hazing statute notes that the statute's intent was to prosecute those who "were known to have planned the hazing or recruited others to participate in hazing but who could not otherwise be identified as having actively participated in the

---

[84] *Id.* at 999.
[85] FLA. STAT. § 1006.63(2) (2022).
[86] *Petagine*, 290 So. 3d at 995.
[87] *Id.* at 999.
[88] FLA. STAT. § 1006.63(2) (2022).
[89] *Id.*
[90] *Id.*
[91] *See generally* FLA. STAT. § 1006.63 (2022).
[92] FLA. STAT. § 1006.63(1) (2020).

act of hazing itself."[93] Again, Petagine neither planned the hazing nor recruited others for the hazing.[94] Had the Legislature wanted to criminalize creating a generalized, non-specific risk of hazing, it easily could have done so.

The court appears to realize that a direct hazing charge is unlikely under this set of facts.[95] However, it is unclear whether the court relied solely on a principal to hazing theory as the basis for the charge.[96] The court states, "Petagine committed felony hazing under the principal theory" and "Petagine committed felony hazing by aiding and counseling actions and situations."[97] Those assertions appear to be the basis for its ruling; however, the court also notes that Petagine's action of lifting the liquor ban by itself "establishe[d] . . . a prima facie case of felony hazing."[98] As explained above, this argument is not one that appears to be supported by the statute, and thus this Article operates under the presumption that the principal theory was the one relied upon.[99]

The principal theory imposes criminal liability on those who aid the commission of a listed crime.[100] Florida's principal statute provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as

---

[93] PRO. STAFF COMM. CRIM. JUST., BILL ANALYSIS & FISCAL IMPACT STATEMENT, CS/SB 1080, at 3 (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/1080/Analyses/2019s01080.cj.PDF.
[94] *See generally Petagine*, 290 So. 3d 991.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 995-96.
[98] *Id.* at 996.
[99] In this case, the state pursued a principal theory of hazing, further supporting this proposition. *Id.* at 995.
[100] *See* Horton v. State, 442 So. 2d 1064, 1065-66 (Fla. Dist. Ct. App. 1983) (holding that aiding and abetting, which are listed possibilities to qualify as a principal in the first degree, requires an intent to participate in the crime); *see also* Jackson v. State, 18 So. 3d 1016, 1026 (Fla. 2009) (holding that, in terms of Florida's principal statute, "participation with another in a common criminal scheme renders the defendant guilty of all crimes committed in furtherance of that scheme").

> such, whether he or she is or is not actually or constructively present at the commission of such offense.[101]

The crux of the court's argument is that Petagine's action of lifting the liquor ban aided and/or allowed the hazing to occur.[102] Essentially, Petagine's actions of allowing liquor to be present at the party gave the perpetrator the opportunity to encourage the victim to drink.[103] But for this decision, the bourbon would not have been at the party.[104]

This argument is flawed in that it fails to consider how Petagine's actions aided the hazing violation. Under these facts, the hazing incident is either (1) one involving the pressuring or coercing the student into a violation of law or (2) the forced consumption of alcohol.[105] Petagine intended neither of these to happen.[106] Principal liability is something more than "but for" causation—it requires an intent to participate in the crime.[107] Crimes that were not within the scope of a criminal plan "exonerate the nonparticipant from acts committed by a co-felon."[108] Petagine could not and did not intend to aid the perpetrator (the big brother) by pressuring the victim to consume alcohol illegally.[109]

---

[101] FLA. STAT. § 777.011 (2022).
[102] *Petagine*, 290 So. 3d at 996.
[103] *Id.* at 995.
[104] This is conceded to be true because the case was decided on a motion to dismiss, which entitles the state to the most favorable construction of the evidence. *Id.* at 993-94. In reality, it is certainly possible that a liquor ban would not have dissuaded anyone from bringing the bourbon to the party.
[105] FLA. STAT. § 777.011(1) (2022).
[106] *Petagine*, 290 So. 3d at 997-1003 (Bilbrey, J., dissenting). Importantly, the majority opinion does not dispute that Petagine did not intend either of these contentions; instead, the majority rests its conclusion on Petagine's intent to violate state law. *Id.* at 996.
[107] *Jackson*, 18 So. 3d at 1026 (holding that independent acts of a purported principal remove principal liability in instances, "(1) which the defendant did not intend to occur, (2) in which the defendant did not participate, and (3) which was outside of, and not a reasonably foreseeable consequence of, the common design or unlawful act contemplated by the defendant"); *see also* Rosemond v. United States, 572 U.S. 65, 76 (2014) (stating that, under the federal aiding and abetting statute, "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission").
[108] *Jackson*, 18 So. 3d at 1026.
[109] *Petagine*, 290 So. 3d at 1001 (noting that the statement of particulars did not allege any peer pressure placed on the victim by Petagine to violate the law).

Perhaps Petagine made a foolish decision to allow alcohol at a university organization's party, but that in no way gives rise to an inference that he wanted pledges to be pressured to drink. Petagine had absolutely nothing to do with the victim's forced consumption of alcohol—again, he did not aid, abet, or counsel the perpetrator to do so, and no allegation in the statement of particulars indicated he desired that result.[110] If evidence existed that Petagine intended to participate in or increase the likelihood of alcohol-related hazing, perhaps the principal theory would be viable.[111] That simply was not the case here—Petagine made a passive decision to allow alcohol to be served at the party without any intent whatsoever that someone underage—or any pledge—would drink. Indeed, Petagine did the opposite—he specifically was involved in informing pledges of their right not to drink.[112] Under these facts, it is a bridge too far to presume he actively desired the criminal hazing to occur.

