

A LAZARUS TAXON IN SOUTH CAROLINA: A NATURAL HISTORY OF NATIONAL FRATERNITIES' RESPONDEAT SUPERIOR LIABILITY FOR HAZING

Jared S. Sunshine*

The apparent “return from the dead” of taxa absent after a long interval (and whose disappearance would otherwise have been inferred to be a global extinction) has been called the “Lazarus effect,” and taxa exhibiting such a fossil record are known as “Lazarus taxa.”¹

There is nothing in the ritual of the order authorizing the use of a mechanical goat as part of the ceremony in the initiation of a member.²

I. INTRODUCTION

The modern fraternity lives in the shadow of litigation stemming from hazing.³ While the local chapter may at times give short shrift to the legal consequences of its undergraduate constituents' actions, the national fraternity office of professional staff knows better.⁴

* J.D., *cum laude*, Fordham University School of Law, 2008; B.A., Columbia College of Columbia University in the City of New York, 2004. The author is a brother of the Zeta Psi Fraternity, and has served at various times on its Legal & Compliance, Disciplinary, Ritual, and Membership Development Committees. The views expressed in this Article are the author's alone, and do not represent those of the abovesaid bodies or any other.

1. John Damuth, *Extinction*, in KEYWORDS IN EVOLUTIONARY BIOLOGY 106, 110 (Evelyn, Fox, Keller & Elisabeth A. Lloyd eds., 1992). The singular form of *taxa* is *taxon*.

2. *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904). Regarding the mechanical goat in question, see *infra* notes 43-46 and accompanying text.

3. See Byron L. LeFlore, Jr., *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 199 (1987-1988) (“Litigation over injuries sustained during pledgship [*sic*] or initiation is likely the greatest threat, next to alcohol incidents, that a local chapter faces.”); see also *id.* at 225; Shane Kimzey, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 465-466 (1997).

4. For clarity and consistency, this Article uses “national” and “local” throughout both adjectivally and nominally (e.g., “the Elks’ Atlanta local was often antagonistic to its national”) to refer to a national (or regional or international) fraternal organization and its subordinate chapter, respectively, in an effort to conform to modern parlance and avoid the potpourri of historical Tents, Lodges, Camps, Temples, Tabernacles, *et hoc genus omne*. The use of the term “national” should be read to include both organizations regional or international in scope. Cf. Eric A. Paine, *Recent Trends in Fraternity-Related Liability*, 23 J.L. & EDUC. 191, 191 n.2 (1994).

For the same reason, this Article uses “fraternity” and “fraternal” throughout to refer to both men’s and women’s fraternal organizations, following like practices in other legal scholarship. E.g., Kimzey, *supra* note 3, at 460 n.2; Paine, *supra*, at 191 n.1; Susan J. Curry, *Hazing*

Whether it be a blessing or curse for the latter, the national fraternity's liability for the sometimes callow decisions of its local chapters in their induction and initiation processes is highly uncertain. In modern jurisprudence, the court typically relies upon a phalanx of ill-defined factors that might or might not give rise to a custodial duty to control, supervise, or otherwise restrain its undergraduate chapters from injurious behavior. The modern body of such law is diverse and deserves more searching treatment than this Article will provide.⁵

The national fraternities of the early twentieth century, however, enjoyed not even such ambivalent treatment under the law, generally being vicariously liable under agency law for the actions of their subordinate chapters in inducting new members. Even local misdeeds in contravention of a national's directions could be laid at that national's doorstep so long as they occurred in the admission of new members. This was the result of the doctrine of *respondeat superior*, which deemed local chapters in the performance of such inductions to be agents and servants of the national master, their acts tantamount to those of the national. This brand of agency liability was particularly onerous because it did not, in application, turn on the acts and omissions of the national organization, but attached automatically from the organization's structure.⁶ A claimant seeking redress, therefore, did not need to prove a national's involvement in or knowledge of the wrongdoing: a windfall to plaintiffs, and an albatross to defendants.

In the interim of this early era of benevolent fraternities and the modern era of social college fraternities,⁷ the case law regarding their liability in agency has changed dramatically. The benevolent fraternities fell from the perch of societal influence they had held,

and the "Rush" Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts, 16 J.C. & U.L. 93, 93 n.1 (1989).

5. For a broader discussion of theories of liability in hazing-related injuries and other contexts, see generally LeFlore, *supra* note 3; Paine, *supra* note 4; Michael John James Kuzmich, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths*, 31 MCGEORGE L. REV. 1087 (1999-2000); Dara Aquila Govan, "Hazing Out" the Membership Intake Process in Sororities and Fraternities, 53 RUTGERS L. REV. 679 (2000-2001); Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scored . . . And Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361 (1998); Edward J. Schoen & Joseph S. Falchek, *You Haze, I Sue: A Fraternity Stew*, 18 J. LEGAL STUD. EDUC. 127 (2000).

6. See generally *Supreme Lodge Knights of Pythias v. Withers*, 177 U.S. 260 (1900).

7. For clarity, this Article consistently refers to organizations of the former species as "benevolent" fraternities, and the latter as "social" or "college" fraternities, when distinction is needed. This choice of terminology is made solely to avoid ambiguity, and is not meant to suggest that benevolent societies had no social aspects, or could not include collegiate men; or conversely that social college fraternities do not perform benevolent works. In fact, the opposite is true on both accounts. As to the distinctions between the two, see *infra* Part II.

and with them went the body of law they had engendered. By the time cases involving social college fraternities came onto the scene, this niche of precedent was seemingly forgotten, the recent cases almost universally wrestling with the more knotty questions of balancing tests and multipartite standards. One modern case, however, appeared in the 1980s and represents the sole modern outlet of the early agency law cases—the “Lazarus taxon” of the title.⁸

In Part II, this Article briefly compares and contrasts the benevolent fraternities, about which this agency case law developed, with the social college fraternities that now predominate, focusing on their respective historical development and common organizational structure. Part III narrates and analyzes the advent and proliferation of *respondeat superior* agency jurisprudence in fraternity hazing, the arguments for and against such agency liability, and the abrupt disregard of this niche of precedent after the Great Depression. Part IV focuses on the titular Lazarus taxon, a South Carolina case seemingly representing the unique progeny of this previously extinct body of law, and commentary on its holding.⁹ Part V places this “Lazarus case” in the larger context of policy regarding hazing and reflects on future approaches to national fraternity liability.

While this Article will presumably be of primary interest to those concerned with the liability of fraternities, hopefully it also provides a window into the longitudinal taxonomy of American jurisprudence. Rare is it that an established body of law is rendered extinct by such societal upheaval such as the Great Depression, and rarer still that a scion of the extirpated line of case law reappears half a century later. This story of agency liability is told in terms of a population of cases that evolved, flourished, competed, and died out—and out of which a single survivor appeared long after, the “Lazarus case,” *Ballou v. Sigma Nu General Fraternity*. Even as the paucity of modern case law imputing agency liability to national fraternal organizations may give them some comfort, the same may also provide insight for the legal phylogenist into the latent viability of moribund precedent.

II. BENEVOLENT AND SOCIAL COLLEGE FRATERNITIES: THEN AND NOW

It will be useful to distinguish between two species, and amongst several largely discrete epochs, of fraternal societies in America and

8. *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488 (S.C. Ct. App. 1986).

9. *Id.*

Canada.¹⁰ Such societies began to emerge in the late eighteenth and early nineteenth centuries. On college campuses, the literary societies that had long existed at more prestigious institutions began to transform into what are now often called “Greek” organizations, after the Greek letters by which they identified themselves, following the example of the first, Phi Beta Kappa.¹¹ In parallel, benevolent fraternities arose in non-academic society to provide fellowship, networking, and insurance to their members, in many cases leveraging a large membership to make insurance against death and disability available to a broader demographic, though not all fraternities provided such pecuniary services.¹² This latter group includes the archetypal Masons, such well-known exemplars as the

10. For sociological and historical reasons beyond the scope of an article focusing on legal issues, social college fraternities have been almost entirely restricted, until very recently, to the North American continent. Although social college fraternities have surely had alumni groups based overseas, universities abroad have evidently not been fertile territory for fraternal expansion. See P.F. Piper, *College Fraternities*, COSMOPOLITAN, Nov. 1896–Apr. 1897, at 641, 644–45 (“There are no similar organizations in Europe. . . . Attempts to extend the fraternity system to Europe have failed, except in the case of a chapter of Chi Phi, which was established at Edinburgh University. It lived only a few months and has never been revived. Extension into Canada has resulted more favorably.”). This historical parochialism may at last be giving way to an increasingly global view befitting an increasingly global educational system. See, e.g., Rachel Lavin & Gareth Gregan, *Introducing Trinity’s Frat Pack*, THE UNIVERSITY TIMES (Dublin, Ireland), March 23, 2012, available at universitytimes.ie; Sharon Udasin, *Brotherly Love, from NYU to Israel*, THE JEWISH WEEK (New York, N.Y.), June 3, 2009, available at www.thejewishweek.com. The legal implications of overseas chapters of North American fraternities have not yet been fully developed, but are surely a fecund topic for future study.

Benevolent fraternities present a more nuanced picture, originating and being closely associated with the secret society paradigm of Freemasonry and its successors (as did, ultimately, social college fraternities as well). While benevolent fraternities in the form discussed may have been endemic to North America, their immediate predecessors shared many of the same features, including a distributed structure of national authorities and local lodges as well as abstruse rituals of accession. See generally ALBERT C. STEVENS, *THE CYCLOPEDIA OF FRATERNITIES* (2d ed. 1907). Because examination of this broader and longer history would contrast with the more parochial nature of social college fraternities, this Article’s perspective has been limited to the North American continent to provide continuity of subject and context.

11. See Piper, *supra* note 10, at 641-43; Govan, *supra* note 5, at 685; RICKY L. JONES, *BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES* 29 (2004); HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* 118-20 (1990); HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING & BINGE DRINKING* 116-18 (1999); see generally Anthony W. James, *Fraternities, in AMERICAN MASCULINITIES: A HISTORICAL ENCYCLOPEDIA* 178, 178-79 (Bret E. Carroll ed., 2003); WM. RAIMOND BAIRD, *BAIRD’S MANUAL OF AMERICAN COLLEGE FRATERNITIES* 4-11 (6th ed. 1905).

12. See DAVID T. BEITO, *FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890-1967*, 1-3 (2000); Linda D. Wilson, *Fraternal Orders, in ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE* (Okla. Historical Society ed., 2007), available at <http://digital.library.okstate.edu/encyclopedia/entries/F/FR007.html>; see generally STEVENS, *supra* note 10.

Elks and Odd Fellows, and a menagerie of other less-remembered groups.¹³

Despite the contemporaneity of their development, benevolent and college fraternities occupied divergent niches. In their origins, college fraternities were secret societies in the truest sense of the word, unmentionable except amongst their members because of strident faculty hostility to their presence on campuses.¹⁴ Conversely, benevolent fraternities were more widely spread because they depended to some extent upon public awareness of their mission and the benefits they offered.¹⁵ In the nineteenth century, however, both species of fraternity were novel societal innovations outside of mainstream penetration, representing only a glimpse of the institutions they would become in time.

Towards the end of the nineteenth century and emphatically in the early twentieth century, fraternal societies collectively reached their acme.¹⁶ The venerable Baird proclaimed in 1905 that college fraternities had “become *the* prominent factor in the social life of American students,”¹⁷ while benevolent fraternities had come to encompass a sizable plurality of the population.¹⁸ Despite this social rise, college fraternities maintained much of the secrecy engendered by their origins, owing to continued faculty hostility.¹⁹ As a result of this secrecy, much more was known of the practices of benevolent fraternities than their collegiate cousins, and the lawsuits from this epoch concerned only the former.²⁰ The reputation of both, however, made membership much in demand, and thus gave rise to more elaborate standards and procedures for initiation into these orders.²¹

Upheavals from the Great Depression and World War II drove the two species of fraternities in different directions. While benevo-

13. See generally STEVENS, *supra* note 10 (compiling encyclopædically).

14. See Piper, *supra* note 10, at 642-43; JONES, *supra* note 11, at 28-29; NUWER, WRONGS OF PASSAGE, *supra* note 11, 118-19.

15. BEITO, *supra* note 12, at 1-3; see also STEVENS, *supra* note 10, at xv-xvi.

16. See James, *supra* note 11, at 178-79; see generally BEITO, *supra* note 12, at 161-80; NICHOLAS L. SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES 187-90* (2009).

17. BAIRD, *supra* note 11, at 10.

18. W.S. Harwood, *Secret Societies in America*, 164 N. AM. REV. 617, 617-21 (May 1897); see *infra* note 187 and accompanying text.

19. See James, *supra* note 11, at 178-79; NUWER, WRONGS OF PASSAGE, *supra* note 11, at 118-19.

20. See *infra* Part III.A-C.

21. See JONES, *supra* note 11, at 7; SYRETT, *supra* note 16, at 245-48; Kenneth L. Ames, *The Lure of the Spectacular*, in *THEATRE OF THE FRATERNITY: STAGING THE RITUAL SPACE OF THE SCOTTISH RITE OF FREEMASONRY, 1896-1929* 18, 19-25 (Susan C. Jones ed., 1996).

lent fraternities began a long decline from popular prominence,²² college fraternities experienced a more volatile ride of alternating periods of plaudits and opprobrium. The latter saw a dramatic surge in membership after World War II, a diminution during the collegiate anti-establishment sentiment of the Vietnam War, a return to eminence in the late 1970s and 1980s, and finally a sort of unsettled hostility-*cum*-acceptance in the modern era.²³ While many benevolent fraternities are still going concerns, none retain their prior prestige and ubiquity.²⁴ Meanwhile, the college fraternities of today are far-removed from the provincialism and secrecy that insulated them from public scrutiny in their earlier days.²⁵

The commonality joining benevolent and college fraternities throughout their development is their organizational structure, which gives rise to the idiosyncratic complexities of agency law that are this Article's subject. A modern case succinctly summarizes the essential constitution common to both:²⁶

Although such associations may be organized according to any one of a number of systems, the majority of them consist of a supreme central or governing body which exercises jurisdiction and control over the various local lodges or other divisional units.²⁷ Frequently, and in the case before us, the central or governing body of a benevolent association is a corporation organized under the laws of another state.²⁸ This governing body is authorized to establish local divisions and to grant them what are known as "charters" in the name

22. See Ames, *supra* note 21, at 21-22; e.g., James Straub, *Fraternal Organizations Battle Technology, Declining Membership*, THE ELLSWORTH AMERICAN (Maine), July 8, 2009; Tamar Audi, *Elks, Ahead of Their Time*, USA TODAY, March 15, 2006; Wilson, *supra* note 12.

23. See James, *supra* note 11, at 179-80; Govan, *supra* note 5, at 684-87; NUWER, WRONGS OF PASSAGE, *supra* note 11, at 131-32; Rutledge, *supra* note 5, at 365-66; see also *infra* Part III.D.1.

24. See Wilson, *supra* note 12; Ames, *supra* note 21, at 21-22.

25. See NUWER, WRONGS OF PASSAGE, *supra* note 11, at 118-19.

26. *Benevolent and Protective Order of Elks Local 291 v. Mooney*, 666 N.E.2d 970, 972-73 (Ind. Ct. App. 1996). For ease of reading and reference, inline citations have been converted to footnotes and generally conformed to standard scholarly practice.

Although the organization described is a benevolent fraternity, the same observations are applicable to both. See BAIRD, *supra* note 11, at 16-19; Kerri Mumford, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL'Y 737, 763 (2000-2001); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. Ct. App. 1999). Indeed, courts invited to distinguish amongst species of fraternal organizations more finely have declined the offer. E.g., *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519, 522 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916).

27. See *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 534 (1915); *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141, 142 (1907).

28. *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519, 520 (1916), *cert. denied*, 244 U.S. 652(1916); *Thompson*, 82 N.E. at 141.

of the association.²⁹ The charter granted to a subordinate lodge constitutes a contract between it and the parent organization and may be revoked by the governing body. Often the subordinate lodges are unincorporated. . . .³⁰

. . . All the subdivisions of a benevolent association derive their powers from the central or governing body and are subject to its authority.³¹ Thus, ordinarily the governing body is invested with absolute control over the organization of subordinate chapters as well as the right to promulgate legislation, levy assessments, and otherwise collect revenue from subordinate bodies.³² Further, when a person is initiated into a local lodge, the person becomes a member of the supreme body as well.³³

It is this last commonality on which this Article will focus: the process of inducting and initiating new members into the fraternity.

Most such societies have adhered to a secret and mystically-inspired ritual for the initiation of new members into their orders.³⁴ Oftentimes in both their early days and today, fraternities have also followed the practice of pledging or candidacy³⁵—a period of assaying and assessing applicants prior to initiation, generally denominated amongst college fraternities as pledges or neophytes,³⁶ and amongst benevolent fraternities as candidates.³⁷ In some cases, the reported historical practices sound whimsical, such as carefully rolling a peanut down the street or singing nursery rhymes,³⁸ but other

29. *Thompson*, 82 N.E. at 141.

30. See generally 36 AM. JUR. 2D *Fraternal Orders and Benefit Societies* §§ 1, 35; 4 ILE BENEFICIAL ASSOCIATIONS § 1.

31. See, e.g., *Kenny*, 73 So. at 521, 523; *Mitchell v. Leech*, 48 S.E. 290, 291-92 (1904); *Baldwin v. Hosmer*, 59 N.W. 432, 433 (1894).

32. *Kenny*, 73 So. at 521; *Mitchell*, 48 S.E. at 291-92; see 36 AM. JUR. 2D *Fraternal Orders and Benefit Societies* § 37, at 835.

33. See *Mitchell*, 48 S.E. at 292.

34. See *JONES*, *supra* note 11, at 52-53; *Piper*, *supra* note 10, at 646; *Ames*, *supra* note 21, at 19, 23-24; *Ricky L. Jones, Examining Violence in Black Fraternity Pledging*, in *THE HAZING READER* 110, 110-17 (Hank Nuwer ed., 2004).

35. See *Piper*, *supra* note 10, at 646 (“The initiation ceremonies are supposed to be dignified and somewhat elaborate in character. However, there is usually a preliminary ordeal, during which the neophyte is often obliged to submit to many ridiculous indignities. During this period he is required to obey all orders given by any member of the chapter to which he is pledged.”); *NUWER, WRONGS OF PASSAGE*, *supra* note 11, at 118-19.

36. See, e.g., *Piper*, *supra* note 10, at 646.

37. See, e.g., *FREDERICK H. BACON, A TREATISE ON THE LAW OF BENEFIT SOCIETIES AND LIFE INSURANCE* 125-26 § 63 (3d. ed., 1904); *infra* note 77; *Kenny*, 73 So. at 520, 524; *infra* notes 95, 98, 103.

38. An article in *Cosmopolitan*—that venerable archive of popular culture established in 1886 and still vibrant today—described neophytes “rolling a peanut along a street” or “using a toothpick as a lever.” *Piper*, *supra* note 10, at 646. See also *JOHN R. BIRCHFIELD, ZETA PSI FRATERNITY OF NORTH AMERICA DOUBLE DIAMOND JUBILEE* 17 (1997) (quoting an 1882

practices were far more dangerous, involving beatings or electrocutions.³⁹ One scholar's compendious timeline documents the evolution of such hazing practices from the earliest days to the present, demonstrating no fundamental differences between the dangerously rash practices of yore and today,⁴⁰ with the primary modern innovation being the extravagant use of alcohol.⁴¹

Apropos of historical praxis, comment is warranted on the peculiar contrivance known as the mechanical goat, as it will figure in a number of the cases at issue and is likely unfamiliar to the modern reader.⁴² This was not a single species but a whole taxonomical family, ranging from tricycles equipped with a stuffed goat's body and stirrups for the rider to a "ferris wheel coaster goat" whose rider could be completely inverted. The unifying element, of course, was the fake goat on which the rider sat; such devices experienced wide popularity in the late nineteenth and early twentieth centuries amongst fraternity men, coincident with the golden age of fraternalism. In a typical usage, the blindfolded rider was installed on the machine, which was then wheeled about with abandon so as to give him a most wild ride.⁴³

For all their ubiquity, however, these stunts were largely outside the approved ceremonies of national fraternal orders,⁴⁴ serving in-

resolution condemning the requirement that pledges "answer a series of nonsensical questions [and] sing nursery rhymes.").

