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# Poetry as Evidence

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*Despite their more than one hundred years of existence, African American fraternities and sororities have only begun to receive scholarly attention within the past decade. That work, however, has largely been the focus of historians, sociologists, and scholars in ethnic studies as well as education. Given these organizations' complicated and robust interface with the law (e.g., civil rights activism, organizational governance, tax law, and hazing) this Article is one of the first attempts to analyze the relationship between African American fraternities and sororities and the law. In this Article, the authors investigate the problem of violent hazing within these organizations and the role that poetry, learned by hazing victims, plays in elucidating what those victims know and understand about their hazing experiences. In essence, to what extent could these hazing victims' memorization of select poems be used as evidence in affirmative defense claims under tort law? The authors employ both doctrinal and qualitative methodologies.*

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## INTRODUCTION

Black Greek-letter organizations (BGLOs) have existed for more than one hundred years.<sup>1</sup> Despite their longevity and influence on American history and culture, their history has largely been confined to texts internal to them for most of their existence.<sup>2</sup> It was not until the mid-1990s that any scholarly analysis of these organizations had been conducted. Even then, that work was inaccessible to the general public and narrowly focused on student affairs issues.<sup>3</sup> Almost a decade later, public works on BGLOs finally began to appear.<sup>4</sup> Shortly thereafter,

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1. Among the first BGLOs were the fraternities Alpha Kappa Nu (University of Indiana-Bloomington, 1903), Sigma Pi Phi (Philadelphia, 1904), and Gamma Phi (Wilberforce University, 1905). For a history of those organizations, see Michael H. Washington & Cheryl L. Nuñez, *Education, Racial Uplift, and the Rise of the Greek-Letter Tradition: The African American Quest for Status in the Early Twentieth Century*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION 141 (Tamara L. Brown et al. eds., 2d ed. 2012) [hereinafter AFRICAN AMERICAN FRATERNITIES AND SORORITIES]; see also William H. Harris, *The Grand Boulé at the Dawn of a New Century: Sigma Pi Phi Fraternity*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra*, at 101. For the purposes of this Article, however, our focus is on those BGLOs that were intercollegiate in nature and were perpetual in their existence—i.e., Alpha Phi Alpha, Kappa Alpha Kappa Alpha, Kappa Alpha Psi, Omega Psi Phi, Delta Sigma Theta, Phi Beta Sigma, Zeta Phi Beta, Sigma Gamma Rho, and Iota Phi Theta.

2. Each continuous, intercollegiate BGLO has an internal history book. See OLA ADAMS, ZETA PHI BETA: 1920–1965 (1965); WILLIAM L. CRUMP, THE STORY OF KAPPA ALPHA PSI: A HISTORY OF THE BEGINNING AND DEVELOPMENT OF A COLLEGE GREEK LETTER ORGANIZATION, 1911–1991 (1991); HERMAN DREER, THE HISTORY OF OMEGA PSI PHI FRATERNITY: A BROTHERHOOD OF NEGRO COLLEGE MEN, 1911 TO 1939 (1940); MARJORIE H. PARKER, ALPHA KAPPA ALPHA: IN THE EYE OF THE BEHOLDER (1978); W. SHERMAN SAVAGE & L.D. REDDICK, OUR CAUSE SPEEDS ON: AN INFORMAL HISTORY OF THE PHI BETA SIGMA FRATERNITY (1957); JOHN D. SLADE, THE CENTAUR RISING: IOTA PHI THETA FRATERNITY, INC.: ASCENDING TO THE NEXT MILLENNIUM (1999); MARY ELIZABETH VROMAN, SHAPED TO ITS PURPOSE: DELTA SIGMA THETA—THE FIRST FIFTY YEARS (1965); CHARLES H. WESLEY, THE HISTORY OF ALPHA PHI ALPHA: A DEVELOPMENT IN COLLEGE LIFE (Found. Publishers 12th ed. 1975) (1929); PEARL SCHWARTZ WHITE, BEHIND THESE DOORS—A LEGACY: THE HISTORY OF SIGMA GAMMA RHO SORORITY (Lillie Wilkes ed., 1974); LULLELIA WITTARRISON, TORCHBEARERS OF A LEGACY: A HISTORY OF ZETA PHI BETA SORORITY, INC. 1920–1997 (1998). *But see* PAULA GIDDINGS, IN SEARCH OF SISTERHOOD: DELTA SIGMA THETA AND THE CHALLENGE OF THE BLACK SORORITY MOVEMENT (1988) (discussing Delta Sigma Theta's public history).

3. See Walter M. Kimbrough, *The Membership Intake Movement of Historically Black Greek-Letter Organizations*, 34 NASPA J. 229 (1997); Walter M. Kimbrough, *Self-Assessment, Participation, and Value of Leadership Skills, Activities, and Experiences for Black Students Relative to Their Membership in Historically Black Fraternities and Sororities*, 64 J. NEGRO EDUC. 63 (1995).

4. See, e.g., LAWRENCE C. ROSS, JR., THE DIVINE NINE: THE HISTORY OF AFRICAN-AMERICAN FRATERNITIES AND SORORITIES IN AMERICA (2000). Given that the respective BGLO histories, see *supra* note 2, have been treated as quasi-secret documents, non-members have had limited access to those works. Ross's book became the first publicly accessible book on these organizations.

a proliferation of scholarship on BGLOs began to make its way into scholarly books and peer-reviewed journal articles.<sup>5</sup> While this scholarship has been interdisciplinary in its approach, little academic work has been conducted on BGLOs from a legal vantage point.<sup>6</sup> This Article seeks to fill that gap.

Research on BGLOs is essential to understanding complex organizations.<sup>7</sup> Also, research on BGLO hazing is critical to comprehending how laws constrain organizational and individual behavior that flows from organizational affiliation.<sup>8</sup> Even more, research on BGLO hazing highlights a unique culture within these organizations.<sup>9</sup> While armchair theorists may presume that BGLOs are mere carbon copies of their white counterparts, nothing could be further from the truth. Indeed, there are similarities, but these similarities are limited.<sup>10</sup> In fact, the elements of BGLOs make them of particular interest in analyzing initiatory hazing that takes place within them. First, while not marred by the substance abuse usually associated with white fraternities,<sup>11</sup> BGLO hazing is particularly brutal.<sup>12</sup>

5. See, e.g., ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE (Gregory S. Parks & Stefan M. Bradley eds., 2011) [hereinafter ALPHA PHI ALPHA]; BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY: OUR FIGHT HAS JUST BEGUN (Gregory S. Parks ed., 2008) [hereinafter BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY]; BLACK GREEK-LETTER ORGANIZATIONS 2.0: NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES (Matthew W. Hughey & Gregory S. Parks eds., 2011) [hereinafter BLACK GREEK-LETTER ORGANIZATIONS 2.0]; ELIZABETH C. FINE, SOULSTEPPING: AFRICAN AMERICAN STEP SHOWS 69, 143 (2003); RICKY L. JONES, BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES (2004); WALTER M. KIMBROUGH, BLACK GREEK 101: THE CULTURE, CUSTOMS, AND CHALLENGES OF BLACK FRATERNITIES AND SORORITIES (2003); DEBORAH ELIZABETH WHALEY, DISCIPLINING WOMEN: ALPHA KAPPA ALPHA, BLACK COUNTERPUBLICS, AND THE CULTURAL POLITICS OF BLACK SORORITIES (2010). While the growing number of peer-reviewed journal articles would be too numerous to mention, it is of note that two such journals—the *Journal of African American Studies* and *Ethnic and Racial Studies*—published special issues in 2012 on black and ethnic fraternal orders.

6. But see, e.g., Richard J. Reddick et al., *The Harms and Hazards of Hazing: Medical, Sociocultural, and Legal Perspectives*, in ALPHA PHI ALPHA, *supra* note 5, at 279; Dara Aquila Govan, Note, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679 (2001).

7. See Felix L. Armfield et al., *Defining the “Alpha” Identity*, in ALPHA PHI ALPHA, *supra* note 5, at 23.

8. See, e.g., Govan, *supra* note 6, at 698–714 (describing and assessing the broad ramifications of universities’ efforts to combat hazing); Oscar Holmes IV, *Hazing and Pledging in Alpha Phi Alpha: An Organizational Behavior Perspective*, in ALPHA PHI ALPHA, *supra* note 5, at 313; Reddick et al., *supra* note 6, at 293–304.

9. See KIMBROUGH, *supra* note 5, at 111–46.

10. For comparative analyses of BGLOs and their white counterparts, see Alexandra Berkowitz & Irene Padavic, *Getting a Man or Getting Ahead: A Comparison of White and Black Sororities*, 27 J. CONTEMP. ETHNOGRAPHY 530 (1999); Tyra Black et al., *Racism, Sexism, and Aggression: A Study of Black and White Fraternities*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 395; Mindy Stomler & Irene Padavic, *Sister Acts: Resistance in Sweetheart and Little Sister Programs*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 289.

11. See Black et al., *supra* note 10, at 395–97.

12. See, e.g., JONES, *supra* note 5.

Second, BGLOs' membership has long represented corresponding membership in the black middle and upper classes.<sup>13</sup> Third, both BGLOs and their members played a crucial role in African Americans' quest for civil rights and social justice. In fact, civic engagement, and not necessarily frivolity, undergirds the very identities of these organizations.<sup>14</sup> Fourth, and maybe most significantly, alumni chapters play a vital role within these organizations. Not only do many BGLO members maintain deep emotional ties to their respective organizations of initiation, but they often remain financially and physically active within the organizations as well.<sup>15</sup> Moreover, the organizations routinely initiate members at the alumni level. In many respects, membership is for life, and these groups serve a vital role in the academic, professional, and social development of members over their life spans.<sup>16</sup> Accordingly, given the investment of academically and professionally successful African Americans in these organizations, which have long been engaged in the uplift of African American communities, how should violent BGLO hazing be contemplated in light of legal constraints?

In this Article, we analyze a particular aspect of BGLO hazing culture—the role that poems play within the BGLO pledge experience. In essence, with respect to the violent and torturous acts pledges will endure, what do these poems suggest about what pledges know and when they know it? More specifically, how might courts view BGLO pledge memorization of such poems during the pledge process as evidence, particularly with regard to tort defenses like assumption of risk? In Part I, we provide a history of BGLOs with specific attention to the evolution of hazing within them. Part I is aimed at a central point. That is, BGLOs have long grappled with the issue of hazing, which has been particularly violent and injurious, especially within BGLO fraternities. In Part II, we explore how courts have admitted an analog of poetry (i.e., song lyrics) into criminal cases as evidence. Part II demonstrates that an individual's creation of song lyrics has evidentiary value in that it demonstrates what, in this instance, a criminal defendant knows about his or her alleged crime and when he or she knew it. In Part III, we analyze the salience of poetry within BGLO culture and provide an empirical analysis of how BGLO pledges interpret these poems. In this Part, we suggest that BGLO

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13. See LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* 86 (1999).

14. See, e.g., Marybeth Gasman, *Passive Activism: African American Fraternities and Sororities and the Push for Civil Rights*, in *BLACK GREEK-LETTER ORGANIZATIONS 2.0*, *supra* note 5, at 27; Robert L. Harris Jr., *Lobbying Congress for Civil Rights: The American Council on Human Rights, 1948–1963*, in *AFRICAN AMERICAN FRATERNITIES AND SORORITIES*, *supra* note 1, at 213; Jessica Harris & Vernon C. Mitchell Jr., *A Narrative Critique of Black Greek-Letter Organizations and Social Action*, in *BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY*, *supra* note 5, at 143; Robert E. Weems Jr., *Alpha Phi Alpha, Civil Rights, and Public Policy*, in *ALPHA PHI ALPHA*, *supra* note 5, at 233.

15. See, e.g., Marcia D. Hernandez, *Sisterhood Beyond the Ivory Tower: An Exploration of Black Sorority Alumnae Membership*, in *BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY*, *supra* note 5, at 253.

16. *Id.*

pledges' memorization of certain types of poems that reflect their hazing experience at a time when they are being hazed, to some extent, puts pledges on notice about what they are likely to endure. Accordingly, BGLO pledges' knowledge and understanding of these poems may serve as valuable evidence in hazing litigation.

#### I. HAZING AND THE BLACK "GREEK" EXPERIENCE

A confluence of institutions and factors gave rise to BGLOs. African American institutions, like the black church and black secret and benevolent societies, provided institutional frameworks, a sense of community, life-long fictive kinship ties, ritual, and a politic of racial uplift.<sup>17</sup> White collegiate literary societies and fraternities added a spirit of intellectualism, fun, collegiate bonds, and ritual.<sup>18</sup> Universities like Cornell, Howard, Indiana, and Butler each added their own differing imprints (for example, academic exceptionalism, duty to the race, privilege, and even racial isolation).<sup>19</sup> Even more, the racial milieu of the time—the nadir of American race relations—created an environment of racial anxiety, but also a redoubling of efforts to uplift the race.<sup>20</sup> It is within this context that the nine members of the National Pan-Hellenic Council (NPHC) were born. Alpha Phi Alpha fraternity was founded as the first among these organizations at Cornell University in 1906.<sup>21</sup> Howard University gave birth to Alpha Kappa Alpha (1908), Delta Sigma Theta (1913), and Zeta Phi Beta (1920) sororities as well as Omega Psi Phi (1911) and Phi Beta Sigma (1914) fraternities.<sup>22</sup> At Indiana University and Butler University, Kappa Alpha Psi Fraternity (1911) and Sigma Gamma Rho Sorority (1922) were founded.<sup>23</sup> And in 1963, Iota Phi Theta Fraternity took root at Morgan State University.<sup>24</sup> From their earliest years, BGLOs developed a rich

17. See Armfield et al., *supra* note 7, at 37–43. See generally Anne S. Butler, *Black Fraternal and Benevolent Societies in Nineteenth-Century America*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 75; Jessica Harris & Said Sewell, *Faith and Fraternalism: A History*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 63.

