ST. JOHN'S UNIVERSITY

COLLEGE OF PROFESSIONAL STUDIES

THE LEGAL APPRENTICE

Volume 3 Spring 2016 Number 1

THE LEGAL APPRENTICE

ARTICLES

ST. JOHN'S UNIVERSITY

COLLEGE OF PROFESSIONAL STUDIES

OFFICES OF ADMINISTRATION AND FACULTY
2015 – 2016

JEFFREY GROSSMANN, J.D.
INTERIM DEAN

MARY NOE, J.D.
ASSOCIATE DEAN

* * *

ANTOINETTE COLLARINI-SCHLOSSBERG, J.D.
CHAIRPERSON
CRIMINAL JUSTICE, LEGAL STUDIES, AND HOMELAND SECURITY

BERNARD HELLDORFER, J.D.
JAMES CROFT, J.D.
DIRECTORS
LEGAL STUDIES

MARY NOE, J.D.
ASSOCIATE PROFESSOR
EDITOR

JAMES CROFT, J.D.
ASSISTANT PROFESSOR
ASSISTANT EDITOR

THE LEGAL APPRENTICE

FOREWORD

The College of Professional Studies is pleased to unveil the third edition of *The Legal Apprentice* featuring excellent student articles on college hazing, Nike's trademark and a New York City school teacher with heroin in his pocket. These articles would whet any reader's appetite.

The Legal Apprentice is a worthy showplace for the talented work of our student-authors. Our College is honored to sponsor this undergraduate journal, the only one of its kind within the St. John's University community. *The Legal Apprentice* is distributed to scholars and faculty at other universities and is readily available to the world. Just Google *The Legal Apprentice.* It is listed first in the search engine.

Thanks are extended to Professor Mary Noe, the editor and creator of *The Legal Apprentice,* who works with student-authors in reviewing and editing the articles and *The Legal Apprentice* Advisory Board, consisting of faculty members who select the articles in a blind review. I would be remiss not to also thank the Hon. P. Kevin Castel, a graduate of this school for his commitment to our students' efforts in writing .

It is my hope that faculty and students will be inspired to contribute to future editions of this publication. Congratulations to all!

Jeffrey P. Grossmann J.D.
Interim Dean
College of Professional Studies

A Note from the Editor

My mantra is there is no such thing as good legal writing. There is just good writing and bad writing. This thought is not original to me. Its source is a person who is admired for his ability to communicate complex ideas with crystal clarity to those who agreed and those who passionately disagreed. Associate Justice Antonin Scalia passed as the Third Volume of *The Legal Apprentice* was in its final editing stages. Jeet Heer, writing last June in the *New Republic*, proclaimed his deep-seated disagreement with the Justice but described him with these words: ". . . Scalia is the foremost living practitioner of performative legal prose, a masterful writer who can make torts tarty and judgments jazzy."[1]

I will share one example of his style. He was making the point that the words of a statute are controlling and not how many legislators favored it or their state of mind. Justice Scalia's imagery will make you smile:

> "It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, 'The more we get together, the happier we'll be.' ."[2]

And so a giant has left us with his excellent writing to read and enjoy and then form our own opinions whether to agree or disagree. I, like my students, continue to struggle with writing. Justice Scalia's inspires me as a writer and I hope he does the same for you.

Mary Noe
Associate Academic Dean
and Associate Professor
Editor, *The Legal Apprentice*

---

[1] J. Heer, *Antonin Scalia Is the Supreme Court's Greatest Writer* (New Republic, June 26, 2015)(https://newrepublic.com/article/122167/antonin-scalia-supreme-courts-greatest-writer).

[2] *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 595 (1998)(Scalia, J. dissenting).

DRUGS EFFECTS SHOULD NEVER BE SAID IN THE SAME SENTENCE

VERONICA HARRIS[†]

The best parts of my childhood happened while in middle school. I met my best friends in the sixth grade and made long-lasting connections with some of my teachers. One of my favorite teachers was my sixth grade math teacher. Every student in the middle school wanted to be in his class. He was the friendliest, most understanding, and easy-going teacher in the entire school. I was lucky enough to have him during first period. I would normally dread waking up for school in the morning, but his class made the struggle with my mother and alarm clock well worth it.

One morning, everyone's favorite math teacher was absent for my class. This was an extremely rare occurrence because he was known throughout the school for having a perfect attendance record. Shortly after the bell rang to start the school day, the school's social worker entered the classroom telling the class that our math teacher would no longer teach our class because of an "incident." My classmates and I later learned that our teacher was arrested for indecent exposure because he flashed a middle school boy in the mall's bathroom. This devastated my classmates. At eleven years old I became cynical of every teacher, even the ones I once believed to be my favorites. I am thankful that the school district terminated my math teacher and his teaching license was revoked. Therefore, he could never hurt another person's middle school experience again.

This paper will examine a case regarding the termination of a teacher arrested for heroin possession, my research on the widespread use of heroin, and why I disagree with the court's decision.

[†] Veronica Harris is a Senior at St. John's University College of Professional Studies. Her major is Legal Studies.

CASE SUMMARY

In the case of *Damien Esteban v. the Department of Education of the City School*,[1] Damien Esteban is a tenured architecture teacher at Williamsburg High School. While employed by a New York City Public School, he maintained a good standing as a teacher and never received any disciplinary actions.

On October 17, 2012 the teacher entered New York City Criminal Court where he was a juror in a criminal trial. During a routine security check at the door of the court, the teacher removed twenty glassine envelopes of heroin from his pocket. He was immediately arrested and charged with a misdemeanor, possession of heroin. The Criminal Court's determination of the case was an Adjournment in Contemplation of Dismissal (ACOD) and the Court required Esteban to complete a one-day Treatment Readiness program. The ACOD would result in a dismissal of Esteban's case after six months from the date of his arrest if there were no additional charges against him. In addition to Esteban's legal problems, he was the subject of negative publicity from articles in three major New York publications.

The New York City Department of Education requested a disciplinary hearing to bring charges against Esteban and request termination.

Editor's Note: At a disciplinary hearing both sides can present evidence and testimonyto an Arbitrator pursuant to Education Law § 3020–a [3].

The school district brought charges of misconduct against the teacher and requested his termination based on five allegations: his arrest, his removal from jury duty, his failure to report his arrest to the school district, pleading to a criminal charge and the negative publicity surrounding his arrest.

Esteban denied that he failed to report his arrest to the school district. He claimed to only use drugs on the weekends and never used drugs in or brought drugs to the school. To further support his case, Esteban states that he did not know he had heroin in his pocket on October 17, 2012.

The Arbitrator dismissed the third allegation against the defendant (failure to report his arrest to the school). However, the Arbitrator held the defendant accountable for the other four allegations. The Arbitrator terminated the teacher. The teacher appealed the Arbitrator's decision to the Supreme Court of New York County.

---

[1] *Esteban v. The Dep't of Edu. of the City of New York*, 40 Misc.3d 1241(A) Sept. 16, 2013.

The issue for the court to decide was whether the defendant, a New York City teacher, should have been terminated from his teaching position based on the four allegations, (arrest on October 17, 2012, removal from jury duty, pleading to an ACOD, and the public scrutiny that surrounded the arrest).

The court ruled in favor of Esteban and vacated his termination.