While the statutory application of the principal theory of culpability is certainly questionable under these facts, it is undeniable that the analysis by the majority is defensible. Accepting a broad view of the mens rea required for guilt leads to the conclusion that Petagine and others similarly situated could very well face criminal charges. This opinion is not a rogue outlier that cannot be duplicated. While reasonable minds could disagree, the fact remains that other courts can use their own principal statutes to legitimately reach the same conclusion. The Florida Supreme Court denied certiorari and thereby failed to give guidance as to whether this is a cognizable criminal theory.[113] Consequently, fraternity presidents should be aware that prosecution and conviction for hazing are distinct possibilities for similar scenarios.

Interestingly, even the dissent in this case indicated that the principal theory could have been applied had the facts been slightly different. The dissent noted that the victim was not pressured or

---

[110] *See generally id.*

[111] Bittner, *supra* note 46, at 238 (noting that if a student assists in tasks such as "procuring the vehicles, the blindfolds, the keys to the field, or other elements used in the hazing incident," such students could bear criminal liability given that they took "substantial steps towards committing the crime"). Petagine did not assist in any tasks directly related to the hazing nor did he take a substantial step towards committing the crime of hazing. *See generally Petagine*, 290 So. 3d 991.

[112] *Id.* at 999.

[113] State v. Petagine, No. SC20-519, 2020 WL 4524716, at *1 (Fla. Aug. 5, 2020).

coerced to do anything but was merely encouraged to drink.[114] Without that prerequisite pressure, no one, including the big brother, violated the statute. Since there was no underlying hazing at all, Petagine could not possibly be a principal.[115] The dissent then states, "[t]herefore, without an allegation that another person or persons actually committed or attempted to commit a crime, there are insufficient allegations that Petagine was a principal to criminal hazing."[116] The inference is that had there been some underlying pressure sufficient to give rise to a hazing charge, Petagine's actions would have been enough to allow for a principal to hazing charge.

After the three-judge *Petagine* panel rendered its decision, the defendant later moved for rehearing en banc.[117] The motion was denied.[118] Judge Tanenbaum, concurring in the denial of the rehearing en banc, wrote a lengthy opinion expressing both procedural and substantive concerns with the defendant's motion.[119] Judge Tanenbaum referred to the trial court's decision as an "overzealous dismissal" for unduly requiring the prosecution to be "informative enough."[120] Judge Tanenbaum stated, "[t]he [hazing] statute affords the State a significant amount of leeway in deciding who should face criminal liability."[121] Judge Tanenbaum explained, "[t]he principal statute expands the scope of potential criminal liability even further."[122] Judge Tanenbaum then distilled the issue in the case down to a single question—was the defendant aware of the potential dangers that could occur at this party, regardless of any specific plan to haze?[123] Essentially, Judge Tanenbaum's view is that any danger that a fraternity president could have been aware of is enough to support a felony hazing charge.[124] And, under this rule, Judge Tanenbaum found that Petagine's knowledge of

---

[114] *Petagine*, 290 So. 3d at 1001.
[115] *Id.* at 1002.
[116] *Id.*
[117] State v. Petagine, 290 So. 3d 1106 (Fla. Dist. Ct. App. 2020).
[118] *Id.* at 1106.
[119] *Id.*
[120] *Id.* at 1115.
[121] *Id.*
[122] *Id.* at n.8.
[123] *Id.* at 1116-17.
[124] *Id.* at 1117 (Indeed, Judge Tanenbaum writes, "[c]an anyone doubt the high risk involved with a bunch of highly motivated young adult males congregating at an apartment on a Friday night with a bunch of liquor and a couple of strippers?").

prior big brother parties with easily accessible amounts of alcohol required a finding that Petagine could be held criminally liable.[125]

The key takeaway here is that all three judges on the panel, and at least one other judge en banc, seem to support principal culpability where a fraternity president allows alcohol at a party and where others commit hazing.[126] This holding should be a warning to anyone holding the office of fraternity president. Even though *Petagine* stands jurisprudentially alone in terms of this level of principal culpability, nothing restricts other courts or other states from reaching the same conclusion. Only those who are prepared to enact unpopular decisions and follow a risk-averse set of recommended practices should entertain the idea of becoming a fraternity president.

IV. STATE APPROACHES TO CRIMINALIZING HAZING

State approaches to the prohibition of hazing vary widely. Currently, forty-three of the fifty states have legislation that specifically criminalize higher education hazing.[127] Ideally, state statutes would be standardized to eliminate any confusion or ambiguity as to what constitutes criminal hazing.[128] Unfortunately, of those forty-three states, there are several differences that emerge; however, some common threads appear throughout all of the statutes. While the majority of state statutes do not textually support a conviction for conduct similar to Petagine's, a small minority of state statutes are arguably expansive enough to cover conduct beyond the actual hazing itself. Indeed, only one court—the *Petagine* court—has interpreted its hazing laws in such a way as to potentially criminalize the conduct of a fraternity president for an act of hazing that he had no knowledge of, no intent to further, and no part of the planning.[129]

---

[125] *Id.* at 1117-18.