18. Armfield et al., *supra* note 7, at 34–36; see Craig L. Torbenson, *The Origin and Evolution of College Fraternities and Sororities*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 33.

19. See Armfield et al., *supra* note 7, at 31–34.

20. *Id.* at 27–31. See generally Washington & Nuñez, *supra* note 1, at 137–79 (analyzing how BGLOs demonstrated the duality of lifting the black masses as their members climbed the ladder of success).

21. André McKenzie, *In the Beginning: The Early History of the Divine Nine*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 183, 183–84.

22. *Id.* at 185–86, 190–99.

23. *Id.* at 188–90, 199–201.

24. *Id.* at 201–03.

pledge culture of which violent hazing came to be a significant and contentious part.<sup>25</sup>

By 1920, organized BGLO pledge clubs emerged: Kappa Alpha Psi's Scroller Club (founded at the Ohio State University in 1919), Delta Sigma Theta's Pyramid Club (Philadelphia, Pennsylvania in 1920), Alpha Phi Alpha's Sphinx Club (Howard University in 1921), and Alpha Kappa Alpha's Ivy Club (Wilberforce University in 1922), as well as Omega Psi Phi's Lampodas Club, Phi Beta Sigma's Crescent Club, Zeta Phi Beta's Archonian Club, and Sigma Gamma Rho's Aurora Club (Howard University, circa 1920s and 1930s).<sup>26</sup> Their focus varied by location and era; in some instances, pledge club members had to learn organizational information, perform service projects, or compete against pledges of other organizations for academic and athletic bragging rights.<sup>27</sup>

Even before that period, however, BGLO members had begun to use fear and secrecy in the selection process of new members. In 1913, for example, Alpha Phi Alpha members at the University of Pittsburgh chapter sent prospective members a letter, opening with: "Victim! Beware! Victim! Beware!"<sup>28</sup> Terrifying images as openers to the fraternity and sorority sections in Howard University yearbooks during this period also illustrate this point.<sup>29</sup> And just as fear and secrecy became an integral part of the BGLO pledge experience, so too did violence. For example, a student at Lincoln University reported witnessing "men beaten until portions of their bodies were raw as fresh beefsteak."<sup>30</sup>

As early as the 1930s, college students and university administrators criticized the practice of violent BGLO hazing.<sup>31</sup> In a 1938 issue of Omega Psi Phi's *The Oracle*, a member wrote, "the time for brutal initiations has passed. I said that ten years ago. They thought I was crazy. Now the papers have taken it up."<sup>32</sup> In 1947, Alpha Phi Alpha took official action to eliminate initiation brutality.<sup>33</sup> During the same period, Lincoln University instituted a no-hitting rule, and members of Fisk University's faculty executive committee suspended BGLO probation period activities due to brutality.<sup>34</sup> By the time the civil rights movement was fully underway in the 1960s, BGLO hazing seemed wholly out of line with the movement's principles. In the early 1960s, under Jeanne Noble's administration as

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25. See generally Gregory S. Parks & Tamara L. Brown, "In the Fell Clutch of Circumstance": Pledging and the Black Greek Experience, in *AFRICAN AMERICAN FRATERNITIES AND SORORITIES*, *supra* note 1, at 437, 440.

26. *Id.* at 441.

27. *Id.*

28. *Id.* at 440.

29. *Id.*

30. *Id.*

31. *Id.* at 443.

32. *Id.*

33. *Id.*

34. *Id.*

its National President, Delta Sigma Theta sorority sought to address the complaints about brutality within its pledge process.<sup>35</sup> Similarly, the other NPHC organizations faced the question of what to do about violent hazing within their own ranks.<sup>36</sup> Despite the concerns and actions on the part of NPHC organization leadership, hazing continued to remain violent, deadly, and costly (e.g., legal judgments). What follows is just a sampling of the major BGLO hazing incidents. They demonstrate the pervasiveness of BGLO hazing violence across time and organizations and illuminate the increasing legal consequences of this issue.

During the 1970s, there were four major BGLO hazing incidents that received National attention. Three involved Omega Psi Phi Fraternity,<sup>37</sup> and one involved Alpha Phi Alpha Fraternity.<sup>38</sup> These hazing incidents entailed sleep deprivation,<sup>39</sup> grueling calisthenics,<sup>40</sup> physical violence (i.e., punches and paddling),<sup>41</sup> and the forced consumption of alcohol and drugs.<sup>42</sup> In one instance, a pledge suffered acute kidney failure.<sup>43</sup> In another, a pledge had to be admitted to a psychiatric ward due to a mental breakdown from hazing.<sup>44</sup> In two instances, pledges died.<sup>45</sup> In only one of these instances was the justice system involved, with fraternity members pleading guilty to hazing charges.<sup>46</sup>

During the 1980s, there were four major BGLO hazing incidents. Two involved Omega Psi Phi Fraternity,<sup>47</sup> one involved Alpha Phi Alpha Fraternity,<sup>48</sup> and one involved Kappa Alpha Psi Fraternity.<sup>49</sup> Much like the hazing incidents from the previous decade, these entailed forced consumption of alcohol,<sup>50</sup> an

35. *Id.*

36. *Id.*

37. JONES, *supra* note 5, at 122; 2 *N.C. Central Students Injured in Fraternity Hazing Incident*, CHARLOTTE OBSERVER (N.C.), Feb. 24, 1989, at 3C; Judith Valente, *Student's Death During Hazing Is Investigated*, WASH. POST, Apr. 25, 1977, at A1.

38. JONES, *supra* note 5, at 122.

39. Valente, *supra* note 37.

40. 2 *N.C. Central Students Injured in Fraternity Hazing Incident*, *supra* note 37; Valente, *supra* note 37.

41. JONES, *supra* note 5, at 122; Lori Rozsa, *Dean Suspends UF Fraternity for 1 Year*, MIAMI HERALD, Feb. 22, 1985, at 22A; Valente, *supra* note 37.

42. JONES, *supra* note 5, at 122.

43. *Id.*

44. Rozsa, *supra* note 41.

45. 2 *N.C. Central Students Injured in Fraternity Hazing Incident*, *supra* note 37; Valente, *supra* note 37.

46. JONES, *supra* note 5, at 122.

47. Amy Green, *TSU Student's Death Tied to Hazing Is Latest in Series for Fraternity*, COM. APPEAL (Memphis), Mar. 31, 2001, at B3; *Student Charged in Hazing: 8 Fraternity Pledges at N.C. A&T Injured*, CHARLOTTE OBSERVER, Apr. 9, 1986, at 5B, [hereinafter *Student Charged in Hazing*].

48. W. Stevens Ricks, *Slaps, Blows a Part of Hazing Ritual, Examiner Reports*, ATLANTA CONST., Oct. 26, 1989, at D1.

49. Steven Goldberg, *Six at Fort Valley Frat Charged as Hazing Injures Two*, ATLANTA J., Nov. 22, 1989, at A11.

50. Green, *supra* note 47.



incident in which a pledge was hit with a two-by-four,<sup>51</sup> more rituals consisting of physical violence such as slaps, punches,<sup>52</sup> beatings with paddles and canes,<sup>53</sup> and an incident in which a pledge's beard was lit on fire.<sup>54</sup> In two of these instances, a pledge died.<sup>55</sup> In one, a pledge suffered an open head wound that required stitches.<sup>56</sup> In one, a pledge required hospitalization for internal bleeding, kidney failure, and a sprained back.<sup>57</sup> Like the similar incidents of the 1970s, in two of the incidents, no charges were filed.<sup>58</sup> In the other two instances, criminal charges were filed against multiple fraternity members for assault and battery.<sup>59</sup>

In the 1990s, there were eighteen major BGLO hazing incidents. One involved Alpha Kappa Alpha Sorority,<sup>60</sup> two involved Alpha Phi Alpha Fraternity,<sup>61</sup> one involved Delta Sigma Theta Sorority,<sup>62</sup> six involved Kappa Alpha Psi Fraternity,<sup>63</sup> five involved Omega Psi Phi Fraternity,<sup>64</sup> and three involved Phi Beta Sigma Fraternity.<sup>65</sup> The hazing incidents continued the violence of the previous decades: physical assaults<sup>66</sup> (i.e., slapping, punching, and paddling),<sup>67</sup> psychological coercion and embarrassment,<sup>68</sup> verbal abuse,<sup>69</sup> coerced purchases of

51. *Student Charged in Hazing*, *supra* note 47.

52. Goldberg, *supra* note 49.

53. *Id.*

54. *Student Charged in Hazing*, *supra* note 47.

55. Green, *supra* note 47; Ricks, *supra* note 48.

56. *Student Charged in Hazing*, *supra* note 47.

57. Goldberg, *supra* note 49.

58. Green, *supra* note 47; Ricks, *supra* note 48.

59. Goldberg, *supra* note 49; *Student Charged in Hazing*, *supra* note 47.

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

61. *See, e.g., Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 97-CV-565, 1999 WL 47153, at \*1 (N.D.N.Y. Jan. 26, 1999).

62. *Jones v. N. Ill. Univ.*, Nos. 95 C 50162 to 95 C 50164 and 95 C 50174, 1996 WL 19453, at \*1 (N.D. Ill. Jan. 2, 1996).

63. *Edwards v. Kappa Alpha Psi Fraternity, Inc.*, No. 98 C 1755, 1999 WL 1069100, at \*1 (N.D. Ill. Nov. 18, 1999); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1110 (La. Ct. App. 1999); *McKenzie v. State*, 748 A.2d 67, 69 (Md. Ct. Spec. App. 2000); *State v. Allen*, 905 S.W.2d 874, 875 (Mo. 1995); *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 180 (Pa. Super. Ct. 2002); Peter Applebome, *Lawsuit Shatters Code of Silence Over Hazing at Black Fraternities*, N.Y. TIMES, Dec. 21, 1994, at B1.

64. *Snell v. Omega Psi Phi Fraternity*, CAL95-14509, 1997 WL 33103496, at \*1 (Md. Cir. Ct. July 10, 1997); *Thomas v. Lamar Univ.*, 830 S.W.2d 217, 218 (Tex. App. 1992); John Blake, *Clark Atlanta Student Hospitalized for Kidney Injury in Alleged Hazing*, ATLANTA J., Nov. 20, 1991, at D3.

65. *See Green v. Phi Beta Sigma Fraternity*, 91-VS-36257A, 1992 WL 1350855, at \*1 (Ga. State Ct. July 1992); *Walker v. Phi Beta Sigma Fraternity (Rho Chapter)*, 706 So. 2d 525, 526 (La. Ct. App. 1997); Joan Stroer, *Greeks Under Fire: Hazing in Spotlight After Death*, ATHENS BANNER-HERALD (Ga.), Apr. 9, 2000, at 7C.

66. *Morrison*, 738 So. 2d at 1110; *Walker*, 706 So. 2d at 526.

67. *McKenzie*, 748 A.2d at 69; *Allen*, 905 S.W.2d at 875; *State v. Brown*, 630 N.E.2d 397, 399-400 (Ohio Ct. App. 1993); *Kenner*, 808 A.2d at 180.

68. *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 97-CV-565, 1999 WL 47153, at \*1 (N.D.N.Y. Jan. 26, 1999).

69. *Jones v. N. Ill. Univ.*, Nos. 95 C 50162 to 95 C 50164 and 95 C 50174, 1996 WL 19453, at \*1 (N.D. Ill. Jan. 2, 1996).

merchandise,<sup>70</sup> ritualized beatings to the genitals and head,<sup>71</sup> extortion,<sup>72</sup> forced transport of drugs,<sup>73</sup> pouring of hot wax on pledges' skin,<sup>74</sup> forced consumption of dog food,<sup>75</sup> assault with an automobile,<sup>76</sup> long-distance running,<sup>77</sup> branding,<sup>78</sup> and forcing pledges to crawl up a hill while being paddled.<sup>79</sup> In two of these instances a pledge died.<sup>80</sup> Hospitalization was required in the remaining sixteen incidents for pledges suffering the following injuries: bruising,<sup>81</sup> bleeding,<sup>82</sup> nosebleeds,<sup>83</sup> renal failure,<sup>84</sup> seizures,<sup>85</sup> hypertension,<sup>86</sup> lacerated kidneys and liver,<sup>87</sup> brain bruising,<sup>88</sup> gangrene,<sup>89</sup> neck injuries,<sup>90</sup> suicidal thoughts,<sup>91</sup> and knee damage.<sup>92</sup> In one of these incidents no charges were filed, but the fraternity terminated the Membership Intake Process. In five of the incidents, criminal charges were filed against fraternity members for hazing, assault, and manslaughter.<sup>93</sup> In twelve of the cases, civil complaints were filed against individual members<sup>94</sup> and the Greek organizations.<sup>95</sup>

70. *Id.*

71. Applebome, *supra* note 63.

72. *Id.*

73. Edwards v. Kappa Alpha Psi, Fraternity, Inc., No. 98 C 1755, 1999 WL 1069100, at \*1 (N.D. Ill. 1999).

74. *Id.*

75. Thomas W. Waldron, *Fraternity Members in Hazing Must Perform Volunteer Service*, SUN (Balt.), June 29, 1994, at 2B.

76. Gullatt v. Omega Psi Phi Fraternity, Inc., 546 S.E.2d 927, 928 (Ga. Ct. App. 2001).

77. Thomas v. Lamar Univ., 830 S.W.2d 217, 218 (Tex. App. 1992).

78. Applebome, *supra* note 63.

79. Green v. Phi Beta Sigma Fraternity, 91-VS-36257A, 1992 WL 1350855, at \*1 (Ga. State Ct. July 1992).

80. State v. Allen, 905 S.W.2d 874, 875 (Mo. 1995); *Thomas*, 830 S.W.2d at 218.

81. State v. Brown, 630 N.E.2d 397, 400 (Ohio Ct. App. 1993).

82. *Id.*

83. *Id.*

84. Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 180 (Pa. Super. Ct. 2002).