Previous New York State cases have ruled that a teacher cannot be discharged if the conduct did not directly affect his students or his teaching performance. There was no factual evidence presented during arbitration that proved the defendant's heroin possession affected his ability to carry out his responsibilities as a teacher. According to legal precedent, *Weinstein v. Department of Education of the City of New York,*[2] an arbitrator's decision may be vacated if "there is no rational basis for the determination based on the evidence adduced at the hearing."

The court concluded that the defendant's conduct occurred when he was off duty, it was off-campus, and there were no students involved. The defendant also had no criminal record and an outstanding teaching record. In a similar case, *Matter of Dubner*,[3] a teacher in a similar situation to Esteban received a two-year suspension. "On a record that supports the conclusion that petitioner suffered from drug addiction prior to his arrest, acknowledged his problem, sought treatment that has been successful and is capable of carrying out his professional responsibilities, termination would be unduly harsh."

The court noted that the Arbitrator failed to consider the defendant's unblemished teaching record. It was also highly unlikely that the defendant would be arrested for another drug offense.

Editor's Note: The New York City Department of Education appealed the decision to the Appellate Division, First Department. The Court reversed the decision of the New York Supreme Court. The Court found that an Arbitrator's decision should not be reversed unless "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power"[4] *And the Arbitrator's penalty of termination should not be reversed unless it was "so disproportionate to the offense as to be shocking to the court's sense of fairness"*[5] *The Appeals*

---

[2] *Weinstein v. Department of Education of the City of New York,* (19 AD3d 165, 798 N.Y.S.2d 383 [1st Dept.2005]).

[3] *Matter of Dubner*, (N.Y.C DOE decision No. 13, 021, dated October 15, 1993).

[4] *Matter of Board of Educ. of Arlington Cent. School Dist. v. Arlington Teachers Assn., 78* N.Y.2d 33*,* 37 [1991]).

[5] *Lackow v. Department of Educ. of City of N.Y.,* 51 AD3d 563, 569 (1st Dept 2008).

Court found that the Arbitrator's decision and penalty should not be changed.

RESEARCH

According to the National Institute on Drug Abuse, in 2011, 4.2 million Americans have used heroin at least once in their lifetimes.[6] Heroin is a highly addictive controlled substance derived from the seed pod of poppy plants that gives its users a euphoric rush, or pleasurable sensation.[7] These properties of heroin have caused the steady increase of heroin users in America since 2007.

From 2007 to 2012, the number of users has doubled.[8] In 2012, 669,000 Americans admitted to using heroin in the past year, compared to 337,000 Americans in 2007. Although use is the highest among males 18-25, nearly every demographic is using the drug more.[9] Drug use has increased with people with higher incomes, such as teachers and other professionals. The charts below show the increased use of heroin over the years and the increase in use over different demographics. These statistics exhibit the growing heroin epidemic that shows little signs of stopping.

---

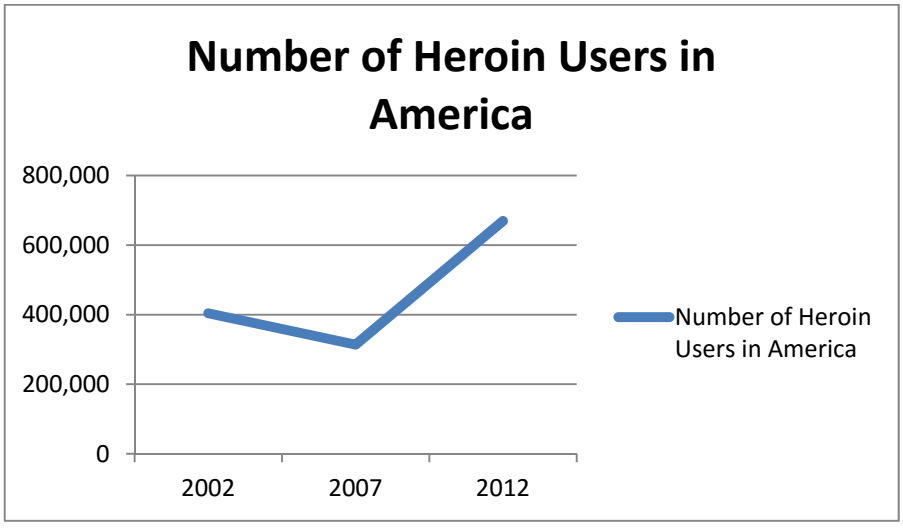
[6] www.drugabuse.gov/publications/drugfacts/heroin, (last retrieved 12/5/15).

[7] www.drugabuse.gov/publications/research-reports/heroin/what-heroin, (last retrieved 12/5/15).

[8] www.drugabuse.gov/publications/research-reports/heroin/scope-heroin-use-in-united-states, (last retrieved 12/5/15).

[9] www.cdc.gov/vitalsigns/heroin, (last retrieved 12/5/15).

Results from National Institute on Drug Abuse[10]



Results from the Centers for Disease Control and Prevention[11]

SEX	2002-2004	2011-2013	Percent Increase
Male	2.4	3.6	50%
Female	0.8	1.6	100%
AGE			
18-25	3.5	7.3	109%
26 or older	1.2	1.9	58%
HOUSEHOLD INCOME			
Less than $20,000	3.4	5.5	62%
$20,000- $49,999	1.3	2.3	77%
$50,000 and up	1	1.6	60%

The number of heroin related deaths has a direct relationship with the drugs increased use. The death rate for heroin overdose nearly quadrupled

[10] www.drugabuse.gov, (last retrieved 12/5/15).
[11] www.cdc.gov/vitalsigns/heroin, (last visited 12/5/15).

since the new millennium.[12] From 2012 to 2013 alone, heroin-related deaths have doubled.[13] Heroin addicts who are able to survive the disease are often left with long-term consequences such as collapsed veins, infection of the lining and valves of the heart, liver or kidney disease, and pneumonia.[14] According to the National Institute on Drug Abuse, avid heroin users are also at a higher risk of contracting HIV/AIDS.[15]

The increase in popularity of the drug has led to an increase in deaths in every demographic, even suburban teenagers. In recent years, suburban towns in Long Island, New York have been most affected by the heroin epidemic. One hundred twenty-two people died on Long Island from heroin overdoses in 2013, an increase of 44% from 2009 to 2014.[16] According to Suffolk County District Attorney, Thomas Spota, a major highway on Long Island, the Long Island Expressway, has earned the nickname, "Heroin Highway."[17] Over the past decade, heroin has affected the most promising teenagers on the island. According to The Long Island Press, Natalie Ciappa, 18, of Massapequa, NY, died of a heroin overdose in 2008. Ciappa was a singer, cheerleader, and honors student awaiting graduation from her local high school.

OPINION

Damien Esteban's admission to using heroin on the weekends is not surprising. However, if a teacher uses or is addicted to an illegal substance, he or she should not be allowed to teach. The teacher does not have to be under the influence during school hours in order to have a negative influence on his students.

Children attending school are an impressionable age group. On elementary school playgrounds, children participate in "pretend play," where they assume the identity of their favorite characters with each other. From watching television to playing video games, these students are able to replicate the characters' voices, movements, and behavior. In addition to fictional characters, students look up to their teachers as role models. If children see their teachers writing in script, they will be more influenced to write in script as well. But, teachers can also have a negative influence. If students see their teacher smoking a cigarette during recess, they might

---

[12] www.cdc.gov/nchs/data/databriefs/db190.pdf, (last visited 12/5/15).

[13] *Id.*

[14] www.drugabuse.gov/drugs-abuse/heroin (last visited 12/5/15).

