

4-18-2017

## Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law

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### Recommended Citation

Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 Mont. L. Rev. 31 (2017).

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## ARTICLES

### INSTITUTIONAL FAILURE, CAMPUS SEXUAL ASSAULT AND DANGER IN THE DORMS: REGULATORY LIMITS AND THE PROMISE OF TORT LAW

Professor Andrea A. Curcio\*

*In the winter of 1979, outside a fraternity house at a small liberal arts elite college, the boys built a snow sculpture of a train<sup>1</sup> with the number 5 displayed on it. The sculpture glorified the fact that 5 boys had raped a young college woman. The train remained outside the fraternity house for weeks while school administrators drove by the house on their way to and from campus. No one questioned the boys.<sup>2</sup>*

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\* Professor of Law, Georgia State University College of Law. The author thanks Professors Wendy Hensel, Eileen Kaufman, & Timothy Lytton, as well as Thomas Michael Hodell Jr., all of whom provided insight and expertise that greatly assisted with the research and drafting of this paper. While they may not agree with all the interpretations or conclusions of this paper, their help was deeply appreciated. The author also thanks Billy Fawcett for his work as a graduate research assistant and the Georgia State University College of Law librarians, in particular Pam Brannon, for their collective unending patience and support with research requests. Finally, she thanks the University of Montana School of Law for hosting this important symposium.

1. Julie K. Ehrhart & Bernice Sandler, *Campus Gang Rape: Party Games?*, ASS'N OF AM. COLLS. PROJECT ON THE STATUS OF WOMEN 2 (Nov. 1985), <https://perma.cc/JTP6-GDSP> (noting that fraternity members often call gang rape “pulling a train” to symbolize “men lining up like train cars to take turns”).

2. This story is based upon my own experience. I also had a roommate who was raped in a dorm room her sophomore year of college. This all happened almost forty years ago. Unfortunately, the stories of campus sexual violence, silence about that violence, and universities ignoring the problem are not new. As for the snow sculpture, it is impossible to say whether university administrators knew what the sculpture symbolized. I can only say that the gossip on campus about that sculpture was rampant and widespread.

I. INTRODUCTION<sup>3</sup>

For decades many institutes of higher education (IHEs) have purposefully ignored the peer-on-peer sexual assaults occurring with alarming frequency on their campuses<sup>4</sup> and have discouraged victims from reporting or pressing criminal charges against their alleged perpetrators.<sup>5</sup> These institutional failures have gotten significant attention recently.<sup>6</sup> What has not received much attention is the fact that most on-campus sexual assaults happen in college dorm rooms.<sup>7</sup>

Ignoring *where* most on-campus sexual assaults occur matters for numerous reasons. First, while schools have begun addressing the issue of campus sexual assault, many still are not being totally open about the problem. Data suggests that those most vulnerable to sexual assault are freshmen early in the first semester<sup>8</sup> and that most victims know their assailant.<sup>9</sup> On residential campuses, most freshmen live in dorms. Failure to alert these students to *where* they are at greatest risk for an on-campus acquaintance

3. While sexual violence victims are not exclusively women, throughout this article, I use female pronouns to refer to victims and male pronouns to refer to perpetrators because this reflects reality—most victims are women and most perpetrators are men. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L. J. 205, 207 n.1 (2011). I also use the term sexual assault to describe all forms of unwanted sexual activity, including rape. See CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 3 (1993) (noting that “[s]exual assault is a general term that describes all forms of unwanted sexual activity”).

4. In October 1985, after a three-year survey of 7,000 students, Ms. Magazine published an article that discussed how one in four college women reported being raped or subjected to attempted rape, although most failed to identify what had happened as rape. See Ellen Sweet, *Date Rape Revisited*, WOMEN’S MEDIA CENTER (Feb. 23, 2012), <https://perma.cc/VT52-VT5H> (discussing 1985 Ms. Magazine article, “*The Story of an Epidemic and Those Who Deny it*”). The Ms. Magazine article was followed by a published report in 1988 detailing the study’s findings. See ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE* (1988). In the early 1990s, the national media engaged in widespread coverage about acquaintance rapes on college campuses. See BOHMER & PARROT, *supra* note 3, at 1–3. Additionally, in 1985, an extensive study about the problem of gang rape on college campuses was published by the Association of American Colleges Project on the Status of Women. See Ehrhart & Sandler, *supra* note 1. That report outlined the extent of the problem and proposed model prevention programs—recommendations that likely were largely ignored by many schools.

5. Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L. J. 1195, 1216 (2014) (discussing various cases in which universities discouraged reporting).

6. See, e.g., Schroeder, *supra* note 5, at 1218–24 (discussing widespread publicity surrounding how Notre Dame, Marquette and University of Colorado Boulder dealt with assault reports).

7. See *infra* Section II(B)(1) (compiling data regarding incidence of sexual violence by location).

8. Matthew Kimble et al., *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, 57 J. OF AM. COLL. HEALTH 331 (2008) (noting that the start of freshmen year has been thought to be such high risk for incoming students that the start of the school year has become known as “the red zone” and finding support for the existence of the “red zone”).

9. Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEP’T OF JUST. 17 (Dec. 2000), <https://perma.cc/F8W4-N2BW>.

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sexual assault illustrates a long-standing, and ongoing, institutional failure by many schools to deal forthrightly with a problem they know, or should know, exists. Second, by focusing on threats external to the dorms, IHEs provide students with a false sense of security once they arrive at the dorm, therefore potentially contributing to dorm-based assault risks because potential victims, and bystanders who might intervene, are not aware of the risks in the dorm itself and thus may be unaware of the need to address those risks.<sup>10</sup> Third, ignoring where sexual assaults occur means that many schools are not studying whether dorm-based interventions can reduce acquaintance assault risks.<sup>11</sup> Finally, the fact that this information has not been widely disseminated raises questions about whether existing regulatory schemes can adequately motivate institutional behavioral changes in light of many schools' beliefs that their reputational and financial interests are best served by presenting their campuses, and particularly their campus housing, as bucolic and safe educational and living environments.<sup>12</sup>

Laws cannot solve the multi-dimensional campus and societal sexual assault problem.<sup>13</sup> However, regulations and litigation can influence institutional behaviors. That is what current federal regulations hope to do. Existing federal regulations require IHEs to publicly disclose various types of sexual violence occurring both on- and off-campus<sup>14</sup> and to facilitate student sexual violence reporting.<sup>15</sup> More recently enacted regulations seek to reduce sexual violence risks by mandating awareness and prevention education.<sup>16</sup>

This essay suggests that for numerous reasons, existing regulations face implementation roadblocks and are unlikely, standing alone, to motivate many schools to meaningfully address the widespread acquaintance sexual assault problem—especially assaults occurring in dorm rooms. However, litigation, and publicity arising from litigation, may be a powerful

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10. See *infra* Section II(B)(3)(a) (discussing how schools may be misleading students into thinking their dorms are a “safe space”).

11. See *infra* Section II(B)(3)(b) (discussing missed risk reduction opportunities).

12. See *infra* Section III(A)(2) (discussing actual and perceived financial and reputational disincentives when it comes to disclosing the high percentage of campus rapes occurring in dorm rooms).

13. Sexual assault is a societal problem, not just one that occurs on college campuses. See generally Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 4, 2014), <https://perma.cc/7T45-3RLJ> (discussing national sexual violence survey results).

14. See *infra* Section II(B)(1) (describing Clery Act requirements).

15. See *infra* text accompanying notes 106–108 and 119 (discussing Dear Colleague Letter and its later codification).

16. See *infra* text accompanying notes 108–112 (describing Campus SaVE Act requirements).

force in reforming schools' dorm-based assault risk reduction efforts.<sup>17</sup> That is what has happened with the campus assault reporting process. Largely due to Title IX enforcement actions, civil litigation, and the resulting publicity, schools have begun to take seriously their responsibility to facilitate the assault reporting process and to address campus sexual assault more generally.<sup>18</sup>

This essay asks whether tort law negligence claims can fill a gap between existing regulations and Title IX actions when it comes to addressing dorm-based acquaintance sexual assaults. It suggests that just as Title IX suits are putting pressure on schools to improve how they handle sexual assault reports, negligence claims based upon IHEs' failure to engage in meaningful dorm-based risk reduction efforts may focus attention on institutional failures that need to be addressed and consequently may result in self-regulatory reform.