85. *Id.*

86. *Id.*

87. State v. Allen, 905 S.W.2d 874, 875 (Mo. 1995).

88. *Id.*

89. McKenzie v. State, 748 A.2d 67, 69 (Md. Ct. Spec. App. 2000).

90. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1110 (La. Ct. App. 1999).

91. Lisa Frazier, *Former Student at U-Md. Wins Hazing Lawsuit*, WASH. POST, July 12, 1997, at B1.

92. Green v. Phi Beta Sigma Fraternity, 91-VS-36257A, 1992 WL 1350855, at \*1 (Ga. State Ct. July 1992).

93. *McKenzie*, 748 A.2d at 69; State v. Allen, 905 S.W.2d 874, 875 (Mo. 1995); State v. Brown, 630 N.E.2d 397, 399 (Ohio Ct. App. 1993); John Blake, *3 Plead Guilty To Fraternity Hazing*, ATLANTA J., Feb. 20, 1992, at E8; Rebecca McCarthy, *UGA Reduces Suspensions in Hazing Case: The Three Men Who Paddled a Pledge Also Were Convicted on Criminal Charges*, ATLANTA J.-CONST., Aug. 23, 1997, at E5.

94. Lloyd v. Alpha Phi Alpha Fraternity, No. 96-CV-348, 97-CV-565, 1999 WL 47153, at \*1 (N.D.N.Y. Jan. 26, 1999); Walker v. Phi Beta Sigma Fraternity (Rho Chapter), 706 So. 2d 525, 526 (La. Ct. App. 1997); Kenner v. Kappa Alpha Psi Fraternity Inc., 808 A.2d 178, 180 (Pa. Super. Ct. 2002); Thomas v. Lamar Univ., 830 S.W.2d 217, 218 (Tex. App. 1992).

During the 2000s, there were nineteen major hazing incidents. One involved Alpha Kappa Alpha Sorority,<sup>96</sup> six involved Phi Beta Sigma Fraternity,<sup>97</sup> three involved Alpha Phi Alpha Fraternity,<sup>98</sup> one involved Delta Sigma Theta Sorority,<sup>99</sup> five involved Kappa Alpha Psi Fraternity,<sup>100</sup> two involved Omega Psi Phi Fraternity,<sup>101</sup> and one involved Sigma Gamma Rho Sorority.<sup>102</sup> Across these incidents, hazing entailed beatings (i.e., paddling, punching, kicking, caning, slapping),<sup>103</sup> forced consumption of large amounts of water,<sup>104</sup> covering pledges' heads and bodies in vinegar and syrup,<sup>105</sup> forced purchasing of food and alcohol for fraternity members,<sup>106</sup> choking,<sup>107</sup> and strenuous exercise sessions on bread

95. *Edwards v. Kappa Alpha Psi Fraternity, Inc.*, No. 98 C 1755, 1999 WL 1069100, 1 (N.D. Ill. Nov. 18, 1999); *Gullatt v. Omega Psi Phi Fraternity, Inc.*, 546 S.E.2d 927, 928 (Ga. Ct. App. 2001); *Green*, 1992 WL 1350855; *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1110 (La. Ct. App. 1999); *Snell v. Omega Psi Phi Fraternity*, CAL95-14509, 1997 WL 33103496, at \*1 (Md. Cir. Ct. July 10, 1997); Applebome *supra* note 63; *Omega Psi Phi Ordered to Pay \$1 Million in Hazing Suit*, AFRO-AMERICAN RED STAR (Washington, D.C.), Aug. 21, 1999, at A1.

96. Sandy Banks, *Five Years Later, Still Haunted by Drowning*, L.A. TIMES, Sept. 15, 2007, at B1.

97. Michael Buettner, *VSU Hazing Charges May Be Dismissed*, PROGRESS-INDEX (Petersburg, Va.), June 20, 2009, available at <http://infoweb.newsbank.com>; Cindy George, *Family Settles Hazing Lawsuit: Parents Sued Fraternity After Their Son's Death*, HOUS. CHRON., Sept. 16, 2010, at B2; Lee Higgins, *7 USC Students Accused of Hazing*, STATE (Columbia, S.C.), Apr. 27, 2007, at B1; Lou Misselhorn, *Ex-Student at NSU Sues Frat, Members Over Hazing: Norfolk Chapter Has Been Suspended*, VIRGINIAN-PILOT, Mar. 21, 2002, at A1; Scott Shifrel, *Xtreme Hazing Trial to Begin: 3 Face 7 Years for Severe Injuries*, DAILY NEWS (N.Y.), Nov. 14, 2000, at 38; Patty Wooten, *Alleged Hazing Incident Under Investigation at UAM*, PINE BLUFF COM. (Ark.), May 6, 2000, at A1.

98. See, e.g., *Griffen v. Alpha Phi Alpha*, No. 06-1735, 2007 WL 707364, at \*1 (E.D. Pa. Mar. 2, 2007); *Ex parte Smith*, 185 S.W.3d 887, 889 (Tex. Crim. App. 2006); *Ex parte Smith*, 152 S.W.3d 170, 171 (Tex. App. 2004); Patti Weaver, *OSU Frat Hazing Charges Expected*, TULSA WORLD (Okla.), Mar. 6, 2007, at A1.

99. *Five UTC Sorority Members on Suspension for Hazing*, CHATTANOOGA TIMES FREE PRESS (Apr. 29, 2009), <http://www.timesfreepress.com/news/2009/apr/29/five-utc-sorority-members-suspension-hazing>.

100. *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); *Morton v. State*, 988 So. 2d 698, 700 (Fla. Dist. Ct. App. 2008); Candace Carlisle, *Sixth Arrest Made in November Hazing Case*, DENTON RECORD-CHRON. (Tex.), Jan. 21, 2010, at 2A; Brian Smith, *EKU Hazing Victim Files Suit Against Fraternity*, RICHMOND REG. (Ky.), Feb. 4, 2009, available at <http://richmondregister.com/eku/x155217623/EKU-hazing-victim-files-suit-against-fraternity>; Tiffany St. Martin, *Pledge Files Suit Against University*, REVELLE (La. State Univ.), June 19, 2001, at 1.

101. *Green*, *supra* note 47; Mary Flood, *UH Senior Sues Frat, Alleges He Was Beaten*, HOUS. CHRON., May 1, 2010, at B3.

102. Tamar Lewin, *Account of Violent Beatings Lead to Hazing Accusations Against a Sorority*, N.Y. TIMES, Oct. 6, 2010, at A21.

103. *Griffen*, 2007 WL 707364, at \*1; *Morton*, 988 So. 2d at 700; Buettner, *supra* note 97; Carlisle, *supra* note 100; Flood, *supra* note 101; Alex Ginsberg, *Hellish Hazing: Pledge Tells of Vicious Beating*, N.Y. POST, Nov. 17, 2004, at 24; Lewin, *supra* note 102; Misselhorn, *supra* note 97; Smith, *supra* note 100; St. Martin, *supra* note 100; Weaver, *supra* note 98; Wooten, *supra* note 97.

104. *Ex parte Smith*, 185 S.W.3d 887, 888–90 (Tex. Crim. App. 2006).

105. *Chattanooga: Police Investigating Hazing at UTC Sorority*, CHATTANOOGA TIMES FREE PRESS (Apr. 15, 2009), <http://www.timesfreepress.com/news/2009/apr/15/chattanooga-police-investigating-hazing-utc-sorori>.

106. *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006).

and water diets.<sup>108</sup> In three of these incidents a pledge died.<sup>109</sup> In the rest of the incidents, pledges suffered from a variety of ailments, including: permanent damage to body parts from scarring and muscle damage,<sup>110</sup> broken ribs,<sup>111</sup> internal bleeding,<sup>112</sup> coma,<sup>113</sup> concussions,<sup>114</sup> irregular vaginal bleeding,<sup>115</sup> infection,<sup>116</sup> hospitalization for a variety of maladies including swelling and bleeding,<sup>117</sup> kidney and renal failure,<sup>118</sup> punctured lungs,<sup>119</sup> and blindness.<sup>120</sup> In eight of the cases, criminal charges have been filed for crimes including hazing and assault.<sup>121</sup> Civil complaints were filed against the Greek organization in ten cases,<sup>122</sup> against individual members in one case, and against a university in two cases.<sup>123</sup>

These instances provide a survey of the numerous news accounts and court cases that address the particularly violent brand of hazing largely seen within BGLOs.<sup>124</sup> Not only has this type of hazing resulted in deaths and injuries, negative publicity, and suspensions and expulsions of chapters and members from university campuses, it has also resulted in significant interfacing between these organizations, their members, and the U.S. court system. While there have been a

107. Higgins, *supra* note 97.

108. Cindy Horswell, *No Indictments in Death of Prairie View Student*, HOUS. CHRON., Nov. 11, 2010, at B3.

109. Green, *supra* note 47; George, *supra* note 97.

110. Griffen v. Alpha Phi Alpha, No. 06-1735, 2007 WL 707364, at \*1 (E.D. Pa. Mar. 2, 2007).

111. Wooten, *supra* note 97.

112. *Id.*

113. *Ex parte* Smith, 185 S.W.3d 887, 890 (Tex. Crim. App. 2006).

114. Adam Crisp, *Police Investigate UTC Hazing Allegation*, CHATTANOOGA TIMES, Apr. 16, 2009, at B1, available at 2009 WLNR 7081001.

115. *Id.*

116. St. Martin, *supra* note 100.

117. Morton v. State, 988 So. 2d 698, 700 (Fla. Dist. Ct. App. 2008).

118. Ashlee Clark, *EKU Suspends Fraternity: 8-Year Ouster Comes After Allegations of Hazing*, LEXINGTON HERALD-LEADER (Ky.), June 25, 2008, at A1.

119. Misselhorn, *supra* note 97.

120. Shifrel, *supra* note 97.

121. Morton, 988 So. 2d at 702; *Ex parte* Smith, 185 S.W.3d 887, 890–92 (Tex. Crim. App. 2006); *Ex parte* Bowie, No. 05-04-00964-CR, 2004 WL 2805264 (Tex. App. Nov. 23, 2004); *Ex parte* Berhe, No. 05-04-00922-CR, 2004 WL 2633922 (Tex. App. Nov. 19, 2004); Buettner, *supra* note 97; Candace Carlisle, *Five Now Charged in Hazing Incident*, DENTON RECORD-CHRON., Dec. 3, 2009, at A1; Lisa M. Krieger, *Student: Sorority Sisters Hazed Me: Four Girls Convicted; Civil Lawsuit Targets College, Greek Group*, SAN JOSE MERCURY NEWS (Cal.), Sept. 4, 2010, at A1; N. *Charleston Man Charged in Hazing: 7 USC Students Accused of Beating Pledge During Fraternity Initiation*, POST & COURIER (S.C.), Apr. 27, 2007, at 3B; Shifrel, *supra* note 97; Smith, *supra* note 100.

122. Jolevare v. Alpha Kappa Alpha Sorority, Inc., 521 F. Supp. 2d 1, 2 (D.D.C. 2007); Griffen v. Alpha Phi Alpha, No. 06-1735, 2007 WL 707364, at \*1, 3 (E.D. Pa. Mar. 2, 2007); Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); *Frat Sued Over TSU Hazing Death*, OAK RIDGER (Tenn.), Jan. 10, 2002, at 5A; George, *supra* note 97; Lewin, *supra* note 102; Derek Montgomery, *Alleged Hazing Incident at Cal State-Los Angeles Leaves 2 Dead*, BADGER HERALD (Univ. of Wisc.-Madison), Sept. 25, 2002; St. Martin, *supra* note 100.

123. St. Martin, *supra* note 100.

124. *See generally* JONES, *supra* note 5, at 2–6 (discussing violence particular to BGLO culture).

growing number of criminal sanctions brought against BGLO members accused of hazing, much of the BGLO-related hazing litigation has been in the civil context—namely, torts. Thus, it is important to ask what type of evidence the respective parties in these litigations marshal to make their respective cases.

## II. SONG LYRICS AS LEGAL EVIDENCE OF INTENT

As is suggested by the history of pledging and hazing within BGLOs, recent decades have witnessed a growth in civil litigation resulting from hazing. This growth raises the specter of what types of evidence might be employed in such litigation. One such piece of evidence could be the poems oft-memorized by BGLO pledges, which may provide some indicia of what they knew and when they knew it about their hazing experience. In another context, the use of song lyrics as evidence provides a useful analog to the type of evidence that might be used in civil BGLO hazing litigation. Over the past several decades, both state and federal courts have increasingly allowed for the admissibility of song lyrics as evidence in criminal trials.<sup>125</sup> The courts that have admitted song lyrics as evidence of criminal intent have focused on either (1) lyrics written by the criminal defendant himself, or (2) lyrics written by others, but listened to or sung by the criminal defendant at the time of his alleged offense.<sup>126</sup> Courts in either type of case admit the evidence because it tends to demonstrate criminal defendants' intent. In turn, we analyze both.