[15] *Id.*

[16] www.longislandpress.com/2014/04/18/how-long-island-is-losing-its-war-on-heroin, (last visited 12/5/15).

[17] *Id.*

think that there is nothing wrong with smoking cigarettes. In the same manner, Damien Esteban's students may not be alarmed by his heroin use. They may believe that because he was such a great teacher with outstanding reports, heroin must not be that bad after all. By allowing him to continue to teach, students will be desensitized to the criminality of heroin. However, if he is fired from his job, students may abstain from experimenting with illegal substances, because of the effect it can have on their lives.

The court argued that because Esteban received treatment for his drug addiction he would be fit to teach again. However, heroin addicts have a 40 to 60% chance of relapsing within the first year following completion of a treatment program[18] Undergoing a 30-day treatment program does not eliminate the problem. Recovery is a long process, according to addiction specialists. Relapse is probable due to heroin's highly addictive properties as well as its long-term effects on the brain. The court failed to take these addiction studies into account by overturning Esteban's termination. If Esteban is allowed to teach again, he may use heroin again.

The court did not make a decision in the students' best interest. The intention of Esteban's termination was to protect the school's students. Students need to know that heroin is an illegal substance that affects more than the user. An addiction to the illegal substance will interfere with one's reputation, personal life, and health. Although Esteban was not caught using heroin with his students, their education was still affected.

CONCLUSION

Teachers are often seen as role models to their students. Students look up to their teachers after forming a relationship with them over the course of a school year. It is a teacher's responsibility to be a model citizen so that their students are influenced to be the same. If a teacher is arrested for a crime, he or she is not a model citizen anymore. However, according to the New York State Supreme Court, New York County, a teacher can continue to teach if their crime did not involve any students. Children need to know that even their favorite teacher must face the consequences for their illegal actions.

The New York State court decision sent a message to Damien Esteban's students that you can use heroin, and still keep your job. Students are already placed under peer pressure to use the illegal substance because of its widespread use over past years. New York State is endorsing the

[18] www. archives.drugabuse.gov/about/welcome/aboutdrugabuse/chronicdisease, (last visited12/5/15).

heroin epidemic by refusing to make an example out of Esteban. As long as the court's decision stands, students will be desensitized to the social, mental and physical effects of illegal drug use.

DON'T TREAD ON ME

DANIEL GOMEZ[†]

INTRODUCTION

I think back to my childhood, it's 2009 and I am a soccer-crazed twelve year-old boy putting on my Nike United States Men's National Team shirt bearing the historical American phrase "Don't Tread on Me." Many kids had the more expensive flashy jersey; but I was content to have my simple t-shirt. I remember the adrenaline pulsating in me when I donned that shirt and stepped onto the field with my friends. I had no clue about the controversy that went into its production.

As consumers we often fail to appreciate the amount of preliminary work that goes into producing a simple shirt. Even after having the materials, labor, and machinery to produce the apparel, there is a lot of logistical legal work to carry out; namely securing the trademark for the phrases the producer would like to print on their apparel. Many times securing the trademark proves problematic. So what happens when the trademark is previously chosen? What if a company ignores another company's trademark? What if it was attained fraudulently?

In 2009, the companies Bauer Bros. LLC and Nike, Inc. went to court over the very phrase on my beloved soccer shirt, "Don't Tread on Me." This paper will first summarize the case *Bauer Bros. LLC. v. Nike, Inc.*;[1] second, review research results of the historical and current uses of this phrase and its complementary flag; and finally give my opinion on the controversial uses of the phrase and flag.

CASE SUMMARY

A trademark is obtained to protect brand names and logos used on goods and services. To attain a trademark, a business must first apply to the United States Patent and Trademark Office of the federal government. In order for the trademark to be valid the business must ensure that they provide accurate information on the application, including a specific

---

[†] Daniel Gomez is a senior at St. John's University College of Professional Studies. His major is Legal Studies.

[1] *Bauer Bros. LLC. v. Nike, Inc*. (2010 WL 1900047), US Dist. Ct. S.D. Cal. May 24, 2012.

explanation of what products will be licensed under the trademark and the date of first usage of the trademark on their product.

Luke Bauer, the plaintiff, submitted the phrase "Don't Tread on Me" to be trademarked for apparel from his company Bauer Bros. LLC. in 2004. When he filed the application he declared that his company first used the phrase on March 11, 2004 on more than a hundred different products. The trademark was granted in 2005. In 2006, he applied for, and attained the trademark for the phrase "DTOM."

In 2005, Nike began selling apparel with the phrase "Don't Tread on Me" and in 2006 they began selling apparel with the phrase "DTOM."

In 2009, Bauer Bros. sued Nike over trademark infringement on both the phrase "Don't Tread on Me" and "DTOM."

Nike alleges Bauer's trademark was attained fraudulently, and therefore Bauer Bros.' claim is invalid. Nike states that Bauer Bros. lied on the application as to the date of first usage. In addition, Nike claims that they were the first to use the trademarked phrases in the market.

Bauer's records do not indicate the dates when they first used the phrases "Don't Tread on me" and "DTOM" on apparel. A private consultant hired by Nike submits evidence suggesting that Bauer was not selling apparel with the trademarked phrases in 2005. Bauer Bros. concedes that the phrases were only used on their t-shirts.

Based on this information, Nike has requested the Court decide the case against Bauer without a trial. Additionally, Nike countersued Bauer Bros. to cancel their trademark.

Editor's Note: Both parties asked the court for a summary judgment. Summary judgment is a request to the court to end a case without a trial based on written submissions. The case law states that a court can grant summary judgment if there is no genuine dispute as to any material fact and the requesting party is entitled to judgment as a matter of law.

The issue for the Court to decide is whether Bauer Bros.' suit against Nike, Inc. for selling products with Bauer Bros. trademarked phrases ("Don't Tread on Me" and "DTOM") was a trademark infringement and whether Bauer Bros.' trademark was fraudulently obtained.

The Court decided that Bauer Bros.' trademarks "Don't Tread on Me" and "DTOM" are not valid. The court denied Bauer's request to amend the trademark registration.

The court referred to the Lanham Act[2] which is found in the U.S. Code and is the primary source for all matters related to trademarks. The Lanham Act states that in order for a trademark to be considered legally valid, the applicant must show that the mark is already in the market at the time of applying for the trademark.[3]

The court reasoned that Luke Bauer admitted that he only used the trademark on t-shirts and not on other clothing and there was no evidence of use of the trademark in 2004, the date on the trademark application. However, the court states that an error of the date on the application is not fatal as long as the phrase was in use in the market prior to the filing of the trademark application.[4] However, Bauer could not prove through their sales records that their mark was in use before the application date and did not list the sale of the t-shirts bearing the trademarked phrase. These facts were enough to invalidate the trademark. When an applicant cannot provide bona fide proof of the use of the trademark, which Bauer could not do, it is appropriate for the court to decide the case without a trial.[5]

Nike only needed to show evidence proving Bauer's wrongdoing.[6] They managed to do that through Luke Bauer's testimony in which Bauer admitted that he lied on the application to attain maximum protection from the trademark. In addition, Nike's records revealed the date of first use of the trademarked phrases by Nike. Bauer's did not.