[126] *See generally Petagine*, 290 So. 3d 991.

[127] *See* STOPHAZING, *supra* note 8 (noting that Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming have no anti-hazing statutes). Utah's hazing statute only criminalizes hazing in elementary or secondary schools and thus is not included in this analysis. UTAH CODE § 53G-9-601(9) (2022).

[128] Somers, *supra* note 35, at 679 (noting that courts need a clear definition that can be applied easily without confusion).

[129] *See generally Petagine*, 290 So. 3d 991.

This Article categorizes hazing into four main categories, grouped according to how each addresses non-participants. The first category—"Recklessly Endangers"—consists of thirty state statutes.[130] These states have hazing statutes that prohibit any conduct that recklessly endangers the health of a student for the purpose of initiation into or affiliation with a university organization. These statutes are the narrowest in terms of their potential coverage of non-participants. Most statutes within this category use the words "reckless" or "intentional" to describe the conduct that endangers the mental or physical health of a student for purposes of initiation.[131] Importantly, these statutes connect the two ideas—(1) the conduct that recklessly endangers

---

[130] *See, e.g.,* ARIZ. REV. STAT. § 15-2301 (2022); CAL. PENAL CODE § 245.6 (2022); COLO. REV. STAT. § 18-9-124 (2022); CONN. GEN. STAT. § 53-23a (2022); DEL. CODE tit. 14, § 9302 (2022); FLA. STAT. § 1006.63 (2022); GA. CODE § 16-5-61 (2020); 720 ILL. COMP. STAT. 5/12C-50 (2022); IOWA CODE § 708.10 (2021); KAN. STAT. § 21-5418 (2022); KY. REV. STAT. § 164.375 (2022); LA. REV. STAT. § 14:40.8 (2022); ME. REV. STAT. tit. 20-A, § 6553 (2022); MD. CRIM. LAW CODE § 3-607 (2021); MASS. GEN. LAWS ch. 269, § 17 (2022); MICH. COMP. LAWS § 750.411t (2022); MO. REV. STAT. § 578.365 (2021); NEB. REV. STAT. § 28-311.06 (2022); NEV. REV. STAT. § 200.605 (2022); N.H. REV. STAT. § 631:7 (2022); N.J. STAT. § 2C:40-3 (2022); OR. REV. STAT. § 163.197 (2022); 21 OKLA. STAT. § 21-1190 (2022); 18 PA. CONST. STAT. § 2802 (2021); 11 R.I. GEN. LAWS § 11-21-1 (2022); S.C. CODE § 59-101-200 (2022); TENN. CODE § 49-7-123 (2022); VA. CODE § 18.2-56 (2020); W. VA. CODE § 18-16-2 (2022); WIS. STAT. § 948.51 (2020). While most of these statutes include the words "recklessly" and/or "endanger," New Hampshire uses the phrase "any act." N.H. REV. STAT. § 631:7(I)(d) (2022). South Carolina uses the word "wrongful." S.C. CODE § 59-101-200(A)(4) (2022). California uses the term "likely to cause serious bodily injury." CAL. PENAL CODE § 245.6(b) (2022), while Illinois uses the words "knowingly requires." 720 ILL. COMP. STAT. 5/12C-50(a) (2022). These four states are placed in this category given that they do not include words/phrases such as "aid," "conspire," or "substantial risk" that define the other three categories. *See* N.H. REV. STAT. § 631:7(I)(d) (2022); S.C. CODE § 59-101-200(A)(4) (2022); CAL. PENAL CODE § 245.6(b) (2022); 720 ILL. COMP. STAT. 5/12C-50(a) (2022).

[131] *See* MASS. GEN. LAWS ch. 269, § 17 (2022) (defining hazing as "any conduct or method of initiation into any student organization . . . which willfully or recklessly endangers the physical or mental health of any student or other person"); WIS. STAT. § 948.51(1) (2022) (stating, "[n]o person may intentionally or recklessly engage in acts which endanger the physical health or safety of a student for the purpose of initiation or admission into or affiliation with any organization operating in connection with a school, college, or university").

the student must have been (2) directly linked to the initiation of the pledge.[132]

On their face, the Recklessly Endangers statutes appear to exclude non-participants who act recklessly but without a link to the initiation of the pledges. The statutes in this category focus on a direct connection between the conduct by the defendant and the physical harm that results.[133] Typically, the conduct is defined illustratively by the statute to include actions such as forced consumption of alcohol or physical attacks.[134] Further, the conduct must be done for the purpose of initiation or affiliation with the student organization.[135] The dictionary definition of "affiliate" is to "officially attach or connect (a subsidiary group or a person) to an organization."[136] Both the words "initiation" and "affiliation" refer to the process of entering or retaining membership in the group. Thus these statutes criminalize those persons who directly cause harm to students for the purpose of initial or continued membership. A person not involved in the hazing itself would not be covered by the express terms of these statutes.[137] Petagine's act of lifting the liquor ban was not for the purpose of initiation or affiliation of students into the group.[138] Instead, these statutes

---

[132] *See* KAN. STAT. § 21-5418(a) (2022) (defining hazing as "recklessly coercing, demanding, or encouraging another person to perform, as a condition of membership in a social or fraternal organization, any act which could reasonably be expected to result in great bodily harm, disfigurement or death or which is done in a manner whereby great bodily harm, disfigurement or death could be inflicted"); NEB. REV. STAT. § 28-311.06(1) (2022) (defining hazing as "any activity by which a person intentionally or recklessly endangers the physical or mental health or safety of an individual for the purposes of initiation into, admission into, affiliation with, or continued membership with any organization").