Part II of this essay provides a brief review of existing data that speaks to the breadth of the campus sexual assault problem, particularly the data indicating that the majority of on-campus rapes occur in college dorms. It also briefly discusses why *where* sexual assaults occur matters. Part III identifies existing regulations and how and why those regulations have not fully achieved their goals of encouraging widespread meaningful sexual assault risk reduction efforts, as well as why existing regulations do little to eliminate the institutional silence about the "danger in the dorms." Part IV looks at whether tort law negligence claims can complement existing regulations' goal of motivating schools to explore and develop meaningful acquaintance assault risk reduction mechanisms. Drawing from Professor Timothy Lytton's analysis of clergy sexual abuse cases,<sup>19</sup> it examines negligence claims' potential to re-frame the issue of campus sexual assaults occurring in dorms as part of a long-standing and on-going institutional failure. It discusses how that framing may lead to media attention, which may in turn lead to increased public pressure and potentially greater IHE self-

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17. This is what happened in clergy sexual abuse cases. *See generally* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008).

18. Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, KUOW (Aug. 12, 2014), <https://perma.cc/9Z4T-MKWB> (transcript of NPR interview with women's advocates who note that schools only began to pay attention to campus sexual assaults when they realized they faced potentially serious consequences for violating Title IX if they failed to change their policies); Robin Wilson, *In Context: Why Colleges Are on the Hook for Sexual Assault*, THE CHRON. OF HIGHER EDUC., Fall 2014, at 3 (noting that "[i]t wasn't until 2011, experts say, when the Education Department's Office of Civil Rights released a 'Dear Colleague' letter, that campuses began taking their role more seriously").

19. Framing the issue as one of institutional failure, and discussing how that framing influences behaviors, builds upon work done by Professor Timothy Lytton in context of clergy sexual abuse cases. *See* LYTTON, *supra* note 17.

regulation. It also looks at how negligence claims, via discovery and investigation during those claims, can provide policymakers with information to help inform future policy decisions. Part V examines barriers to using tort law negligence claims to motivate institutional change. In particular, it notes that before tort law can be a vehicle for change, courts must reformulate the conceptualization of schools' duty of care. This section discusses how, like in clergy sexual abuse cases, reframing the issue from one of "a few bad men" to one of institutional failure can eventually shift public perceptions and judicial attitudes when it comes to schools' responsibilities to take reasonable precautionary measures to protect their students (particularly students living in dorms) from acquaintance sexual assaults. The section goes on to suggest a framework to conceptualize schools' duty to use reasonable precautionary measures to protect students living in their dorms as a special duty based on schools' superior knowledge of risks and their ability to regulate dorm life. Finally, this section also briefly reviews barriers to tort litigation claims that may limit tort law's ability to effectuate immediate change.

At the outset, it is important to acknowledge that there is not a single way schools approach campus sexual assaults. As early as 1993, Professors Bohmer and Parrot noted that schools have dealt with campus sexual assault along a continuum that runs from engaging in meaningful prevention efforts and enforcing severe offender penalties to ignoring the problem or, in some cases, blaming the victim.<sup>20</sup> The proposals in this essay target the latter schools but may also inform the former.

## II. DATA AND DANGER IN THE DORMS

### A. *Campus Acquaintance Sexual Assaults: A Widespread and Long-Standing Problem*

Studies indicate an extremely high rate of sexual victimization among college students.<sup>21</sup> While sexual violence affects all students regardless of gender,<sup>22</sup> most sexual violence victims are women.<sup>23</sup> Reports suggest ap-

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20. BOHMER & PARROT, *supra* note 3, at 123–24 (noting the continuum of colleges' behaviors when it comes to handling campus sexual assault in the 1990s). Victim blaming is not something of a bygone era. See, e.g., Ana Carbrera & Sara Weisfeldt, *Punished After Reporting Rape at Brigham Young University*, CNN (Apr. 29, 2016), <https://perma.cc/QW58-TCRW> (discussing how young women who reported rapes at BYU were disciplined or treated with disbelief after reporting sexual assaults).

21. See David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS'N OF AM. UNIV. 26 (Sept. 21, 2015), <https://perma.cc/UJZ4-B6WB> (discussing studies that indicate an extremely high rate of non-consensual sexual contact involving force or incapacitation occurring on college campuses).