RESEARCH

In 1775 Christopher Gadsden, a North Carolina native, created the term "Don't Tread on Me" when he inscribed it on a flag during the Revolutionary War. The flag is bright yellow and features a coiled snake over the words "Don't Tread on Me." The flag, known as the Gadsden flag was used to unite the colonies against their British oppressors, much like Ben Franklin's "Join or Die" campaign. Gadsden also likely borrowed the symbol of the rattlesnake from this very campaign.[7]

---

[2] 15 USC § 1051(a)(3)(C).

[3] *Sengoku Works Ltd. v. RMC Intern., Ltd.,* 96 F.3d 1217, 1219 (9th Cir.1996).

[4] *Car Subx Serv. Sys., Inc. v. Exxon Corp.,* 215 U.S.P.Q. 345, 351, (Trademark Tr. & App. Bd. 1982).

[5] *Carlsbad v. Shah,* 666 F.Supp.2d 1159 (S.D.Cal.2009).

[6] *Zobmondo Entertainment, LLC v. Falls Media, LLC,* 602 F.3d 1108, 1113 (9th Cir.2010).

[7] Interview with Professor Joseph Ellis. History, Mount Holyoke College All Things Considered Washington, D.C.: National Public Radio. (Mar 25, 2010). http://search.proquest.com/docview/189922309?accountid=14068 (last retrieved 4/15/15).

The original Gadsden flag did not even include the apostrophe over in the word "don't."[8]

The origin of the flag and the phrase were meant to unite the American colonies in the war effort against the British. It did not advocate for non-governmental rule. The flag actually supported government, as long as appropriate representation was apparent. In addition, the flag was created before the final drafting of the U.S. Constitution, so it was not a symbol of protection of our constitutional rights. Ultimately, the flag was intended as a pro-government symbol.

The flag, along with several flags containing rattlesnakes were heavily used during the Revolution by the American troops. At that time, however, there was no official American flag. When the revolution waned, leaders had to choose a flag for the new country. Before settling on Betsy Ross' flag featuring stars and stripes, the Union considered using the Gadsden flag. Even though it was not chosen as the unifying flag, it still became the first official "Navy Jack" when navy ships started flying the flag in 1775, and continues to be flown by the Navy today.[9] The flag is used on these US Marine ships as a symbol of unity with the government of the United States and an expression of their will to protect it.

[8] Steve Tuttle, Don't Tread on My Don't-Tread-on-Me Flag: The writer looks deep inside the frightening Tea Party movement and finds nice people and potato salad. Newsweek Web Exclusives (Oct 1, 2010). http://search.proquest.com/docview/773618865?accountid=14068 last retrieved 4/15/15.

[9] Chris Whitten, The Gadsden Flag History, http://www.gadsden.info/history.html (last retrieved 4/15/15).

In recent times, several politicians have used this flag to erroneously convey a sense of anti-government sentiment. No use of the flag is as controversial and high profile as the modern Tea Party's adoption of the flag as their unofficial symbol. The Tea Party is a modern far-right political movement that endorses strict adherence to the Constitution and supports limiting government, and in some cases even abolishing certain sectors of government. They use the flag, and the phrase "Don't Tread on Me" as their political mission statement, telling the government to respect their rights and refrain from getting involved in citizens' lives. This is a misuse of the flag and the phrase's original meaning.[10] Their use of the flag contradicts the flag's historical purpose of unifying the United States.

OPINION

I believe that the Gadsden Flag's use as the unofficial symbol of the Tea Party is a gross misrepresentation of the flag's original purpose. As a symbol of unity it serves a very good and important service to the United States; keeping us together as a country and reminding us of the dangers of rule without representation. The flag's original purpose of bringing all the separate states together has now become a message of hatred towards any type of governance and a plea for anarchical rule. And for the first time in recent history, there is a large and organized political movement vouching for this type of limitless freedom: the Tea Party.

While I disagree with their erroneous use of the flag, I think that they should be allowed to use it. I think that the power of free speech is one of the most important rights afforded to us by the Bill of Rights; without it we would be subjected to tyranny and live our lives in quiet obedience. So, because of this ever-important right, I think that the Tea Party should be afforded the right to use the flag as they see fit, even if it is a misuse of the flag's original meaning.

In addition, I also believe that the phrase "Don't Tread on Me" should not be a trademarked phrase for any use. In the case *Bauer Bros vs. Nike* one of the main parameters for being able to apply to trademark a phrase is to demonstrate that the applicant was the first to put the mark into the market, in other words demonstrate first use and original thought. However, no one can claim first use, except for Christopher Gadsden. No other party could truly claim that the phrase "Don't Tread on Me" is their own original content in a trademark application.

---

[10] Marissa A. Kristbergs: Tea partiers don't know U.S. history. (Jul 08 2010). *Asbury Park Press,*
http://search.proquest.com/docview/603571007?accountid=14068 (last retrieved 4/15/15).

Also, the phrase is so important culturally and historically in the United States that I think it should be a part of the public domain. When content is considered to be part of the public domain, it is free from copyright, trademark, or other restrictions of use. This is usually attributed to phrases, slogans, works produced by the U.S. Government, familiar symbols or designs, etc.[11] The phrase "Don't Tread on Me" and the Gadsden Flag in its entirety fits into many of the parameters I listed. It is a phrase so historically important it should not be in the rare category of protected phrases. The flag was not made by an employee of the U.S Government because the government did not exist at the time. As a soldier of the Continental Congress, Gadsden did work for the first colonies that would later become our government. And finally, the flag, along with the phrase that accompanies it are not the physical objects themselves, but rather symbols. The symbols that represent the earliest times of the U.S. history as a country, and embody a sense of patriotic pride. For those reasons, the phrase and the flag should be a part of the public domain, and the entire case *Bauer Bros vs. Nike* should not have occurred.

CONCLUSION

Trademarks are crucial to helping businesses secure protection for their ideas from other businesses. Today securing trademarks is increasingly important and ensures that they are attained legally and correctly as well. Bauer Bros. LLC. learned this lesson all too well in their case against Nike, Inc. in 2009.

Both the companies' and the Tea Party's use of the Phrase "Don't Tread on Me" has spurred controversy; one for breaching trademark and the other for being historically inaccurate. However in the particular use of phrases of such large and historical value, I believe it is wrong to trademark them. Thus, I also believe that controversies like these will continue to arise in both the private and public sectors of the United States.

[11] What is in the public domain, always, besides ideas? (n.d.) http://www.publicdomainsherpa.com/what-is-public-domain.html (last visited 4/27/15).

HAZING, CRAZY DAYS OF COLLEGE

CHRISTINA BORGES[†]

In February of 2015, the New York Times published an article about a Baruch College freshman who died during a fraternity ritual. This college freshman was nineteen-year old Chun "Michael" Deng wgi died as a result of a brain injury while on a trip to the Poconos pledging Pi Delta Psi chapter at Baruch.[1] The more I looked into this case, the more incidents I found of similar situations at other colleges and universities. I began to wonder whether there is any criminal or civil liability for the members of the fraternities and whether there is any criminal or economic liability for hazing injuries or deaths in New York. After doing some research, I found that there is legal exposure for fraternity members who serve alcohol to underage pledges or participate in hazing activities. In certain circumstances the affiliated college or university may be held responsible as well.

Several New York statutes as well as cases address the range of possible criminal and civil liability for hazing-related injuries and deaths.

The leading case dealing with hazing-related death in New York is *Oja v. Grand Chapter of Theta Chi Fraternity*,[2] which involved a wrongful death action brought by the parents of a deceased fraternity pledge student. The case analyzed the ability of the parents of a deceased pledge to take legal action against the members of the fraternity and the organization that their child was pledging at the time of his death.