39. See NUWER, BROKEN PLEDGES, *supra* note 11, at 253-55; *see, e.g., infra* notes 95, 182 (referring to electrocutions), 145 (referring to beatings).

40. NUWER, BROKEN PLEDGES, *supra* note 11, at 285-324; *see also* JONES, *supra* note 11, at 121-28 (expanding upon Nuwer's timeline from 1970 onward); NUWER, WRONGS OF PASSAGE, *supra* note 11, at 120-22 (comparing early and later hazing practices); *cf.* Lionel Tiger, *Males Courting Males*, in THE HAZING READER 14, 15-16 (Hank Nuwer ed., 2004) (listing some early modern practices).

41. SYRETT, *supra* note 16, at 241-42, 246-48 (discussing changes in use of alcohol in hazing over time); *see also id.* at 302 ("And as in the nineteenth century, while this breaking of rules is associated with alcohol, there is no question that current fraternities' overwhelming reliance upon alcohol in order to socialize is a marked change from the early parts of the nineteenth century."); Rutledge, *supra* note 5, at 370; *see generally* James C. Arnold, *Hazing and Alcohol in a College Fraternity*, in THE HAZING READER 51 (Hank Nuwer ed., 2004).

42. Apparently, however, the use of fake goats in initiations is not entirely unknown to the modern hazer. *See* NUWER, BROKEN PLEDGES, *supra* note 11, at 191.

43. For a most thorough treatment of the mechanical goat, and elaboration upon the brief summary of this paragraph, the inquisitive reader ought consult the scholarly and well-illustrated treatment in William D. Moore, *Riding the Goat: Secrecy, Masculinity, and Fraternal High Jinks in the United States, 1845-1930*, 41 WINTERTHUR PORTE 161 (2007).

44. MARK A. TABBERT, AMERICAN FREEMASONS 150 (2005) ("Although not part of the ritualistic ceremony, some fraternal groups offered unsuspecting new brothers an opportunity to ride blindfolded on a mechanical goat. Freemasonry and other fraternities condemned this . . .").

stead to obscure the true secrets of the fraternity;⁴⁵ perhaps this prudent exclusion was because such disport so frequently gave rise to litigation.⁴⁶ This Article next turns to one theory of national orders' liability in lawsuits of this kind.

III. THE EVOLUTION AND APPARENT EXTINCTION OF RESPONDEAT SUPERIOR LIABILITY FOR HAZING

The strictest theory of liability for a national fraternal organization—the subject of this Article—grounds itself in agency law by way of analogy to the state-created corporation.⁴⁷ Just as the corporate person can act only through its agents, so too (*arguendo*) the national fraternity acts through the members of the local chapters established under its ultimate authority. And just as the corporation is vicariously liable for its employees' acts in service of their employer, the national is liable for its members' acts in service of the fraternity. This paradigm conceives an agency relationship of master and servant between the national and the local members, such that the national must answer for the torts of these members under the venerable doctrine of *respondeat superior*—also known as “master-servant agency.”⁴⁸

The relationship is an outgrowth of principal and agent where the principal has the right to control the agent's physical conduct.⁴⁹ Within such an agency relationship, the master will be vicariously liable for injuries caused by the servant's actions. Whether the master authorized or forbade the conduct is irrelevant; in practice, the only limitation of *respondeat superior* liability is whether the servant was within the scope of his legitimate agency, which is broadly determined by looking to whether the conduct undertaken

45. Moore, *supra* note 43, at 180 (“In this mode, the goat represented the fact that knowledge of activities within the lodge room was shared by members of the organizations but, ultimately, was denied to outsiders. The goat served as a shield that fraternalists employed to hide actual practices while simultaneously ridiculing and frustrating the uninitiated's curiosity.”).

46. *Id.* at 187; *e.g.*, Mitchell v. Leech, 48 S.E. 290, (S.C. 1904); Jumper v. Sovereign Camp Woodmen of the World, 127 F. 635 (5th Cir. 1904); Derrick v. Sovereign Camp, W.O.W. 106 S.E. 222 (S.C. 1921).

47. Indeed, many national fraternities are incorporated entities in the state of their national headquarters, while their local chapters frequently are not. See *supra* notes 28-30 and accompanying text.

48. See John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 93-94 (1995-1996); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 69, at 499-500 (W. Page Keeton 5th ed. 1984), cited in LeFlore, *supra* note 3, at 206 n.76.

49. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

was reasonably in furtherance of the master's business.⁵⁰ While *respondeat superior* originated in the context of employment, it is equally applicable even to wholly informal relations, and certainly to formal hierarchical associations such as fraternities.⁵¹

In 1920, the University of Minnesota Law Review summarized the theory of national fraternal master-servant agency liability neatly:

This view is based on the theory that the relation between the local lodge and the Grand Lodge is that of principal and agent, and therefore the general rule applies that the principal is responsible for the acts of his agent done within the scope of his employment, and in the accomplishment of objects within the line of his duties, though the agent seeks to accomplish the master's business by improper or unlawful means or in ways not authorized by the master, unknown to him, or even contrary to his express directions.⁵²

At least superficially, locals' *respondeat superior* agency for their nationals is a conceptually attractive doctrine, and one that flourished in the early twentieth century, the heyday of benevolent fraternal societies. Insofar as the local chapters and their members worked to benefit the national fraternity as a whole, why should they not be treated as agents, servants to the national master? Where the local chapter was a transparent proxy for the financial interests of the larger organization, this approach was widely accepted; vicarious liability was generally imputed in quotidian matters of contract such as collection of dues, insurance obligation and negotiation, transfers of local membership, and disbursement of benefits.⁵³

50. See KEETON ET AL., *supra* note 48, at § 70, 501-02, cited in LeFlore, *supra* note 3, at 206 n.77 and accompanying text; Ingram, *supra* note 48, at 93-94; see generally RESTATEMENT (SECOND) OF AGENCY §§ 219-49 (discussing in detail master-servant agency). Despite the many encomia due the Third Restatement of the Law of Agency, citation is nonetheless made throughout this Article to the Second Restatement, for the simple expedient that the Second utilizes such traditional designations as "master," "servant," and "*respondeat superior*," which have been largely abandoned in the most recent edition. The more vernacular vocabulary, though befitting a modern restatement of the law, hampers ready interpretation of the many early twentieth-century cases that this Article discusses. Rather than shift erratically between the Second and Third based on time period, the Article adopts the use of the Second throughout.

51. See RESTATEMENT (SECOND) OF AGENCY §§ 220 cmt. b, 225 (1958).

52. Recent Cases, 5 MINN. L. REV. 548, 562 (1920-1921).

53. See RESTATEMENT (SECOND) OF AGENCY § 140(b) (1958); e.g., Supreme Lodge Knights of Pythias v. Withers, 177 U.S. 260, 275 (1900); see generally 7 C.J. Beneficial Associations § 76, 1111 (1916); Louis Lougee Hammon, *Mutual Benefit Insurance* § I(F)(2)(b), in 19 CYCLOPEDIA OF LAW & PROCEDURE 1, 42 (William Mack ed., 1908) [hereinafter CYCLOPEDIA]; *Mutual Benefit Societies* § 34, in 19 RULING CASE LAW 1221 (William M. McKinney & Burdett A. Rich eds., 1917) [hereinafter RULING CASE LAW]. The vast majority of

On the other hand, “hazing” was not consistently known as such at the time,⁵⁴ going instead by a miscellany of terms from “horse play”⁵⁵ and “ridiculous indignities”⁵⁶ to probably the most evocative, “rough treatment”⁵⁷ or “rough usage”;⁵⁸ the terminological variety bespeaks a lack of definition to what precisely was under discussion.⁵⁹ Lawsuits deriving from initiation practices, comparatively rare as they were, sounded in tort, with the prospective member alleging physical injury⁶⁰—or more tragically, with his survivors alleging wrongful death.⁶¹ Unlike contractual relations, the individual fraternal tortfeasor’s status as an agent and servant was not *a priori* obvious; but the strong weight of early twentieth-century law came to adopt national liability under *respondeat superior* where

case law on benevolent fraternities in agency concerns such pecuniary matters as these, as such societies were not only social but also provided death and disability insurance benefits for their membership. *See supra* Part II.

Local chapters, being generally unincorporated associations, *see supra* notes 28-30, existed as instrumentalities of a proper legal person—either the national organization or the local’s constituent members. Viewing the local as an agent of the national avoided the paradoxical alternative that a local lodge, in contracting with its members, was also acting as agent of those selfsame members. *See Evans v. Junior Order United Am. Mech.*, 111 S.E. 526, 527 (N.C. 1922) (“The subordinate lodge acts for and represents the [national] defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent.” (citing *Bragaw v. Supreme Lodge Knights and Ladies of Honor*, 38 S.E. 905, 907 (N.C. 1922)).

54. *See* OXFORD ENGLISH DICTIONARY *hazing*, n.3 (2d ed. 1989) (citing first usage for “[a] species of brutal horseplay practised on freshmen at some American Colleges” circa 1860); compare NUWER, BROKEN PLEDGES, *supra* note 11, at 253-55 (compiling printed references of “hazing” in early nineteenth century) with NUWER, BROKEN PLEDGES, *supra* note 11, at 118-19 (noting the varied terminology used to refer to hazing).

55. *E.g.*, BACON, *supra* note 37, at 126 § 63.

56. *E.g.*, Piper, *supra* note 10, at 646.

57. *E.g.*, *Liability of Fraternal Order for Injuries Inflicted in Ritualistic Ceremony*, 84 CENT. L.J. 153, 154 (1917) [hereinafter *Fraternal Order*].

58. *E.g.*, *Kinver v. Phœnix Lodge, Indep. Order of Odd Fellows*, 7 O.R. 377, 388 (1885); BIRCHFIELD, *supra* note 38, at 17 (quoting 1882 fraternity resolution).

59. *See* Kuzmich, *supra* note 5, at 1093 (stating “there is no universally accepted definition of ‘hazing’”); *cf.* *People v. Lenti*, 253 N.Y.S.2d 9, 10-11 (Nassau Cty. Ct. 1964) (“‘Hazing’ is a word, which incorporates treatment such as the wearing of a ‘beanie cap’ to the permanent disfigurement of the body. It would have been an impossible task if the legislature had attempted to define hazing specifically. Fraternal organizations and associations have never suffered for ideas in contriving new forms of hazing.”).

60. *E.g.*, *Mitchell v. Leech*, 48 S.E. 290 (S.C. 1904); *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141 (N.Y. 1907); *Grand Temple & Tabernacle in the State of Tex. of the Knights & Daughters of Tabor of the Int’l Order of Twelve v. Johnson*, 171 S.W. 490 (Tex. 4th Civ. App. 1914) [hereinafter *Johnson III*]; *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586, 587 (N.C. 1917); *Derrick v. Sovereign Camp, W.O.W.*, 106 S.E. 222 (S.C. 1921).

61. *E.g.*, *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916).

the act occurred in the course of a prospective member's induction into the fraternity.⁶²

A. *Genesis: The Lifeblood of the National Brotherhood Is Its Membership*

Though fraternities had become countrywide institutions by the end of the nineteenth century,⁶³ North American courts did not address the issue of liability in agency for hazing until the twentieth century.⁶⁴ To be sure, local chapters had previously been found liable for the hazing of their members, but the reasoning had been based on the local officers' knowledge of, acquiescence in, or even participation in the misdeeds of the membership.⁶⁵ Unaddressed before the turn of the century, however, was whether a distant national headquarters, without direct participation in the affairs of the local chapter and its members, could be held liable for hazing under a more attenuated theory of agency.⁶⁶

The year 1904 saw the end of this lacuna.⁶⁷ In the leading case, *Mitchell v. Leech*,⁶⁸ one Samuel W. Mitchell had sought admission to the local camp of the Woodmen of the World fraternal organization; he was evidently subjected to a ride on the mechanical goat in the course of initiation, was injured thereby, successfully sued several individuals along with the Woodmen of the World's national

62. See Recent Cases, *supra* note 52, at 562; Notes of Cases, 7 VA. L. REG. N.S. 219, 221-22 (July 1921); RULING CASE LAW, *supra* note 53, at § 34, p.1221; 7 C.J. *Beneficial Associations* § 76, p.1111.

63. See *supra* notes 16-19 and accompanying text.

64. See generally *Supreme Lodge Knights of Pythias v. Withers*, 177 U.S. 260 (1900).

65. In *Kinver v. Phænix Lodge, Indep. Order of Odd Fellows*, 7 O.R. 377 (1885), a local chapter was found corporately liable for the acts of its members. The holding, however, relied on the admitted facts that the full officers and body of the local chapter were assembled for and administering the initiation when the roughhousing giving rise to the injury was done, and that they were aware such roughhousing occurred as a matter of course but did nothing to dissuade their members from engaging in such. *Id.* at 387; see also *State v. Williams*, 75 N.C. 134 (1876) (criminal liability given like premises liability).

66. See *Moore*, *supra* note 43, at 187; *Jumper v. Sovereign Camp Woodmen of the World*, 127 F. 635, 638 (5th Cir. 1904) ("The proposition of the counsel is that the members and officers of the Water Valley lodge did the plaintiff hurt, and their principal, the [national] defendant, is liable for damages. The general doctrine here suggested is familiar, but the researches of counsel have discovered very few authorities where issues of this kind have been passed upon, involving injury by initiation in secret orders.").

67. A case absolving the national of liability for its local's batteries on its members also emerged in 1904; properly considered, however, the batteries in question were not part of initiation—indeed, were committed against an already-inducted member—and thus do not bear directly on the issue of hazing. See *Jumper v. Sovereign Camp, Woodmen of the World*, 127 F. 635 (5th Cir. 1904); see generally *infra* Part III.C.1.

68. *Mitchell v. Leech*, 48 S.E. 290 (S.C. 1904).

organization, and received damages of \$1,000.⁶⁹ The defendants appealed to the Supreme Court of South Carolina, citing twelve assignments of error.⁷⁰ Finding none convincing, the court affirmed.⁷¹

Saliently, viewing the local chapter's induction of new members into the national order to be quintessentially in the interest of and in service to the national, the court held the local chapter an agent and the national liable for its tort under the doctrine of *respondeat superior*.⁷² Given the centrality of *Mitchell* to subsequent case law, the holding is worth perusing at length:

In order to accomplish the objects for which the sovereign camp was organized, it was necessary, from the very nature of the business, to call to its assistance the services of persons through whom it might act, in transacting the affairs of the order in various localities. It selected and organized local lodges for the purpose of meeting this necessity. *Not only the subordinate camps, but the members as well, were under the complete direction and control of the parent camp These facts show that, when a person was initiated in a local lodge, he became, to all intents and purposes, a member of the sovereign camp.* And they further show, under the authority of *Blackwell v. Mortgage Co.*, 65 S.C. 118, 43 S.E. 395, that the subordinate camps were the agents of the sovereign camp. In the case just mentioned the court uses this language: "The business of the company was such as necessarily compelled it to rely upon the work of other parties, and this necessity usually and naturally gives rise to the employment of agents. When, therefore, this work is done by others, there is a strong implication that they are the agents of the parties receiving the benefit of their services." . . . *As the subordinate lodges were the agents of the sovereign camp, the acts of the local camps were binding upon the parent camp, if performed within the scope of the agency, even though not authorized by the sovereign camp.*⁷³

69. *Id.* at 290. This award would be worth approximately \$24,000 adjusted for inflation to 2010. See U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES (1975); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES § 14 (2010). Unfortunately for the inquisitive scholar, the appellate record does not preserve any detail as to the nature of *Mitchell's* injury.

70. *Mitchell*, 48 S.E. at 290-91.

71. *Id.* at 293.

72. *Id.* at 292.

73. *Id.* (emphasis added). The court went on to cite with approval *Hutchison v. Rock Hill Real Estate & Loan Co.*, 43 S.E. 295 (S.C. 1902), quoting the venerable treatise of agency by Justice Joseph Story:

It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent in

The language of *Mitchell*, and the cases cited, invoke the model of the national fraternity as a corporate body, referring to the “nature of the business,” the “business of the company,” and the “employment of agents”—as well as citing a treatise defining the application of master-servant agency.⁷⁴ The *Mitchell* court thus grounded its reasoning firmly in the logic of *respondeat superior*: the national was liable for the torts of its locals just as an employer was liable for the torts of its employees because the national had the *right to control* the local.⁷⁵ The other key rule of law was that the local’s torts against candidates for membership were attributable to the national, despite their being wholesale fabrications of the local and unknown to the national—as the epigram to this Article emphasized, “[t]here is nothing in the ritual of the order authorizing the use of a mechanical goat as part of the ceremony in the initiation of a member.”⁷⁶

Though *Mitchell*’s reasoning was an innovation by the Supreme Court of South Carolina,⁷⁷ it proved persuasive. Two decades later,

the course of employment, although the principal did not authorize or justify or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them. *In all such cases the rule applies, respondeat superior*; and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealing either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.

Mitchell, 48 S.E. at 292-93 (emphasis added) (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 452 (1839)).

74. *Mitchell*, 48 S.E. at 292.

75. See RESTATEMENT (SECOND) OF AGENCY §§ 245, 250 cmt. a; 251 (1958); Ingram, *supra* note 48, at 93-94 (reciting the general principle).

76. *Mitchell*, 48 S.E. at 292; see *supra* notes 43-46 and accompanying text.

77. That *Mitchell* promulgated a novel principle of law is underscored by a treatise published the same year, which enunciated a philosophy at odds with *Mitchell*’s acceptance that local officers’ own embellishments on initiation ceremonies remained within the scope of their agency authority:

On principle, it seems that a distinction should be made between injuries received as a result of the negligence of the officers of the lodge conducting the initiation, according to a ritual prescribed by the superior body, and the torts of the individual members in inflicting injuries upon a candidate by doing something not prescribed by the ritual of the order. . . . [C]learly, if the members of a lodge, on their own responsibility, indulge in horse play, or do some act not prescribed in the ritual, which results in injury, neither the supreme, nor subordinate lodges, would be liable for such injury.

BACON, *supra* note 37, at 125-26 § 63 (citing *contra, Mitchell*). While Bacon’s approach is not far off the mark, its limitation of national liability to only acts “prescribed by the superior body” rather than undertaken within the general context of initiation would prove too circumscribed for the bench.

Yet it did have its takers in the scholarly community; a journal article as late as 1917 would follow Bacon’s argument, stating:

If the applicant [to a fraternal order] were suddenly placed in surroundings such as to obscure his judgment so as to call for exercise of judgment in an

the same court would declare in *Derrick v. W.O.W.* that “the principle that a subordinate lodge is the agent of the parent organization, which is responsible in damages for the tortious act of its agent done within the scope of its agency, and that maltreatment of a candidate during the ceremony of initiation is within such scope” had been firmly settled by *Mitchell*.⁷⁸ In inducting new brothers, the local chapters and membership were “‘about the business’ of [their] master” and indeed acting as the very “life blood of all such organizations,”⁷⁹ and their national master was properly liable for the torts committed as part of the process that sustained it.⁸⁰

B. *Efflorescence: The Proliferation of Respondeat Superior Liability for Hazing*

1. *Mitchell’s Progeny: the Early Twentieth-Century Fraternity Cases*

In the interim of *Mitchell* and *Derrick*, their principle had been adopted in several more states, firstly by New York’s high court in 1907.⁸¹ The Knights of the Maccabees had prescribed a ritual of initiation in which the candidate was to be surprised by an actor in the ceremony purporting to remove him from the proceedings, and, in practice, this generally involved grasping the candidate physically.⁸² The brotherhood’s ritual did not endorse use of injurious force; notwithstanding, in *Thompson v. K.M.W.*, the candidate had been “seized from behind by the shoulders, by one Rolland, a member of the order who had been selected for that purpose, and his body bent backward so that he fell against the man who seized him, producing an injury to the muscles, or spinal column of the back.”⁸³

emergency, those placing him there ought to be liable, though by his request he was so placed. This may be granted, but hardly, we think, would this principle go any further than to make individual actors liable to the applicant. It is to be remembered that up to this point he submits to individuals, designated it is true by the corporation, but not so far as the transaction of any corporate business is concerned.

Fraternal Order, *supra* note 57, at 154.

78. *Derrick v. Sovereign Camp, W. O. W.*, 106 S.E. 222, 224 (S.C. 1921) (Cothran, J., concurring). Owing to the extraordinarily long names of the fraternal parties in some of these cases, e.g., *infra* note 82, this Article will refer to fraternal parties acronymically in the main body of the text if necessary. Citations, of course, provide the complete proper name.