[133] *See generally* McKenzie v. State, 748 A.2d 67, 73 (Md. Ct. Spec. App. 2000) (holding that, for purposes of Maryland's anti-hazing statute, "'[a] person who hazes a student so as to cause serious bodily injury' is the only person reached under the statute").

[134] *See generally* DEL. CODE tit. 14, § 9302 (2022); MASS. GEN. LAWS ch. 269, § 17 (2022).

[135] *See generally* COLO. REV. STAT. § 18-9-124(2)(a) (2022); CONN. GEN. STAT. § 53-23a(a)(1) (2022).

[136] *Affiliate*, OXFORD ENG. DICTIONARY (2d ed. 1989).

[137] *McKenzie*, 748 A.2d at 79 ("Even if a group member observes such an act or situation from the sidelines, it is unlikely he would be charged under the statute, if he were truly a non-participant.").

[138] *See Petagine*, 290 So. 3d at 996 (noting that Petagine lifted the liquor ban "to allow liquor at the party"). The court's opinion is silent on whether Petagine's intent was to use liquor for the purposes of initiation or affiliation. *Id*.

focus on other conduct—the actual activity that directly causes the hazing.

There are six states whose statutes fall in the "Substantial Risk" category.[139] This category of hazing statutes requires the creation of a substantial risk of physical injury. These statutes expand the zone of coverage for hazing, making more persons susceptible to criminal prosecution. The states in the Substantial Risk category criminalize conduct that not only recklessly endangers or directly causes the harm, but also prohibits conduct that increases the risk that the harm might occur, even if the defendant is not the one that triggers the harm.[140] Typically, the term "substantial risk" is not defined statutorily.

It is possible that a fraternity president's lackadaisical approach to governance or irresponsible decision making could create the substantial risk needed for a conviction. The Substantial Risk statutes do not state that the defendant must be the person doing the actual hazing—the conduct must create a risk which then causes the injury.[141] While it is not clear whether the act of lifting a liquor ban for a fraternity party known to be conducive to hazing activity in the past creates a substantial risk, it is certainly arguable.

The closest case to the *Petagine* scenario, *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*,[142] was a civil case in New York.[143] The court held that a claim against the owner of a fraternity house was cognizable if the owner had constructive knowledge of recurring dangerous activities and failed to control them.[144] While the owner of a fraternity house does not possess the same level of authority over fraternity members as its president does, the owner's constructive knowledge parallels what Petagine should have known was going to

---

[139] *See, e.g.,* IND. CODE § 35-42-2-2.5 (2022); MINN. STAT. § 121A.69 (2022); MISS. CODE § 97-3-105 (2022); N.Y. PENAL LAW § 120.16 (2022); N.D. CENT. CODE § 12.1-17-10 (2021); OHIO REV. CODE § 2903.31 (2022).

[140] *See* IND. CODE § 35-42-2-2.5(a) (2022) (requiring that an act be performed that "creates a substantial risk of bodily injury"); N.D. CENT. CODE § 12.1-17-10 (2021) (prohibiting hazing when a person "willfully engages in conduct that creates a substantial risk of physical injury to that other person or a third person").

[141] *See generally* MISS. CODE § 97-3-105(1) (2022) (stating that the person accused of hazing must, "intentionally or recklessly engage in conduct which creates a substantial risk of physical injury to such person or a third person and thereby causes such injury").

[142] 255 A.D.2d 781, 782 (N.Y. App. Div. 1998).

[143] *Id.*

[144] *Id.* at 782.

occur at the party.[145] However, *Oja* involved the lower threshold of a civil claim and procedurally gave all favorable inferences to the plaintiff.[146] Whether *Oja* translates to a criminal case's higher burden of proof is unclear.

The third category—the "Conspire" states—expressly make it illegal to "conspire" to engage in or to commit hazing.[147] The "Conspire" category criminalizes actors who do not actively haze the victim and is thus broader than those states within the "Recklessly Endangers" or "Substantial Risk" categories. Persons can be guilty of conspiracy to commit a crime without committing the underlying offense itself.[148] So, the "conspire" language used in these statutes is simply duplicative and not, in fact, any broader than what the other states might prohibit.[149] However, including conspiratorial behavior in the statute could signal to prosecutors a desire to aggressively charge non-participants with a connection to the hazing incident. Regardless, Petagine's conduct certainly does not give rise to a conspiracy charge, given that there is no allegation that he made his decision in concert with the hazing perpetrators.[150]

The final category contains "Aiding and Abetting" statutes with the broadest language that expands the universe of possible criminal actors the furthest. The Aiding and Abetting category contains the statutes from five states.[151] Both North Carolina and Vermont prohibit