### *A. The Admissibility of Defendant-Authored Lyrics*

In her work, Andrea Dennis finds that courts typically allow defendant-authored lyrics into evidence for the following purposes: as confessions to the charged crimes; as direct evidence of intent or knowledge; or as circumstantial “other acts” evidence to establish intent, identity, knowledge, or motive.<sup>127</sup> Despite objections from defense attorneys to the admission of such lyrics, courts overwhelmingly find the evidence to be non-hearsay: permissible, non-prejudicial character evidence.<sup>128</sup> Even in cases where the admission of the lyrics was deemed to be in error on appeal, the reviewing courts have nearly always found that that the error was harmless.<sup>129</sup>

*Non-Hearsay.* Under the Federal Rules of Evidence, hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,”<sup>130</sup> and is “not

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125. See *infra* notes 127 through 225 and accompanying text.

126. See generally Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007).

127. *Id.* at 8.

128. *Id.*

129. *Id.* at 30 n.182.

130. FED. R. EVID. 801(a)–(c).

admissible except as provided [in the Rules or elsewhere].”<sup>131</sup> Defendant-authored rap lyrics are typically introduced into evidence during the prosecution’s case-in-chief through the testimony of a law enforcement witness.<sup>132</sup> While on their face the lyrics appear to be “hearsay” testimony, the Federal Rules of Evidence clearly establish that “admissions by a party-opponent” are not hearsay.<sup>133</sup> Courts have generally found that such lyrics fall under this exception.<sup>134</sup> Under the admission by a party-opponent provision, statements are admissible if the statement is offered against a party and is the party’s own statement.<sup>135</sup>

In *People v. Williams*, the Michigan Court of Appeals found rap lyrics to be a written statement that fell under the definition of non-hearsay as being a “party’s own statement” or a “statement of which a party has adopted or manifested a belief in its truth.”<sup>136</sup> The lyrics in this case were offered as evidence of William’s motive and intent to commit a murder.<sup>137</sup> Lyrics such as (1) “I got ragged hollow tips that’s gon’ spit at yo’ dome” and (2) “when I come through yo’ hood, you ain’t no good” mirrored the circumstances of the crime because Williams initially (1) shot the victim in his head and (2) testified he was not at a location familiar to him.<sup>138</sup> The court ruled that although the lyrics constituted a statement made out of court that was offered as evidence of the matter asserted, the lyrics were admissible over a hearsay objection as an admission by a party-opponent.<sup>139</sup>

Similarly, in *People v. Singleton*, the defendant argued to a California appeals court that an “expert opinion” about his rap lyrics was inadmissible hearsay.<sup>140</sup> The court ruled that the lyrics were not offered to prove the truth of the matter stated, but were offered as a basis for expert opinion.<sup>141</sup> Further, even if the lyrics were hearsay, they were still the defendant’s lyrics and thus admissible under the “admissions exception” to the hearsay rule.<sup>142</sup> Lastly, even if the lyrics were inadmissible hearsay, the court ruled that an expert opinion can be based on reliable, but inadmissible, hearsay.<sup>143</sup>

*Relevant.* Under the Federal Rules of Evidence, only relevant evidence is admissible.<sup>144</sup> The rules define relevant evidence as evidence having “any tendency to make [the existence of] a fact more or less probable than it would be without

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131. FED. R. EVID. 802.

132. Dennis, *supra* note 126, at 8.

133. FED. R. EVID. 801(d)(2).

134. Dennis, *supra* note 126, at 8–9 (citing cases).

135. *See* FED. R. EVID. 801(d)(2)(A).

136. *People v. Williams*, No. 263892, 2006 WL 3682750, at \*1 (Mich. Ct. App. Dec. 14, 2006).

137. *Id.*

138. *Id.*

139. *Id.*

140. *People v. Singleton*, No. B171718, 2005 WL 699307, at \*1 (Cal. Ct. App. Mar. 28, 2005).

141. *Id.*

142. *Id.* (citing CAL. EVID. CODE § 1220 (West 2012)).

143. *Id.* (citing *People v. Gardeley*, 14 Cal. 4th 605, 618 (1996)).

144. FED. R. EVID. 402.

the evidence” when “the fact is of consequence in determining the action.”<sup>145</sup> According to Andrea Dennis, courts typically find defendant-authored lyrics to be relevant in one of two situations: either (1) when lyrics are characterized as a confession depicting the crime charged, or (2) when lyrics are deemed direct evidence of a defendant’s intent or motive.<sup>146</sup>

Under the first situation, courts characterize lyrics as confessions depicting the crime charged.<sup>147</sup> Such was the case in an Indiana courtroom where a juvenile defendant was charged with the murder of his stepmother.<sup>148</sup> Police found the corpse of the defendant’s stepmother in the trunk of her car and later determined that she had died of strangulation.<sup>149</sup> During the investigation, police discovered rap lyrics written by the defendant, which the prosecution offered as evidence of intent to carry out the murder.<sup>150</sup> The lyrics stated, “Cuz the 5-0 won’t even know who you are when they pull yo ugly ass out the trunk of my car.”<sup>151</sup> Similarly, a Kentucky court allowed the admission of defendant-authored lyrics in a murder case in which the defendant recorded a homemade rap video.<sup>152</sup> The video, which was recorded after the murder of the defendant’s wife and before an arrest had been made, contained the following lyrics: “B—— made me mad, and I had to take her life. My name is Dennis Greene and I ain’t got no f—— wife. . . . I cut her motherf——in’ neck with a sword.”<sup>153</sup> The court reasoned that these lyrics were probative on multiple fronts: to show premeditation, motive, and the defendant’s emotional state after the killing.<sup>154</sup>

Likewise, the Seventh Circuit in *United States v. Foster* held that defendant-written lyrics that discussed the alleged crime tended to show that the defendant committed the crime and were therefore relevant evidence.<sup>155</sup> The defendant claimed his rap lyrics were minimally relevant to the issue of his knowledge of the drugs he was carrying.<sup>156</sup> He argued that his rap verse “certainly was nothing that could show knowledge of what was in the suitcases” because the verse “made no reference to the suitcases he carried, or the trip he was making.”<sup>157</sup> The court found this to be unpersuasive, since a finding of relevance only required that the

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145. FED. R. EVID. 401.

146. Dennis, *supra* note 126, at 2.

147. *See also* State v. Allen, No. COA05-1480, 2006 WL 2529580, at \*5 (N.C. Ct. App. Sept. 5, 2006) (holding that the lyrics were “sufficiently similar to the facts and circumstances surrounding the murder” and therefore relevant).

148. Bryant v. State, 802 N.E.2d 486, 491 (Ind. Ct. App. 2004).

149. *Id.* at 492.

150. *Id.*

151. *Id.* at 498.

152. Greene v. Commonwealth, 197 S.W.3d 76, 79, 85 (Ky. 2006).

153. *Id.* at 87.

154. *Id.*

155. United States v. Foster, 939 F.2d 445, 455 (7th Cir. 1991).

156. *Id.*

157. *Id.*

evidence made it more probable that he had knowledge of the drugs rather than requiring it to prove his actual knowledge.<sup>158</sup> Interestingly, the defendant attempted to diminish the relevance of the verse by arguing its rap lyrics were fiction with artistic value and thus could not be relevant to his guilt.<sup>159</sup> The court, however, reasoned that the rap verse was not admitted to show the defendant was “the biggest dope dealer” and that, in writing about a “fictional” character, the defendant displayed knowledge of an activity that is far from fictional.<sup>160</sup>

Courts also find defendant-authored lyrics to be relevant when the lyrics demonstrate defendants’ intent or motive.<sup>161</sup> Despite defendants’ repeated objections to the admission of defendant-authored rap lyrics on the ground of irrelevancy, courts typically overruled these objections because the threshold for relevance is relatively low.<sup>162</sup> Because these lyrics tend to make the fact that their author committed the crime more probable, courts typically hold that the lyrics are relevant.

Using this logic, the Arkansas Supreme Court found relevant a rap song written by the defendant entitled “Give Up the Strilla.”<sup>163</sup> The defendant was charged with, among other things, aggravated robbery, and the song featured lyrics that depicted an aggravated robbery.<sup>164</sup> The rap song was found three days after the crime on the front seat of the vehicle used in the crime.<sup>165</sup> The court reasoned that the song, because of the similarity between the events it described and the crime that took place, made the defendant’s intent to commit aggravated robbery more probable than without the evidence.<sup>166</sup> The song discussed using a “strap” (slang for “gun”) to force a victim to “give up the cash,” which the court found probative of an intent to commit aggravated robbery.<sup>167</sup>

Defendant-authored rap lyrics that demonstrate in-depth awareness of the criminal enterprise on trial are often used as substantive evidence when their author claims to have little to no knowledge of the crimes with which he is charged.<sup>168</sup> In *United States v. Belfast*, the Eleventh Circuit held that the admission

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158. *Id.*

159. *Id.* at 456.

160. *Id.*

161. Dennis, *supra* note 126, at 2.

162. FED. R. EVID. 401 (“Evidence is relevant if: (a) it *has any tendency* to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”) (emphasis added).

163. Cook v. State, 45 S.W.3d 820, 822–23 (Ark. 2001).

164. *Id.* at 823.

165. *Id.*

166. *Id.*

167. *Id.*; see also Jones v. State, 797 A.2d 673, 677 (Del. 2002) (explaining that defendant’s rap song about a witness on his “hit list” and his proposing to put the heads of his enemies on a shelf were material evidence to determining his intent or state of mind in the earlier knife incident).

168. See *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir. 2010); *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991).



of rap lyrics, which were found on the defendant's person at the time of his arrest, were admissible as evidence in the defendant's criminal trial.<sup>169</sup> The defendant was charged with multiple acts of torture, conspiracy to commit torture, and two firearm-related crimes after he was arrested at Miami International Airport for using a false passport to enter the country.<sup>170</sup> Lyrics to a rap the defendant had authored were found in his luggage in the course of his arrest.<sup>171</sup> The prosecution sought to introduce the lyrics as evidence of the defendant's association with the Anti-Terrorism Unit (ATU)<sup>172</sup> and his role in committing acts of torture.<sup>173</sup> The court found that the lyrics were probative on "multiple fronts," holding that the lyrics—which referred to the ATU—were particularly relevant for the purpose of contradicting the defendant's own statements.<sup>174</sup> The lyrics, which largely centered on ATU violence, directly contradicted the defendant's prior statement concerning his awareness of the violent tendencies of the group.<sup>175</sup> The court reasoned that the use of such lyrics bolstered the credibility of the witnesses who testified about both the defendant's and the ATU's incessant use of force and violence.<sup>176</sup> Similarly, the Seventh Circuit noted that rap lyrics could be admissible as an admission by a party opponent to establish a familiarity with the illegal drug market where the defendant makes "protestations of naiveté."<sup>177</sup> Lyrics that used drug code-words demonstrated a certain level of knowledge about drug trafficking and made it more likely that the defendant knew that he was carrying illegal drugs on or about his person the day that he was apprehended.<sup>178</sup>

In 2002, the Arkansas Supreme Court admitted rap lyrics written by a fifteen-year-old defendant where the lyrics were directly related to the alleged crime of making terroristic threats in the first degree.<sup>179</sup> The defendant in *Jones v. State* was a high school student who frequently wrote rap lyrics.<sup>180</sup> He mailed his lyrics to a female classmate expressing how he felt about her.<sup>181</sup> Although the

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169. *Belfast*, 611 F.3d at 819.

170. *Id.* at 799.

171. *Id.*

172. The ATU was a paramilitary group formed by the defendant for the protection of President Taylor of Liberia and the President's family. *See id.* at 793.

173. *Id.* at 820.

174. *Id.*

175. *Id.* ("Take this for free, six feet is where you gonna be. ATU niggas on the scene. Body bag is all you see"; "More sweat in my training means less blood in my life. So with the shots from guns keep it dead and precise. Bull-doze ambushes in the midst of a fight. Try to cut my supply, you'll be losing your life.")

176. *Id.*

177. *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991).

178. *Id.* at 449, 455 ("Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town").

179. *Jones v. State*, 64 S.W.3d 728 (Ark. 2002).

180. *Id.* at 730.

181. *Id.*

lyrics were not personally directed to her, they were often violent in nature.<sup>182</sup> When the classmate refused to respond to the defendant's letters and lyrics on one occasion, the defendant authored and sent the following lyrics directed specifically at the recipient:

You gonna keep being a bitch, and I'm gonna cliché [click],  
 . . . you better run, bitch, cuz I can't control what I do. I'll murder you  
 before you can think twice, cut you up and use you for decoration to look  
 nice,  
 I've had it up to here, bitch, there's gonna be a 187 on your whole family,  
 trik [trick],  
 Then you'll be just like me, with no home, no friends, no money,  
 . . . you'll be six feet under, beside your sister, father and mother.<sup>183</sup>

The defendant was subsequently charged with and convicted of making terrorist threats.<sup>184</sup> He argued that the lyrics were protected under the First Amendment, and therefore the statute criminalizing his creation of rap lyrics was unconstitutionally applied to him.<sup>185</sup> The court, however, held that the lyrics fell under the fighting words exception to the First Amendment, and thus were not protected.<sup>186</sup> The court held that the lyrics constituted a "true threat" using a formulation set forth by the Eighth Circuit.<sup>187</sup>

*Evidence of Intent, Knowledge, or Motive.* While the evidence of a person's character is generally not admissible for the purpose of proving action in conformity with that character,<sup>188</sup> Federal Rule of Evidence 404(b)(2) allows the use of "evidence . . . for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>189</sup> Propensity evidence (i.e., character evidence) is evidence offered to show that a person has a particular character trait (violence, untruthfulness, a tendency to break the law, etc.), thereby allowing the jury to infer that the person acted in conformity with that trait on the occasion in question.<sup>190</sup> Such evidence is typically not admissible for that purpose because it is of little probative value and

182. *Id.*

183. *Id.*

184. *Id.* at 729.

185. *Id.* at 729, 733.