79. *Derrick*, 106 S.E. at 224 (Cothran, J., concurring).

80. *Id.* at 223 (majority opinion).

81. *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141, 142 (N.Y. 1907).

82. *Id.* at 141.

83. *Id.*

The candidate sought recompense of his assailant, the local, and the national.⁸⁴

Citing *Mitchell*, the New York Court of Appeals rejected the national's defense that it had not authorized its supposed agents to exercise any such violence in its service.⁸⁵ Reasoning that although the national had not intended the ritual to be performed with such force, it had nonetheless prescribed the general course of action, and was properly liable for its agent's unintended overexuberance.⁸⁶ A treatise contemporaneous to *Mitchell* had aptly explained that "where a ritual is prescribed by a supreme body, and in observing that ritual, the lodge, which is authorized to conduct the ceremony, is guilty of so negligently performing the duties enjoined upon them that injuries result to the candidate, the supreme body could, under possible circumstance, be liable."⁸⁷ *Thompson* arguably fit into this possible circumstance: the grossly negligent or reckless discharge of the general ritual contemplated by the national.⁸⁸ The court added a sensible suggestion in closing:

We are not disposed to criticise the defendant on account of its being a secret society. . . . Coupled with the mutual benefit of its members through insurance is the social and fraternal feature, which, through the secret rituals of their lodges, have enabled them to keep their members in touch with each other and interested in the work of the tents. We think, however, that other acts might be prescribed by the ritual, from which the importance of the work of the tent might be impressed upon the mind of the applicant without resorting to violence.⁸⁹

The Texas Court of Civil Appeals, in *Johnson III*, followed New York's approach, emphasizing that the national had promulgated the ritual in question, even if it did not foresee that injury could ensue through the ritual's liberal interpretation by the local chapter.⁹⁰ In that case, the candidate claimed injury after being tripped by a saber carried as part of the ceremonial regalia of the initiation.⁹¹ Nonetheless, the court ultimately held the injury sufficiently

84. *Id.*

85. *Id.* at 143.

86. *Id.* at 143.

87. BACON, *supra* note 37, at 125-26 § 63; *see supra* note 77.

88. *Thompson*, 82 N.E. at 143.

89. *Id.*

90. Grand Temple & Tabernacle in the State of Tex. of the Knights & Daughters of Tabor of the Int'l Order of Twelve v. Johnson, 171 S.W. 490, 492 (Tex. Civ. App. 1914) [hereinafter *Johnson III*].

91. *Id.* at 491.

connected to the prescribed ceremony to warrant liability,⁹² announcing itself “not willing to subscribe to the doctrine that a secret order may provide forms and ceremonies that are, *or may by the manner of executing the same become*, dangerous, and then escape liability when injury results from the negligence of its agents in carrying out those ceremonies.”⁹³

Two additional cases from state high courts, however, cannot simply be characterized as wanton excess in the course of conducting a nationally prescribed ritual.⁹⁴ Both recited similar facts concerning local chapters’ imposition of “certain electrical stunts” upon the candidate during his initiation, the resultant injury or death being the basis of the suits.⁹⁵ The national rituals did not

92. “Ultimately” may be an understatement; the procedural history of the case is convoluted. It had already been before the Texas appellate court twice before its final disposition, and at the first hearing the court had been dismissive of agency liability, finding the local’s negligence utterly unconnected with the national ritual, and disregarding *Mitchell*, which “we think is not well considered, and which we decline to follow, as not supported by reason and authority.” *Grand Temple & Tabernacle of Knights & Daughters of Tabor of the Int’l Order of Twelve v. Johnson*, 135 S.W. 173, 175 (Tex. Civ. App. 1911) [hereinafter *Johnson I*]. The court had thereupon reversed and rendered the case, but on motion for rehearing (and evidently before reporting their opinion, since the outcome of the rehearing appears in the same publication), it remanded in order that “an opportunity [be] afforded appellee of showing that the act complained of was done by some agent of appellant in furtherance of the business of the principal.” *Id.* at 176. This the plaintiff did, but in his second appearance as appellee, the court did not pass on the question of national agency, remanding again on other grounds. *Grand Temple & Tabernacle in State of Tex. of Knights & Daughters of Tabor of Int’l Order of Twelve v. Johnson*, 156 S.W. 532, 534 (Tex. Civ. App. 1913) [hereinafter *Johnson II*].

By the time the lawsuit returned for its third and final hearing, however, plaintiff had developed ample evidence for both the trial and appellate court, which now viewed the local chapter’s negligence in wearing the saber used as sufficiently connected to the prescribed ritual as to be imputable to the national. See *infra* note 93 and accompanying text. The case’s circuitous journey, along with the development of facts and final disposition contrary to *Johnson I*, leave the vitality of that first holding rejecting national fraternal agency in doubt. See 7 C.J. *Beneficial Associations* § 76 n. 5[a], p.1111; *infra* notes 137–44. But see *Gonzales v. Am. Postal Workers Union, AFL–CIO*, 948 S.W.2d 794, 798 (Tex. App. 1997) (citing *Johnson I* for the proposition that a “grand body [is] not liable for subordinate lodge member’s acts when evidence established that acts were neither authorized by grand body nor in furtherance of its business”).

93. *Johnson III*, 171 S.W. at 492 (emphasis added).

94. *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916); *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586, 587 (N.C. 1917) (reversing trial court’s finding of nonsuit and remanding for factual development).

95. The details of these galvanic gantlets are frankly horrifying, and bespeak a wholly unhealthy fascination with electrocution. In *Ange*, the court explained that:

as a part of the ceremony then exercised, plaintiff was blindfolded and carried into a room, was placed on a machine similar to a pair of platform scales, and told to pull a certain lever which would register his strength, as this was required by the lodge and by the defendant, the Sovereign Camp; that plaintiff thereupon pulled the lever as directed and immediately received a severe shock of electricity which threw him out on the floor and caused him serious and painful injuries.

evidently prescribe or intimate any such diabolical contrivance,⁹⁶ the use of which was then on the initiative of the local chapters.⁹⁷ Yet, in both cases, the evidence indicated that the dangerous procedures had been previously used by the local chapter.⁹⁸

The local chapter's agency for the national with regard to hazing was never in doubt in *L.O.M v. Kenny*.⁹⁹ Determining *Mitchell* to be "well founded and correct,"¹⁰⁰ the Supreme Court of Alabama quoted it at length before adopting its reasoning: "the conclusion is irresistible that these subordinate lodges, in taking in and initiating candidates into membership of the lodge, were acting as the agents of the Supreme Lodge."¹⁰¹ Constrained from arguing against agency by this conclusion, the national organization then claimed

Ange, 91 S.E. at 587. The court's description of the "certain electrical stunts" employed by the local chapter for initiation in *Kenny*, where the candidate perished, is even more thorough:

During the progress of the initiation of intestate, as an applicant for membership in said lodge, there were used what are referred to as "certain electrical stunts," one known as the "branding stunt," and the other as the "prize ring." In the "branding stunt" the victim was placed on a board and, while strapped there, a current of electricity was passed through him by means of wires attached to his ankles, the current being completed by means of another wire attached to a razor and applied to the back of his neck. The "prize ring" was a mat containing numerous wires interlaced throughout its entire surface, around which mat were chains supported by posts; both mat and chains being charged with electricity. A wooden box was placed on this mat, and three or four of the candidates were placed in the ring with boxing gloves, and instructed to box; the electricity was then turned on, and the candidates were supposed to make a scramble for the box, which was only large enough to hold one at a time.

Kenny, 73 So. at 520. That death might ensue from such stunts is not surprising. See *infra* note 106.

96. This matter was in some doubt, however, as the national ritual was in neither case admitted into the record. See *Kenny*, 73 So. at 523. In *Ange*, the court surmised that the "electric shock" was merely "purporting to be a part of the ceremonial," given that "[n]either the ritual nor constitution or by-laws of [the national] defendant or of the local lodge, if any such exist, were offered in evidence by either party on the trial." *Ange*, 91 S.E. at 588. One might assume, however, that the written national ritual did not require a fatal electrocution.

97. The *Kenny* court, it must be noted, opined that the evidence tended to show that a national representative had actually observed the use of the electrical device in question and "approved" of it, 73 So. at 521, though there was no suggestion that the impetus to use it was anything but local.

98. *Kenny*, 73 So. at 520, 524 ("There was also evidence going to show that on the same night another candidate for membership, going through the same initiation, met his death also" and "[t]he ceremony of initiation, with the electrical apparatus used on the night of the fatal accident, had been in use some time previous thereto."); *Ange*, 91 S.E. at 587 ("It was further shown that another individual had been admitted as member of defendant lodge a short time before the night in question, and that he too was placed on said machine and received an electric shock similar to that described by plaintiff.").

99. *Kenny*, 73 So. 519. *Kenny's* application of *Mitchell* was thoroughly criticized by a contemporary journal article, which this Article discusses in more depth in the next section, but may be worth noting now for the reader's convenience in assessing the strength of *Kenny's* reasoning. *Fraternal Order*, *supra* note 57, at 153.

100. *Kenny*, 73 So. at 525.

101. *Id.* at 523.

that the local's use of the "electrical apparatus" was beyond the purview of the national initiation ritual—but lacking a copy of the national ritual to determine its metes and bounds, *Kenny* did not directly pass on this claim.¹⁰² Rather, the court decided that the exact letter of the national's rules were immaterial, as the principal remains liable even when the agent's conduct of his master's business goes outside his master's direction.¹⁰³ There being no dispute that the tort occurred in the course of initiation, "the local lodge, in taking in new members and initiating them into the order, was acting within the scope of its authority and agency and in the accomplishments of the objects of the Supreme Lodge."¹⁰⁴

That the local chapter may act as its national's agent in initiations was equally clear in *Ange v. W.O.W.*, where the plaintiff appealed a judgment of nonsuit.¹⁰⁵ In reversing and remanding, the Supreme Court of North Carolina emphasized the venerable doctrine in agency that "if the wrong complained of is committed within the course of the agent's employment and within its scope, the principal may be held liable, though it went beyond his express direction and even contrary thereto."¹⁰⁶ Citing *Mitchell, Thompson*, and *Johnson III*, the court concluded that it was a fair inference that the local chapter was acting within the scope of agency for the national, even if the electrocution was only "*purporting* to be a part of the ceremonial," given that the conduct took place during an initiation into the national order and was done on its behalf.¹⁰⁷

Opinions passing on fraternal societies outside the context of hazing naturally had cause to comment on agency in initiations,

102. *Id.* at 524 (claiming that "the local lodge was acting, in the use of the electrical apparatus in the initiation of intestate, beyond the scope of its authority"); *see supra* note 96.

103. *Kenny*, 73 So. at 524. Moreover, placing itself in the shoes of the deceased initiate, the court reasoned that the local at least *appeared* to have the authority to demand compliance; an outsider to the fraternity's mysteries could not know any better. Accordingly, "the intestate, a stranger, a candidate for membership in the order, had, it would seem, a right to rely upon this apparent authority of the local lodge to give this particular initiation." *Id.* The court's "belt and braces" approach, finding both actual and apparent agency, leaves *Kenny* in an odd posture, since either of the two findings would have been dispositive of liability.

104. *Id.*

105. *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586 (N.C. 1917). A judgment of nonsuit, now largely a legal archaism, involved the dismissal of the case for the plaintiff's failure to introduce sufficient evidence to support his claims, akin to summary judgment or judgment as a matter of law in its effect. *Ange* is unclear as to precisely when in the prosecution of the case the nonsuit was directed, though a number of witnesses gave testimony. *Id.* at 587.

106. *Id.* at 588; *cf. supra* text accompanying note 104.

107. *Ange*, 91 S.E. at 588 (emphasis added). Given the case's procedural posture as an appeal from nonsuit, the court did not reach a final judgment on liability, but rather remanded for trial on the merits. *Id.*

though such cases can only be viewed as instructive analogues to those involving torts of hazing. These observations nevertheless serve to illustrate a growing consensus about the responsibilities of national fraternities. An Indiana appellate court represented the trend cogently in opining,

the candidate for initiation . . . had no voice or choice. He must submit to the initiation, if he would become a member, and the parent, or head society, prescribes the character of the initiation, and the persons who shall act for it in such ceremony. . . . [I]t would be repugnant to an enlightened sense of justice to hold otherwise than that the parent society was acting in those matters by its agent.¹⁰⁸

This enlightened sense of justice evidently impelled courts in Arkansas and Texas to acknowledge the wisdom of agency liability in initiations as well.¹⁰⁹

Thus, by the time South Carolina reaffirmed *Mitchell* with *Derrick* in 1921, her sister states of New York, North Carolina, Texas, and Alabama had adopted her court's reasoning, while Arkansas and Indiana, amongst others, had echoed *Mitchell's* theory, even if lacking a case directly on point.¹¹⁰ Whether these cases couched local members' initiation practices as reckless excesses or outright additions to the national's instructions for inducting new members, their holdings recapitulated the judicial admonition first issued to fraternal orders even before *Mitchell*:

It will be better in all such bodies to enforce rigidly the directions given by the *Ritual* of this order, "no rough usage to be allowed" to the candidate, for a practical joke or lark at such a time, although sport to the one party, may be very

108. *Modern Woodmen of Am. v. Lyons*, 128 N.E. 651, 653 (Ind. Ct. App. 1920).

109. See *Sovereign Camp, W.O.W. v. Richardson*, 236 S.W. 278, 280 (Ark. 1921) ("In all such cases as this, where the agent, having express or apparent authority to take the application and initiate members into the appellant society, makes false representations which induce the member to join the order, and which he otherwise would not have done, then the society, through its agent making such false representation, will not be heard afterwards to controvert their truth."); *Brotherhood of R.R. Trainmen v. Cook*, 221 S.W. 1049, 1053 (Tex. Civ. App. 1920) ("The order of which the grand lodge and its officers are the controlling body acts through the local lodge and its officers in the matter of the reception and readmission of members. Necessarily the local lodge and its officers are the agents of the Brotherhood in these matters . . .").

110. *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904); *Derrick v. Sovereign Camp, W.O.W.*, 106 S.E. 222, 224 (S.C. 1921); *Thompson v. Supreme Tent of the Knights of the Maccabees of the World*, 82 N.E. 141 (N.Y. 1907); *Ange v. Sovereign Camp, Woodmen of the World*, 91 S.E. 586, 588 (N.C. 1917); *Johnson III*, 171 S.W. 490, 492 (Tex. Civ. App. 1914); *Supreme Lodge of the World, Loyal Order of the Moose v. Kenny*, 73 So. 519, 524 (Ala. 1916); *Richardson*, 236 S.W. at 280; *Lyons*, 128 N.E. at 653.

hurtful to the other, and may end quite differently from what was desired or could possibly have been expected.¹¹¹

National fraternal orders ignored this sage advice at their peril, as incidents of hazing by their local chapters and members were increasingly becoming their vicarious responsibility.

2. Underlying Principles of Agency Law in the Early Twentieth-Century Cases

Before turning away from these cases, it is worthwhile to examine more rigorously their interpretation of agency law. Of the greatest consequence is the distinction between general agency and the relationship of master and servant in *respondeat superior*, the more specialized variety that renders the principal (the “master”) liable for the physical torts of the agent (the “servant”).¹¹² Although the aforementioned courts may not have been as plain as possible about it, they viewed fraternal agency as of the master-servant variety in the context of hazing.¹¹³ In a general agency relationship, the national organizations would not have been liable (as they were) for the locals’ physical torts.¹¹⁴ But in *respondeat superior*, the master may indubitably be held liable for both the negligent and intentional physical torts of his servant.¹¹⁵ Given the role

111. *Kinver v. Phoenix Lodge, Indep. Order of Odd Fellows*, 7 O.R. 377, 388 (Can. Ont. 1885), quoted in *Jumper v. Sovereign Camp, Woodmen of the World*, 127 F. 635, 639 (5th Cir. 1904).

112. See RESTATEMENT (SECOND) OF AGENCY §§ 219-20, 243, 245 (1958).

113. *Mitchell*, of course, had been clear that its basis was in *respondeat superior*, *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904) (“In all such cases the rule applies, respondeat superior . . .”), see *supra* note 77, so to the extent the later cases relied on its holding, they too were grounded in that doctrine. Nor did the later cases fail to explicitly advert to master-servant agency. See, e.g., *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519, 522 (Ala. 1916) (“The principal is responsible for the acts of his agent done within the scope of his employment, and in the accomplishment of objects within the line of his duties, though the agent seek to accomplish the master’s business by improper or unlawful means, or in a way not authorized by the master . . .”) (quoting *Hardeman v. Williams* 53 So. 794, 796); *Ange*, 91 S.E. at 587; *Derrick v. Sovereign Camp, W. O. W.*, 106 S.E. 222, 224 (S.C. 1921) (Cothran, J., concurring) (“In such initiation the local camp was ‘about the business’ of its master.”); Recent Cases, *supra* note 52 (summarizing the case law with reference to the national “master”).

114. See RESTATEMENT (SECOND) OF AGENCY § 250 (1958); *id.* at cmt. a (“It is only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.”); *id.* at § 245 (use of force); cf. *LeFlore*, *supra* note 3, at 227 (claiming these cases “blur the distinctions between agency and master-servant by characterizing fraternal organization fact situations such as these as apparent scope of authority cases”). These issues are explored in greater depth in the context of later case law and policy. See *infra* Parts IV.B and V.

115. See RESTATEMENT (SECOND) OF AGENCY §§ 243 (negligence), 245 (intentional) (1958). The master is liable for intentional use of force “if the act was not unexpected in

of locals as recruiters for their national,¹¹⁶ denoting them actual or apparent servants for the national master is hardly a flight of fancy.

Note should also be made of the distinction between a local's actual and apparent authority. In most of the case law discussed, the local was held to be exercising the *actual* authority granted by the national for the performance of initiations;¹¹⁷ in at least one concurrence, the local was thought to engender liability because of its *apparent* authority to perform the same;¹¹⁸ and in a few cases, the precise nature of the authority in agency was equivocal.¹¹⁹ While most decisions fell into the first camp, all agreed that the local had *some* species of authority to conduct the national's induction of new members. This diversity amounts to a distinction without a difference, however, for as the court in *Derrick* would rightly conclude, "a case of apparent authority, which is equivalent to actual authority, . . . comes within the principle of the Mitchell Case."¹²⁰

This is because once agency in hazing is taken to be *ipso facto* that of master and servant, the distinction of actual or apparent authority is largely moot—the principal is liable in *respondeat superior* for physical conduct either way¹²¹—as the court in *Derrick* recognized.¹²² The main surviving discrepancy is the outer bound of the local's authority under the two theories. Actual agency is constrained by the scope of the authority granted by the national,¹²³

view of the duties of the servant," *id.* at § 245, and the Restatement's examples vividly illustrate that when the authorized acts necessarily involve some degree of physical contact (as in initiation rituals), excesses and additions to the authorized physicality are "not unexpected." See *id.* at cmts. a, c, e.

116. See *infra* notes 174-79.

117. *E.g.*, *Mitchell*, 48 S.E. at 292; *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141 (N.Y. 1907); *Grand Temple & Tabernacle in the state of Texas of the Knights & Daughters of Tabor of the Int'l Order of Twelve v. Johnson*, 171 S.W. 490, 490 (Tex. Civ. App. 1914); *Brotherhood of R.R. Trainmen v. Cook*, 221 S.W. 1049, 1053 (Tex. Civ. App. 1920); *Modern Woodmen of Am. v. Lyons*, 128 N.E. 651, 653 (Ind. Ct. App. 1920); *Derrick*, 106 S.E. at 223; see also *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586, 587-88 (N.C. 1917) (suggesting, without holding, that the local was an actual agent because of the case's posture).

118. *Derrick*, 106 S.E. at 223 (Cothran, J., concurring).

119. *E.g.*, *Supreme Lodge of the World, Loyal Order of Moose v. Kenny*, 73 So. 519, 524 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916), *supra* notes 93-96; *Sovereign Camp, Woodmen of the World v. Richardson*, 236 S.W. 278, 280 (Ark. 1921).

120. *Derrick*, 106 S.E. at 224 (Cothran, J., concurring); see also *Richardson*, 236 S.W. at 280 ("In all such cases as this, where the agent, having express or apparent authority . . ."), *supra* note 109.