---

[145] *Petagine*, 290 So. 3d at 1117 (implying that Petagine must have had enough information to know what he did wrong).
[146] *Id.*
[147] IDAHO CODE § 18-917(1) (2022) (stating that, "[n]o student . . . shall intentionally haze or conspire to haze");WASH. REV. CODE § 28B.10.901(1) (2022) (stating that, "[n]o person, or other person in attendance at any public or private institution of higher education, or any other postsecondary educational institution, may conspire to engage in hazing or participate in hazing of another").
[148] John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties?*, 66 WASH. & LEE L. REV. 1881, 1904 (2009) (stating that because conspiracy is an inchoate offense, "[i]t does not require the completion of the substantive crime to be punishable by law").
[149] *Id.*
[150] Patrick Griffo, *Devil is in the Details: Interpreting Counterterrorism Legislation to Avoid an Unconstitutional Result*, 29 GEO. MASON L. REV. 907, 925 (2022) (noting that "conspiracy requires proof of an agreement between two or more persons to commit a crime").
[151] *See* ALA. CODE § 16-1-23 (2022); ARK. CODE § 6-5-201 (2022); N.C. GEN. STAT. § 14-35 (2022); TEX. EDUC. CODE § 37.152 (2022); VT. STAT. tit. 16, § 11 (30)(A) (2022).

aiding another student's attempt to haze.[152] Non-participants in the hazing are criminally responsible under these two statutes but only if the aid is done to further the commission of the hazing itself.[153] This appears to exclude those whose acts make it *indirectly* easier to commit a hazing act. Vermont's statute requires that the person must aid or participate "in these acts," while North Carolina maintains that the person cannot aid "in the commission of this offense."[154] Of course, the principal theory of criminal responsibility could still be an alternative means to charge potential hazers, despite the lack of unambiguous language permitting such a charge in the statute itself.

The next two states in this category—Alabama and Arkansas—use the word "acquiesce" in its hazing statutes.[155] The word "acquiesce" means to "accept something reluctantly but without protest."[156] Both of these statutes require that the acquiescing be either knowing or willful.[157] A fraternity president who knows that hazing is going to occur but does nothing to stop it is guilty under the most straightforward interpretation of these statutes.[158] This is the closest that a

---

[152] N.C. GEN. STAT. § 14-35 (2022) (stating that it is unlawful to "aid or abet any other student in the commission of this offense."); VT. STAT. tit. 16, § 11(30)(A) (2022) (stating that hazing includes "soliciting, directing, aiding, or otherwise participating actively or passively in these acts.").

[153] North Carolina's law states the aiding and abetting help a student "in the commission of this offense." N.C. GEN. STAT. § 14-35 (2022). Vermont's law states that the aiding occurs "in these acts." VT. STAT. tit. 16, § 11(30)(A) (2022).

[154] N.C. GEN. STAT. § 14-35 (2022); VT. STAT. tit. 16, § 11(30)(A) (2022).

[155] These statutes are nearly identical in their phrasing. *See* ALA. CODE § 16-1-23(c) (2022) (stating that "No person shall knowingly permit, encourage, aid, or assist any person in committing the offense of hazing, or willfully acquiesce in the commission of such offense"); ARK. CODE § 6-5-202(b)(1) (2022) (stating that "[a] person shall not knowingly permit, encourage, aid, or assist another person in committing the offense of hazing, or knowingly acquiesce in the commission of the offense of hazing").

[156] *Acquiesce*, OXFORD ENG. DICTIONARY (2d ed. 1989).

[157] ALA. CODE § 16-1-23(c) (2022); ARK. CODE § 6-5-202(b)(1) (2022).

[158] Interestingly, Alabama's anti-hazing statute does not preclude consent as a defense to hazing. *See* ALA. CODE § 16-1-23 (2022). In fact, the Alabama Supreme Court has expressly held that a victim who participates in hazing activities "of his own volition" relieves civil defendants of liability. Ex parte Barran, 730 So. 2d 203, 208 (Ala. 1998). Twenty-five states explicitly eliminate consent as a defense to hazing, due to the belief that hazing pressures are coercive to such an extent that it is impossible for such consent to be freely given. Brandon Chamberlin, Comment, *"Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925, 959 (2014).

statute's clear wording criminalizes behavior beyond the actual commission of the hazing offense. However, this does not apparently cover a situation where a fraternity president, like Petagine, is unaware that hazing would occur.[159] Petagine could not protest something he was not aware of, and in fact, was involved in measures to mitigate its likelihood.[160] However, any fraternity president in Alabama or Arkansas should be very aware that simply looking the other way from a potential hazing operation could lead to a hazing conviction under the plain terms of these statutes.