186. *Id.* at 733 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

187. *Id.* at 735–37 (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)) ("The five factors for determining whether speech constitutes a 'true threat' include: (1) the recipient's reaction; (2) whether the threat was conditional; (3) whether there was direct communication with the recipient; (4) whether the author had previously made similar threats to the victim; and (5) whether the recipient believed the maker of the threat had the propensity to engage in violence.").

188. FED. R. EVID. 404(a)(1).

189. FED. R. EVID. 404(b)(2).

190. FED. R. EVID. 404 advisory committee's note.

is usually very prejudicial.<sup>191</sup> Such evidence tends to distract jurors from the facts of the case and encourages them to place an unsubstantiated amount of emphasis on facts not at issue.<sup>192</sup> In essence, propensity evidence allows the juror to “reward the good man [and] to punish the bad man because of their respective characters.”<sup>193</sup>

Even though propensity evidence is typically circumstantial, the Rules Advisory Committee for the Federal Rules of Evidence accepts that an accused’s state of mind usually can only be proven with circumstantial evidence.<sup>194</sup> Therefore, courts tend to admit defendant-authored lyrics as “other acts” evidence, holding that such lyrics are probative of the defendant’s intent, knowledge, or motive.<sup>195</sup> Take, for example, the defendant in *Foster*.<sup>196</sup>

Also, the court in *Cook* held that the lyrics were not only relevant but were admissible as “other acts” evidence under a modus operandi theory.<sup>197</sup> The test for this theory is that (1) both acts must be committed with the same or strikingly similar methodology, and (2) the methodology must be so unique that both acts can be attributed to one individual.<sup>198</sup> The defendant argued both that the prosecution failed to establish the first prong, because the rap lyrics were not similar to the crime, and that the prosecution failed to prove that the rap lyrics were not remote in time.<sup>199</sup> In answering the defendant’s first argument, the court determined that the standard for similarity is relatively low and the degree of similarity between the lyrics describing an aggravated robbery and the robbery itself was sufficient to meet the standard.<sup>200</sup> For the second argument, the court found that, regardless of when the song was written, it was found in the car three days after the robbery, on top of other papers depicting plans for a robbery.<sup>201</sup> The defendant did not challenge the second prong of the modus operandi test.<sup>202</sup> Thus, the song was independently relevant proof of the defendant’s intent to commit the aggravated robbery.<sup>203</sup>

In *Greene*, the Supreme Court of Kentucky disagreed with the defendant’s contention that his rap video was character evidence introduced to prove a “criminal disposition.”<sup>204</sup> The defendant admitted to killing his wife but attempted

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*; Dennis, *supra* note 126, at 10–11.

195. *See* Dennis, *supra* note 126, at 8.

196. *See supra* text accompanying notes 156–61.

197. *Cook v. State*, 45 S.W.3d 820, 823–25 (Ark. 2001).

198. *Id.* at 824 (citing *Williams v. State*, 36 S.W.3d 324, 329 (2001)).

199. *Id.*

200. *Id.*

201. *Id.* at 825.

202. *Id.* at 824.

203. *Id.* at 825.

204. *Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006).

to assert a defense of extreme emotional distress, contending that he acted out of rage over his wife's abuse of their son.<sup>205</sup> The prosecution offered as evidence a rap video the defendant had made after his wife's killing, which showed the defendant bragging about how he had killed her.<sup>206</sup> The court reasoned that the rap video referred to the defendant's actions and emotions vis-à-vis the alleged crime, and that it was not a previous act.<sup>207</sup> The court also stated that the video showed the defendant's mental state shortly after the killing and established premeditation and motive.<sup>208</sup> Thus, the court allowed the video to come in as evidence of the defendant's premeditated intent to kill his wife.

*Not Prejudicial.* While the Federal Rules of Evidence allow admission of relevant data, Rule 403 provides that although relevant, evidence may be excluded if "its probative value is *substantially outweighed* by a danger of . . . unfair prejudice . . ." <sup>209</sup> Unfair prejudice results from evidence that has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>210</sup> Not surprisingly, defendants often try to exclude rap lyrics by arguing that the lyrics are unfairly prejudicial.

Courts typically conduct a balancing test, considering "(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; [and] (5) the availability of less prejudicial proof . . . ;" among other things, to determine whether the evidence unfairly prejudices the defendant with respect to "other acts" evidence.<sup>211</sup> A 2004 Ninth Circuit decision illustrates this balancing test.<sup>212</sup> The victim was killed when he failed to comply with a police order to lie down on the ground.<sup>213</sup> Two weeks prior to the killing, police found rap lyrics in the victim's car during a traffic stop. The lyrics advocated the murder of police officers.<sup>214</sup> During the trial, the district court admitted the lyrics for the limited purpose of showing that the victim possessed animosity toward the police, and it found that the lyrics were probative of the proposition that the victim would have refused to comply with a police order.<sup>215</sup> However, on appeal, the Ninth Circuit found that portions of the lyrics, which stated, "Bitches are to be pimped in this world for money. . . . And when these bitch ass pigs trying to f\*\*k up your pimping, split the cop's wig and keep moving always," had no probative

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205. *Id.* at 79–80.

206. *Id.* at 86.

207. *Id.* at 87.

208. *Id.*

209. FED. R. EVID. 403 (emphasis added).

210. FED. R. EVID. 403 advisory committee's note.

211. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 177–78 (3d ed. 1996).

212. *Boyd v. City of S.F.*, 576 F.3d 938, 949 (9th Cir. 2009).

213. *Id.* at 942.

214. *Id.*

215. *Id.* at 944.

value regarding the suspect's refusal to comply with police commands and were unfairly prejudicial due to their offensive nature.<sup>216</sup>

In *People v. Wright*, rap lyrics found in the defendant's jail cell were determined by an expert to exemplify the defendant's "hardcore gang mentality" and desire to be a "soldier" against his rival gang.<sup>217</sup> The defendant, a gang member, was charged with the murder of a rival gang member, and the court found the expert's testimony probative of the defendant's motive to kill.<sup>218</sup> Interestingly, the court drew a distinction between the lyrics themselves and the expert testimony, claiming that the lyrics would have been overly prejudicial as evidence, but that the expert testimony based on those same lyrics was not.<sup>219</sup> Similarly, in *Allen*, the court found that the rap lyrics, when considering the facts and circumstances surrounding the murder, were properly admitted to establish the defendant's intent and motive.<sup>220</sup> The defendant shot the victim after drinking heavily at a child's funeral and composed the rap lyrics while awaiting trial for murder.<sup>221</sup> While some distinctions could be made between the actual rap lyrics and the facts of the case, those distinctions were de minimis and not unfairly prejudicial to the defendant.<sup>222</sup>

### B. The Admissibility of Other Lyrics

In addition to defendant-authored lyrics, courts have allowed the admission into evidence of songs that criminal defendants listened to at the time of their offenses. For example, the lyrics to songs by Tupac Shakur were at the forefront of a 1993 Texas case.<sup>223</sup> In that case, Ronald Ray Howard shot Texas Department of Public Safety Trooper Bill Davidson during a routine traffic stop.<sup>224</sup> Howard, who was listening to the song when he was stopped, attempted to use the violent, anti-police lyrics to show that he had been brainwashed by the lyrics.<sup>225</sup>

Song lyrics from genres other than rap have also been put on display in the courtroom. The Tenth Circuit held that racist lyrics were admissible to show a defendant's racial animus and intent.<sup>226</sup> In *United States v. Magleby*, the defendant burned a cross in an interracial couple's yard.<sup>227</sup> Prior to burning the cross, the

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216. *Id.* at 949 n.7.

217. *People v. Wright*, No. B162219, 2004 WL 516250, at \*5 (Cal. Ct. App. Mar. 17, 2004).

218. *Id.*

219. *Id.* at \*6.

220. *State v. Allen*, No. COA05-1480, 2006 WL 2529580, at \*5 (N.C. Ct. App. Sept. 5, 2006).

221. *Id.* at \*1, \*5.

222. *Id.* at \*5.

223. *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907, at \*1 (S.D. Tex. Mar. 31, 1997).

224. *Howard v. State*, 941 S.W.2d 102, 107 (Tex. Crim. App. 1996).

225. *See Davidson*, 1997 WL 405907, at \*1 (describing what Howard argued at his criminal trial).

226. *See United States v. Magleby*, 241 F.3d 1306, 1318-19 (10th Cir. 2001).

227. *Id.* at 1309.

defendant had been listening to and singing the following racist lyrics calling for the removal of African Americans from the United States: “Nigger, nigger, get on that boat. Nigger, nigger, row. Nigger, nigger, get out of here. Nigger, nigger, go, go, go.”<sup>228</sup> The defendant claimed that he was unaware that he had placed his burning cross on the front lawn of an interracial couple.<sup>229</sup> The court found that the lyrics, and the defendant’s knowledge of them, were probative of his specific intent to “oppress, threaten, or intimidate” the interracial couple via cross burning.<sup>230</sup> The defendant objected to the admissibility of the song on the grounds that the lyrics were both irrelevant and unfairly prejudicial.<sup>231</sup> The reviewing court, taking note of the defendant’s objections on both of these grounds, looked to precedent to resolve the issue.<sup>232</sup> A few years prior to the *Magleby* decision, in *United States v. Viefhaus*, the Tenth Circuit held that “the context in which an alleged threat is made is probative of whether a ‘true threat’ exists.”<sup>233</sup> Bearing its *Viefhaus* holding in mind, the *Magleby* court ruled that while the admission of the lyrics was certainly “harmful” to the defendant’s case, the lyrics’ “probative value outweighed its prejudicial effect.”<sup>234</sup>

### C. Rap Music as an Analog for Poetry

Rap music can be used as an analog for poetry because the two genres share similar concepts and forms. Embracing the spirit of competition that has roots in historical poetic performances, rap takes advantage of poetry’s usage of rhythm and rhyme, similes and metaphors, and storytelling.<sup>235</sup> In this regard, rap is more of an oral poetry that focuses less on the actual words and more on the rhythms and rhymes.<sup>236</sup> Rap “naturally relies more heavily than literary poetry on devices of sound.”<sup>237</sup> It also stresses a dual rhythmic voice, unlike its older derivative.<sup>238</sup> “In literary poetry, the difference between meter and rhythm is the difference between the ideal and the actual rhythms of a given line.”<sup>239</sup> On the other hand, “rap makes audible a rhythmic relationship that is only theoretical in conventional verse.”<sup>240</sup>

The ancient Greeks even referred to their lyrical poetry as “ta mele,” which translates to “poems to be sung.”<sup>241</sup> “[R]ap bears a stronger affinity to some of

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228. *Id.* at 1318.

229. *Id.* at 1309.

230. *Id.* at 1319.

231. *Id.*

232. *Id.*

233. *United States v. Viefhaus*, 168 F.3d 392, 398 (10th Cir. 1999).

234. *Magleby*, 241 F.3d at 1319.

235. ADAM BRADLEY & ANDREW DUBOIS, *THE ANTHOLOGY OF RAP xxx–xxx* (2010).

236. ADAM BRADLEY, *BOOK OF RHYMES: THE POETICS OF HIP HOP 5* (2009).

237. *Id.* at xvii.

238. *Id.* at 8.

239. *Id.*

240. *Id.*

241. *Id.* at xvii.

poetry's oldest forms, such as the strong-stress meter of *Beowulf* and the ballad stanzas of the bardic past.<sup>242</sup> Similar to most poets, rappers write their lyrics with a beat in mind, and this beat drives the connection between the language and a poetic identity.<sup>243</sup> The heavy reliance on 4/4 beats and the limited use of melody and harmony are what make rap an "effective vehicle for poetry."<sup>244</sup>

While specific literary aspects of rap can be seen as similar to poetry, there are also genres of poetic satire and mockery in Greco-Roman classical antiquity that show rap is poetic. Ancient Greco-Roman literature contained poems filled with traditions of mockery and personal attacks on one another.<sup>245</sup> This satire and mockery shares with forms of rap, like gangsta rap, a propensity for generic self-consciousness.<sup>246</sup> Moreover, ancient traditions exhibiting a variety of transgressive poetry across several genres are seen in many forms of rap today and also support the idea that rap is a form of poetry.<sup>247</sup>

### III. POETRY, THE BGLO HAZING CULTURE, AND WHAT THEY MEAN FOR LAW

The admissibility of song lyrics in criminal cases and lyrics' utility in understanding, legally, what some legal actor knew or understood at a particular point in time provides a useful template: given that poetry is arguably an analog to song lyrics, the poems oft-learned and memorized by BGLO pledges highlight a convergence of what BGLO pledges know, when they know it, and possibly the legal significance of their knowledge vis-à-vis hazing. Specifically, it is likely that BGLO pledges learn and internalize poems about sacrifice, hardship, and suffering while they are simultaneously experiencing those things during hazing. Arguably, they are on notice about what they are likely to experience during their pledge process and have assumed the risk of those experiences. Given the authors' experience as BGLO members, we explore the extent to which particular poems were part of BGLO members' pledge experiences and how pledges interpreted those poems in light of their pledge experiences.

*Ex parte Barran* elucidates assumption of risk in the hazing context.<sup>248</sup> In *Ex parte Barran*, Jason Jones, a former fraternity pledge, sued the Kappa Alpha Order national fraternity, the Auburn University chapter, and individual members, alleging, among other things, negligent and wanton hazing.<sup>249</sup> Chapter members

242. *Id.* at xv.