121. See RESTATEMENT (SECOND) OF AGENCY §§ 219-20, 243, 245 (1958).

122. See *supra* note 120 and accompanying text.

123. See RESTATEMENT (SECOND) OF AGENCY § 228; Angel N. Marshlain, *Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association Be Required to*

and apparent agency by the reasonableness of the candidate's belief that local was acting for the national.¹²⁴ With regard to hazing, however, these standards have the same result: both the actual scope of authority granted the local¹²⁵ and the breadth of authority apparent to a pledge or candidate¹²⁶ were to induct new members into the fraternity. Indeed, it was for that very reason that local chapters were chartered.¹²⁷ That *respondeat superior* collapses the distinctions of actual and apparent authority for hazing has much to recommend it from the point of view of public policy seeking to eliminate hazing, as will be discussed later.¹²⁸

C. Competition: The Early Arguments For and Against Agency

Notwithstanding the weight of the early twentieth-century precedents, some contemporary treatises and journals discerned a countercurrent absolving national fraternal organizations of agency liability for hazing.¹²⁹ To be sure, after the due niceties regarding the cases' lack of accord, most of these commentators confirm that the balance favored agency liability, but even suggesting the need for balancing two sides gives too much credit to a countercurrent that was little more than a trickle. At best, four cases were identified with this nominal countercurrent; of these, two can only be so attributed by misinterpreting their holdings, and one more was later reconsidered by the deciding court.¹³⁰ None were well-followed in any event, and no relevant cases relied upon any after 1911.¹³¹

Assume a Parental Role?, 5 APPALACHIAN J.L. 1 (2006); sources cited *supra* notes 48, 50 and accompanying text; *cf. infra* text accompanying note 158.

124. See RESTATEMENT (SECOND) OF AGENCY § 8 cmt. c (1958) ("Apparent agency exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized."); see also *id.* at § 219(2)(d) (specifically within the context of master-servant).

125. See, e.g., *supra* notes 73, 93 and accompanying text.

126. See, e.g., *supra* note 103.

127. See *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904); *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519, 523 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916); *infra* notes 176-79 and accompanying text.

128. See *infra* text accompanying notes 163-70; *infra* text accompanying notes 372-75.

129. See, e.g., Notes of Cases, 7 VA. L. REGIS. N.S. 219, 221-22 (1921-1922); Recent Cases, *supra* note 52; CYCLOPEDIA, *supra* note 53, at § 1(F)(2)(b), p.43; 7 C.J. *Beneficial Associations* § 76, p.1112.

130. See *infra* Subpart II.C.1.

131. As this Subpart will illustrate, aside from *Kaminski*, *infra* note 133, and *Johnson I*, *supra* note 92, the commentariat's putative precedent did not even involve hazing. See *infra* notes 148-153 and accompanying text. As for those two learned tribunals espousing a view genuinely contra *Mitchell* in *Kaminski* and *Johnson I*, this author can only observe that the pair have experienced a certain modern renaissance after decades of oblivion, having each been cited for their holdings once in the last few decades—albeit in dicta, with regard to a tangential point, and relegated to a footnote. See *Harter v. Grand Aerie Fraternal Order of*

Though hardly dead letters at the time, having been regularly trotted out by nationals in their defense, they offered scant shelter in practice.¹³²

1. The Putative Countercurrent Against *Mitchell*

Only a single decision stood for the unvarnished proposition that a national fraternity was not liable for the tortious conduct of its local members in performing initiations.¹³³ In *Kaminski v. K.M.M.*, the plaintiff alleged “that during the initiation the said initiating officers recklessly, negligently[,] and carelessly grasped the plaintiff by his shoulders, tripped his knees forward, and threw his body backward, causing plaintiff to fall upon the floor of said room with great force and violence . . . whereby the said plaintiff was seriously and permanently injured[,]” and urged that the national be held liable because its ritual prescribed that the officers “rush upon and seize” the candidate, as was done.¹³⁴

The Michigan Supreme Court demurred, finding dispositive the candidate’s agreement to be bound by the laws, rules, and regulations of the order, which expressly disclaimed any national liability for injuries in the course of initiation and provided that the local and its members should be solely responsible for initiation in all its particulars.¹³⁵ In essence, the court viewed the candidate’s adoption of the national’s bylaws as a waiver of national liability. In this holding, however, *Kaminski* stood against legions of cases holding that where agency was legally immanent in the relationship between local and national, a disclaimer could not insulate against liability, whether in initiations or otherwise.¹³⁶

In this discussion also belongs *Johnson I*, in which a Texas appellate court absolved a national of liability for an ostensible trip-

Eagles, No. 244689, 2004 WL 868655, at *5 n.1 (Mich. Ct. App. Apr. 22, 2004) (O’Connell, J., concurring); *Gonzales v. Am. Postal Workers Union, AFL-CIO*, 948 S.W.2d 794, 798 (Tex. App. 1997). Regardless, the present discussion concerns the state of law in the early twentieth century, and within that body of law *Kaminski* and *Johnson I* found few takers beyond the other cases discussed herein.

132. See, e.g., *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586, 588 (N.C. 1917) (citing *Jumper*); *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141, 142-43 (N.Y. 1907) (citing *Jumper* and *Kaminski*).

133. *Kaminski v. Knights of Modern Maccabees*, 109 N.W. 33 (Mich. 1906).

134. *Id.* at 33 (omission in original). The description of the tort is remarkably similar to that in *Thompson*, which makes sense in that both involved related orders of the Maccabees that presumably prescribed analogous initiation rituals. See *supra* note 81 and accompanying text.

135. *Kaminski*, 109 N.W. at 33.

136. See 7 C.J. *Beneficial Associations*, § 76 n.8 at 1112. Regarding specific jurisprudential concerns with such waivers, see *infra* notes 167-69.

and-fall¹³⁷ in the course of an initiation.¹³⁸ Yet that court assumed that the local officers were agents of the national and recognized the proper principle of agency,¹³⁹ basing non-liability upon testimony that the swordplay that tripped the plaintiff was in no way related to the initiation.¹⁴⁰ In essence, the court saw the accident as owing to a wholly extrinsic intervening cause, beyond the scope of the initiation. Considering, however, that the suit was reheard and the national was held liable in agency because the plaintiff was able to demonstrate that the injury did occur in the course of initiation, the cogency of *Johnson I* is dubious at best, and is probably best thought of as abrogated.¹⁴¹

As for the remainder of this underwhelming countercurrent, *Jumper v. W.O.W.*¹⁴² in 1904 and *Kendrick v. M.W.O.A.*¹⁴³ in 1908 exhaust the supply. In *Jumper*, the plaintiff claimed injury after being made to ride a mechanical goat;¹⁴⁴ in *Kendrick*, the plaintiff was blindfolded and beaten with cudgels;¹⁴⁵ and in both, the national escaped liability. Some commentators characterized their holdings as resting on the fact that these torts were not a literal part of the national ritual of initiation, but were added gratuitously by the local

137. "Trip-and-fall" obviously being a modern term, the injury complained of nonetheless falls comfortably within the bounds of those regularities of the personal injury plaintiffs' bar. See generally B. Bresler & J.P. Frankel, *The Forces and Moments in the Leg During Walking*, 72 TRANSACTIONS. AM. SOC'Y. MECH. ENG'RS. 27 (1950).

138. *Johnson I*, 135 S.W. 173 (Tex. Civ. App. 1911); see *supra* note 92.

139. "[T]he principal is liable for all acts of the agent expressly authorized, or which are the result of acts which he has expressly authorized or directed, as well as for tortious acts knowingly ratified by the principal. Where a tort is committed by the agent in the course of his employment for the principal's benefit, he will be liable although he has not authorized or ratified such act, or even though he had forbidden or disapproved of it, and the agent had disobeyed his orders or instructions." *Johnson I*, 135 S.W. at 175.

140. *Id.*

141. As the court recognized, "[i]f it had been necessary in executing the commands of the principal to use a foil or sword about the person of appellee, and in so doing the agent had thrown him to the floor and injured him, appellant might be liable." *Johnson I*, 135 S.W. at 175. In fact, this was precisely what the plaintiff proved after the case was remanded for further factual development, and plaintiff prevailed in a third hearing before the Texas appellate court on the basis that the local officers *were* acting within the scope and purpose of the national. See *supra* note 92 and accompanying text.

142. *Jumper v. Sovereign Camp Woodmen of the World*, 127 F. 635 (5th Cir. 1904). There is some confusion in the authorities as to the name of the plaintiff. The Central Law Journal reported the case as "Tumber" rather than "Jumper," Case Comment, *Benefit Societies—Liability for Injury of Candidate in Initiation*, 59 CENTRAL L.J. 48, 48 (1904), while a citation in a later case had "Jumber." *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141, 143 (N.Y. 1907). The Federal Reporter, however, had it right with "Jumper."

143. *Kendrick v. Modern Woodmen of Am.*, 109 S.W. 805 (Mo. Ct. App. 1908).

144. See *Jumper*, 127 F. at 636, 639-40. See *supra* notes 43-46 and accompanying text.

145. See *Kendrick*, 109 S.W. at 805-06.

chapter¹⁴⁶—a characterization that, if true, would represent a direct challenge to *Mitchell's* rule, which viewed even unauthorized conduct in the course of fraternal initiation as imputable to the national.¹⁴⁷

But these commentators misread *Jumper* and *Kendrick*. The cases did concern local members' torts committed outside the nationally-prescribed ritual, but the unifying fact in both was that the injury occurred not to a *candidate* but to an *admitted member*, after his initiation. To wit: in *Jumper*, "the particular act causing the injury was not part of the ceremony of initiation at all, but occurred after and when the claimant had become a member of the local lodge";¹⁴⁸ in *Kendrick*, the tort occurred after "the member had been passed on and accepted as a member, and the ritualistic work required by the order had been done."¹⁴⁹

The dispositive distinction is therefore between torts against candidates in the course of initiation and those arising from horse-play amongst admitted members; the distinction is *not* between acts of hazing punctiliously prescribed and not prescribed by the national.¹⁵⁰ *Jumper* and *Kendrick*¹⁵¹ stood only for the proposition

146. *E.g.*, Recent Cases, *supra* note 52, at 562 (citing both for the proposition of non-liability "when the injuries resulted from a ceremony not prescribed by the ritual"); 7 C.J. *Beneficial Associations* § 76, n.5[a] at 1111 (citing *Jumper* for the fact that "the part of the ceremony which resulted in the injury [was] not . . . prescribed by the ritual"); see also RULING CASE: LAW, *supra* note 53, § 34, at 1221.

147. *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904).

148. *Ange v. Sovereign Camp of Woodmen of the World*, 91 S.E. 586, 588 (N.C. 1917) (describing *Jumper*); accord *Jumper*, 127 F. at 640 (noting that the defendant explained that the mechanical goat "is not treated as a part of the initiation proceedings, and . . . is never used at all on any subject until he has been fully initiated").

149. Notes of Cases, *supra* note 62, at 222; accord *Kendrick*, 109 S.W. at 805-06.

150. See *Ange*, 91 S.E. 586, 588 (N.C. 1917) (characterizing *Jumper*); Supreme Lodge of the World, Loyal Order of Moose v. *Kenny*, 34 L.R.A. 476, 476 (1914) ("And in the *Kendrick* Case (Mo.) *supra*, where it was stated in substance that after the plaintiff had been obligated and gone through all the ritualistic requirements, and after he had become a member of the order, he suffered himself to be put through some kind of 'horse play' which resulted in his injury, it was held that this horse play was a side affair for which neither the head nor local camp was responsible, but only those who participated in it.").

151. *Kendrick* purported to pronounce a broader principle: "Having no power to appoint or nominate officers of the local camp who initiated plaintiff into the order it cannot be held that these officers are the agents or servants of the head camp in the ceremonial process of initiating a member into the order." *Kendrick*, 109 S.W. at 806. This is indeed quite a repudiation of *Mitchell*, basing agency not on the national orders' ability to ultimately control lower officers, but rather on the fact that the national had delegated the election of local officers to the local, thus (putatively) insulating them from the misdeeds of those electees. Were nationals truly able to insulate themselves merely by withdrawing from involvement in their locals' administration, the perverse incentives would be severe. See *infra* text accompanying notes 321-27.

But as the injury in *Kendrick* occurred after "the ceremonial process of initiating a member into the order," *Kendrick*, 109 S.W. at 806, this sweeping pronouncement is mere dictum, and was never followed thereafter. *Johnson I's* rejoinder to it is apt: "While under the facts

that tortious behavior of local members wholly outside the processes of member induction and initiation are not (necessarily) within the scope of national agency.¹⁵² As the concurrence to *Kendrick* said of the local members, the national “was in no sense responsible for their conduct after the ritualistic work was completed.”¹⁵³ Indeed, by establishing that a local’s injuries to members *after* their initiations cannot mechanistically be laid at the national’s door, these decisions only underscored the agency of the local chapter for injury done to candidates *before* they were admitted.¹⁵⁴

Nonetheless, scholarly criticism of *Mitchell*’s principle was not without any merit. The most lucid of these criticisms addressed itself to *Kenny*, the appalling facts of which—multiple electrocutions, the victim’s death, and the clear requirement that the candidate acquiesce—might be thought to make it insuperable to reproach. All the same, one widely read law review of the day identified two main arguments.¹⁵⁵ First, the applicant entered into the process of candidacy of his own free will, was free to discontinue at any time, and therefore assumed the risk of any gauntlets allegedly imposed upon him.¹⁵⁶ Second, while acknowledging that the principal may be liable for an agent’s errant actions, the journal proposed that “this rule has its limitations,” and such inhumane behavior as the electrocutions in question could not be fairly imputed to a national without any inkling¹⁵⁷ that such atrocities were being

of that case the court properly held that the Sovereign Camp was not liable, we do not deem it necessary to express an opinion as to the soundness of the principle involved in the quotation.” 135 S.W. 173, 176 (Tex. Civ. App. 1911). See *Kendrick*, 109 S.W. at 805-06 (noting the injury occurred after initiation). It is worth reiterating that *Johnson I* upheld immunity for the national, and this author views such treatment of *Kendrick*’s dictum as a studiously polite repudiation.

152. This same sentiment would be well stated in dictum almost a century later in *Estate of Hernandez v. Flavio*, 924 P.2d 1036 (Ariz. Ct. App. 1995), *vac’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997). See *infra* note 225. “Necessarily” must be parenthetically imposed because, of course, a national could theoretically order a local chapter to commit a tort upon an existing member. Such a circumstance, however, does not appear in the case law, and is difficult to encompass mentally in any case, even in simpler days of litigiousness.

153. *Kendrick*, 109 S.W. at 806 (Nortoni, J., concurring). *Jumper* concluded similarly: “the plaintiff has not shown that there does exist between the sovereign camp and the Water Valley Camp such relationship of master and servant, or principal and agent, as renders the sovereign camp responsible for the acts of the Water Valley Camp in the matters of which the plaintiff complains.” *Jumper*, 127 F. at 642-43. Tomfoolery amongst members is not tantamount to hazing of candidates.

154. See *infra* note 170.

155. Fraternal Order, *supra* note 57.

156. *Id.* at 153-54.

157. *Contra* *Supreme Lodge of World, Loyal Order of Moose v. Kenny*, 73 So. 519, 521 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916); see *supra* note 97.

committed in its name.¹⁵⁸ In sum, the journal argued that a general policy of deputing local chapters to induct new members could not justly render the national liable for the unforeseeable depravities imposed by wayward individuals and freely undertaken by the hopeful candidates.¹⁵⁹

2. Contemporary Arguments in Defense of *Mitchell's* Principle

The greater majority of authorities, however, were wary even of the limited concessions proposed variously by *Kaminski*, the misplaced commentary on *Jumper* and *Kendrick*, and apologia akin to that of the Central Law Journal.¹⁶⁰ These philosophical qualms coalesce into two discrete schools of thought regarding the local's relationship to the candidate and to the national. In the first, these authorities worried about the local lodge's apparent authority and actual ability to dictate the terms and conditions of a candidate's initiation into the national order; in the second, they observed that local members were an integral and indivisible part of the national body, at least as far as the recruitment of members went.¹⁶¹

The first school viewed abrogation of the national's agency for hazing as troubling in light of the local's dominant position vis-à-vis the candidate.¹⁶² Local chapters stood as gatekeepers between the eager candidate and influential national orders—gatekeepers whose consent was required for national membership and its attendant emoluments.¹⁶³ From the perspective of the candidate, the local and national appeared coextensive.¹⁶⁴ Furthermore, as an outsider to the secret rituals of the order, the candidate had no way to distinguish between the true requirements of the national ritual

158. Fraternal Order, *supra* note 57, at 154.

159. In a way, the Journal's argument foreshadows the predominance of the analysis in tort generally applied to modern national fraternity liability focusing on the foreseeability of the injury, the involvement of the national with the local's actions, the extravagance of the procedures administered, and the multifarious other factors that enter into the balancing analysis of the custodial duty in tort. *See infra* Part III.D.2.

160. Fraternal Order, *supra* note 57; *See supra* Part II.C.1.

161. *See infra* notes 175-90.

162. *See infra* notes 175-84.

163. *See* Modern Woodmen of Am. v. Lyons, 128 N.E. 651, 653 (Ind. Ct. App. 1920); *supra* note 108; *see also* Supreme Lodge of World, Loyal Order of Moose v. Kenny, 73 So. 519, 523 (Ala. 1916), *cert. denied*, 244 U.S. 652 (1916); *infra* note 176.

164. *See, e.g.,* Kenny, 73 So. at 523 ("The candidate joining the subordinate lodge was, of course, then a member of the order; and it does not appear that he could become a member in any other manner."); Mitchell v. Leech, 48 S.E. 290, 292 (S.C. 1904) ("These facts show that, when a person was initiated in a local lodge, he became, to all intents and purposes, a member of the sovereign camp.")

and those imposed gratuitously by an errant local¹⁶⁵—especially when the local represented to the candidate that its peculiar additions were *bona fide*.¹⁶⁶ And the New York Court of Appeals,¹⁶⁷ amongst others,¹⁶⁸ fretted that recognizing a candidate's "voluntary" waiver for injuries in initiation (as in *Kaminski*) would implicate public policy concerns in light of the pervasive disparity of power. All of these concerns, however, evaporated once a candidate was admitted: he was now entitled to all the benefits of membership, rather than a supplicant therefor,¹⁶⁹ and had knowledge of

165. See, e.g., *Kenny*, 73 So. at 524, *supra* note 103; see also *Derrick v. Sovereign Camp, W.O.W.*, 106 S.E. 222, 223 (S.C. 1921) (Cothran, J., concurring); *infra* note 170; cf. *Brotherhood of R.R. Trainmen v. Cook*, 221 S.W. 1049, 1054 (Tex. Civ. App. 1920) ("Since the applicant for membership is to a large extent dependent upon the officers of the lodge and the members thereof, who are inducting him into the order, for instructions as to what is necessary to be done in such matters, it might be reasonably concluded that the initiate has the right to rely on the fact that the proceedings to which he submits himself are regular and in compliance with the rules of the order.").

166. E.g., *Ange v. Sovereign Camp, Woodmen of the World*, 91 S.E. 586, 587 (N.C. 1917) (plaintiff was "told to pull a certain lever which would register his strength, as this was required by the lodge and by the defendant, the Sovereign Camp"); *Derrick*, 106 S.E. at 224 (Cothran, J., concurring) ("The plaintiff of course did not know of what the initiation consisted, or that it was fully completed at the July meeting; naturally, from the directions to return for the August meeting to receive other degrees, he supposed that it was not. It does not appear that he knew that he was called upon to go through a performance for the amusement of the lodge, or that he had any other conception than that it was a deferred part of the initiation ceremony.").

This concern was addressed in the first instance by *Mitchell*, which quoted a treatise directly to the point: "In all such cases the rule applies, respondeat superior; and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealing either directly with the principal, or indirectly with him through the instrumentality of agents." *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904) (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 452 (1839)).

167. See *Thompson v. Supreme Tent of Knights of Maccabees of the World*, 82 N.E. 141 (N.Y. 1907). In the realm of contractual law, courts were similarly concerned, fearing members would have no recourse for their faithful payments to local chapters for insurance if the national—who held the purse strings—were not made to answer for the local's acceptance thereof. Then as now, that the member accepted some waiver of agency liability in the "fine print" scarcely attenuated the policy concern. See, e.g., *Brown v. Supreme Court I.O.F.*, 68 N.E. 145 (N.Y. 1903) (rejecting disclaimer of agency liability embodied in the national's by-laws); *Bragaw v. Supreme Lodge Knights & Ladies of Honor*, 38 S.E. 905, 907 (N.C. 1901) (stating of such a disclaimer that in "some jurisdictions it is held to be practically void and of no effect, in others it is looked upon as a species of wild animal lying in wait and ready to spring upon the unwary policy holder, and in all it is eyed with suspicion and construed with great strictness"). *Contra Kaminski v. Knights of Modern Maccabees*, 109 N.W. 33 (Mich. 1906); *supra* notes 135-36 and accompanying text.