22. *Id.* at 24 (noting that 19% of TGQN, 17% of women and 4.4% of male students reported experiencing some form of sexual assault).

proximately one in four to five college women experience some form of unwanted forcible or incapacitated sexual violence from the time they enter school until graduation.<sup>24</sup> For college women, the highest risk exists during the first few months of their freshmen year.<sup>25</sup> In fact, this vulnerability has led the first few weeks of college attendance to be labeled the “red zone” for college freshmen.<sup>26</sup> Finally, data indicates that approximately 90% of sexual assault victims know their assailant.<sup>27</sup> Much of this data has been part of the public discussion for decades.<sup>28</sup> This essay discusses data that has been largely ignored—data about *where* most on-campus assaults occur.

### B. Danger in the Dorms

#### 1. Clery Act Data Shows Most On-Campus Sexual Assaults Occur in Campus Housing

The Clery Act<sup>29</sup> requires schools to compile and report statistics on a wide range of crimes occurring “on campus, in or on noncampus buildings or property, and on public property.”<sup>30</sup> The report must identify where the crime occurred, and for crimes occurring on campus, schools must disclose whether the crime occurred in campus residential housing.<sup>31</sup> Under the Clery Act, colleges and universities must disclose all reported crimes, regardless of whether these reports led to investigations or disciplinary ac-

23. Cantalupo, *supra* note 3, at 210.

24. Cantor et al., *supra* note 21, at 26 (reporting findings from two studies indicating anywhere between one in four and one in five college senior women report an incident of non-consensual sexual contact involving force or incapacitation since entering college). *But see* L. Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000–2015*, TRAUMA VIOLENCE ABUSE (Feb. 22, 2016) (advance online publication, doi:10.177/1524838016631129) (noting that the data needs further refinement by type of sexual violence and finding significant variability in the forms of sexual victimization on college campuses with unwanted sexual contact, including sexual coercion, as the most prevalent form of sexual victimization on college campuses, followed by incapacitated rape and completed or attempted forcible rape).

25. Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUST. STAT. 75 (Jan. 2016), <https://perma.cc/V7D4-BGXL> (noting that the most vulnerable students were freshmen, with the incidence of assault declining each year after the freshmen year).

26. Kimble et al., *supra* note 8.

27. Fisher et al., *supra* note 9, at 17 (noting that for “completed and attempted rapes, about 7 in 10 offenders were known to their victims”).

28. BOHMER & PARROT, *supra* note 3, at 26 (noting, in their book published in 1993, that most sexual assaults occur between acquaintances, one in four college women will experience an attempted or completed forced sexual encounter and that the sexual assaults happen most often during the women’s first year in college).

29. 20 U.S.C.A. § 1092(f)(1)–(15) (West 2013).

30. *Id.* § 1092(f)(1)(F).

31. *Id.* § 1092(f)(4)(A)(i); *Handbook for Campus Safety and Security*, U.S. DEP’T OF EDUCATION 2-9 (June 2016), <https://perma.cc/B592-BKTQ> [hereinafter Clery Act Handbook 2016].

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tions,<sup>32</sup> and regardless of whether the crime victim filed a police report or pressed charges.<sup>33</sup> A crime is considered “reported” if it is brought to the attention of a campus security authority.<sup>34</sup>

Until 2014, schools were required to report sexual offense crimes as either forcible sexual offenses or non-forcible sexual offenses.<sup>35</sup> In 2014, sexual offense reporting categorization changed. Now, schools must report sexual offenses as rapes<sup>36</sup> and fondlings.<sup>37</sup>

The reported Clery Act data indicates that in 2014, 82% of all reported *on-campus* rapes occurred in campus residence halls and that 71% of *all* reported rapes occurred in campus residence halls.<sup>38</sup> The majority of on-campus fondlings also occurred in campus residence halls.<sup>39</sup> [See Table 1.]

Similar statistics exist for 2005–2013.<sup>40</sup> In those years, approximately 70% of all reported *on-campus* forcible sexual offenses occurred in residence halls and 54–60% of *all* reported forcible sexual offenses occurred in campus residence halls. [See Table 2.]

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32. Clery Act Handbook 2016, *supra* note 31, at 3-3.