243. *Id.*

244. BRADLEY & DUBOIS, *supra* note 235, at xix, xxxiv.

245. Ralph M. Rosen & Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 NEW LITERARY HIST. 897, 899–90 (1999).

246. *Id.*

247. *Id.*

248. *See Ex parte Barran*, 730 So. 2d 203, 206–08 (Ala. 1998). It is not the contention of this Article that assumption of risk is a widely applied doctrine. In fact, only a minority of jurisdictions use it. *See* JACOB A. STEIN, 3 STEIN ON PERSONAL INJURY DAMAGES § 14:15 (3d ed. 1997).

249. *Ex parte Barran*, 730 So. 2d at 204.

began to haze Jones two days after he became a pledge.<sup>250</sup> The hazing activities included:

(1) having to dig a ditch and jump into it after it had been filled with water, urine, feces, dinner leftovers, and vomit; (2) receiving paddlings to his buttocks; (3) being pushed and kicked, often into walls, pits, and trash cans; (4) eating such foods as peppers, hot sauce, butter, and “yerks” (a mixture of hot sauce, mayonnaise, butter, beans, and other items); (5) doing chores for the fraternity and its members, such as cleaning the fraternity house and yard, serving as designated driver, and running errands; (6) appearing regularly at 2 a.m. “meetings” during which the pledges would be hazed for a couple of hours; and (7) “running the gauntlet,” during which the pledges were pushed, kicked, and hit as they ran down a hallway and down a flight of stairs.<sup>251</sup>

Despite his knowledge that it was against university rules, and despite the fact that he was the one being hazed, Jones “continued to participate in the hazing activities for a full academic year” and repeatedly covered up the hazing when asked about it.<sup>252</sup> However, 20% to 40% of Jones’ fellow pledges withdrew from the Kappa Alpha Order pledge process without any additional hazing.<sup>253</sup> Jones alleged that the coercive environment of the pledge process prevented him from voluntarily leaving the fraternity in response to the defendants’ asserted defense that Jones assumed the risks associated with hazing.<sup>254</sup> An Alabama state trial court granted summary judgment for the defendants on the negligence claims, and an Alabama state intermediate appellate court affirmed in part, reversed in part, and remanded.<sup>255</sup> On petition for a writ of certiorari, the Alabama Supreme Court concluded that Jones’ “participation in the hazing activities was of his own volition,” and it rejected his contention that peer pressure prevented him from leaving the hazing activities.<sup>256</sup> Thus, the court found that Jones assumed the risks of hazing.<sup>257</sup>

In light of the *Ex parte Barran* holding, the following part details (A) the significance of poetry within BGLOs, especially within BGLO pledge processes, and the background of some of the most salient BGLO poems; (B) the findings of a previously conducted and published study on BGLO poetry; and (C) a second study that this Article’s authors conducted on BGLO poetry.

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250. *Id.* at 206.

251. *Id.* at 204–05.

252. *Id.* at 206.

253. *Id.* at 205, 207.

254. *Id.* at 206–07.

255. *Id.* at 205, 208.

256. *Id.* at 207–08.

257. *Id.* at 208.



*A. Poetry and the BGLO Experience*

Many BGLOs have specific poems that members learn either as part of the initiation process or in the context of the organization's broader culture. The poems "If—" and "Invictus" have special significance in black "Greek" life, as they are the only two poems that BGLO members seem to collectively share regardless of sorority or fraternity affiliation, generation, or region of the country.<sup>258</sup> The poems not only are enduring favorites in the English-speaking world, but also play a central role in black "Greek" life discourse.<sup>259</sup>

"If—"

If you can keep your head when all about you  
 Are losing theirs and blaming it on you;  
 If you can trust yourself when all men doubt you,  
 But make allowance for their doubting too;  
 If you can wait and not be tired by waiting,  
 Or being lied about, don't deal in lies,  
 Or being hated don't give way to hating,  
 And yet don't look too good, nor talk too wise;

If you can dream—and not make dreams your master;  
 If you can think—and not make thoughts your aim,  
 If you can meet with Triumph and Disaster  
 And treat those two impostors just the same;  
 If you can bear to hear the truth you've spoken  
 Twisted by knaves to make a trap for fools,  
 Or watch the things you gave your life to, broken,  
 And stoop and build 'em up with worn-out tools;

If you can make one heap of all your winnings  
 And risk it on one turn of pitch-and-toss,  
 And lose, and start again at your beginnings  
 And never breathe a word about your loss;  
 If you can force your heart and nerve and sinew  
 To serve your turn long after they are gone,  
 And so hold on when there is nothing in you  
 Except the Will which says to them: 'Hold on!'

If you can talk with crowds and keep your virtue,  
 Or walk with Kings—nor lose the common touch,

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258. Rashawn Ray et al., *Bloody, but Unbowed: Making Meaning of "Invictus" and "If—" for the Shaping of a Collective Black Greek Identity*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES, *supra* note 1, at 445, 445 [hereinafter Ray et al., *Bloody, but Unbowed*].

259. *Id.* at 455.

If neither foes nor loving friends can hurt you,  
 If all men count with you, but none too much;  
 If you can fill the unforgiving minute  
 With sixty seconds' worth of distance run,  
 Yours is the Earth and everything that's in it,  
 And—which is more—you'll be a Man, my son!<sup>260</sup>

Rudyard Kipling penned "If—" while at Bateman's, his residence in the village of Burwash in Sussex.<sup>261</sup> Composed in iambic pentameter, the poem delineates the virtues Kipling associates with ideals of heroic manhood.<sup>262</sup> The poem's hero, Sir Leander Starr Jameson, led the famous Jameson Raid against the Boers of South Africa in 1895.<sup>263</sup> Some of the poem's enduring popularity, especially in England, where the poem is regularly regarded as the nation's favorite,<sup>264</sup> can be attributed to its recognition of stoicism as an important character trait. Stoicism opens the poem; the ability to "keep your head" when all those around you are not only "losing theirs" but "blaming it on you" is as close as it comes to a poetic definition of stoicism.

Even more than stoicism, "If—" exalts the ability to persevere through the most harrowing times, such as losing all of one's possessions "on one turn of pitch-and-toss" without coming undone as a result. The leader Kipling paints in "If—" can take a beating and maintain his dignified manhood by means of a stoic disposition paired with a strong will to persevere.<sup>265</sup> Though it is over one hundred years old, "If—" still resonates with the modern reader.<sup>266</sup> Through its depiction of the strong leader, a resilient man who is able to "walk with Kings" without losing the "common touch," the poem guides its readers' and reciters' ideas about leadership and so-called manhood.<sup>267</sup>

"Invictus"

Out of the night that covers me,  
 Black as the pit from pole to pole,  
 I thank whatever gods may be  
 For my unconquerable soul.

In the fell clutch of circumstance  
 I have not winced nor cried aloud.

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260. RUDYARD KIPLING, *If—*, in *REWARDS AND FAIRIES* 175 (1910).

261. Ray et al., *Bloody but Unbowed*, *supra* note 258, at 446.

262. *Id.* at 447.

263. *Id.* at 446.

264. *Id.* at 448.

265. *Id.* at 447.

266. *Id.* at 448–49.

267. *Id.* at 449.

Under the bludgeonings of chance  
My head is bloody, but unbowed.

Beyond this place of wrath and tears  
Looms but the Horror of the shade,  
And yet the menace of the years  
Finds and shall find me unafraid.

It matters not how strait the gate,  
How charged with punishments the scroll.  
I am the master of my fate:  
I am the captain of my soul.<sup>268</sup>

William Ernest Henley's poem "Invictus" first appeared in *A Book of Verses* in 1888 and was republished in *Poems* in 1898.<sup>269</sup> The title "Invictus" (Latin for "the unconquerable"), however, did not appear until 1903, after Henley's death.<sup>270</sup> Like "If—," "Invictus" in many ways represents Victorian stoicism. While "If—" is a didactic coming-of-age poem directed toward children, "Invictus" is a poem about self-mastery in the face of extreme suffering, something Henley experienced firsthand.<sup>271</sup>

Henley suffered from osteoarthritic tuberculosis as a young boy, and by age eighteen, necrosis necessitated amputation of his left leg.<sup>272</sup> Shortly afterwards, the infection spread to his right leg. He underwent a series of painful treatments at the Royal Sea-Bathing Infirmary in order to save his remaining leg. However, his doctors determined that its amputation was the only manner to save Henley's life. Unwilling to lose both legs, Henley took a chance and transferred himself to the Royal Infirmary in Edinburgh in 1873, where he was treated for twenty months.<sup>273</sup> As he convalesced in Edinburgh following his treatment, he wrote poems about his experiences, including "Invictus."

Considering the harrowing personal experience that prompted Henley to pen "Invictus," it is hardly surprising that the poem's portrayal of stoicism in the face of adversity is more startling and fearsome than that in "If—." "Out of the dramatic first line emerges a darkness 'black as the pit' of hell, permeating 'from pole to pole' in all four stanzas and setting the tone for the gothic, sublime perspective of near death cast by the poem's imagery."<sup>274</sup> "In the negation of what 'Invictus' refuses to do—neither did he 'wince nor [cry] aloud' [nor] fear the

268. WILLIAM ERNEST HENLEY, *A BOOK OF VERSES* 56–57 (1893).

269. Ray et al., *Bloody, but Unbowed*, *supra* note 258, at 449.

270. *Id.*

271. *Id.*

272. *Id.*

273. Edward H. Cohen, *Two Anticipations of Henley's "Invictus,"* 37 HUNTINGTON LIBR. Q. 191, 192–94 (1974).

274. Ray et al., *Bloody, but Unbowed*, *supra* note 258, at 450.

‘Horror of the shade’—the hell of suffering is . . . powerfully invoked for the reader to experience, even as the unconquerable one ultimately rises above it all.”<sup>275</sup> “Each of the first three stanzas concludes with stoical evidence of self-mastery—soul unconquered, bloody head ‘unbowed,’ despair and fear kept at bay.”<sup>276</sup> “The [fourth and final] stanza breaks with the pattern . . . devot[ing] two lines to the triumph of self-mastery with the oft-quoted ‘I am the master of my fate: I am the captain of my soul.’”<sup>277</sup> “With this shift in emphasis, . . . gothic horror . . . gives way to heroic triumph in the Victorian stoic mode.”<sup>278</sup>

Though scholars “deride the poet as a ‘declaimer on a cosmic soap box’ or . . . condemn the poem for its ‘senseless swagger’ and its self-consciously heroic attitudinizing,” the poem is still “widely anthologized and learned by rote and quoted.”<sup>279</sup> Like “If—,” “Invictus” was met with divergent popular and academic receptions; both have been reviled by critics but revered by the masses.<sup>280</sup>

### B. Study I: A Review

Just as “If—” and “Invictus” themselves have been enduring, popular favorites in the English-speaking world for over one hundred years, so too have the messages from “If—” and “Invictus” had a lasting, central place in the discourse of black “Greek” life.<sup>281</sup> From their survey of BGLO members, Ray and colleagues found that “meanings derived from the recitation of these poems during the intake process [continue to have] relevance for the personal identities of young African Americans in college and beyond.”<sup>282</sup>

#### 1. Methods

Ray and colleagues conducted an online survey of members of the Divine Nine, the nine BGLOs represented in the NPHC, by sending an e-mail to a large listserv of BGLO members, soliciting their participation.<sup>283</sup> The researchers used a confidential survey to gather the responses of 366 individuals.<sup>284</sup> This survey, which also collected standard demographic information, sought to determine how salient “If—” and “Invictus” were during initiation and the nature of each poem’s contribution to respondents’ Greek and personal identities.<sup>285</sup> They found that not all respondents learned both poems, and so, where appropriate, they limited the

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. Cohen, *supra* note 273, at 191.

280. Ray et al., *Bloody, but Unbowed*, *supra* note 258, at 450–51.

281. *Id.* at 455.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

sample to respondents who had learned the given poem during initiation.<sup>286</sup> For example, when asking whether “If—” influenced the way members viewed their personal identity, they omitted respondents who had learned only “Invictus.”<sup>287</sup>

In addition to the quantitative and descriptive inquiries, the survey asked respondents two open-ended questions intended to gauge the respondents’ interpretation of the meanings of these poems.<sup>288</sup> For each of the poems, respondents were prompted: “Please provide us with one to four sentences on your interpretation of the meaning of ‘Invictus’/‘If—.’” After excluding respondents who did not answer or who said that they did not learn the poems during initiation, there were 269 responses for “Invictus” and 192 responses for “If—.”<sup>289</sup> Ray and colleagues analyzed the responses for key words or phrases (for example, perseverance, resolve, determination, overcome, self-mastery, self, religion, spirituality, inspiration, hope, success, race, gender, suffrage, racism, triumph, trials, tribulations, adulthood, coming of age, manhood, womanhood, and optimism) and synonyms for these words to establish patterns in the data.<sup>290</sup> They then developed themes from the literature to make sense of these patterns.<sup>291</sup> They searched the data thoroughly again, looking both for examples that confirmed the emerging patterns and examples that contradicted them.<sup>292</sup> Finally, they refined or eliminated propositions to explain negative cases.<sup>293</sup>

## 2. Preliminary Findings

Ray and colleagues determined that the likelihood of learning the poems depends on organizational affiliation.<sup>294</sup> Sorority members are less likely to learn either poem than are fraternity members.<sup>295</sup> Among fraternity members, Alpha Phi Alpha and Omega Psi Phi in particular, are more likely to learn both poems than are other BGLO members.<sup>296</sup>

In addition to determining which organizations required their members to learn the poems, Ray and colleagues wanted to know whether the poems’ wording remained salient to members.<sup>297</sup> They asked respondents whether they could still recite the poem word for word.<sup>298</sup> They found that more than 73% of respondents

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286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 455–56.

293. *Id.* at 456.