168. See, e.g., *Recent Decisions*, 7 COLUM. L. REV. 616, 616 (1907) ("An assumption of risk has been declared invalid, because against public policy, of the negligence of a trusted agent The candidate has no control over the officers or ritual; the Supreme Lodge is over both, and should provide a safe ritual. The parties are not on an equal footing . . .") (citations omitted).

169. *But cf. Patterson v. Supreme Commandery United Order of Golden Cross of the World*, 71 A. 1016, 1018 (Me. 1908) ("The initiation was not enough. It was a step, but it was only a step. It gave the applicant a certain status, as, if his medical examination was finally disapproved, the laws of the order gave him the option of remaining as a social member.

the truth of the guarded ritual.¹⁷⁰ That national liability inhered to hazing but not to risky horseplay amongst admitted members (as *Jumper* and *Kendrick* evidenced) follows naturally from these practical concerns about the process of pledging.

As for the second school of thought, limiting nationals' liability for hazing to the local's conduct of literally prescribed rituals was viewed as an abnegation or even contradiction. Such a proposition (wrongly ascribed to *Jumper* and *Kendrick*,¹⁷¹ but on evidence in *Kaminski* and *Johnson I*,¹⁷² as well as in the law review apologia)¹⁷³ was not only at odds with the prevailing agency law but was "severely criticized, in that without subordinate lodges the Grand Lodge could not exist, as its very life depends upon the organization of subordinate lodges through which new members may be taken in and revenues for the support of the organization raised."¹⁷⁴ If the national fraternity had no liability for torts committed by its members, it would have no liability at all, because the organization could only act through its members as agents—this was the very reason that local chapters existed.¹⁷⁵ The Supreme Court of Alabama had explained *en route* to imposing liability on the national:

Not only the prosperity and success of the Supreme Lodge depended upon the organization of the subordinate lodges, and the reception of members, but the very life of the corporation depended upon holding these subordinate lodges and their membership intact. . . . The candidate joining the subordinate lodge was, of course, then a member of the or-

Approval of the application by the supreme medical director was made essential" for insurance claims.).

170. This point was made exceptionally well by *Derrick*, in which the majority held that acts undertaken *during* initiation exposed the national to liability. Justice Cothran then added:

Where the initiation ceremonies are fully completed and the initiate understands that the fantastic "stunts" in which he is to become the principal actor are not a part of the initiation ceremonies, that he is at liberty to participate in them or not as he pleases, but he is willing to assume for the time being the role of "the goat" in order to qualify himself to enjoy the discomfiture of the next victim, neither the local camp nor the Sovereign Camp would be responsible for injuries received thereby, but that his remedy would be against those alone who may have instituted that species of amusement.

Derrick, 106 S.E. 222, 223 (S.C. 1921) (Cothran, J., concurring).

171. See *supra* note 146.

172. See *supra* notes 135 and 140.

173. E.g., *supra* notes 155-58.

174. Recent Cases, *supra* note 52.

175. See *Hendrickson v. Grand Lodge A.O.U.W.*, 138 N.W. 946, 948-49 (Minn. 1912) ("To hold otherwise would be to relieve the officers and agents of an association like defendant, and defendant also, of all responsibility, and throw it on its members."); *Quinn v. Sigma Rho Chapter Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197-98 (Ill. App. Ct. 1987); see also *supra* text accompanying note 33; *infra* text accompanying note 176.

der; and it does not appear that he could become a member in any other manner. The subordinate lodges were organized for this purpose and are recognized by the charter and laws of the Supreme Lodge as being the very lifeblood of the organization.¹⁷⁶

So conceived,¹⁷⁷ the labeling of local members as agents and servants of the national is an understatement. In a figurative fashion, the local members were the body and blood of the national, appendages indistinguishable and indivisible from the whole.¹⁷⁸ The national could not readily disclaim nor evade responsibility for the recruitment undertaken by its integral members in service of its own perpetuation.¹⁷⁹ This was the foundation of *Mitchell's* reasoning: like a corporation, the national could only act through its members, and the national's interests were at their zenith in the context of recruiting the new members without whom no fraternity could endure.¹⁸⁰

D. *Extinction: Seismic Shifts in Both Fraternities Themselves and Accompanying Agency Jurisprudence*

So matters stood in 1929, a quarter-century to the year after the leading case of *Mitchell*: if the law could not be called entirely *settled*,¹⁸¹ it was certainly *settling* into a posture consistent with *Mitchell*. The leading cases of state high courts were by then well-established, and the lapse of time would inexorably fill the report-

176. Supreme Lodge of World, Loyal Order of Moose v. Kenny, 73 So. 519, 523 (Ala. 1914), *cert. denied*, 244 U.S. 652 (1916); see Fraternal Order, *supra* note 57, at 153.

177. As suggested at the beginning of this Part, *Kenny's* labeling the whole fraternity a "corporation" is a telling metaphor; if the entire fraternal body is *de facto* (even if not *de jure*) a corporation, then it is subject to the same *respondeat superior* liability. *Mitchell* had used the same conceit with regard to its treatment of fraternal-cum-corporate liability. See *supra* note 74 and accompanying text.

178. Cf. *Derrick v. Sovereign Camp, W.O.W.*, 106 S.E. 222, 224 (S.C. 1921) (Cothran, J., concurring), *supra* note 79.

179. It is intriguing, though beyond the scope of this Article, to contrast contemporaneous cases considering agency in which the national's interest in a local member's admission was adverse, as was often the case in insurance cases sounding in contract, where the national sought to prove some defect in initiation to absolve them of the requirement to pay benefits. For example, consider *Sovereign Camp of Woodmen of the World v. Jackson*, 157 P. 92, 94 (Okla. 1916), which discussed the situation when "the head camp has no direct interest in whether the candidate is carried through the ceremony of initiation or not" and compared *Jumper v. Sovereign Camp Woodmen of the World*, 127 F. 635 (5th Cir. 1904), involving the same defendant. Note, however, that *Jackson* made clear the limits of its decision: "We do not mean to say that, initiation being prescribed by the head camp, if a candidate is initiated in fact, the local lodge might not be deemed the agent of the head camp for the purposes of the initiation, and might not be liable for the results of the initiation; but that question is not presented here, and is not intended to be passed on." *Jackson*, 157 P.92 at 94.

180. *Mitchell v. Leech*, 48 S.E. 290 (S.C. 1904).

181. *Contra Derrick*, 106 S.E. at 224 (S.C. 1921) (Cothran, J., concurring).

ers of the lower courts with their sequelæ.¹⁸² Though liability in both tort and agency be a matter of state law, the several states by habit look to their sisters for guidance, and early variety thus tends toward considered consensus over time. Such entrenchment can only be aggravated when the states tackle an interstate issue such as the liability of a national fraternal organization for the torts of a local chapter in a far-flung chapter, myriad miles from its headquarters.¹⁸³ While prognostication of the counterfactual is always vain, were it not for intervening events, the body of law respecting national liability might now be as well settled as *Derrick* proposed.¹⁸⁴

1. A Transition from Benevolent to College Fraternities as the Primary Locus of Hazing

Mass extinctions are often precipitated by upheaval in the environment to which the population is adapted.¹⁸⁵ The year 1929 did not merely mark the twenty-fifth anniversary of *Michell*, but also the advent of the greatest economic cataclysm in the nation's his-

182. See, e.g., *Grand Lodge, Colored Knights of Pythias v. Bleavins*, 282 S.W. 949 (Tex. Civ. App. 1926). As before, *supra* note 95, the court detailed the circumstances, here in the victim's voice:

So I went around to the hall on Chestnut street, and there was a big gang of us there, and we were all waiting until our turn came to be initiated; and then I went up stairs, went inside of the hall. I don't know what all was done after I got inside of the hall; there are so many things I have forgotten. After we got in the hall, they removed our shoes, coat, and hat. That was the first time I was in the hall. Then they came and got me and carried me over there and showed me these steel spikes; said, "Feel these," and I felt of them. "See these spikes?" Yes; I saw them. Mr. Tolbert told me that; he said, "You see these spikes?" Yes; I saw them. "I want you to jump on them." At that time I felt those spikes; they were pure steel. I know that because I worked in steel; I saw it. He says, "I want you to jump on them." They were all sharp, and were stuck up in a square board. And, after I put my hand on the spikes and seen they were tight, then they led me facing the wall; I don't know what they done then. After I faced the wall, they came back and got me again, and got on each side of me and helped me up a ladder, and said "We want you to jump." After they got me up the ladder and wanted me to jump, they said, "Jump! Jump!" Wanted me to jump on those spikes. The spikes were in front of me. They placed the spikes in front of this ladder and led me up to this ladder and told me to get up the ladder and told me to jump, jump. I couldn't; I didn't want to jump on the spikes; and they told me to jump, jump, and they put electricity to me, you see. I had been shocked before with electricity, and I knew then that was electricity that went through me; resembled the shock I received at that time. They told me to jump, and I was shocked and fell back, and they caught me and put me back up there again, and said, "We want you to jump, and don't fall backwards." I couldn't jump, and they—I tried to get away and I fell. I didn't know anything after I fell, I only knew I was falling. The second time they shot this electricity in me it was a stronger volt than the first one was. I just couldn't stand that electricity.

Bleavins, 282 S.W. at 950. The Grand Lodge was found liable for the injuries ensuing from this perverse initiation ceremony, with judgment affirmed by the appellate court.

183. Cf. *supra* notes 27-28 and accompanying text.

184. See *supra* sources cited at notes 78 & 181.

185. See generally *Damuth*, *supra* note 1.

tory. By most measures, “fraternal societies were in good shape on the eve of the Great Depression,” but they had undergone a sea change a decade later, as the ranks of six leading orders plummeted from 7.2 million in 1930 to 5.9 million in 1935 and 4.7 million by 1940, a fall of over a third.¹⁸⁶ These figures may be compared with those for the turn of the century, when national orders comprised some 5.5 million members, or thirty percent of adult Americans.¹⁸⁷ Though certainly no extinction, the drop presaged a long-term decline: the model of the benevolent fraternal lodge was gravely wounded by the economic downturn, and would never recover its quondam ubiquity.¹⁸⁸

What was extinguished, however, was the corpus of cases alleging injury from fraternal initiations. It is no cause for astonishment that the avid scholar labors in vain to uncover an appellate case imputing agency liability for hazing to a national fraternal organization in the years following the Great Depression. Simply put, fewer members were joining such orders, and fewer still were willing to undergo the hazardous gantlets that had given rise to the hazing lawsuits of the early century. In the face of this resistance, many fraternal organizations moved to limit or abolish the severe practices of yesteryear.¹⁸⁹

The nature of the fraternal organizations at the center of the hazing discussion was also changing. In the middle of the twentieth century, the social college fraternities surpassed the benevolent fraternities of the past with respect to immoderate initiation practices. Amongst other things, only in college fraternities did the distended period of induction leading to initiations—pledging—develop in full.¹⁹⁰ College fraternities of the nineteenth and even early twenti-

186. BEITO, *supra* note 12, at 222-24.

187. Harwood, *supra* note 18, at 619-23 (figures for 1897). This comprised at least half of adult men, since most orders were open only to males. See Ames, *supra* note 21, at 19.

188. See generally Ames, *supra* note 21, at 19 (ending the “heyday” of fraternalism in 1930); AMERICAN FOLK ART MUSEUM, ENCYCLOPEDIA OF AMERICAN FOLK ART 175 (Gerald C. Wertkin ed., 2004) (“The Golden Age of Fraternalism, however, came to an end at about the time of the Great Depression.”).

189. See Govan, *supra* note 5, at 685; MARY C. MCCOMB, GREAT DEPRESSION AND THE MIDDLE CLASS 84 (2006) (“In 1935, all forms of hazing were completely abolished by the Council of Fraternity President. The number of freshman pledging to fraternities had been dwindling, in part, because hazing traditions were too harsh. The complete termination of hazing represented a fiscal survival mechanism rather than a humanitarian strategy.”); CALVIN B.T. LEE, THE CAMPUS SCENE, 1900-1970, at 49-50 (1970) (recounting generally increased sobriety and specifically fraternal orders and hazing being deprecated). Showing rare premonition, the leaders of the National Interfraternity Conference had actually issued a condemnation of hazing in 1928. See *A Chronology of Hazing Events*, in THE HAZING READER xxvi (Hank Nuwer ed., 2004).

190. See NUWER, WRONGS OF PASSAGE, *supra* note 11, at 120-24.

eth century, deriving from literary societies, had generally engaged in milder hazing, if they engaged in formal pledging at all.¹⁹¹ But as the twentieth century progressed, college fraternities grew “more boorish, reckless and violent” in their hazing.¹⁹² In this, they were likely emulating or adopting elements of the more vicious rituals of the benevolent fraternal societies¹⁹³—but also internalizing an influx of servicemen with differing notions of training and inducting new members.¹⁹⁴

World War II, which brought to an end the economic malaise of the Great Depression, exacerbated the connection of fraternities to hazing. Just as after the Great War, men returning after World War II to school and college fraternities brought with them dysfunctional and conflicted views;¹⁹⁵ as one scholar related:

Hazing dropped drastically during World War Two (as it had during the First World War) when fraternity membership plummeted as college men went off to war. Following the war, many vets would not tolerate being hazed by fuzzi-cheeked kids But ironically, these same veterans introduced strenuous physical hazing that gave some fraternity pledge programs a boot camp aura.¹⁹⁶

This dissonance between members themselves rejecting the demeaning position of pledge while simultaneously imposing a harsher version of pledging on others had as its natural result more outrageous hazing practices amongst college fraternity men.¹⁹⁷ If

191. See Brian Hansen, *Hazing: Should More Be Done to Stop It?* 14 CONG'L Q. RESEARCHER 1, 13 (2004); JONES, *supra* note 11, at 5 (“From what they tell me, most early members were not overwhelmingly concerned with physical hazing or an extensive pledge period. Remember, even though our fraternity was founded in 1911, there was no official pledge club until 1919.”); Govan, *supra* note 5, at 685-86; James, *supra* note 11, at 178-79; NUWER, WRONGS OF PASSAGE, *supra* note 11, at 120-22.

192. Hansen, *supra* note 191, at 13; see NUWER, WRONGS OF PASSAGE, *supra* note 11, at 120-24.

193. In 1945, for example, the St. Louis University chapter of Phi Beta Pi had subjected one of its pledges to an all-too-familiar series of electrical tortures; the chapter erred fatally in coating the pledge in a flammable fluid as part of the rite, which was then evidently accidentally set alight. See Hansen, *supra* note 191, at 13 (2004).

194. See Govan, *supra* note 5, at 685-87; see *infra* notes 195-96.

195. See James, *supra* note 11, at 179; Govan, *supra* note 5, at 685; e.g., JONES, *supra* note 11, at 5 (“Also, activities in the [pledge] process changed a lot after World War I and again after World War II. This is because a lot of guys went to the military and then returned to school after the wars. They brought things like dressing alike and walking in line, along with a few other ‘unmentionables’ back with them.”); see also Colleen A. McGlone, *Hazy Viewpoints: Administrators’ Perceptions of Hazing*, 7 INT’L J. SPORT MGMT. & MKTG. 119, 121 (2010) (discussing the effect of World War II developments on modern college hazing).

196. NUWER, BROKEN PLEDGES, *supra* note 9, at 120-21; accord Govan, *supra* note 6, at 686 (“They brought a boot camp mentality to the experience . . .”).

197. See NUWER, WRONGS OF PASSAGE, *supra* note 11, at 122-23; Govan, *supra* note 5, at 686-87.

before the benevolent fraternal societies had viewed hazing more as high jinks undertaken for amusement (though sometimes going much too far),¹⁹⁸ the college fraternity of mid-century and beyond increasingly approached hazing more as a means of entrenching power hierarchies and enforcing solidarity over a progressively lengthier pledging process.¹⁹⁹

Thus both because of the weakening of benevolent fraternal societies and the strengthening of college fraternity induction and initiation practices, the targets of lawsuits alleging hazing shifted almost completely from the former to the latter. As fraternal membership swelled after the Great Depression and World War II, incidents of hazing increased as well.²⁰⁰ It was then inevitable that lawsuits arising from injuries in pledging and initiation would begin to work their way into the court system again, with the first opinions at the appellate level issued in the late 1970s.²⁰¹

2. The General Lapse of Respondeat Superior Liability in College Fraternity Hazing Cases

Yet with this new focus on college fraternities did not come renewal of the agency theory of liability for their national organizations. It is important at this juncture to distinguish between liability via agency theory and that arising strictly through principles of duty in tort.²⁰² The relationship between tort law and agency is tortuous at best,²⁰³ as both provide principles for assigning liability to a non-actor for the injury done to a victim by another actor. As best this complex intersection can be dissected, the analysis in tort employs a balancing test of factors to determine whether the interactions of the non-actor, actor, and victim considered together exist in an amorphous “special relationship” that gives rise to a “custodial”

198. See, e.g., *Derrick v. Sovereign Camp, Woodmen of the World*, 106 S.E. 222, 223 (S.C. 1921) (Cothran, J., concurring); see *supra* text accompanying note 170; see generally Moore, *supra* note 43.

199. See Jones, *supra* note 34, at 110, 121-22; SYRETT, *supra* note 16, at 245-47; NUWER, *WRONGS OF PASSAGE*, *supra* note 11, at 45-47, 122-23; Govan, *supra* note 5, at 685-88; see generally JONES, *supra* note 11, at 67-93.

200. Mumford, *supra* note 26, at 742.

201. See *id.* (asserting *Davies v. Butler*, 602 P.2d 605 (Nev. 1978) to be the “first [college] fraternity-related injury civil case”); Govan, *supra* note 5, at 688 & n.77 (same); Rutledge, *supra* note 5, at 369, 386.

202. As this Article’s purpose is not to delve into the intricacies of the inherent and assumed duties of national fraternities, the cases not decided on agency that are discussed in this subsection are mentioned in passing, and used in order to underscore the pointed omission of traditional agency liability. More detail may be found in articles discussing the duties of the national in more depth. See *supra* note 5.

203. The author begs forgiveness for the pun.

duty in the non-actor; the analysis in agency depends on the specific legal deputation of the alleged agent by the principal (or appearance thereof).²⁰⁴ Unquestionably, agency law animated *Mitchell* and its progeny, which saw national-local relations in inducting new members as inherently those of master and servant.²⁰⁵ It is the tort analysis, however, upon which modern hazing opinions have usually focused.²⁰⁶ Whether the local was the actual or apparent servant of the national and thereby created *respondeat superior* liability has not—with rare exception—been passed upon by modern courts.²⁰⁷

Recent opinions regarding nationals' liability for hazing have consequently turned on whether the nationals' actions, policies, and involvement with local chapters create the "special relationship . . . between a national fraternal organization and one of its local chapters, as would give rise to an affirmative duty of supervision and control"—not whether the local was specifically an agent or ser-

204. See Mumford, *supra* note 26, at 742 (distinguishing between agency and general or custodial duty theories of liability); LeFlore, *supra* note 3, at 206 § III.B (same); Rutledge, *supra* note 5, at 373-74 (same); Schoen & Falchek, *supra* note 5, at 133-35 (same); see also Marshlain, *supra* note 123, at 12; see also, e.g., Colangelo v. Tau Kappa Epsilon Fraternity, 517 N.W.2d 289, 291 (Mich. Ct. App. 1994); Shaheen v. Yonts, 394 F. App'x 224, 228 (6th Cir. 2010); Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 850-51 (Ky. 2005).

The distinction between agency and tort law is further complicated by the fact that the Restatement of Torts explicitly contemplates master-servant as a "special relationship" that may give rise to liability; clearly, however, it is one amongst many listed at § 315, which are not even exhaustive. Moreover, the duties imposed by the § 315 special relationship are not identical to *respondeat superior*. Whatever the essential nature of this special relationship, it is simultaneously more and less than that of master and servant under agency law. Compare generally RESTATEMENT (SECOND) OF AGENCY §§ 214-251 (1958) with RESTATEMENT (SECOND) OF TORTS §§ 315-319 (1965).