Finally, Texas's statute on hazing covers the widest swath of criminal conduct, possibly covering conduct similar to Petagine's.[161] Similar to North Carolina, Vermont, Alabama, and Arkansas, Texas prohibits the solicitation or aiding of another to commit hazing.[162] Texas' statute makes it an offense if a person "recklessly permits hazing to occur."[163] It is true that a Texas appellate court has found that this provision is facially unconstitutional because it does not adequately define the group of persons who may recklessly permit hazing under the statute.[164] However, given that the Texas Supreme Court denied review in that case and has subsequently failed to address the issue, the constitutionality of the statute is in doubt and thus remains susceptible to enforcement.[165]

On its face, a prohibition against recklessly permitting hazing to occur does not require any advance knowledge that hazing would happen or any intimate knowledge of the specifics of any plan to do so. Lifting a liquor ban on a party that is notoriously rowdy and susceptible to bad behavior could be reckless conduct that permits the hazing to occur. Poor decisions in which foresight could anticipate bad

---

[159] *See generally Petagine,* 290 So. 3d 991.
[160] *Id.* at 999.
[161] *See generally* TEX. EDUC. CODE § 37.152(a) (2022).
[162] *Id.* at § 37.152(a)(2).
[163] *Id.* at § 37.152(a)(3).
[164] State v. Zascavage, 216 S.W.3d 495, 498 (Tex. App. 2007) (holding that "statutes that impose duties on 'every living person in the universe' as opposed to specific classes of entities fail to inform those who could potentially be subject to prosecution").
[165] The petition for discretionary review was refused on June 27, 2007; *cf. id.* at 495, *appeal denied* (2007).

results seem to fall under this statutory definition.[166] Petagine's conduct arguably falls precisely in that description; his act of lifting the liquor ban at a party of young college students with a history of extreme intoxication was not prudent conduct.[167] Petagine was the decisionmaker with the authority to "permit" alcohol at off-campus parties.[168] Since the Supreme Court of Texas has yet to rule on the meaning of subsection (3) of this statute,[169] fraternity presidents in Texas should view this as a clear warning signal to be guarded and cautious.

V. RECOMMENDED PRACTICES FOR FRATERNITY PRESIDENTS

In light of *Petagine*, any university student who becomes president of their fraternity should engage in cautious governance. While *Petagine* is only one court's interpretation of criminal culpability for hazing, other courts could follow its lead. Those states in the Aiding and Abetting category have statutory language that is arguably more expansive than Florida's hazing statute.[170] Because of their explicit textual reference to non-participants, these statutes give rise to a clearer, more direct avenue to criminalize non-participants of hazing incidents.[171] Courts in almost any of the forty-three anti-hazing states could adopt *Petagine*'s principal theory to punish fraternity presidents who irresponsibly permit alcohol during fraternity-sponsored events. To ensure maximum protection against criminal prosecution, fraternity presidents should operate under the presumption that they are responsible for any and all acts of hazing committed by all members of the organization.[172]

---

[166] *See generally* Bogenberger v. Pi Kappa Alpha Corp., Inc., 104 N.E.3d 1110, 1125 (Ill. 2018) (finding that injuries resulting from hazing incidents are "reasonably foreseeable" and "likely to occur").
[167] *Petagine*, 290 So. 3d at 996.
[168] *Id.* at 995.
[169] *Contra* TEX. EDUC. CODE § 37.152(a)(3).
[170] *See* ALA. CODE § 16-1-23 (2022); ARK. CODE § 6-5-201 (2022); N.C. GEN. STAT. § 14-35 (2022); TEX. EDUC. CODE § 37.152 (2022); VT. STAT. tit. 16, § 11 (30)(A) (2022).
[171] *Id.*
[172] *See generally* Christine Scherer, Comment, *Rushing to Get Rid of Greek Life and Social Clubs: The Impact of Bostock on Single-Sex College Organizations*, 71 CASE W. RSRV. L. REV. 1165, 1173 (2020) (noting that the leaders of individual fraternity chapters are older members who are advised by alumni).

Therefore, fraternity presidents should implement the following recommended practices to ensure they avoid criminal prosecution. Even if these risk-averse strategies run counter to the mission or values of the organization, it simply is no longer safe to pursue any other leadership model. Many of these strategies have been repeatedly suggested by scholars and experts as a way to proactively prevent hazing. Student presidents must go even further than what scholars have suggested and explore governance options that better insulate them from criminal prosecution.

A national team of experts from the Clery Center and Hazing Prevention Consortium developed a comprehensive Hazing Prevention Toolkit that highlights best practices against hazing, which recommends a visible commitment to anti-hazing messaging.[173] The Toolkit further recommends a senior-led, endorsed mandate for hazing prevention, backed by a sufficient allocation of resources to collect data and disseminate information that stakes out a clear and unambiguous commitment to a hazing-free environment.[174] Signaling this commitment by way of website pages and other outlets can set the cultural tone for the organization.[175] Importantly, the report recommends that anti-hazing activities should not be presented through a one-time event; regular sets of in-person trainings and discussions are more appropriate to continuously reinforce the group's anti-hazing stance.[176] This includes collecting data from members and stakeholders alike to proactively investigate any possible incidents of hazing.[177]

Avoiding a "one-size-fits-all" approach to hazing is key to effective hazing prevention.[178] Instead, a variety of approaches tailored to the organizational environment should be implemented, such as social media campaigns, web content, newsletters, and posters that best target impacted students.[179] These activities need to be addressed with

---

[173] Elizabeth Allan et al., *Hazing Prevention Toolkit for Campus Professionals*, 1 CLERY CTR. (2018), https://www.clerycenter.org/assets/docs/Hazing-Prevention-Toolkit_CleryCenter-StopHazing.pdf. Anti-hazing messaging could include "clear language about social norms, the Spectrum of Hazing, and when behavior crosses the line into hazing." *Id.* at 3.
[174] *Id.*
[175] *See id.*
[176] *Id.* at 4.
[177] *Id.* at 5.
[178] *Id.* at 8.
[179] *Id.* at 10.