294. *Id.* at 460.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

who learned “Invictus” could still recite it word for word.<sup>299</sup> Unsurprisingly, there was a drop-off in the percentage of respondents who could still recite the substantially longer “If—.”<sup>300</sup> Despite its length, more than 54% of respondents stated that they were able to recite “If—” during initiation, with about one-third of respondents reporting that they could still recite it today.<sup>301</sup> The researchers concluded that while there was organizational variation in who learned the poems (“If—” in particular), the poems remained salient to BGLO members who learned them.<sup>302</sup>

### 3. Role of Poems in Greek Identity Formation

BGLOs have an initiation process riddled with organizational and historical information. Members gain status by being able to repeat this information, and the observed repetition of this information legitimizes the group and becomes a distinct characteristic of the black “Greek” identity.<sup>303</sup> In addition to the role poems play in the collective self-concept of BGLO members, the poems’ words, not least through members’ recitation and memorization of those words, become a characteristic of members’ personal identities.<sup>304</sup> Personal identity has been defined as “a sense of self built up over time as the person embarks on and pursues projects or goals that are not thought of as those of a community, but as the property of the person. Personal identity thus emphasizes a sense of individual autonomy rather than of communal involvement.”<sup>305</sup> “From this perspective, BGLO members view [“Invictus” and “If—”] as salient [not only] to their social identities as black “Greek” members [but] to their personal identities as individuals.”<sup>306</sup>

Ray and colleagues attempted to determine whether these poems influenced how BGLO members view their “Greek” and personal identities by asking participants to respond to each of the following survey items:

- (1) “Invictus”/“If—” plays a role in how I view my identity as a member of my “Greek” organization.
- (2) Did “Invictus”/“If—” help you persevere during your membership intake process?
- (3) I referred to or thought about “Invictus”/“If—” at other points during my life outside “Greek” membership.
- (4) Having potential members recite “Invictus”/

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 461.

303. *Id.*

304. *Id.*

305. JOHN P. HEWITT, SELF AND SOCIETY: A SYMBOLIC INTERACTIONIST SOCIAL PSYCHOLOGY 98 (8th ed. 2000).

306. Ray et al., *Bloody, but Unbowed*, *supra* note 258, at 461.

“If—” should be required to be a member of my “Greek” organization.<sup>307</sup>

“More than fifty percent of survey participants who learned ‘Invictus’ reported that the poem played a role in how they view their Greek identities.”<sup>308</sup> On the other hand, less than 25% of the respondents stated that “Invictus” “did not play a role in the formation of their Greek identities,” and the other 25% were neutral.<sup>309</sup> Nearly 70% of respondents reported that “Invictus” “helped them persevere during initiation . . . .”<sup>310</sup> Additionally, 87% reported that “Invictus” “helped them deal with life situations outside of Greek membership.”<sup>311</sup> Approximately 70% stated that new members should be required to learn “Invictus.”<sup>312</sup> Taken together, these findings suggest that “Invictus” “plays a substantial role in shaping the Greek and personal identities of BGLO members.”<sup>313</sup>

The percentages for “If—” are even higher than those for “Invictus.”<sup>314</sup> Roughly 58% of respondents who learned “If—” reported that the poem played a role in the formation of their Greek identity, whereas only 17% said that it played no such role.<sup>315</sup> Seventy-five percent stated that it helped them persevere during initiation, and, like “Invictus,” just over 87% reported that “If—” has helped them persevere in their lives outside of Greek membership.<sup>316</sup> More than 70% believed that new members should be required to learn “If—.”<sup>317</sup> Thus, these findings suggest that “If—,” like “Invictus,” is an important part of the formation of BGLO members’ Greek and personal identities.<sup>318</sup>

#### 4. *Poems’ Meaning*

Given the suggestion that “Invictus” and “If—” are meaningful to BGLO members’ Greek and personal identities, the question then becomes, what actual meaning do members derive from the poems?<sup>319</sup> Ray and colleagues looked at four unique themes: perseverance, self-mastery, spirituality, and racial uplift.<sup>320</sup> Nearly 50% of the respondents cited perseverance as a major theme prevalent in

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307. *Id.*

308. *Id.* at 462.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 463.

319. *Id.*

320. *Id.*

these poems, and more than 33% noted self-mastery.<sup>321</sup> Slightly less than 13% of respondents stated that “Invictus” is about spirituality, while racial uplift and miscellaneous responses represented smaller percentages.<sup>322</sup>

“Perseverance can be conceptualized as the ability to overcome obstacles, to never give up, and to be steadfast in the pursuit of a goal.”<sup>323</sup> “A member of Omega Psi Phi Fraternity in his thirties who was initiated in the early 1990s in the Northeast stated that, to him, the message of “Invictus” is, “to achieve or to make some positive progress, one will most certainly have to overcome hardships.”<sup>324</sup> A member of Sigma Gamma Rho Sorority in her late twenties from the Midwest said: “To me the entire poem shows perseverance and strength! How obstacles may get in your way, but it is your strength that helps you knock down those obstacles.”<sup>325</sup> Another Midwestern Sigma Gamma Rho in her early twenties stated, “‘Invictus’ is about coming out of something victorious regardless of the obstacles you face.”<sup>326</sup> A member of Delta Sigma Theta who was initiated in the early 2000s in the South stated: “For me, the meaning [of ‘Invictus’] is perseverance. I think of all the struggles that we’ve been through and are yet to face as Black people. I think the message here is to keep moving towards your goal and what you know is true and right, no matter what you must go through.”<sup>327</sup>

Self-mastery is the ability to control one’s own destiny despite obstacles and personal limitations.<sup>328</sup> Self-mastery is exemplified by the following lines: “I am the master of my fate: I am the captain of my soul.”<sup>329</sup> A member of Alpha Phi Alpha Fraternity from the South who was initiated in the 1980s took this from the poem: “No matter what grave circumstances an individual faces, they [sic] are the ultimate controller of the outcome.”<sup>330</sup> A member of Delta Sigma Theta Sorority who was initiated in the South before 1980 said, “‘Invictus’ encourages one to never give up in spite of the obstacles or hardships and supports the notion that a person is responsible for his own fate.”<sup>331</sup>

Spirituality involves the belief that a higher power, primarily God, is involved when one overcomes life’s obstacles.<sup>332</sup> A member of Alpha Phi Alpha Fraternity who was initiated in the South in the early 1990s stated: “I always think of

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 464.

325. *Id.*

326. *Id.*

327. *Id.* at 465–66.

328. *Id.* at 464.

329. HENLEY, *supra* note 268, at 57.

330. *Id.*

331. *Id.* at 464–65.

332. *Id.* at 465.



overcoming the most hopeless situation when I think of ‘Invictus.’ It’s a harrowing reminder that no matter how futile your current situation is, with God on your side you can conquer anything.”<sup>333</sup>

Racial uplift encompasses the ideal “related to ameliorating racial inequality. Here, responses were linked with what sociologist and Alpha Phi Alpha member W.E.B. DuBois conceptualized as the ‘Talented tenth’—that is, the top ten percent of African Americans who are well educated, politically engaged, and in a position of influence to help rectify racial inequality.”<sup>334</sup> “Recently, scholars who study BGLOs have shown that members of these organizations have historically contributed to the cause of racial uplift.”<sup>335</sup> A member of Delta Sigma Theta Sorority who was initiated in the 1980s in the South responded, “No matter how much the media depicts me [as] a Black woman in a negative way or how much pressure I must endure from society—I might have to retreat to my secret place to be emotional but they will never see me defeated.”<sup>336</sup>

### C. Study II

In order to gather the further qualitative data required to investigate the meaning that poems other than “If—” and “Invictus” provide to members of BGLOs, the authors of this Article conducted an online survey of members of the nine BGLOs represented in the NPHC. We sent an e-mail soliciting participation in the survey to a large listserv, composed mostly of alumni members of BGLOs. Using a confidential online survey, we gathered 1,281 responses. Besides collecting standard demographic information, the survey gauged the salience of poetry during initiation, when individuals learned the poems, and the interpretative meaning associated with the poems as they relate to the initiation process, the pledge experience, and hazing.

As a complement to Study I, some of the poems asked about in this study include “Don’t Quit,” “The Man Who Thinks He Can,” and “Test of a Man,” though other poems also were mentioned by the respondents.<sup>337</sup> Accordingly, we asked respondents two open-ended questions. First, we asked respondents to give us the names of poems they remember from their initiation process. Second, we asked them to tell us the meaning of those poems. We gathered 132 open-ended responses from men and 330 open-ended responses from women on these open-ended questions. In line with previous research on BGLOs,<sup>338</sup> we searched each

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. These poems are among the most commonly learned poems among BGLO pledges based on the authors’ experience within these organizations.

338. Rashawn Ray & Kevin Walter Spragling, *Am I Not a Man and a Brother? Authenticating the Racial, Religious, and Masculine Dimensions of Brotherhood Within Alpha*, in ALPHA PHI ALPHA, *supra* note 5,

of the responses for key words (for example, perseverance, hope, coping, and unity) and synonyms to these words to establish patterns in these data about the meaning of the poems and their relation to how information is used during the initiation process. These data were searched again for examples that both confirmed and contracted the established results. These results were refined or eliminated to explain negative cases.

### 1. *Sample*

As seen in Table 1, nearly 80% of respondents were sorority members (women), while slightly over 20% were fraternity members (men). These percentages are similar to the gender disparity in college attendance and graduation rates, as black women significantly outnumber black men.<sup>339</sup>

Interestingly, though, there are few differences in the responses given by age or period of initiation. This finding speaks to the history, consistency, and depth of BGLOs. However, there is a difference in the amount of information provided by gender. Fraternity members are more likely to provide specific details about the meaning of the information learned during the pledge process. This difference might be attributed to the larger percentage of men who pledged and did not go through the MIP compared to women, although a similar percentage of men and women became members as undergraduates (roughly 75%).

**Table 1:** Descriptive Statistics of Study II (N = 1281)

	<i>Fraternity</i>	<i>Sorority</i>
<i>Sample Size</i>		
Percentage	22.6	77.4
Number	289	992
<i>Initiation Process</i>		
Pledge	63	49.3
Membership Intake Process (MIP)	9	23.5
Pledge and MIP	28	27.2

at 207, 213; Rashawn Ray & Jason A. Rosow, *The Two Different Worlds of Black and White Fraternity Men: Visibility and Accountability as Mechanisms of Privilege*, 41 J. CONTEMP. ETHNOGRAPHY 66, 77 (2012).

339. DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* 39–40 (2003).

**Table 1** (continued): Descriptive Statistics of Study II (N = 1281)

	<i>Fraternity</i>	<i>Sorority</i>
<i>Initiation Period</i>		
Before 1980	22.1	24.5
1980 to 1990	22.8	21.2
1991 to 1995	11.1	12.3
1996 to 2000	12.8	12.7
2001 to 2005	21.1	15.4
2006 to 2010	10	13.9
<i>Initiation Stage</i>		
Undergraduate	76.1	73.6
Alumni	23.9	26.4
<i>Initiation Region</i>		
Northeast	10	9.7
Midwest	22.1	16.7
South	63.3	68
West	4.5	5.4
Abroad	0	0.1
<i>Type of University Attended</i>		
Historically Black College/University	41	47.6
Predominately White Institution	59	52.4
<i>Parent is/was Member of Respondent's Greek Organization</i>		
Yes	15.9	19.9
No	84.1	80.1
<i>Participates in Initiating New Members</i>		
Yes	58.1	48.7
No	41.9	51.3
<i>Financially Active</i>		
Yes	77.2	65.6
No	22.8	34.4
<i>Age</i>		
18 to 24	3.8	5.4
25 to 29	12.1	10.6
30 to 39	28.7	24.4
40 to 49	26.3	22.5
50 and Older	29.1	37.1

**Table 1** (*continued*): Descriptive Statistics of Study II (N = 1281)

	<i>Fraternity</i>	<i>Sorority</i>
<i>Race</i>		
Black	94.5	96.1
Non-Black	5.5	3.9
<i>Sexual Orientation</i>		
Heterosexual	92.7	98.8
Gay or Lesbian	3.8	0.3
Bisexual	3.5	0.9
<i>Religion</i>		
Protestant Christian	58	55.7
Non-Protestant Christian	19.8	23.2
Muslim	1.4	0.7
Other	14.9	17.8
Non-Religious	5.9	2.6
<i>Education Level</i>		
Some College	1.4	1
Bachelor's Degree	36.7	26
Master's Degree	44.3	51.8
Ph.D./M.D. or Equivalent	17.6	21.2
<i>Relationship Status</i>		
Married	61.6	45.7
Single	38.4	54.3

According to U.S. Census region codes,<sup>340</sup> over 60% of the sampled individuals became members in the South. Twenty-two percent of fraternity members were initiated in the Midwest compared to 17% of sorority members. About 10% of the sample became members in the Northeast, while only about 5% became members in the Western region. Considering that about half of African Americans are born and live in the Southern region of the United States and a much smaller percentage live in the West, this finding is expected. Our sample is similar across university contexts, as 54% became members at predominately white universities, while 46% became members at historically black colleges and universities.

Twenty percent of the women's mothers were members of the same

340. U.S. CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES (1984), available at [http://www.census.gov/geo/www/us\\_regdiv.pdf](http://www.census.gov/geo/www/us_regdiv.pdf).

sororities as their daughters, while 16% of the men's fathers were members of the same fraternity, so we do see some status transmission in our sample. Fifty-eight percent of fraternity members, compared to 49% of sorority members, participate in initiating new members. This gender difference is also seen concerning financial activity. Over 75% of fraternity members, compared to 66% of sorority members, are financially active. Participation in initiating new members and financial activity may also contribute to fraternity members being able to better recall information learned during their initiation process, as they are more likely than sorority members to see and hear the information. Still, the breadth of information learned during a pledge process compared to the MIP is more responsible for fraternity men being more likely to provide specific information than sorority women.