205. See *supra* notes 117-21.

206. See, e.g., Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991) (distinguishing between theories for vicarious agency liability, on the one hand, and liability by means of a "special relationship" giving rise to a duty, on the other); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1117-20 (La. Ct. App. 1999) (same).

207. See Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 850 (Ky. 2005) ("While the courts of other jurisdictions have addressed the issue of a national fraternal organization's negligence in supervising a local chapter, most have done so only by analyzing the national organization's voluntary assumption of a duty to supervise, *supra*, or the national organization's relationship with the party who suffered the harm, rather than its relationship with the local chapter.").

vant,²⁰⁸ Courts in Kansas,²⁰⁹ Louisiana,²¹⁰ Delaware,²¹¹ Michigan,²¹² and Iowa²¹³ have found no such special relationship; conversely, those in Tennessee²¹⁴ and Pennsylvania²¹⁵ have found that a national fraternity may have enough involvement in the local initiation process to justify imposing a custodial duty.²¹⁶ And in *Morrison v. Kappa Alpha Psi Fraternity*, the Louisiana Court of Appeals held that the national had assumed an affirmative duty to regulate the initiation process, citing an official's admission that the national was "in a sense, responsible for all that goes on in its chapters, as it has the right to control intake, expel or suspend members, and revoke charters," and detailing the ramified structure of national staff overseeing local chapters' operations.²¹⁷ Markedly absent from all but the last of these cases was any substantial analysis of agency theory as such.

As for *Morrison*, the evidence showed that a pledge at the Louisiana Tech chapter of Kappa Alpha Psi had been summoned to the room of the local fraternity president under color of the pledging

208. *Id.*; accord *Shaheen v. Yonts*, 394 F. App'x 224, 228 (6th Cir. 2010).

209. *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 411 (Kan. 2002) (upholding trial court's ruling that national owed no custodial duty, and not addressing whether agency existed because it found no duty in the alleged agents, the local fraternity members).

210. *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 530 (La. Ct. App. 1997) (finding no duty in the national because their actions regarding hazing did not sufficiently involve them with the chapter).

211. *Furek*, 594 A.2d at 514 (Del. 1991) (affirming jury verdict of no liability against national fraternity on the basis of a special relationship while noting that the plaintiff did not "question the ruling of the trial court that the National Fraternity could not be vicariously liable for any allegedly tortious conduct of Sig Ep.").

212. *Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289, 289 (Mich. Ct. App. 1994) (upholding summary judgment in favor of national defendant after weighing factors in favor and against imposing duty of care).

213. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000) (upholding dismissal as to national because no special relationship existed).

214. *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 755-56 (M.D. Tenn. 2006) (denying summary judgment to national because issue of material fact existed on whether they had a duty with regard to hazing).

215. *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182-84 (Pa. Super. Ct. 2002) (weighing factors and finding the national had a special relationship with the pledge himself and had already undertaken involvement in banning hazing and changing the member intake processes).

216. See generally A. Catherine Kendrick, *Tort Law Ex Parte Barran: Can a Pledge's Voluntarily Submitting to Hazing Constitute Assumption of the Risk?*, 23 AM. J. TRIAL ADVOC. 485, 488-89 (1999) (collecting cases); Cheryl M. Bailey, *Tort Liability of College, University, Fraternity, or Sorority for Injury or Death of Member or Prospective Member by Hazing or Initiation Activity*, 68 A.L.R. 4th 228 § 3[a] (1989) (same). Note should be taken that this listing is not intended to be comprehensive of every such holding.

217. *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1117-19 (La. Ct. App. 1999).

process and beaten.²¹⁸ In addition to the national's liability under the "special relationship" theory described already, the jury also found the national to have vicarious liability in agency for the actions of its local member.²¹⁹ The appellate court disagreed. To begin, it expressed doubt about (and did not) whether any agency relationship existed between the national and its local chapter. Even assuming *arguendo*, the court reasoned that a principal is only liable for physical torts in a master-servant relationship where he has the right to control the agent's conduct. There being "no evidence that the national fraternity exercised any control over the physical details of Magee's acts of hazing, assaulting and battering Kendrick during a secret, unscheduled, unsanctioned meeting in Magee's dorm room," the court reversed the jury's finding of vicarious liability in agency.²²⁰

Morrison was a stark repudiation *sub silentio* of the reasoning of *Mitchell* and its progeny. At the latter's heart lay the principle that the national and local existed in such close harmony of conduct and purpose with respect to initiations that *respondeat superior* liability applied.²²¹ *Morrison*, by contrast, rejected the assumption that locals' induction of new members was conducted within a master-servant relationship, instead parsing whether the national fraternity in fact had command and control over the particularized element of the process in question.²²² From such a narrow perspective, it is implausible that a far-flung national with little to no everyday interaction could accrue liability under *respondeat superior* for any atomized part of the pledging process.²²³

Aside from *Morrison*, the modern cases scarcely discuss a national's liability for hazing in *respondeat superior*.²²⁴ Kansas' high

218. *Id.* at 1110.

219. *Id.*

220. *Id.* at 1120.

221. See sources cited *supra* notes 117-21.

222. *Morrison*, 738 So. 2d at 1105; see Kendrick, *supra* note 216, at 486 (commenting on *Morrison*); cf. Jones v. Kappa Alpha Order, Inc., 730 So. 2d 197, 202 (Ala. Civ. App. 1997), *rev'd on other grounds sub nom.* Ex parte Barran, 730 So. 2d 203 (Ala. 1998), *infra* note 227.

223. See Paine, *supra* note 4, at 202-03 ("[P]laintiffs usually attempt to impute liability to the [national] by alleging some form of vicarious liability. Most of the time, national fraternities prevail with the argument that they lack control of the chapter's day-to-day activities."). The earlier cases had largely considered the national's liability for the acts of its locals to be essential given its existential interest in their recruitment. See *supra* notes 171-72 and accompanying text. Moreover, insulating the national from liability on the basis of its ignorance of the local's actions creates powerfully perverse incentives. See *infra* notes 320-26 and accompanying text.

224. Very recently, the Indiana Supreme Court also rejected the proposition of vicarious national liability for a local's alleged hazing, albeit in brief words. *Yost v. Wabash College*, 3 N.E.3d 509, 520-22 (Ind. 2014). Echoing the *Morrison* court, the Indiana high court believed

court mentioned that the plaintiff had pled apparent agency, but because it found the local chapter not liable, it did not determine whether agency (master-servant or otherwise) existed.²²⁵ A Delaware trial court ruled that the national could not be vicariously liable for the local members' hazing, but the issue was not challenged on appeal.²²⁶ And an Alabama court came closer to a substantive holding in *Jones v. Kappa Alpha Order* when it observed that there was no evidence the national "encouraged, authorized, or ratified the alleged hazing. It is well settled that 'in the absence of authorization or ratification by its members, an association is not liable for intentional torts by a member or members.'"²²⁷ In none of these, however, did the rebuff of agency liability occupy more than a scant paragraph of otherwise lengthy opinions, nor did any cite to *Mitchell* and its multijurisdictional progeny.

Although the court's perspective in *Morrison* provides some clue, exactly why modern plaintiffs have not more effectively urged *respondeat superior* liability under the *Mitchell* line of cases is unclear. One may speculate that despite the similarities in structure of benevolent and college fraternities,²²⁸ modern courts (and plaintiffs) view the relationship between the latter's local and national organizations fundamentally differently. If the local camps of the Woodmen of the World were appendages of the national, perhaps

that the national did not exercise control over the local, and went further here to note that the "conduct of the local fraternity in everyday management and supervision of the activities and conduct of its resident members is not undertaken on behalf of the national fraternity." *Id.* at 521-22. Unaddressed was whether then local might have been acting for the national's benefit in the particular circumstance of inducting new members, rather than more "everyday" activities. But, finding evidence of neither control nor benefit, the court concluded that no agency relationship existed as a matter of law. *Id.* at 522.

Additionally, a most relevant dictum may be found in a case where an existing fraternity member drunkenly hit the decedent with his car, wholly outside the context of pledging and initiation:

We affirm summary judgment for the national on other theories of liability. The members of the local chapter were not employees or servants of the national fraternity so as to impose *respondeat superior* liability for their torts. That the local may have been an agent of the national for purposes of collecting dues or accepting members does not create liability for all tortious activity of the agents.

Estate of Hernandez v. Flavio, 924 P.2d 1036, 1039 (Ariz. Ct. App. 1995), *vac'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997).

225. Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 413 (2002).

226. Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991).

227. *Jones v. Kappa Alpha Order, Inc.*, 730 So. 2d 197, 202 (Ala. Civ. App. 1997), *rev'd on other grounds sub nom.* Ex parte Barran, 730 So. 2d 203 (Ala. 1998). The *Jones* analysis would seem to accord with that of *Morrison*, focusing on whether the national had command and control of the particularized element of the pledging process in question, but its brevity makes its meaning less than pellucid. In any event, *Jones* did not appear to be engaging in a *respondeat superior* analysis, but one couched in the terms of simple agency.

228. See *supra* notes 26-41 and accompanying text.

the local chapters of the Kappa Alpha Psi Fraternity are seen more as independent operators.²²⁹ A number of modern courts have referred to geographical distance translating to disengagement between national headquarters and the local chapter²³⁰—and yet such distances were as great amongst early twentieth-century benevolent fraternities, and surely more daunting given the hazards of travel then.²³¹ Explanation may also lie in the lengthened pledging period amongst college fraternities, in which the process of admitting new members is extenuated further from the national ritual,²³² even if the existential interest of the national in the admission of new members remains admittedly as strong.²³³

Regardless of the reason, judging by *Mitchell's* absence from the ample modern case law of hazing, its holding that the local acts as the national's servant in the course of admitting new members was effectively a dead letter. Of the few courts that even addressed the arguments for agency, all except one rebuked *Mitchell's* reasoning. This singular case, the titular "Lazarus taxon" of this Article, and its reasoning are the subject of the next Part.

IV. A LAZARUS TAXON IN SOUTH CAROLINA: THE RECRUDESCENCE OF *RESPONDEAT SUPERIOR* LIABILITY FOR HAZING

The term "Lazarus taxon" is imported from the discipline of evolutionary biology. Much of our modern understanding of past organisms derives from the fossil record they leave behind, demonstrating the epochs during which they flourished. While some species survive to the modern day, the vast majority have long since become extinct, and thus are only known from this fossil record. The phenomenon of the biological Lazarus taxon describes the perplexing situation in which a species of animal disappears from the fossil record long ago, and yet is discovered alive and well in the modern day.²³⁴ Probably the best-known example is the

229. See, e.g., *Millard v. Osborne*, 611 A.2d 715, 719 (Pa. Super. Ct. 1992), *appeal denied*, 615 A.2d 1312 (Pa. 1992).

230. E.g., *Millard*, 611 A.2d at 719-20 (Pa. Super. Ct. 1992); *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 530 (La. Ct. App. 1997); see also *Shaheen v. Yonts*, 394 F. App'x 224 (6th Cir. 2010); cf. *LeFlore*, *supra* note 3, at 211.

231. See generally SEYMOUR DUNBAR, *A HISTORY OF TRAVEL IN AMERICA passim* (1915); BAIRD, *supra* note 11, at 16-17.

232. See *supra* notes 190-91 and accompanying text.

233. See, e.g., *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488, 496 (S.C. Ct. App. 1986), *infra* note 257.

234. See KEITH THOMPSON, *LIVING FOSSIL: THE STORY OF THE COELACANTH* (1991).

coelacanth, which was found living contentedly in the ocean off South Africa in 1938 despite a sixty-five million year absence from the fossil record.²³⁵

This concept is readily applicable to the study of law, which regularly speaks of a case's "progeny" and "descendants." Like biological palæontologists, legal palæontologists know the jurisprudence of the past largely from the record of cases. When a legal doctrine disappears from the case law for sufficient time, it may rightly be considered extinct; should it reappear alive and well in a modern case, the revival may be considered a sort of "Lazarus case."²³⁶ As discussed in the previous Part, national fraternity liability in agency for hazing enjoyed a period of at least modest success, only to wholly disappear in the mid-century. Even with the resurgence of modern cases addressing hazing, *respondeat superior* agency liability has been largely ignored (and occasionally rejected). The exception therefore takes on some importance in assessing potential liability: if the doctrine remains viable, then it may well find further application in future cases.

A. *Ballou v. Sigma Nu General Fraternity and Related Cases*

By way of preamble to the titular Lazarus case, it is worth mentioning a sort of precursor, presented in 1985 to the Supreme Court of South Carolina by *Easler v. Hejaz Temple of Greenville*.²³⁷ The plaintiff had undergone the initiation ritual for a local chapter of the Shriners, part of which required some species of balancing act on a rotating barrel, from which the plaintiff slipped and injured himself.²³⁸ Amongst its defenses, the national organization claimed that the local was not acting as its agent in conducting the rotating barrel ritual.²³⁹ The jury disagreed, as did the judge in denying a motion for directed verdict and judgment *non obstante veredicto*, and the high court affirmed.²⁴⁰ No mention was made of *Mitchell* or the other early twentieth-century cases, and given the case's posture, the court merely accepted that sufficient evidence existed to

235. *Id.* See generally Damuth, *supra* note 1.

236. Of course, the precedential record is considerably more comprehensive than the fossil record, but given imperfect records from early common law, *e.g.*, *supra* note 142, unpublished opinions, and judgments rendered without written opinion, there is still much decisional precedent that escapes easy examination and preservation.

237. *Easler v. Hejaz Temple* (Ancient Arabic Order of the Nobles of the Mystic Shrine) of Greenville, S.C., 329 S.E.2d 753 (S.C. 1985).

238. *Id.* at 754.

239. *Id.* at 755.

240. *Id.*

avoid supplanting the jury's finding.²⁴¹ Nonetheless, that a local was the national's agent in the context of hazing was a finding unseen in many decades.²⁴²

1. A Lazarus Case: *Ballou v. Sigma Nu General Fraternity*

The following year would see *Mitchell's* full recrudescence from long oblivion in *Ballou v. Sigma Nu General Fraternity*.²⁴³ The antecedent events giving rise to the lawsuit occurred six years before, in 1980, and are related in some detail by the court. One Lurie Barry Ballou, a student at the University of South Carolina, had reached the end of his semester-long period of pledging at the local chapter of Sigma Nu.²⁴⁴ After a final week of presumably heightened rigors known as "hell week," the process culminated in the aptly-named "hell night," following which initiation would occur (according to the local).²⁴⁵ Attendance was mandatory for those wishing to be initiated, and Ballou accordingly complied with the hell week and hell night requirements.²⁴⁶

Over the course of the evening, Ballou and his eighteen fellow pledges, having been placed in a state of undress and soaked with various liquids, were tricked, cajoled, or coerced by the active brothers into consuming prodigious quantities of alcohol.²⁴⁷ Returning from the evening's debaucheries (which evidently concluded with the pledges' trip to a party at a neighboring fraternity), Ballou vomited on the threshold of the Sigma Nu fraternity house, and became unconscious inside.²⁴⁸ By midnight, he was pale and nonresponsive when several brothers checked on him, but they opted not to seek medical attention.²⁴⁹ A fellow pledge turned Ballou on his stomach because "he feared Barry, if he remained on his back, might vomit and suffocate."²⁵⁰ In the morning, Ballou was

241. *Id.* at 358.

242. Crucially, the case found that the test was whether the national had the "right to control" the conduct of his alleged agent." *Id.* at 352 (quoting *Fernander v. Thigpen*, 293 S.E. 2d 424 (1982)).

243. *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488 (S.C. Ct. App. 1986).

244. *Id.* Though the local chapter of Sigma Nu comprised the direct tortfeasors, suit was ultimately preferred solely against the national fraternal organization, Sigma Nu General Fraternity, an unincorporated association (and its president, later dismissed). Since the local chapter and its members were not parties, this Article will refer hereinafter to the national as "Sigma Nu."

245. *Id.* at 491.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 491.

found dead; an autopsy determined that he had in fact aspirated his gastric contents.²⁵¹ A lawsuit ensued against Sigma Nu's national organization, which the jury found liable (imposing a quarter of a million dollars in damages); the national promptly appealed the verdict.²⁵²

On appeal, Sigma Nu conceded that the local members were its agents, arguing instead that the actions that led to Ballou's death had exceeded the scope of its agency.²⁵³ At the start of its discussion, the court invoked *Mitchell* for the proposition that the actions of the agent bind the principal even though they be unauthorized.²⁵⁴ The court then made several salient observations in the course of rejecting Sigma Nu's argument. *First*, citing *Derrick*, it noted that the scope of agency embraces not only those acts authorized expressly and by implication, but also those done with apparent authority.²⁵⁵ *Second*, it drew attention to the fact that although Sigma Nu prescribes a specific program of initiation, it does not prohibit supplementation of that program, as was apparently done in Ballou's case.²⁵⁶ *Third*, it emphasized Sigma Nu's interest in the initiation of new members into its brotherhood, the ultimate purpose of the activities that led to Ballou's death.²⁵⁷ *Fourth*, it concluded that Ballou's submission to the chapter's onerous requirements demonstrated its apparent authority, seeing as he "placed himself at the local chapter's disposal on hell night only because he wanted to become an active brother of Sigma Nu."²⁵⁸ Having recited these findings, the court found that the local was acting (at least) within the apparent scope of its authority as the national's agent for admitting new members, citing in support the early cases of *Mitchell*, *Derrick*, and *Kenny* as well as comparing the recent *Easler*.²⁵⁹

251. *Id.*

252. *Id.* at 491-92.

253. *Id.* at 495; cf. *Supreme Lodge of the World, Loyal Order of Moose v. Kenny*, 73 So. 519, 523-24 (Ala. 1914), *cert. denied*, 244 U.S. 652 (1916) (arguing a similar scope-of-agency defense after agency was found), *supra* notes 101-102.

254. *Ballou*, 352 S.E.2d at 495.

255. *Id.* at 495-96.

256. *Id.* at 496.

257. *Id.* (quoting *Derrick* for the proposition that in "initiating new members, the local chapter was accomplishing the purpose of Sigma Nu and was 'about the business' of Sigma Nu" and that "the introduction of new members 'is the life blood of all such organizations.'").

258. *Id.* at 496.

259. *Id.*

Ballou plainly invoked apparent rather than actual authority, unlike most of the early cases, finding it unnecessary to reach the question of actual authority (although the court's factual holdings provide a powerful argument for such actual authority under *Mitchell's* precedent).²⁶⁰ Less plain was its holding that the local chapter and its members were not only agents, but agents within the ambit of *respondeat superior*. Although the opinion was not explicit, *Ballou's* reliance on *Mitchell* for its principles and invocations of *Derick* and *Kenny* leave little doubt of its foundations.²⁶¹ As the court emphasized, echoing those early decisions, Sigma Nu had direct and compelling business in the admission of new blood to the fraternity, along with the right to prescribe both the conditions for that admission and those who would administer the physical acts of induction.²⁶² Given these factual findings and citations, there is no reason to doubt the court believed that the agency to which it referred was of the master-servant variety.

Of course, for the national to accrue liability by agency, the local members must have themselves committed a tort, and Sigma Nu argued that the members did not commit any. On the whole, the court was skeptical of the contention that Ballou had entered into the initiation process with eyes wide open, and thus that whatever actions the local members had taken were secondary to his own free-willed decision to participate and imbibe to lethal excess.²⁶³

Ample evidence, both direct and circumstantial, suggests that extreme intoxication was the primary purpose of the active brothers in furnishing the alcohol and that alcohol played a leading, if not the principal, role in the initiation process at the local Sigma Nu chapter. This same evidence indicates that the active brothers did not simply furnish ordinary able-bodied men with a quantity of alcohol and do nothing else; rather, it shows that they throughout the initiation process plied the pledges with alcohol and that they used song, ceremony, ridicule, subterfuge, and peer pressure

260. See *supra* notes 117-19 and accompanying discussion.

261. See *supra* notes 113-14 and accompanying discussion (discussing the early cases' basis in *respondeat superior*).

262. See *Ballou*, 352 S.E.2d at 496 (discussing Sigma Nu's interest in and control over initiation of members); cf. *supra* text accompanying note 77 (reciting similar factors in *Mitchell*).