Another New York case dealing with hazing related injuries is *Pasquaretto v. Long Island University*[3] which addressed a student's ability to sue the university as a result of the injuries he sustained during a hazing ritual.

[†] Christina Borges is a Senior at St. John's University College of Professional Studies. Her major is Legal Sudies.

[1] http://www.nytimes.com/2015/09/16/nyregion/baruch-college-fraternity-hazing-death-case.html?; (last visited 1/26/16).

[2] *Oja v. Grand Chapter of Theta Chi,* 66 N.Y.S. 2d 650 (N.Y. Sup. Ct. 1997).

[3] *Pasquaretto v. Long Island University* , 964 N.Y.S. 2d 599, 600 (N.Y. App. Div. 2013).

New York has two hazing statutes. Penal Law §120.16 defines the crime of Hazing in the First Degree, a class A misdemeanor, and Penal Law §120.17 defines Hazing in the Second Degree, a class B misdemeanor.

Criminal liability for hazing related conduct can also fall within Reckless Endangerment in the Second Degree[4] and Manslaughter in the Second Degree[5] which penalize behavior which causes death due to reckless behavior.

The New York General Obligations Law §11-100 creates civil liability for anyone who serves alcohol to someone under the age of twenty-one.

OJA V. GRAND CHAPTER OF THETA CHI FRATERNITY

The case of *Oja v. Grand Chapter of Theta Chi Fraternity* involved a wrongful death action brought by the parents of a deceased student. The parents sued the Fraternity organization, members of the Fraternity, and officers of the Fraternity organization that their son was pledging to when he sustained the injuries that lead to his death. Binaya Oja was pledging a fraternity at Clarkson University in Potsdam, New York, when one night during a hazing ritual he and the other pledges were instructed to drink large amounts of liquor. Oja apparently vomited repeatedly, became unconscious, and was abandoned. He died of alcohol poisoning. His parents sued the Fraternity organization, certain chapter members, and officers claiming that the defendants "negligently and recklessly caused [their son's] intoxication and, knowing of his condition, continued to provide alcohol to him and, finally, knowing his life was in danger by reason of intoxication, failed to provide medical assistance to him." In addition to suing the fraternity members, officers, and organization, Oja's parents also alleged that the defendants violated the hazing in the first-degree statute, §120.16 of the New York Penal Law.

The case of *Oja v. Grand Chapter of Theta Chi* makes an important contribution in distinguishing hazing deaths/injuries from the common law rule regarding liability for people who provide alcohol to people who "voluntarily" consume alcohol during hazing rituals. In this case, the defendants argued that they were not responsible for Oja's death because he voluntarily consumed the alcohol that led to his death. The court examined the *Sheehy*[6] ruling, which states that those who provide alcoholic beverages are not responsible for the actions of those who become

---

[4] NYS Penal Law 120.20.

[5] NYS Penal Law 125.15.

[6] *Sheehy v.Big Flats Community Day, Inc.,* 73 N.Y.2d 629 (N.Y. Ct. of Appeals 1989).

intoxicated as long as that person voluntarily became intoxicated. In this case, the court decided that due to the pressure college students face to be socially accepted, any humiliation or bullying they endure may not be truly voluntary and that a reasonable jury could find that the *Sheehy* rule, accordingly, does not apply. "A jury might find that the stoic acceptance of pain and discomfort by a pledge, as the price of admission to the fraternal mysteries, is not truly voluntary." In the end, the defendants' motion to dismiss was denied.

PASQUARETTO v. LONG ISLAND UNIVERSITY

While the *Oja* case discusses what may occur when the fraternity organization and members are sued, *Pasquaretto v. Long Island University* discusses what may occur when a student who was injured as a result of hazing sues a university for negligently failing to supervise and control a fraternity's activities.

Joseph Pasquaretto was attending C.W. Post College of Long Island University where he pledged for membership in its Kappa Sigma chapter. During the hazing activities for the pledges, Pasquaretto was injured. Pasquaretto sued Long Island University claiming, "it was negligent in failing to supervise and control the activities of the fraternity." The court found Long Island University not negligent because it did not have a duty to protect Pasquaretto (or any other students) from hazing activities or any activities from its students. Generally, New York universities are not responsible for protecting their students from the activities of other students.[7] However, in certain circumstances in which universities promote an activity for their students to take part in, the universities may be responsible for monitoring it.[8] "A duty, however, may be imposed upon a college where it has encouraged its students to participate in an activity and taken affirmative steps to supervise and control the activity." Pasquaretto was unable to provide enough evidence that the university promoted the pledging of the fraternity, therefore he was unable to prove the university was negligent in failing to supervise the hazing activities.

Here, the plaintiff's allegations, even as supplemented by his affidavit, failed to sufficiently allege that the University defendants owed the plaintiff a duty with respect to the Fraternity's initiation process. Specifically, the plaintiff did not sufficiently allege that the University

---

[7] *Eiseman v. State of New York*, 70 N.Y.2d 175, 190 (N.Y. Ct. of Appeals 1987).

[8] *Pasquaretto v. Long Island University*, 964 N.Y.S. 2d 599, 601 (N.Y. App. Div. 2013).

defendants' involvement in the Fraternity's initiation process was of a degree that gave rise to a duty.[9]

NEW YORK GENERAL OBLIGATIONS LAW §11-100

Under N.Y. General Obligations Law §11-100, any person who is hurt in some way (financially, property wise, or physically) as a result of the intoxication or impairment of an underage person can bring legal action against the person who caused the underage person to become intoxicated or impaired. The injured person can do so in order to recover any damages caused by the underage person's intoxication or impairment.

N.Y. GENERAL OBLIGATIONS LAW §11-100(1)

In situations where the death of the intoxicated or impaired underage individual injures his or her parents, the parents may be entitled to receive damages. N.Y. G.O.L. §11-100(2)(4). This statute allows for parents of students who pledge and die as a result of alcohol poisoning, can take legal action against the individuals who provided their children with the alcohol that lead to their deaths.

NEW YORK PENAL LAW §120.16

Hazing is a crime in New York. Under New York Penal Law §120.16, it is a class A misdemeanor. "A person is guilty of hazing in the first degree when, in the course of another person's initiation or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or third person and thereby causes such injury."

Penal Law §120.17 defines hazing in the second degree, a class B misdemeanor "a person is guilty of hazing in the second degree when, in the course of another's initiation or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person."[10]

Since criminal liability is premised on intentional as well as reckless conduct, criminal liability for hazing related conduct may also come within the reckless endangerment statute. A person is guilty of reckless endangerment when he or she "recklessly engages in conduct which creates

---

[9] *Pasquaretto v. Long Island University*, 964 N.Y.S. 2d 599, 601 (N.Y. App. Div. 2013).
[10] NYS Penal Law §120.17.

a substantial risk of serious physical injury to another person."[11] Both hazing in the first degree and reckless endangerment in the second degree require one person to cause another to be in a situation where they are faced with "substantial risk" of experiencing some form of physical injury.[12] If the conduct violates the hazing statute Penal law §120.16, and causes the death of an individual, they also will be criminally responsible for Manslaughter in the Second degree, which penalizes recklessly causing death. Both the hazing in the first degree and manslaughter in the second degree statutes require a person to behave "recklessly."[13]

CONCLUSION

The cases and statutes discussed above show that, in certain circumstances, there is legal exposure for people involved in hazing-related injuries and deaths. Depending on the facts surrounding the case, fraternity members, officers, the organization, or the affiliated university may be held responsible for a pledge's injuries or death that occur during initiation activities.