broader campus-wide prevention initiatives, such as sexual violence, bullying, suicide prevention, and substance abuse.[180] While it may seem obvious, fraternity leaders must ensure that new members are aware of anti-hazing policies and must be reassured that hazing activities are never mandatory for entry or continued membership in the organization.[181] To help reiterate the group's stance, fraternity activities should be planned in advance to allow new and experienced members alike the opportunity to contemplate, understand, and discuss their roles to reduce the likelihood of poor decisions.[182]

Lastly, fraternities should actively encourage the reporting of hazing activities. Students remain unlikely to report hazing, which makes it difficult for organizations to appropriately respond to these issues.[183] Specifically, one study found that fewer than ten percent of students say they report hazing incidents to organizational leaders.[184] If students are aware of other reported instances of hazing, they may be more likely to report their own, thus creating a cascading effect for more accurate reporting.[185] Increased reporting leads to increased awareness, and this could deter students, leaders, or others in a position of authority from explicitly or implicitly encouraging hazing.[186] In light of this need, some universities have set up "Hazing Hotlines" to further encourage victims to call a hazing prevention center to report their hazing experiences.[187]

These suggestions, however, do not go far enough. This Article proposes three additional recommendations to decrease the likelihood of criminal prosecution. First, any university president should absolutely ban alcohol from every single fraternity event, including both on-campus and off-campus gatherings. Second, fraternity presidents should always be present at official and unofficial gatherings.

---

[180] *Id.*
[181] *See Hazing: How to Bring Awareness and Prevent It*, A-LIST SISTERHOOD WITH STYLE, https://www.alistgreek.com/2021/09/20/hazing-awareness-and-prevention (last visited Sept. 20, 2021).
[182] *See Hazing Prevention, Ways to Stop Hazing*, U. ROCHESTER, https://www.rochester.edu/college/fsa/hazing/stop.html (last visited Oct. 19, 2022).
[183] Bruckner, *supra* note 26, at 485.
[184] Elizabeth Allan et al., *College Student Hazing Experiences, Attitudes, and Perceptions: Implication for Prevention*, 56 J. STUDENT AFFS. RSCH. & PRAC. 32, 44 (2018).
[185] Somers, *supra* note 35, at 679.
[186] *Id.*
[187] *Id.* at 656.

Lastly, fraternities should encourage students to report hazing activities.

Alcohol bans should be imposed for both on-campus and off-campus fraternity events. The lesson from *Petagine* is clear—young males in universities are susceptible to irresponsible behavior, and therefore these students cannot be trusted to refrain from excessive and careless alcohol consumption.[188] There is a legal presumption that fraternity presidents understand and recognize that—regardless of evidence—underage members are at risk when alcohol is involved.[189] While this might be an unfair stereotype, Judge Tanenbaum observed that a "high risk" exists when any generic group of young males "congregat[e] at an apartment on a Friday night with a bunch of liquor."[190] Specifically, the court held that the mere fact that alcohol was present at the party meant that Petagine knew, apparently as a matter of law, "that underage Pledges would be present and would consume alcohol."[191]

This ban on alcohol should extend to all fraternity events, including both social gatherings and professional meetings fraternities might hold. Fraternity presidents must be vigilant in policing the groups' calendar of events. They must have full knowledge of all present and future activities. Armed with that knowledge, the president must make it specifically clear that all alcohol consumption is prohibited. Additionally, if the event is occurring at an area establishment, such as a conference center or some other establishment, the president should reach out to those in authority over the premises to reiterate and emphasize the ban on alcohol. The alternative is that, if a hazing situation involving alcohol develops, the president could be held responsible as a principal to the behavior.

This is certainly an extreme measure and one that could very well impact the otherwise legitimate culture and values of the organization. In no instance should underage individuals ever consume

---

[188] *Petagine*, 290 So. 3d at 1116-17.

[189] *Id.* at 996 (stating that "underage drinkers are clearly more likely to become dangerously intoxicated in the context of a fraternity party in which that kind of behavior is encouraged and allowed").

[190] *Id.* at 1116-17.

[191] *Id.* at 995. Given that nowhere in the opinion's recitation of the statement of particulars does it say that Petagine had actual knowledge that pledges would consume alcohol, the only reasonable inference from the court's assertion here is that it is legally presumed; *cf. id.* at 996.

alcohol, but perhaps there are collegial connections made among senior-level members through the respectful, moderated, and legal consumption of alcohol.[192] It is, after all, an otherwise legal substance when consumed after a certain age and when no dangers are presented to others through driving or other activities.[193] Regardless, alcohol use cannot be tolerated in fraternities due to the clear and present danger of abuse by those for whom fraternity presidents can be held directly responsible.

The second proposed practice suggests that all fraternity presidents should be present at all fraternity gatherings. One reason Petagine could incur criminal culpability is that he was not present at the Reveal party.[194] He could not prevent something from occurring of which he had no knowledge. Presumably, a responsible fraternity president observing the party and wary of the danger could immediately stop any incident where a pledge was encouraged or coerced to drinking alcohol, or worse, endangering their health as a result. Presidents cannot legally rely on the good faith of the members in their group. Indeed, even a trusted vice president or other officer is no proxy for the president in the room. As a practical matter, no gathering should be allowed unless the president is available to attend.