263. Sigma Nu alleged both contributory negligence (*i.e.* that Ballou himself had been negligent in his decision to drink to excess) and assumption of risk (*i.e.* that Ballou understood the risks inherent in the "hell night" process and freely assumed them), both of which may be subsumed under the general rubric that Ballou himself was more responsible than Sigma Nu for his death. See *Ballou*, 352 S.E.2d at 494-95 ("In layman's terms, the question for the jury to decide was: who was more responsible for Barry's death, Barry himself or those who furnished the alcohol and pressured him to drink?").

to induce the pledges to drink excessive amounts of alcohol within a short period of time.²⁶⁴

This degree of inducement and artifice sufficed for liability in the local members,²⁶⁵ and given that the national was responsible for the actions of its local agents and acted through them,²⁶⁶ this was also sufficient to unanimously affirm the jury's finding of liability in the national.²⁶⁷

As in most hazing cases, the plaintiff in *Ballou* alleged several theories of liability; and thus the court also had cause to consider liability by way of a special relationship giving rise to a custodial duty.²⁶⁸ Specifically, the court saw Sigma Nu as plausibly being in a special relationship, not with the local chapter, but with Ballou himself, as a pledge of the fraternity who had placed himself in harm's way to seek admission.²⁶⁹ Akin to several other cases, the agency theory of liability coexisted with this discrete special relationship theory.²⁷⁰ This coexistence underscores that the two bases of liability are separate and distinct rather than repetitions of the same theory. *Ballou* was nonetheless unique in so thoroughly elaborating on the agency theory that went largely unexamined in other such cases, and in its reliance on the early twentieth-century cases.

2. *Ballou's* Context and Limited Legacy

That *Ballou* arose in South Carolina was likely not coincidental. *Mitchell*, after all, is a decision of that state's supreme court, as is *Derrick*. Even *Easler*, for all its studied omission of *Mitchell* and *Derrick*, was decided within the same jurisdiction. At least one commentator has observed that only South Carolina has such a line

264. *Id.* at 494.

265. *Id.* at 492-93. The individual local members who carried out the hell night initiation ceremonies were not, however, named as defendants in the lawsuit.

266. *Id.* at 493 ("The evidence reasonably suggests that Sigma Nu required Barry to attend hell night as part of its initiation process and that on hell night Sigma Nu through its active brothers created a hazardous condition by hazing him and the other pledges . . ."); *Id.* at 496.

267. *Id.* at 499.

268. *Id.* at 492-93.

269. See *Faille v. S.C. Dep't of Juvenile Justice*, 566 S.E.2d 536, 546 n.5 (2002) (citing *Ballou* for such proposition and cross-referencing the Restatement (Second) of Torts); see also *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A. 2d 178, 182-84 (Pa. Super. Ct. 2002) (inferring a similar such special relationship between national and pledge).

270. E.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 515 (Del. 1991); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1117-20 (La. Ct. App. 1999); see Robert E. Manley, *Hazing Plagues Greeks*, FRATERNAL LAW, Nov. 2003, at 1, 3 (distinguishing in *Morrison* between national's liability under direct theory that it had a duty to "regulate, protect against and prevent further hazing activity" and non-liability for the chapter president's acts under a vicarious agency theory).

of cases on civil liability in hazing, and the state can certainly be considered a national innovator in hazing doctrine.²⁷¹ Yet as *Ballou's* citation to *Kenny* reminds, a number of other states adopted *Mitchell's* reasoning in its day, and there is hardly reason to think *Ballou* should have been any more cabined.²⁷²

Ballou never made its way to the Supreme Court of South Carolina, but it hardly went unnoticed. Strikingly, however, *Ballou* has been cited in fraternity civil cases only for the general proposition that a national might be liable for the torts of its local, without further elaboration of the theory on which the holding relied;²⁷³ or a demonstration that liability for injury from excessive drinking requires some degree of coercion or control over the drinker.²⁷⁴ Nowhere, apparently, has *Ballou's* resurrection of *Mitchell's* agency theory been applied in deciding a later hazing case. Closest is *Colangelo v. Tau Kappa Epsilon Fraternity*,²⁷⁵ where the plaintiff invoked *Ballou* for the general proposition that the national was liable. In upholding summary judgment in favor of the national, the Michigan court distinguished *Ballou* sharply, observing that Sigma Nu had conceded that the local members were agents—and no such theory of liability was alleged in *Colangelo*.²⁷⁶

Certainly the most lengthy and favorable reference to *Ballou* appeared in *Krueger v. Fraternity of Phi Gamma Delta*, a wrongful death lawsuit arising from very similar facts—a similarity that did not escape the court in denying defendants' motion to dismiss.²⁷⁷ The court discussed *Ballou's* rule of agency at some length before finding “the South Carolina rule reasonable and the decision in *Bal-*

271. LeFlore, *supra* note 3, at 201.

272. Then again, the spread of legal principles amongst the several states is often haphazard. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981) (Stevens, J., concurring) (“[J]udges are presumably familiar with their own state law and may find it difficult . . . to discover and apply correctly the law of another State.”).

273. *See, e.g., Shaheen v. Yonts*, 394 F. App'x 224, 228 (6th Cir. 2010); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002); *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 653 (Iowa 2000).

274. *See, e.g., Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 313 (Idaho 1999); *Carson v. Adgar*, 486 S.E.2d 3, 6 (Ct. App. 1997); *Nisbet v. Bucher*, 949 S.W.2d 111, 116 (Mo. Ct. App. 1997). While this fact was of course essential in *Ballou* to liability in the local chapter members (and thus allowed for that liability to be imputed to the national via agency), it did not speak to *Mitchell's* line of reasoning.

275. *Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289, 291 n.1 (Mich. Ct. App. 1994).

276. *See id.* at 291 & n.1.

277. *Krueger v. Fraternity of Phi Gamma Delta, Inc. a.k.a “FIJI” et al.*, No. 00-4292-G, 2001 Mass. Super. LEXIS 430, at *11-13 (Mass. Super. Ct. May 18, 2001) (Giles, J.) (memo. op.).

lou persuasive.”²⁷⁸ As the court had earlier noted, “[t]o prove its case against FIJI National, plaintiff [had] to prove that the local chapter, FIJI House and its officers, were acting as agents of FIJI National within the scope of their agency.”²⁷⁹ *Krueger* provides a compelling roadmap to arguing a modern case under the *Mitchell* theory. Unfortunately from a precedential perspective, the roadmap remains notional because the parties settled the case before it could be further developed.²⁸⁰ The legal scholar can only speculate that the court’s favorable treatment of *Ballou* may have driven that settlement.

In the case law, then, *Ballou* represents essentially the sole modern descendant of *Mitchell*. But if the plaintiffs’ bar and the bench were still overlooking the latent viability of *respondeat superior* law to establish national fraternities’ liability, at least the storied commentariat of the public press and legal scholarship were not.

B. Press and Legal Commentaries on *Ballou*

The jury’s award in *Ballou* was called “precedent-setting” by an opinion leader in the specialized discipline of fraternity hazing, though this undoubtedly involves some hyperbole.²⁸¹ (Amongst other things, *Ballou* is better thought of as precedent-reviving than precedent-setting.) The Associated Press wrote a story summarizing the case’s outcome with its usual competence, which was widely reported in the regional press.²⁸² Certainly, the award in *Ballou* dwarfed that of *Mitchell*, excelling it by a factor of ten, even accounting for inflation.²⁸³ But the national media were mostly oblivious, and in truth, *Ballou* did not catalyze any nationwide discussion of fraternal liability, though it may well have inspired the law subsequently passed by South Carolina’s legislature that provided criminal sanctions for hazing.²⁸⁴

278. *Id.* at *13.

279. *Id.* at *10 n.5.

280. See Robert E. Manley, *Hazing Plagues Greeks*, FRATERNAL LAW, Nov. 2003, at 1 (recapitulating the denials of the motions to dismiss and concluding that “[s]ubsequently, the case was settled with great notoriety”).

281. NUWER, WRONGS OF PASSAGE, *supra* note 11, at xv.

282. See *Dead Student’s Parents Win Suit*, THE SUMTER DAILY ITEM (S.C.), Dec. 11, 1984, at 8A; *Parents of Student Who Died at Party Awarded \$250,000*, NEWS & COURIER (Charleston, S.C.), Dec. 14, 1984, at 12B; *Parents Win Fraternity Hazing Suit*, EVENING HERALD (Rock Hill, S.C.), Dec. 14, 1984, at 16.

283. *Mitchell*, 48 S.E. at 290; see *supra* text accompanying note 69.

284. See NUWER, BROKEN PLEDGES, *supra* note 11, at 189; Matt McColl, *Mother Recalls Son in Fight Against Hazing*, THE STATE (Columbia, S.C.), Jan. 23, 2012.

Legal scholarship, however, has not touched so lightly on *Ballou*, with the foremost discussion in Byron L. LeFlore, Jr.'s magisterial article on national fraternal liability in 1988.²⁸⁵ His commentary, however, was more critical than complimentary. In the first instance, LeFlore disparaged not only *Ballou's* internal consistency,²⁸⁶ but also that of *Mitchell*, *Derrick*, and *Easler*, the other South Carolina cases.²⁸⁷ He claimed *Mitchell* and *Derrick* "blur the distinctions between agency and master-servant by characterizing fraternal organization fact situations such as these as apparent scope of authority cases,"²⁸⁸ a claim that is difficult to understand—both *Mitchell* and the majority in *Derrick* based their conclusions in actual rather than apparent authority.²⁸⁹

LeFlore rightly observed that *Ballou* rested its holding on apparent authority,²⁹⁰ but then objected that *Ballou* never found master-servant (rather than general agency) liability.²⁹¹ Yet this disregards *Ballou's* reliance on *Mitchell*, *Derrick*, and *Kenny*, all of which operated under master-servant *respondeat superior* liability.²⁹² True, *Ballou* never spelled out that the variety of agency of which it spoke was *respondeat superior*, but the cases on which it depended leave little doubt; certainly this is a more attractive interpretation than that the South Carolina Court of Appeals "misapplied the vicarious liability doctrine" and "abolished master-servant as a prerequisite for vicarious liability."²⁹³ Assuming the *Ballou* court understood and followed the cases it cited—as one ought²⁹⁴—its conclusion is clear, as LeFlore recited: a "master will be liable for the torts of his servants even outside the scope of agency if the

285. LeFlore, *supra* note 3.

286. *Id.* at 226-27.

287. *Id.* at 227 & n.179.

288. *Id.* at 227.

289. See *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904); *Derrick v. Sovereign Camp, Woodmen of the World*, 106 S.E. 222, 223 (S.C. 1921) (majority opinion), *id.* at 224 (Cothran, J., concurring). The concurring judge in *Derrick* clearly viewed the situation as of apparent authority, but since the majority of three did not require his vote, see S.C. CONST., art. V § 2, the majority's opinion controls. Only when the concurrence's vote is necessary does its narrower view control the holding. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977). See also *supra* note 117.

290. See LeFlore, *supra* note 3, at 226; see *supra* notes 117-19 and accompanying discussion.

291. See LeFlore, *supra* note 3, at 227.

292. See *supra* text accompanying notes 113-14.

293. LeFlore, *supra* note 3, at 226-27.

294. Cf. *Lafler v. Cooper*, 132 S. Ct. 1376, 1396 (2012) (Scalia, J., dissenting) ("The Court's readiness to find error in the Michigan court's opinion is 'inconsistent with the presumption that state courts know and follow the law.'" (citing *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam))).

servant ‘purported to act or to speak on behalf of the principal and there was reliance upon apparent authority.’”²⁹⁵

Susan J. Curry, writing shortly after *Ballou*, narrated the facts of the case adeptly, along with the court’s determination that Sigma Nu itself had a duty to Ballou based on the “special relationship” theory.²⁹⁶ Curry then explained briefly the burden of establishing an agency relationship, satisfied in *Ballou* by the apparent authority held by the local chapter for the hell night initiation.²⁹⁷ Yet Curry did not mention the *Mitchell* line of cases or *respondeat superior*, though she did detail the affirmative defenses raised by Sigma Nu.²⁹⁸

A later commentator was Dara Aquila Govan, who highlighted a critical factual predicate cited by *Ballou*: “the prestige and mystique of belonging to a fraternity,” noting that this factor would assume a “major role” in subsequent litigation.²⁹⁹ Harkening back to the early cases, this line of reasoning suggests that the more prestigious the fraternity, the greater the pressure applied to the pledge seeking admission, and the more culpable the national fraternity in donating its good name to be used to convince pledges to submit themselves to the very activities that caused them injury—implicating the national directly.³⁰⁰ Her contemporary, Gregory E. Rutledge, also highlighted the prestige issue in his treatment of *Ballou*, while raising the issues of the fraternity’s need for membership and the coercive nature of the local’s authority.³⁰¹ Like Curry, Rutledge spent considerable time elaborating the various theories of

295. LeFlore, *supra* note 3, at 227 (citing RESTATEMENT (SECOND) OF AGENCY § 219(c)); see generally *supra* Part III.B.2.

296. Curry, *supra* note 4, at 97-99.

297. *Id.* at 100.

298. *Id.* at 107-11.

299. Govan, *supra* note 5, at 691-92 & n.18; accord Rutledge, *supra* note 5, at 391; see, e.g., Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 507 N.E.2d 1193, 1197-98 (Ill. App. Ct. 1987); see also SYRETT, *supra* note 16, at 301-02 (discussing the influence of prestige); Tiger, *supra* note 40, at 14-15.

300. See *supra* text accompanying notes 163-70 (early twentieth-century cases); Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 496 (S.C. Ct. App. 1986); cf. Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 667 N.Y.S.2d 650, 652 (Sup. Ct. 1997) (discussing issues of prestige).

Many other legal scholars have also adverted to the importance of local chapters’ prestige to the national. See Curry, *supra* note 4, at 110-11; Paine, *supra* note 4, at 203 n.58; Kuzmich, *supra* note 5, at 1119, 1126; Rutledge, *supra* note 5, at 391; Bailey, *supra* note 216, at 228 § 2[a] (“In determining the circumstances under which one can be held liable for injuries sustained by a pledge as a result of his participation in initiation activities, courts have noted the prestige attached to fraternity membership [and] the social pressure applied to fraternity pledges to comply with the fraternity’s membership ‘qualifications.’”).

301. Rutledge, *supra* note 5, at 391; cf. *supra* text accompanying notes 163-76 (discussing early twentieth-century authorities’ views on these same subjects).

agency,³⁰² but devoted only a paragraph to analysis of agency in the context of *Ballou*.³⁰³

Eric A. Paine appropriately spent considerable time on *Ballou* in his treatment of national fraternity liability.³⁰⁴ Interestingly, Paine began from the premise that “[i]t is generally accepted that an agency relationship exists between chapters and national associations,”³⁰⁵ though he appears to have conceived of this relationship more along the lines of the special relationship analysis in tort discussed above.³⁰⁶ Further, this general acceptance is seemingly belied by his citation only of *Ballou* for authority, expanding by footnote on *Ballou*’s rationale for the national’s liability in agency,³⁰⁷ and only later alluding to this agency in the main text.³⁰⁸ Apparently of more interest to his discussion was the South Carolina court’s analysis of the cause of action in coercively intoxicating the decedent.³⁰⁹ An article by Michael John James Kuzmich had a similar focus: despite devoting an entire subsection of his article on hazing and alcohol-related liability to *Ballou*, the article did not mention its invocation of apparent agency in establishing the national’s liability.³¹⁰

Ironically, A. Catherine Kendrick’s note on a different case may have provided the most penetrating treatment of *Ballou*’s holding on national liability in agency.³¹¹ After lucidly explaining the national’s liability in agency and the inquiry undertaken by the *Ballou* court, albeit without reference to *Mitchell* or *respondeat superior* as such, Kendrick went on to contrast the holdings of other modern cases, *viz.* *Walker v. Phi Beta Sigma Fraternity* and *Morrison v. Kappa Alpha Psi Fraternity*.³¹² As such, the issue of agency liability for the national fraternity was addressed front-and-center.³¹³

Various other scholarship has made briefer mention of *Ballou*. Shane Kimzey observed that the case established the national could be held liable for the local’s torts in the context of insurance cover-

302. Rutledge, *supra* note 5, at 373-74 & nn.76-80.

303. *Id.* at 391.

304. Paine, *supra* note 4, at 206-07.

305. *Id.* at 203.

306. *See supra* Part III.D.2.

307. Paine, *supra* note 4, at 203 n.59.

308. *Id.* at 207.

309. *Id.*; *cf.* cases cited *supra* note 275 and accompanying text.

310. Kuzmich, *supra* note 5, at 1111-12.

311. Kendrick, *supra* note 216.

312. *Id.* at 485-86; *see supra* notes 211, 217-24.

313. Kendrick, *supra* note 216 at 486.

age,³¹⁴ while Kerri Mumford cited *Ballou* as her only example of agency liability, discussing policy concerns in allocation of liability amongst various potential defendants.³¹⁵ Not all such references go to *Ballou's* view of agency, though: Dr. Daryll M. Halcomb Lewis used the case to illustrate duty in tort rather than agency in the course of a wide-ranging discussion of criminal sanctions for hazing,³¹⁶ and quoted a criminal case employing *Ballou* expansively as an example of the civil defenses of “assumption of the risk and contributory negligence” in hazing.³¹⁷

Common to all these articles is their citation solely to *Ballou* for the principle that the national organization may be held liable in agency or *respondeat superior* for hazing, if they make the point at all.³¹⁸ At least by negative implication, the scholarly community is then in accord that *Ballou* represents a unique development in the law respecting fraternal liability, though authors have taken very different approaches to its holding.

V. REFLECTIONS ON *RESPONDEAT SUPERIOR* AND THE THEORY OF NATIONAL FRATERNAL LIABILITY

In modern jurisprudence, it is fairly well-established that the local chapter may be held responsible for the actions of its members in service of inducting new members to the chapter.³¹⁹ But the national's liability for hazing has become a quagmire of the law, with the complexities imposed by the “special relationship” theory under tort making the assessment of liability unpredictable, while the disappearance of *respondeat superior* liability for hazing makes predicting its application speculative. Such uncertainty is hardly desirable for the national, local, prospective members, or a society at large seeking to curb injurious hazing.

314. Kimzey, *supra* note 3, at 465.

315. Mumford, *supra* note 26, at 742 n.37.

316. Dr. Daryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 *Miss. L.J.* 111, 115 n.17 (1991).

317. *Id.* at 136-37 n.111.

318. *E.g.*, Curry, *supra* note 4, at 100 (noting only *Ballou* for agency in hazing); Paine, *supra* note 4, at 203 n.59 (same); Mumford, *supra* note 26, at 742 n.37 (same); Kimzey, *supra* note 3, at 465 & n.29 (same); Govan, *supra* note 5, at 690-691 & n.107 (same); Kuzmich, *supra* note 5, at 1111-1112 (no mention of agency precedent); Lewis, *supra* note 316, at 115 n.17, 136-137 n.111 (same). This commonality does not quite reach LeFlore, *supra* note 3, which as explained above, seems to misconceive the nature of agency in not only *Ballou* but also in the earlier fraternity cases. *See supra* notes 289-96.

319. *See* Kuzmich, *supra* note 5; Govan, *supra* note 5; *e.g.*, *Quinn v. Sigma Rho Chapter, Beta Theta Pi Fraternity*, 507 N.E.2d 1193 (Ill. App. Ct. 1987).

Moreover, the “special relationship” approach centering on custodial duty creates powerfully perverse incentives for the national to be derelict in its duties, because it turns on the national chapter’s involvement with and thus *ability* to control its local members.³²⁰ Case after case has absolved nationals of liability on demonstration that they had neither knowledge of the local’s conduct nor ability to control their local members.³²¹ Meanwhile, nationals who engaged with their locals to police hazing have been punished with liability as a result.³²² In *Morrison*, for example, the national was found liable under the “special relationship” approach after admitting it had the power to discipline its local members and had established a structure of oversight to prevent hazing.³²³

Faced with this legal dilemma, national fraternities are incentivized to mouth a few pieties on the evils of hazing, to disengage from their local chapters, and to close their eyes to the reality. As Paine lucidly concluded, “national fraternities appear best served by adopting policies advocating squeaky-clean behavior by chapters and by making token efforts to enforce substantive policies while distancing themselves from chapter activities.”³²⁴ LeFlore detailed a legal parade of horrors inuring to the Alpha Tau Omega National Fraternity after it began a program to monitor its local chapters, noting the other option is simply to “sever ties to whatever extent is necessary to counterbalance the implication of control,” thusly evading liability.³²⁵ And hazing scholar Dr. Ricky L. Jones has confirmed that fraternities are taking just such a path: “After years of researching and observing this constantly deteriorating situation, I believe the rule changes national offices initiate are for little more than window-dressing and legal defenses.”³²⁶ A legal regime that induces national fraternities to abandon real attempts to mitigate hazing in their local chapters is counterproductive.