---

[11] NYS Penal Law §120.20.
[12] NYS Penal Law § 120.16 and §120.20.
[13] NYS Penal Law §120.16 and §125.15.

HAZING MAY BE HAZARDOUS TO YOUR HEALTH

MEGHAN SULLIVAN[†]

INTRODUCTION

After leaving behind the only home they have ever known, thousands of enthusiastic and starry-eyed college freshmen arrive on university campuses across the nation each year. Eager to make friends and create a social network to help navigate the transition from high school to college, many undergraduates join organizations to bond with individuals of similar interests to themselves. As one of the largest sources of on-campus student activity participation, it is no surprise that freshmen are drawn to Greek Life organizations. I experienced the excitement of learning about Greek Life during my freshman year of college and remember how happy I felt to have older members "rushing" me into their sorority. Sororities and Fraternities actively recruit incoming freshmen to join their organizations, often advertising the great benefits of membership. Recruitment chairs depict the parties, activities and lifelong friend opportunities available to freshmen. Sounds great, right? Well, not exactly. These depictions are accurate – but often only for members of the organization; that is, individuals who have already participated in a pledge process. From firsthand experience I can say that for freshmen, their perception of Greek Life may change drastically, as they work tirelessly to fulfill the requirements to gain initiation.

To protect the well-being of new members, universities may hold seminars for active Greek Life members to discourage hazing activities in the pledge process. In fact, as a member of a sorority, I have attended many of these well-intentioned presentations and find that often their message does not fully reach their target audience. Despite efforts to prevent hazing, many organizations choose to continue their initiation "traditions" in secret. Organizations that choose to maintain their traditional methods of initiation may require students to perform a variety of tasks including the possibility of mandating: excessive alcohol consumption, violence, consumption of

[†] Meghan Sullivan is a senior at St. John's University College Peter J. Tobin College of Business. Her major is Finance.

repulsive insects, and physical abuse. Given the potentially dangerous nature of these activities, it is not surprising students sustain injuries during the pledge process. When an injury occurs, can a pledge seek damages for the harm caused? Is a local fraternity responsible for the injuries a student may sustain during a pledge process? Is a university liable for the activities of a fraternity active on its campus? Is a national fraternity liable for the actions of one of its local chapters? The case *Wabash v. Yost*[1] determined whether a school of fraternity can be responsible for a student sustaining injury while pledging for a fraternity at Wabash College.

CASE SUMMARY

In the case of *Wabash vs. Yost*, the plaintiff attended Wabash College as a college freshman in Crawfordsville, Indiana. The plaintiff decided to join Greek Life at Wabash during his freshman year and pledged Phi Kappa Psi fraternity. During the pledge program process, the plaintiff moved into the Phi Kappa Psi fraternity house, received mentorship from the fraternity "Pledge Father," and learned the traditions of the local fraternity. At one point in his pledge program, the plaintiff suffered injuries when thrown in a shower, an activity listed under the local chapter traditions as reserved for those celebrating a birthday other then their 21st birthday. The plaintiff states that his injuries occurred due to the local fraternity group tradition of hazing. The plaintiff believes three defendants, Wabash College, the National Phi Kappa Psi Fraternity and the Phi Kappa Psi local chapter are liable for the injuries he sustained.

The plaintiff had five arguments to support the claim that the defendants were liable for the injuries he sustained:

1. Wabash College breached their duty as owner/landlord of the house, where the injury occurred and was therefore negligent
2. National Phi Kappa Psi Fraternity breached a duty to exercise reasonable care for the plaintiff
3. Wabash College and the National Phi Kappa Psi Fraternity breached an assumed duty to take active steps to protect the plaintiff and prevent hazing
4. Wabash College and the National Phi Kappa Psi Fraternity assumed vicarious liability for the actions of the individual local fraternity members due the local chapter's relationship with the national organization
5. The local chapter breached an assumed duty to protect the plaintiff

[1] *Wabash v. Yost*, 3 N.E.3d 509 (Ind. Sup. Ct. 2014).

The court dismissed allegation #1. The plaintiff argued Wabash College had a duty to protect him from the alleged negligence because the defendant owned the property where the incident occurred.

Editor's Note: The Restatement of Laws, proposes codification of common law also known as case law that reflects the mostly widely accepted standards of the law for courts and legislatures to review. The American Law Institute is the academic institution of lawyers, law professors and judges that creates and issues the Restatement.

The Restatement Second on Torts §343 states that a landowner is liable for physical harm caused to visitors on the property if the landowner does not take reasonable precaution to prevent this harm.[2] The plaintiff believed Wabash College was negligent because they did not take any precaution to prevent his harm. Wabash College argued that because it acted as a landlord and had leased the property to the local Phi Kappa Psi fraternity chapter, it relinquished all control and therefore liability to the local chapter for the actions taking place on the premises. In order to determine if Wabash was liable the court reviewed a prior case *Olds v. Noel*[3], which states that "A landlord who gives a tenant full control and possession of the leased property will not be held liable for personal injuries sustained by the tenant or other persons upon the property." Wabash College leased the property to the local Phi Kappa Psi fraternity chapter, transferring control and possession of the land to the local chapter alone. For that reason, the court decided Wabash College could not be held responsible for injuries plaintiff sustained on counts of landowner liability.

The court dismissed allegation #2. The plaintiff argued the National Fraternity breached its general duty to exercise reasonable care when the plaintiff sustained injuries while pledging a local chapter of the National Fraternity. The case of *Pfenning v. Lineman*[4] outlines the requirements necessary to establish a negligence action. The case states that there must be a duty owed to the plaintiff by the defendant, a breach of duty must occur and an injury must occur due to the breach of duty. It is the court's responsibility to determine whether a duty exists. The court applied the *Webb v. Jarvis*[5] test to determine duty, which balances the relationship between the parties, the forseeability of harm to the persons injured and public policy concerns. The National Fraternity argued they did not have a

---

[2] Restatement Second of Torts§ 343 (1965).
[3] *Olds v. Noel*, 857 N.E.2d 12, 14 (Ind. Ct.App.1980).
[4] *Pfenning v. Lineman*, 947 N.E.2d 392, 398 (Ind. Sup. Ct. 2011).
[5] *Webb v. Jarvs*, 575 N.E.2d 992 (Ind. Sup. Ct. 1991).

general duty to protect the plaintiff because the relationship between the parties was remote and tenuous. As such, the defendant believed their relationship with the local chapter was not substantial enough to determine they owed a duty to the plaintiff. The National Fraternity referred to their published manual comparing local chapters to small self-governing corporations subject to certain rules set out by the defendant to prove that they did not have control over the local chapter. The court decided that a general duty did not exist because the relationship between the parties did not extend to one where the National Fraternity had direct oversight over the everyday actions of their local chapter.