This could lead to a cumbersome organizational structure that restricts the frequency of fraternity events. Some university-level fraternity chapters can have as many as sixty to seventy members.[195] These members could be subdivided into committees with different projects and initiatives operating simultaneously. It might be quite difficult for the president of the group to attend every single function or gathering, including those concerning basic ministerial committee work. Employing such a rule could have the unintended effect of

---

[192] Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 339 (2006) (noting that some argue moderate consumption of alcohol is "harmless" and that social events involving alcohol can be "pleasant and desirable").

[193] *See generally* J. Joseph Loewenberg, *The Neutral and Public Interests in Resolving Disputes in the United States*, 13 COMP. LAB. L.J. 488, 495 (1992) (noting that alcohol may generally be "purchased, possessed, and consumed legally").

[194] *Petagine*, 290 So. 3d at 995.

[195] *See generally National Fraternity/Sorority Scorecard Launches First Phase of Safety Efforts*, PENN STATE UNIV. 2 (June 10, 2021), https://www.psu.edu/news/campus-life/story/national-fraternity-sorority-scorecard-launches-first-phase-safety-efforts (noting that the average fraternity chapter at Penn State University is sixty-six members).

reducing the organization's community footprint or decreasing the frequency of internal and external networking opportunities. This absolutist, risk-averse approach that eliminates, as much as possible, the likelihood of hazing culpability for a fraternity president is the safest approach. However, presidents may want to use a more flexible strategy of ensuring their presence at parties or other social gatherings where alcohol is reasonably likely to occur. Perhaps the likelihood of deviant behavior is less likely at a formal meeting, a volunteer opportunity, or a professional engagement with faculty and staff. Under this approach, each fraternity president should independently assess the level of risk of abuse for each gathering and act accordingly.

The third and perhaps most draconian approach to address this problem is to focus solely on the service role of fraternities and outright ban fraternity parties. Fraternities regularly hold social events or parties at off-campus locations.[196] Even when the president is present, it is impossible for one person to police the actions and behaviors of a group of sixty to seventy individuals. If the party is at a location with multiple rooms or non-adjacent spaces, hazing could easily occur undetected by even the most vigilant eye. Even banning alcohol would not prevent hazing from occurring, given that hazing also involves physical beatings or other acts of humiliation.[197] These acts could certainly be done quietly and quickly enough to avoid detection. If past experiences at fraternity parties involved nefarious, illegal, or improper behavior, the mere act of approving the party in subsequent years might be enough to invoke principal culpability for the fraternity president.

VI. CONCLUSION

Hazing is undeniably a serious problem on American university campuses. Upperclassmen will take advantage of impressionable freshmen, who will go to great lengths to establish a sense of belonging and community.[198] Recognizing this danger, the vast majority of states have adopted laws to criminalize hazing.[199] Most of these laws criminalize the person(s) directly involved in the hazing itself, whether that

---

[196] Scherer, *supra* note 172, at 1190.
[197] Somers, *supra* note 35, at 655.
[198] Bruckner, *supra* note 26, at 484.
[199] STOPHAZING, *supra* note 8.

involves coercing alcohol consumption, inflicting physical harm, or requiring humiliating or degrading acts.[200] A few states have begun expanding those who are guilty to include non-participants who create a substantial risk of harm, conspire to create the harm, or aid and abet the hazing.[201] Texas's statute goes the furthest, criminalizing anyone who recklessly permits hazing to occur, indicating an intent to punish those that allow hazing to happen even if they are not involved in the hazing itself.[202]

The court in *Petagine* jurisprudentially attached criminal liability on fraternity presidents whose actions create an environment conducive for hazing.[203] Petagine's mistake was to allow liquor at a party which he did not himself personally attend.[204] There was no allegation that he knew underage drinking would occur or that anyone planned to haze.[205] He was even involved in messaging that discouraged hazing.[206] Despite these factors, the court held that Petagine could potentially be held responsible as a principal to hazing.[207]

The court's decision in *Petagine* is a clarion call for change. Regardless of whether *Petagine* is correctly decided, the fact of the matter is that fraternity presidents now face dangers heretofore implausible. If *Petagine's* holding is followed elsewhere, fraternity presidents are susceptible to criminal hazing prosecution by inaction and failing to oversee their members, in spite of any lack of criminal intent to commit a crime.[208] Thus, all fraternity presidents should take a strong no-alcohol stance at all fraternity functions. Additionally, fraternity presidents should strive to attend every fraternity function, both social and professional, and consider the possibility of reducing or even eliminating social parties. Even though the culture and mission of the fraternity might be irrevocably altered by the imposition of these rules, the alternative of prison time is too steep of a price to pay.

---

[200] *See generally supra* note 130.
[201] *See generally supra* notes 139, 148, and 152.
[202] *See generally* TEX. EDUC. CODE § 37.152(a) (2022).
[203] *See generally Petagine*, 290 So. 3d 991.
[204] *Id.* at 995.
[205] *See generally id.*
[206] *Id.* at 999.
[207] *Id.* at 996.
[208] *See generally id.*