Respondeat superior liability provides an alternative. It is true that the state of this law has well been called “confused” in the

320. See sources cited *supra* note 204.

321. See, e.g., *supra* notes 210-14.

322. See, e.g., *supra* notes 213-14.

323. See *supra* note 218 and accompanying text.

324. Paine, *supra* note 4, at 203.

325. LeFlore, *supra* note 3, at 222-24, 235.

326. Lawrence C. Ross, Jr., *BLGO Special Report: Dangerous Hazing Has Not Stopped*, THE ROOT, Oct. 20, 2009, available at <http://www.theroot.com/views/bglo-special-report-dangerous-hazing-has-not-stopped> (quoting Dr. Jones); see *id.* (“While black Greek organizations have outlawed hazing, the fact is that they’ve committed few or any resources to implement policy to insure that underground pledging has been abolished.”).

absence of clear modern precedent in hazing situations.³²⁷ This confusion is readily resolvable, however, by reasoning from the first principles of the master-servant relationship, as LeFlore recommended:³²⁸

It is only when to the relation of principal and agent there is added that *right* to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.³²⁹

The perverse incentives under the “special relationship” in tort lie in encouraging nationals to avoid the *ability* to control their local chapters. The analysis under *respondeat superior* slices this Gordian knot neatly by resting on the *right* to control instead: “The issue ‘is not whether the employer did in fact control and direct the employee in the work, but [rather] whether the employer has the right’”³³⁰ Regardless of whether the national chooses to act upon its right, the right persists, and thus the national cannot simply wash its hands of unruly locals with a “hear no evil, see no evil” approach.³³¹

That national fraternities have the right to control the physical details of inductions to their orders can hardly be gainsaid. To that end, they promulgate detailed stage directions for their rituals that prescribe precisely how, where, and when a pledge may be admitted.³³² Without precise performance of these rituals, the local has no power to admit new members to the national fraternity.³³³ Hav-

327. LeFlore, *supra* note 3, at 224-31.

328. *Id.* at 230-31.

329. RESTATEMENT (SECOND) OF AGENCY § 250 cmt. a (1958) (emphasis added), *cited by* LeFlore, *supra* note 3, at 225 n.169.

330. Ingram, *supra* note 48, at 94 (quoting *Harrison & Ellis, Inc. v. Nashville Mining Co.*, 275 S.E.2d 374, 375 (Ga. Ct. App. 1980)); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (considering “the extent of control which, by the agreement, the master may exercise over the details of the work” in determining whether an agent is a servant for purposes of *respondeat superior*).

331. This is consistent with normative societal expectations as well. As one hazing scholar summarized: “The national is responsible when it allows itself to become disconnected from what is really happening at the various chapters.” NUWER, *WRONGS OF PASSAGE*, *supra* note 11, at 229. *See also* NUWER, *BROKEN PLEDGES*, *supra* note 11, at 220 (laying blame with the national professionals who allow undergraduates to run amok).

332. *See* Schoen & Falchek, *supra* note 5, at 133-34 (“National fraternity organizations normally prescribe the manner in which induction ceremonies are conducted.”); Ames, *supra* note 21, at 19-28; *see also supra* text accompanying note 108; *see generally* JONES, *supra* note 11, at 52-66; Jones, *supra* note 34, at 110, 115-18; *e.g.*, BIRCHFIELD, *supra* note 38, at 17.

333. *See* Rutledge, *supra* note 5, at 391 (“persons could only become members by joining a local chapter” and the national “prescribed the initiation ceremony as the tool for joining”); Schoen & Falchek, *supra* note 5, at 133-34.

ing undertaken to dictate precisely how induction into the fraternity is allowed and conducted, the national is responsible for the manner in which the local proceeds, even if the local makes emendations of its own: once the right to control the physical acts done on behalf of the national is established, the master-servant relationship in agency is as well.³³⁴

Further, the fact that the local chapter strays from the national's choreography does not exceed the scope of agency in *respondeat superior*.³³⁵ Indeed, the *Ballou* court observed that the local chapter of Sigma Nu had done just that in supplementing the detailed ritual prescribed by the national.³³⁶ Even if a national flatly prohibits any hazing, the fact that a servant violates its master's guidelines does not eliminate the national's liability.³³⁷ This is vividly seen in the early twentieth-century cases, which, having established that the national had the right to direct the physical manner of bringing on new members, found it liable for these members' actual conduct in doing so, even though they exceeded or contravened the national's directions.³³⁸

This may all sound unforgiving to a scrupulous national fraternity. But *respondeat superior* does not irrationally render the national fraternity liable for every outrage of its locals. Agency law has long distinguished a servant's mere "detour" from the master's business from a liability-severing "frolic" of his own.³³⁹ (Admittedly, calling a local's actions "frolics" may be blackly ironic in some instances.) In short, some torts are beyond any rational attri-

334. See Bailey, *supra* note 216, at 228 § 2[b] ("The liability of a national fraternity for the initiation activities of a local chapter generally depends upon the scope of their agency relationship. In determining the scope, the national fraternity's constitutional provisions and bylaws relating to membership and initiation are central."); sources cited *supra* notes 48-50.

335. See RESTATEMENT (SECOND) OF AGENCY §§ 230, 245 (1958); e.g., sources cited *supra* notes 52, 73, 139 and accompanying text. *Contra* Paine, *supra* note 4, at 204 (stating without source that "among both agency and *respondeat superior* theories, a passing familiarity with chapter, national fraternity, and university relations would reveal that . . . all of the hazing activities occur *outside* the scope of the chapter's authority and the national fraternity's direction."). Paine appears to conflate "the national fraternity's direction"—which such additions are indeed outside—with "the chapter's authority," within which such additions may comfortably fit under *respondeat superior*.

336. See *supra* note 257.

337. See sources cited *supra* notes 48-52, 73, 139 and accompanying text; see also *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488, 496 (S.C. Ct. App. 1986).

338. See, e.g., *supra* notes 73, 93, 108.

339. FLOYD RUSSEME MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 389-391 (Philip Mechem ed., 4th ed. 1952) (describing the origin of such terminology with James Parke, Baron Wensleydale).

bution to the national organization,³⁴⁰ and as one early court explained, the national “could no more be liable for such tort than if one of the members had drawn a pistol and shot appellee to death.”³⁴¹ National defendants have certainly argued that the acts of the local were outside the bounds of new member induction, and thus outside of master-servant agency—albeit largely in vain.³⁴² But the availability of such a defense mitigates the fear that unimaginable atrocities might be imputed to a national organization that had done all it could.³⁴³

Likewise, one could still contend that pledges “assume the risk” of the dangers involved in pledging,³⁴⁴ or relatedly that those pledges are negligent in acceding to risky behavior.³⁴⁵ National defendants (including the defendant in *Ballou*) have argued just that, also without much success.³⁴⁶ Critical to such a defense, of course, is that the pledge was fully informed of the risks he was assuming and free of duress from the fraternity in undertaking them.³⁴⁷ While such predicates are difficult to establish given the secrecy of the pledge process,³⁴⁸ and the social pressure involved in pledging,³⁴⁹ the availability of the “assumption of the risk” defense still provides a possible safe harbor for law-abiding fraternities.³⁵⁰

340. The outer bounds of actual and apparent authority differ in definition, *see supra* notes 123-24, but are practically the same in the case of fraternity hazing: the induction of new members into the fraternity. *Supra* notes 123-28 and accompanying text.

341. *Johnson I*, 135 S.W. 173, 175 (Tex. Civ. App. 1911); *see supra* notes 137-41.

342. *See, e.g.*, Supreme Lodge of the World, Loyal Order of Moose v. Kenny, 73 So. 519, 524 (Ala. 1916); *Ballou*, 352 S.E.2d at 495.

343. *See Fraternal Order*, *supra* note 57, at 154.

344. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 496A-G (1965). *But see* Recent Decisions, 7 COLUM. L. REV. 616, 616 (1907) (noting precedent refusing to recognize assumption of the risk in such circumstance as against public policy).

345. *See, e.g., supra* note 264 (elaborating on the relationship between an assumption of the risk and contributory negligence affirmative defenses).

346. *See, e.g., supra* notes 264-68; *cf. Fraternal Order*, *supra* note 57, at 153-54 (arguing in favor of the application of the assumption of the risk doctrine in hazing); *Lewis*, *supra* note 316, at 111.

347. *See* Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 146-53 (1952); *see generally* RESTATEMENT (SECOND) OF TORTS §§ 496A-G (1965).

348. *See Lewis*, *supra* note 316, at 148-49; *supra* notes 165-66.

349. *See Lewis*, *supra* note 316, at 148-49; *Curry*, *supra* note 4, at 110-11; *supra* notes 264-66; *infra* notes 375-79.

350. *Ballou* provides a stark example of why such a defense failed, however. In questioning, one Sigma Nu member explained the twin watchwords that were drilled into their pledges: “[s]ecrecy and obedience.” NUWER, BROKEN PLEDGES, *supra* note 11, at 183. Secrecy and obedience, of course, neatly negate each prerequisite for a successful defense of assumption of the risk.

Some suggest that asking national fraternities to prevent hazing would impose an Augean task.³⁵¹ The present author is not so cynical about collegians to think that they are utterly uncontrollable, though some degree of misconduct may be ineluctable.³⁵² But when pledges do suffer injury, the ensuing lawsuits reasonably embrace national fraternities, which prescribe the criteria for admission, charter local chapters to represent them, and sanction their members in conducting initiations.³⁵³ The national fraternity gains the membership of the pledge upon initiation—it can perpetuate itself no way else—and thus has an existential need for its local chapters' conduct.³⁵⁴ To allow the national to both command and benefit from the local's conduct without liability for the local's misconduct would seem a distortion of equity, as the early twentieth-century cases and commentaries recognized.³⁵⁵

Commentators have also advocated an “inverse agency” theory: that if there be an agency relationship, then the national serve at the pleasure of the locals, inasmuch as the national officers are elected and directed by a yearly convocation of the local chapters.³⁵⁶ Yet most fraternities have long characterized themselves as a unitary brotherhood or sisterhood overseeing local appendages,³⁵⁷ a view given force in the formal superintendence of the na-

351. See, e.g., LeFlore, *supra* note 3, at 223 (“The national fraternity has been forced to attempt the impossible . . . The standard of care that it has set for itself, after assuming this duty through its nationwide guidelines, will be impossible to meet.”); Paine, *supra* note 4, at 204 (“Despite national directives, . . . underage students will continue to drink”); cf. Jonathan F. Farr, *Troubled Times in a New England University's Fraternity System*, in *THE HAZING READER* 130, 136 (Hank Nuwer ed., 2004) (quoting an administrator that “assigning responsibility over the fraternities . . . has nothing to do with exerting control over people.”); Brian Hansen, *Hazing: Should More Be Done to Stop It?* 14 *CONG'L Q. RESEARCHER* 1, 11 (2004) (quoting fraternity officials regarding the extent of their operations and abilities).

352. Ultimately, LeFlore seems to accept that the national organization is the best situated to prevent hazing from occurring, but despairs that “this effort at prevention through education cannot be perfectly policed,” and thus from a “resource-allocation theory” proposes to insulate national fraternities entirely from civil liability, reserving that (and criminal consequences) for the local chapter and its members. See LeFlore, *supra* note 3, at 236-37. While granting nationals effective immunity from suit is another way to avoid the perverse incentives described above, *supra* notes 320-26, immunity does not comport with principles of *respondeat superior* that apply forcefully where the national prescribes the initiation ritual and subsists on those initiated.

353. Cf. *supra* notes 29-32 and accompanying text.

354. Ballou made this point, see *supra* note 258, which had also been previously stated with much force and eloquence in *Kenny* as well. See *supra* note 176 and accompanying text.

355. See, e.g., *Mitchell v. Lecch*, 48 S.E. 290, 292 (S.C. 1904); *supra* text accompanying notes 174-79.

356. See LeFlore, *supra* note 3, at 205-06; Paine, *supra* note 4, at 204 & n.61 (citing LeFlore and expanding); Rutledge, *supra* note 5, at 367 & n.27 (same).

357. See, e.g., HOWARD BEMENT & DOUGLAS BEMENT, *THE STORY OF ZETA PSI* 102-03 (2d ed., 1932); FLORENCE A. ARMSTRONG, *HISTORY OF ALPHA CHI OMEGA FRATERNITY*

tional over the locals.³⁵⁸ The national organization may have originated as an outgrowth of local chapters, but even by 1905, Baird aptly characterized the national as supreme.³⁵⁹ A hundred-chapter fraternity is then grossly analogous to a company whose hundred employees each hold equal stock in it, annually convening to elect the company's board of directors. There is little doubt that such a company could be called to answer for its employees' actions in the workplace.³⁶⁰ As Paine summed up: the "inverse agency" theory would revolutionize fraternity law by shielding national organizations from liability from almost every conceivable tort committed by a chapter³⁶¹—hardly a satisfactory situation.³⁶²

National fraternities, on the whole, are not so very unlike the traditional employer in *respondeat superior*, despite the obvious differences. National fraternities commonly have the right to set the rules by which their subordinate chapters will conduct themselves within the scope of their fraternal activities, the right to discipline or terminate members, the right to collect and disburse assets, the right to revoke a local charter wholesale, and even the right to provide for the general welfare of the fraternity.³⁶³ These are rights akin to those an employer holds over his employees, and it is not unreasonable to imagine that similar liability would attach. The national fraternity, like the corporation, cannot transact its business *except* through the conduct of its chosen agents.³⁶⁴ That said, this Article concerns itself solely with hazing, and does not address the arguments for and against non-hazing conduct (for example, host-

(1885-1921) 117-31 (3d ed., 1922); ELIZABETH ALLEN CLARKE HELMICK, *THE HISTORY OF THE PI BETA PHI FRATERNITY* 77-84 (1915).

358. See *supra* note 32, *infra* notes 364-66, and accompanying text; e.g., ARMSTRONG, *supra* note 357, at 117-31; HELMICK, *supra* note 357, at 77-84; WALTER BENJAMIN PALMER, *THE HISTORY OF THE PHI DELTA THETA FRATERNITY* 390 (1906).

359. BAIRD, *supra* note 11, at 17.

360. Were it otherwise, the ubiquitous business practice of granting employees stock would be all a company need do to extricate itself from *respondeat superior*. Nor need the shareholders be entirely passive entities. In some corporations, extraordinary actions of the board require shareholder ratification. That some fraternity constitutions reserve ratification of similarly extraordinary actions to the annual convocation, see Paine, *supra* note 4, at 204 & n.61, does not differentiate the fraternity from the corporate model in principle.

361. Paine, *supra* note 4, at 204.

362. See *supra* Part III.C.2. But see LeFlore, *supra* note 3, at 236-37; *supra* note 352.

363. See *supra* notes 26-33 and accompanying text; Brian Hansen, *Hazing: Should More Be Done to Stop It?* 14 CONG'L Q. RESEARCHER 1, 11 (2004); e.g., ARMSTRONG, *supra* note 357, at 118.

364. See, e.g., *Mitchell v. Leech*, 48 S.E. 290, 292 (S.C. 1904). ("In order to accomplish the objects for which the sovereign camp was organized, it was necessary, from the very nature of the business, to call to its assistance the services of persons through whom it might act, in transacting the affairs of the order in various localities. It selected and organized local lodges for the purpose of meeting this necessity.").

ing recreational events) being made the subject of master-servant agency.³⁶⁵

Nor do the approaches to national liability for hazing discussed thus far—*respondeat superior*, the “special relationship” giving rise to a custodial duty,³⁶⁶ and immunity for national fraternities³⁶⁷—empty the toolbox of legal theory and public policy. Scholars have suggested the application of negligence *per se* in jurisdictions where criminal statutes may reach as far as the national organization.³⁶⁸ An intriguing possibility, apparently not yet well-explored, lies in leveraging established law on liability in franchisor-franchisee relations,³⁶⁹ which may best illustrate the situation of a national fraternity that lends its name and formula for success to a widespread network of local outposts.³⁷⁰ Although this Article has presented arguments for applying *respondeat superior* to nationals in some instances, such liability will not always be appropriate, and alternatives may arise that prove more compelling. As they have for over a century, the doctrinal underpinnings of national fraternal liability for hazing will continue to evolve.

In the end, one must not forget the pledge’s perspective in judging the justness of *respondeat superior*. The prospective member undertakes the pledging process ignorant of any secret tribulations to come, and dependent upon the local chapter as the representative of the national order he seeks to join.³⁷¹ *Respondeat superior* addresses this issue by collapsing the application of actual and apparent authority,³⁷² a distinction that makes no difference to the pledge, who has no choice in dealing with the national fraternity but

365. Marshlain, *supra* note 123; see *Estate of Hernandez v. Flavio*, 924 P.2d 1036 (Ariz. Ct. App. 1995), *vac’d in part on other grounds*, 930 P.2d 1309 (1997). Compare, e.g., Mumford, *supra* note 26, at 763 (“The National Fraternity controls the local chapter by enforcing the National Chapter’s policies and by-laws, supervising local chapters’ day-to-day activities”) with LeFlore, *supra* note 3, at 236 (concluding that “there is no actual day-to-day control to the extent that a master could interfere with or direct activities of his servants.”).

366. See *supra* Part III.D.2; *supra* notes 321-27 and accompanying text.

367. See *supra* notes 353, 362-63.

368. See, e.g., Kuzmich, *supra* note 5, at § IV.A.3; LeFlore, *supra* note 3, at 200-01.

369. See William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 *FRANCHISE L.J.* 162 (2004-2005); John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 *OKLA. CITY U. L. REV.* 1 (1999); Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 *COLUM. BUS. L. REV.* 89 (1993).

370. There is at least some intimation of this in LeFlore when he refers to the national organization being forced into “becoming something similar to a licensing agency for its fraternity.” See LeFlore, *supra* note 3, at 224.

371. See Lewis, *supra* note 316, at 148-49; see *supra* notes 163-70 and accompanying text.

372. See *supra* notes 121-28 and accompanying text.

to rely upon the local chapter.³⁷³ Indeed, this is the *raison d'être* of the master-servant doctrine, which, as Justice Joseph Story expounded,

is founded upon public policy and convenience; for *in no other way could there be any safety to third persons* in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case, the principal holds out his agent, as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.³⁷⁴

Pledges are said to choose their own fate: defendants and scholars alike have argued that pledges enlist of their own accord, and may quit at will.³⁷⁵ Yet the pledging process is like a contract of adhesion—you take it or leave it³⁷⁶—and leaving it may be hard for pledges who have invested much of their time and themselves in their fraternity-to-be.³⁷⁷ One court described them as “adolescents who, however unwisely, trade their insecurities and free will for the promise of acceptance, and prestige, that fraternity membership appears to confer.”³⁷⁸ If it is this prestige that plies pledges onwards,³⁷⁹ then the national fraternity burnishing such a brass ring should be held to task for any injuries suffered as pledges strive to attain it.

* * *

373. See *supra* notes 108, 163-65 and accompanying text.

374. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 452 (1839) (emphasis added), quoted in *Mitchell v. Leech*, 48 S.E. 290, 292-93 (S.C. 1904), *supra* note 73.

375. See, e.g., *supra* notes 156, 264 and accompanying text; Curry, *supra* note 4, at 110-11; *Nisbet v. Bucher*, 949 S.W.2d 111, 116 (Mo. Ct. App. 1997); *Quinn v. Sigma Rho Chapter, Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197 (Ill. App. Ct. 1987).

376. Cf. Christopher M. Kaiser, *Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuit's Formalistic Approach to Contracts of Adhesion*, 80 CHI.-KENT L. REV. 487 (2005).

377. See HANK NUWER, *Cult-Like Hazing*, in THE HAZING READER 27, 29 (Hank Nuwer ed., 2004) (explaining how “fraternities and sororities make it difficult for a pledge to quit.”); JONES, *supra* note 11, at 7; Jones, *supra* note 34, at 125-27. But see Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 152 (1952) (“The plaintiff takes a risk *voluntarily* (within the meaning of the present rule) where the defendant has a right to face him with the dilemma of ‘take it or leave it.’”).

378. *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997).

379. See sources cited *supra* notes 300-301.