The court dismissed allegation #3 for both Wabash College and the National Fraternity. The plaintiff believed the both defendants were liable for his injuries. Wabash College and the National Fraternity assumed a duty to protect the plaintiff from hazing by taking actions to discourage hazing. When they failed to take those actions, they breached their duty. The court relied on the Restatement of Torts: Physical and Emotional Harm.[6] The Restatement states that a party that undertakes services to another and should know these services will reduce the risk of physical harm, has a duty to the other to do so. A defendant may be found liable of breaching an assumed duty for failing to exercise reasonable care. The plaintiff believed Wabash College assumed a duty to protect him from his injuries by discouraging hazing and promoting a "Gentleman's Rule," requesting students conduct themselves in a gentlemanly manner on and off campus. The plaintiff believed the National Fraternity also assumed a duty to protect him from his injuries by disapproving of hazing, like providing local chapter members an annual hazing risk guide. Both defendants argued that their efforts to discourage hazing did not extend to direct oversight or control over the actions of individual local chapter members. They argued the plaintiff lacked evidence to prove he relied on the college and national fraternity efforts to disapprove of hazing to protect him during his time as a pledge. The court adopted the College and the National Fraternity argument and found the plaintiff lacked the evidence to establish direct control over the local chapter. Additionally, there was a lack of evidence to prove the plaintiff relied upon these actions to keep safe during the pledge process.

The court dismissed allegation #4 for both Wabash College and the National Fraternity. The plaintiff believed both defendants could be held vicariously liable for the negligence of the local chapter due to their relationship with the local chapter. The court cited the Restatement on Agency. The Restatement describes a relationship of vicarious liability as

---

[6] Restatement Third of Torts: Physical and Emotional Harm §42 (2012).

one that arises when, "one person manifests assent to another person that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent so to act."[7] The plaintiff argued that Wabash College could be held vicariously liable for his injuries due to the control over the local chapter as the landowner of the property where the plaintiff sustained injuries. The plaintiff argued Wabash College maintained the power to reprimand Greek Life organizations for hazing activities; further demonstrating that the local chapter was under the control of Wabash College. Finally, the plaintiff argued Wabash College benefitted from the presence of the local fraternity chapter on campus indicating that the local fraternity acted on Wabash's behalf. The plaintiff also argued the local chapter was under the control of the National Fraternity.

The National Fraternity argued prior evidence demonstrated the defendant's belief that local chapters act as small self-governing corporations, free from their control. The defendant states that this evidence demonstrates it does not extend direct control over the actions of individual local fraternity members and the individual members had not assented to this control. For these reasons, the defendant believes the plaintiff's argument for vicarious liability fails.

The court dismissed both allegations of vicarious liability. The court decided that Wabash College merely benefitting from the existence of the local fraternity chapter was not enough to prove that the local fraternity chapter acted on the College's behalf and as such the defendant could not be held vicariously liable. The court decided the National Fraternity could not be held vicariously liable for the actions of the local fraternity. No evidence existed to prove that the defendant maintained daily management and supervision of the local fraternity and therefore the plaintiff could not establish the defendant's control over the local chapter, a requisite to award vicarious liability.

The court agreed with the plaintiff on allegation #5. The plaintiff believed the local chapter was liable for his injuries because they had a duty to supervise its individual members' conduct and to ensure the safety of their pledges. The plaintiff believes his injuries occurred as a result of a breach of these duties, establishing defendant liability. The plaintiff argued the local chapter had a duty to supervise its members and to make sure that individual member activities did not turn into hazing. The plaintiff further argued that the relationship between the local chapter and himself was one in which he depended on the instruction of the local chapter. The plaintiff states he was living in the local chapter fraternity house as a student when

---

[7] Restatement Third of Agency §1.01 (2006).

his injuries occurred and was subject to the mentorship of his "Pledge Father," a member of the local fraternity. Therefore, the local chapter assumed a duty to protect him as defined in Restatement on Torts, Physical and Emotional Harm and the local chapter breached this duty when he was forcibly thrown into a shower, thereby causing his injuries and establishing a negligence action.

The local chapter states that no breach of duty occurred because the incident that caused the plaintiff's injuries was mere "horseplay." The court determined the plaintiff may recover damages against the local chapter because the plaintiff demonstrated that he was under the direct supervision and at least partial control of the defendant. The court decided it was possible the plaintiff depended on the local chapter to prevent injury and by failing to do so there was an increased risk of harm to him. The court also determined the local chapter may be held liable for punitive damages, or damages awarded due to malicious negligence, because it is possible the plaintiff's injury was caused by malevolent hazing activities.

RESEARCH

Hazing is defined as any action taken or any situation created that causes embarrassment, harassment or ridicule and risks emotional or physical harm to members of a group regardless of the person's willingness to participate.[8] Though forty-four states have enacted anti-hazing laws,[9] we still hear about hazing practices in use.[10] In fact, more then 50% of college students are involved in some sort of campus hazing but only 10% even realize they have been hazed. Of that, 5% will report an incident. Since 1970 there has been at least one hazing-related death on a college campus each year and 82% of these deaths involve alcohol.[11]

One might assume that Greek Life hazing is a phenomenon confined to fraternities. Interestingly, the practice of Greek Life hazing extends beyond fraternity practices to females pledging sororities. Fraternity hazing may involve excessive alcohol consumption but sorority hazing relies on mental and emotional abuse instead. Sorority hazing activities run a wide

---

[8] "What Hazing Looks Like." *HazingPrevention.org.* November 2015, http://hazingprevention.org/home/hazing/facts-what-hazing-looks-like/ (last retrieved Feb. 10, 2016).

[9] "Important Hazing Statistics" University of Maryland *Stop Hazing @ UMD* http://hazingprevention.umd.edu/HazingPrevention/HazingStatistics.aspx (last retrieved March 4, 2016).

[10] "The Truth About Doroity Hazing" Sprunk, Cara *Campus Life* . January 2013 http://www.hercampus.com/life/campus-living/truth-about-sorority-hazing,(last retrieved March 4, 2016).

[11] *Id.*

spectrum and can involve pledges performing relatively harmless tasks like separating colored sprinkles on wooden floorboards to being forced to stay up all night in the same place at the beck and call of active sisters. Some traditions call for even far more traumatizing traditions such as active sisters circling fat on students or forcing pledges to perform sexual acts on fraternity brothers. Alexandra Robbins, author of the book "Pledged" describes how this emotional trauma can affect students far past their college years and discusses her disturbing interactions with thirty-year old females still traumatized from their experience with sorority hazing.[12]

The practice of hazing pledges extends beyond fraternity pledge programs. Active Greek life members may state that the pledge process creates an unbreakable bond between individual pledge classes but it is hard to imagine that these experiences truly add value to a brotherhood or sisterhood.

OPINION

I agree with the court's decision on allegations #1, 3, and 5. I do not agree with the court's decision on allegations #2 and #4 in regard to the liability assumed by the National Fraternity. I believe the court should hold the National Fraternity negligent or vicariously liable for the plaintiff's injuries based on their application of the evidence to the law.

The court ruled that the *Webb v. Jarvis* test did not establish a general duty of care between the National Fraternity and local chapter. Additionally, the Restatement (Third) of Agency does not establish a vicarious liability between the National Fraternity and the local fraternity because the relationship of the parties does not extend to one where the defendant had direct oversight over the everyday actions of the local chapter. I disagree with this ruling.

I believe evidence demonstrating the depth of the relationship between the parties to determine the existence of a duty as described in the *Webb v. Jarvis* test was brought before the court. For example, the National Fraternity maintained final control to issue and revoke charters from local chapters by their own determination and engaged in educational outreach programs to encourage proper behavior. In my opinion, this is evidence of a strong relationship and oversight of the local chapter by the National Fraternity, establishing the existence of a duty. The court did not find vicarious liability on behalf of the defendant because the defendant did not have direct control over the local chapter and the defendant did not receive a direct benefit from controlling the local chapter.