Over 90% of the sampled individuals reported being black and heterosexual, and over 75% reported being Christian. Sixty-two percent of men and 48% of women were married. This marriage disparity is similar to the broader African American population.<sup>341</sup> For the highest education degree obtained, over 30% had a bachelor's degree, nearly 50% had a master's degree, and about 20% had a Ph.D. or M.D. Thus, the respondents in this sample were as a whole a reliable, valid, and generalizable representation of the BGLO community.

## 2. Results

Forty percent of respondents report learning at least one poem during their initiation process. Roughly 75% of those respondents reported that the poem and related information was about the pledge experience, while over 90% say the information they learned during their initiation process suggested hazing. So an overwhelming percentage of respondents consciously link the poems and additional information (such as songs and chants sung in prose) to pledging and hazing.

The poems learned during initiation are mostly interpreted as a coping mechanism. Regarding the poem "Don't Quit," 65% of fraternity and sorority members reported that the poem helped them persevere during initiation. A similar percentage of fraternity members reported that "Test of a Man" and "The Man Who Thinks He Can" helped them persevere. Given the masculine tone of these two poems, however, only about 25% of sorority women stated that the poems helped them persevere during initiation, while roughly the same percentage said these poems did not help them persevere. Additionally, a much smaller percentage of sorority members reported learning "Test of a Man" and "The Man Who Thinks He Can." Below are some examples of how poetry served as a

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341. See RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 6 (2011) (describing black women as "the most unmarried group of people in our nation" and noting that seven out of every ten black women are unmarried, while "fewer than half" of black men are married).

coping mechanism. We removed the specific names of poems that would identify or single out a particular BGLO. During pledging interactions, poems are often repeated very fast for speed and efficiency or sung to a ballad or hymn. The responses below reflect this style.

One respondent stated, “Invictus was my lighthouse. No matter how bad the storm, I took solace in the blinking never moving secure lighthouse. It set my course.” Another respondent provided a more in-depth response about the meaning of information learned during his initiation process:

“Invictus” and “If” were both poems which spoke to me regarding endurance and the ability to cope or better yet, surmount situations that may be difficult and hard to bear. The songs/chants/greetings kept my spirits lifted, more so helping me to persevere which is why I marked the above answers as “neutral.” I enjoyed that part of the process because it gave us time to display our creativity while learning the history and pertinent information regarding the organization.

A sorority member echoed these sentiments. She said, “Those chants and songs helped my sisters and me to cross those ‘burning sands’ and take the wood of — Sorority, Inc. To wear [sorority insignia] is an honor. And when I went over, we earned it!” Many respondents talked about “earning it” and going through the difficulties and challenges to dutifully and rightfully wear their organization’s Greek letters with pride.

Possibly more pertinent to this Article than the descriptive statistics and meaning of the information mentioned above was when respondents reported learning poems and other information. Table 2 details the time period when respondents learned poems and other information during their initiation process. We asked respondents when, if their initiation process was broken into four quarters, they learned poems and additional information that suggested the process would be difficult or challenging. Nearly 60% of respondents reported learning the information in the first quarter of their process. If we think of a pledge process as lasting eight weeks, these findings suggest that a majority of individuals knew their initiation would be difficult within the first two weeks. An additional 25% reported learning information suggesting difficulty and challenges within the second quarter. So 85% of respondents who learned information during their initiation process made the link between the information they were expected to learn and retain, and the current and future difficulty and challenges of their process, within the first half of their process. Below, we detail some of the qualitative responses to show the severity of the type of information learned during an initiation process.

**Table 2:** Time Period When Respondents Learned Poems and Other Information that Suggested the Initiation Process Would Be Difficult or Challenging

	Fraternities	Sororities	Total Sample
1st Quarter	61.5%	57.6%	59.4%
2nd Quarter	21.9%	29.8%	26.2%
3rd Quarter	8.9%	7.8%	8.3%
4th Quarter	7.7%	4.9%	6.1%

One fraternity member made the following statement when asked to provide examples of poems, songs, chants, and greetings learned during the initiation process:

60 hours and soon will be over, 60 hours and soon will be —s no more wishing for 80 or a hundred! just to be with the men of — HIT ME HARD HIT ME QUICKA BIG BROTHA, THE SOONER YOU HIT ME THE SOONER WE'LL BE OVER, WE'LL BE OVERRRRR, OVERRRRR, OVER WHERE THE REAL MEN ARE!

When this man said, “wishing for 80 or a hundred,” he was referring to “taking wood” by being hit with a wooden paddle repeatedly on his buttocks.<sup>342</sup> Another respondent stated that his chapter had a poem that said, “Love the big black Moriah that beats my ass.” The “big black Moriah” was more than likely the Dean of Pledges or another member who had the role of “giving wood” to pledges. Moriah is a mountain range mentioned in the Book of Genesis in the Bible.<sup>343</sup> It refers to being ordained by God.<sup>344</sup> Another respondent stated that he had to repeat the following during his initiation process: “Sun goes down, moon comes up, big brothers beat across my butt Lord of mercy what kind of fool I am.”

Fraternity men, however, are not the only ones to give examples of information that refers directly to physical violence. A sorority member says the following: “Knowledge is power, taking wood by the hour; Get in the cut, Wood ain’t a friend of our butt.” A few sorority members mention versions of the following poem/song:

I’ve just got to be an —, an —. We may die, we may die, we may die, Oh, while we try, while we try, while we try . . . to make —. My

342. Although the authors are members of BGLOs and have personal experience with these types of phrases, they rely on their methodological training and experience as researchers of BGLOs to interpret these statements. As we mentioned during the details of Study II, a rigorous qualitative analysis was performed to alleviate personal biases and interpretations.

343. M.G. EASTON, ILLUSTRATED BIBLE DICTIONARY 476 (Cosimo Classics 2005) (1893).

344. *Id.*

head it feels like lead. I think I'm almost dead . . . . We may die . . . . Had to carry up the trays, give up my sexy ways . . . . We may die . . . .

Another sorority member says, "It was the blood, tears and sweat on my face for —, the ladies with grace." Similar to this respondent, several men and women mention a version of the poem/song "Sweat, Blood, and Tears" where initiates profess about the actual sweat, blood, and tears they shed to be members of their organization. Others may know Blood, Sweat, and Tears as the New York City band from the late 1960s and 1970s.<sup>345</sup> Besides "Sweat, Blood, and Tears," another popular poem/song includes: "I've got a feelin', I've got a feeling Brothers/[Sisters], I've got a feelin' / Someone's tryin' to sneak in my frat, and it ain't gonna be no shit like that . . . (repeat)." This poem/song indicates that there should be a penalty to pay for becoming a member, like a grueling pledge process, instead of a simple induction ceremony and/or paper application (which is commonly known as "skating," "sneaking in," or "paper made" members).

As mentioned above, some respondents have serious objections to the initiation experience. One sorority member states that the information she learned during her initiation process was "absolutely nothing but fear and degradation." A fraternity member says, "Reading the Bible was an example, chanting scriptures. Now I question God, my faith because where was God as I ask for help as I was brutally beaten?????" A fraternity member says, "I cannot remember, but I know I quit during undergraduate, and was made in graduate school, where I felt more adult behavior prevailed." To some people, this man's response seems very sensible. Interestingly, very few respondents actually mention quitting or stopping their process because of the practices mentioned here.

However, not all of the responses addressing the meanings, interpretations, and feelings about the information learned during the initiation process were negative. In fact, some respondents interpreted and internalized the information as a positive experience that continues to influence their life in beneficial ways. A fraternity member says the following: "— was something to aspire to. 'If—' was truly something I used to get me through the difficult times. I continue to use it today. I've also given that poem to each of my three children and they and I have talked about it at length." Another respondent says, "All songs I learned were positive and enhanced the image of the fraternity but I also felt they were a way [of] demonstrating my commitment by learning them." The following respondent not only provides his interpretation of his experiences during his initiation, but also possible ways to change the current level of hazing in Greek life. He says:

I think for our line what those chants, songs, and greetings did for us was build that brotherhood. We learned our history as an African American people and fraternity what it meant to step, so chants, what [our] letters

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345. BLOOD, SWEAT & TEARS, <http://www.bloodsweatandtears.com> (last visited Dec. 17, 2012).



meant, why no one can break our line. . . . Looking back I am glad we earned the right to wear those letters and did not take the paper route. I do understand some pledges are being hazed, that is why there should be a universal pledge handbook. Taking wood, maybe in a hell week situation, should be part of the process, but I just don't get the slapping, punching, kicking, buying someone's food, etc. should be part. Maybe cut out those parts for calisthenics. What's wrong with pushup[s], sit-ups, jumping jacks, I think that supports keeping in shape.

In sum, the poems and other information mentioned here speak to the difficulties and challenges that individuals endure to become members. These findings also imply that initiates know early on that their initiation process will be extremely difficult and imbued with physical and mental anguish. Despite this realization, many continue on with their initiation process. While some individuals report that the costs of membership outweigh the benefits, most individuals take pride in their initiation process. These respondents believe the Greek letters worn across their chests are properly earned. In this case, their initiation process was simply a rite of passage to membership that they consented to in some form.

#### *D. Poetry's Meaning for Law*

Some courts have rejected tort defense doctrines like assumption of risk and consent on the ground that hazing victims fail to fully appreciate the dangers involved. For example, in 1979, the Supreme Court of Nevada held that:

[C]onsent is not effective as a defense to battery "where the beating is excessively disproportionate to the consent, given or implied, or where the party injured is exposed to loss of life or great bodily harm." Furthermore, capacity to consent requires the mental ability to "appreciate the nature, extent and probable consequences of the conduct consented to."<sup>346</sup>

Several years later, the Court of Appeals of South Carolina held that an assumption of the risk defense was without merit, because the pledge in that case was not fully aware of the nature and extent of the risk involved in hazing.<sup>347</sup> Not surprisingly, "[m]ost of the traditional defenses [to hazing] fail . . . largely because of the serious nature of hazing . . ."<sup>348</sup>

However, hazing within the context of BGLOs raises a peculiar scenario. Implied assumption of the risk occurs when a plaintiff fully understands the risk of harm caused by the defendant's conduct and the plaintiff voluntarily chooses to remain engaged within the situation where that risk exists.<sup>349</sup> Primary implied

346. *Davies v. Butler*, 602 P.2d 605, 612 (Nev. 1979) (citations omitted).

347. *Ballou v. Sigma Nu Gen. Fraternity*, 352 S.E.2d 488, 495 (S.C. 1986).

348. Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scorned . . . And Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 375 (1998).

349. RESTATEMENT (SECOND) OF TORTS § 496C (1965).

assumption of the risk requires that the plaintiff (1) had knowledge of the risk, (2) appreciated the risk, and (3) had a choice to avoid, but voluntarily chose to accept, the risk.<sup>350</sup> Secondary implied assumption of the risk “occurs when the defendant owes a duty of care to the plaintiff but the plaintiff knowingly proceeds to encounter a known risk imposed by the defendant’s breach of duty.”<sup>351</sup> On the other hand, “[c]onsent is willingness in fact for conduct to occur” and “need not be communicated to the actor.”<sup>352</sup> It can be manifested by either action or inaction (express or implied).<sup>353</sup> If words or conduct are reasonably understood by someone to be intended as consent, they amount to apparent consent and are as effective as consent in fact.<sup>354</sup> Research on the poems that BGLO pledges learn and the point in their pledge/hazing process when they begin to learn these poems highlights what these aspiring BGLO members know about the hardships they will endure. In essence, our empirical work suggests that the poems demonstrate that BGLO pledges know that their pledge experiences are characterized by the endurance of hardship as manifested through the appreciation of such poem themes as perseverance and self-mastery. Furthermore, this knowledge seems to emerge during their initiatory processes. The fact is that aspiring BGLO members may know about the risks upon which they are about to embark when they pledge one of these organizations. The poems that BGLO pledges learn during their initiatory processes could and should be valuable evidence in tort cases brought against BGLOs themselves or their members in hazing lawsuits.

#### CONCLUSION

BGLOs are among the oldest and most enduring institutions in the African American community. While scholarship on BGLOs has just begun to bloom within the past few years, questions about how BGLOs intersect with the law and how legal scholarship can answer these questions have just begun to be addressed. In this Article, we take an initial step toward making (legal) sense of these organizations. In short, we explore the meaning of poems within BGLO hazing culture and the evidentiary utility of these poems in tort defenses. We acknowledge that our topic is a quirky one. But it raises equally quirky but no less important questions about the evidentiary utility of other aspects of BGLO hazing culture. For example, BGLO pledges often create songs, chants, and greetings that reflect their understanding of their hazing experiences. They often wear paramilitary gear as if they are going off to “war.” Some BGLO fraternity chapters

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350. *Reimer v. City of Crookston*, 326 F.3d 957, 966 (8th Cir. 2003).

351. *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 873 n.3 (8th Cir. 2003).

352. RESTATEMENT (SECOND) OF TORTS § 892(1) (1979).

353. *Id.*

354. *Griggs-Ryan v. Smith*, 904 F.2d 112, 116–17 (1st Cir. 1990); RESTATEMENT (SECOND) OF TORTS § 892 (1979).

have monikers such as “bloody,” “deadly,” or “merciless.” Furthermore, some organizations have unofficial symbols, like Alpha Phi Alpha’s ape. Each of these aspects of BGLO life may underscore a message that is intentionally conveyed by the organizations or their chapters or one understood by pledges as it relates to hazing.<sup>355</sup>

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355. See, e.g., Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304 (2008) (finding that people’s subconscious association of blacks with non-human primates influences their attitudes about the death penalty for criminal defendants depending on the race of the defendant).