---

[12] *Robbins, Alexander;* Pledged, The Secret Life of Sororities, Hyperion 2004.

I believe the evidence demonstrating the National Fraternity's final authority on issuance of charters, as well as the detailed instruction on appropriate behavior guidelines, establishes at least in part the defendant's control over the local fraternity. The National Fraternity directly gained benefit from the existence of the local chapter because local fraternity members increased the National Fraternity overall member participation. I believe these facts demonstrate the defendant's benefit from and control over the local fraternity, establishing the basis of vicarious liability.

I am a member of a local sorority and have many friends who are members of National sororities. Though the National Fraternity stated that their published manual describes the distant relationship between the National Fraternity and their local chapters, I know from experience that National Greek life organizations can be incredibly involved and overbearing on the activities of their local chapters. National Fraternities can become as involved with their local chapters as they want. It is my opinion that the plaintiff's injuries could have easily been prevented by increased supervision by the National Fraternity. The National Fraternity acted negligently.

CONCLUSION

I am familiar with the pledge process of both my own organization as well as others. Universities can promote anti-hazing practices, but hazing still exists on college campuses. I have seen both the physical and emotional effects of hazing and those who experience such trauma do not forget. I support the court's decision to hold the local fraternity liable for the plaintiff's injuries. If the court were to hold the National Fraternity accountable for the actions of their local chapter, I believe we would see a greater effort and incentive from the National Fraternity to more aggressively prevent hazing.

RAGE AGAINST THE CABLE PROVIDER: THE POWER OF PERSUASIVE WRITING

P. KEVIN CASTEL[†]

If your neuropathways are in good working order, re-reading the Declaration of Independence, Lincoln's Gettysburg Address or Churchill's Finest Hour Speech will cause a physiological reaction. You will feel electrified, inspired and thoughts will swirl through your head. Each is a call to action.

You may find it hard to imagine yourself writing or speaking to a national audience at a moment of crisis. But nearly everyone will have a dispute with a cable or cell provider, bank, landlord, employer or government agency. Persuasive writing skills are important not just to lawyers but to everyone. In appearance and form, a complaint letter differs from the form of a lawyer's brief filed in a judicial proceeding. The skills and thought process that go into framing the heart of your complaint letter are identical to those used by lawyers in crafting their summary of arguments. They are one and the same. Showing frustration or anger in a complaint letter—EVEN IN SOLID CAPITAL LETTERS WITH EXCLAMATION POINTS!!!—may make you feel better, but it is not likely to persuade. Persuasive writing is an acquired skill. It can be learned and can be practiced.

In any persuasive writing exercise, you need to set your goals and assess whether they are realistic. It is doubtful that the cable provider will terminate the employment of all who have wronged you or publically apologize on its Facebook page. The landlord will not evict all tenants with unpleasant cooking odors or noisy children, even if you are willing to provide a list of their names. A refund, a discount, a home visit by a technician, an early termination of a lease or a rent reduction may better fit your problem and keep you from appearing unreasonable. Demanding the sun, the moon and the stars may make you feel great but you will not be taken seriously.

[†] United States District Judge, Southern District of New York. St. John's University, B.S., J.D. LL.D. (Hon.). Judge Castel is a graduate of the College of Professional Studies and served as president of Student Government. Professor Jack Franzetti, a member of the Advisory Board of *The Legal Apprentice*, taught two semesters of World Literature to Judge Castel.

Once you have set realistic goals, frame your story with a focus on its strongest points. Think before you write. You may be frustrated by waiting on hold for 17 minutes, receiving wrong information and having the call disconnected by a rude person in a far-off place but reciting the details of your ordeal may not move you closer to your goals. The reader does not need to read a six-page description of your saga in order to understand that you have been overcharged. Your writing should persuade the reader, not punish her.

Conciseness and clarity are of paramount importance. Great literature need not be concise. It need not be clear and may engage in flights of the imagination. But persuasive writing must get to the point in as few words as possible. Lincoln's Gettysburg Address, as you know, was only 272 words. Strunk & White's Elements of Style instructs the writer to strike unnecessary words. Suppose you wrote the following: "People often find that many sentences they write can be greatly improved, and result in enhanced understanding on the part of the reader, by striking unnecessary words from the sentences." That same sentence, rewritten with a view toward conciseness and clarity and with the incidental benefit of greater impact, might read: "Striking unnecessary words from a sentence enhances a reader's understanding."

In crafting your complaint letter, find an objective standard with which to compare the offending party's conduct. Did you know that Coca-Cola, Hershey's and AT&T have publically-available codes of conduct? Did the company violate its own policy? How do its policies and practices compare with its competitors? Are there relevant government regulations that you can cite? Demonstrating that the offending party's conduct is outside of established norms is an effective way to support your complaint letter.

Threats or statements of "this-is-what-I'm-going-to-do-if-you-don't-comply" are tricky business. For example, a threat to publish truthful information about a company if the company does not comply with a demand for money, depending upon intent and circumstances, may amount to the crime of extortion. N.Y. Penal Law §155.05(e). Cryptic comments such as "if you don't do as I say, I promise you will be very, very sorry," may earn you a visit from a law enforcement officer. Dissemination of false information injurious to a business may subject the writer to liability. Stick to the following: the statement of future intent should relate to the nature of your complaint. In other words, if the cable provider does not honor your request, you will terminate the service, switch providers, report the problem to a government regulator and sue them for a refund—all are

true (if that is what you intend) and all are related to the nature of the dispute.

I will now give you a few random technical suggestions for your complaint letter. Centered at the top of the letter should be your contact information including your name, snail mail address, email address and phone number. Your letter should also include a salutation. As you might imagine, neither "Wassup Cable Dude?" nor "Yo Cable Guy" are preferred ways to open your letter. Do an internet search and see if you can locate the name of the actual head of the department within the company and address your letter to him or her. If that cannot be done, then the following are acceptable: "Dear Sir or Madam:," "Ladies and Gentlemen:," or "[Name of Company]: Attention: Customer Service Department." Your subject line (also known as a "Re" line from the Latin word for "thing" or "matter") should include your account number or other reference number. The opening sentence should identify who you are and what relief or remedy you are seeking. A closing sentence may include a plea for fast action: "This matter is time-sensitive and I look forward to hearing from you in the next week." Present convention suggests that your letter concludes with one of the following insincere statements: "Sincerely," "Sincerely yours, "Very truly yours," or similar phrase. These words should appear immediately above your signature. If you really want to show you mean business, you could include as recipients of copies of the letter an elected official, regulatory authority or the chief executive officer of the company. The names of these individuals should be listed at the bottom of the letter preceded by "cc" (that stands for "carbon copy"‘—it's a long story about something called a typewriter). Certified mail, a service available from the U.S. Postal Service, furnishes you with proof that your letter was mailed on a particular date. Be aware that government bodies will pursue certain types of consumer complaints for you. Check the websites of the Federal Trade Commission or your state, city or county consumer affairs department and consider sending your complaint to them.

Proficiency in writing is a necessary life skill and, through practice, we all continue to grow as writers. I congratulate the student-authors and their dedicated editor, Professor Mary Noe, on the Third Volume of The Legal Apprentice. It is important that good student writers have an audience for their work.