33. *Id.*

34. Campus security authorities encompass a wide range of faculty members, students, and administrators as well as more traditional security personnel. Clery Act Handbook 2016, *supra* note 31, at 4-1 to 4-5 (discussing who is a “campus security authority”).

35. Forcible offenses were defined as “any sexual act directed against another person, forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent.” Non-forcible sex offenses were defined as “unlawful, non-forcible sexual intercourse.” Clery Act Handbook 2016, *supra* note 31, at 3-6.

36. Rape is defined as “the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” *Id.*

37. Fondlings are defined as “the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.” *Id.*

38. *Campus Safety and Security Data Analysis*, U.S. DEP’T OF EDUC. (2014), <https://perma.cc/HTW7-AN5Z> (The data was compiled and analyzed using the online Campus Safety and Security Data Analysis tool available through the Department of Education. At the time of publication, the most recently available data was from 2014) [hereinafter USDE Data Analysis].

39. *Id.*

40. *Id.* (The data for Table 2 was compiled via a search using the online Campus Safety and Security Data Analysis tool, and the search looked at a series of Excel spreadsheets that contained data for forcible and non-forcible sexual offenses from 2005–2013).

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TABLE 1: 2014 CLERY ACT DATA WHICH REPORTS  
RAPES AND FONDINGS

Reported Rape					
Year	Total	On Campus	In Residence Halls	<i>Overall</i> % in –residence halls	% of <i>on-campus</i> in residence halls
2014	5187	4464	3658	71%	82%

  

Reported Fondling					
Year	Total	On Campus	In Residence Halls	<i>Overall</i> % in –residence halls%	% of <i>on-campus</i> in residence halls
2014	2709	2330	1236	46%	53%

TABLE 2 – 2005-2013 CLERY ACT REPORTS

Raw Numbers–Forcible Sexual Offenses <sup>41</sup>					
Year	Total Reported	Total Reported Occurring On Campus	Total Reported Occurring in Residence Halls	<i>Overall</i> % reported occurring in Residence Hall	% of <i>on-campus</i> reported in Residence Hall
2005	3583	2704	1939	54%	72%
2006	3490	2710	1922	55%	71%
2007	3490	2698	1880	54%	70%
2008	3267	2666	1887	58%	71%
2009	3278	2604	1802	55%	69%
2010	3584	2932	2063	57%	70%
2011	4198	3425	2416	57%	71%
2012	4949	4075	2084	57%	70%
2013	6016	5052	3632	60%	72%

## 2. Other Data Also Indicates Most On-Campus Assaults Occur in Dorms

The Clery Act data set forth above in Tables 1 and 2 provides significant support for finding that the majority of on-campus sexual assaults occur in campus residence halls. However, under the Act, campus residential housing includes all forms of on-campus student housing: dorms, married

41. This table does not include the data for non-forcible sexual offenses since the reported number of non-forcible offenses averaged less than 60 per year across the relevant time period.

student housing, and fraternity and sorority houses owned or controlled by the university or located on university property.<sup>42</sup> For reporting purposes, the Act does not require schools to distinguish between Greek housing and other on-campus residence halls.<sup>43</sup> Thus, one might assume that the vast majority of the reported assaults occur in fraternity or sorority housing because of the data linking Greek membership to increased risk of being involved in a sexual assault.<sup>44</sup> That assumption would likely be incorrect. A study of campus sexual assaults occurring on Massachusetts' college campuses from 2001 to 2011 found that 81% occurred in dorms, 9% happened in a house or apartment and only 4% occurred in a fraternity house.<sup>45</sup> Other data also suggests the majority of on-campus assaults occur in dorm rooms. For example, a study by a higher education insurance company found that 53% of *all* claims against universities for campus sexual assaults involved incidents occurring either in the victim's or the perpetrator's dorm room.<sup>46</sup>

The data set forth above relies upon reported incidents. However, many acts of sexual violence are unreported.<sup>47</sup> Where do those occur? A 2014–2015 study of 150,000 students across 27 campuses sought information about unreported, as well as reported, incidences of sexual violence.<sup>48</sup> That study found that for female undergraduate students, 56% of forcible penetration incidents occurred on campus<sup>49</sup> with the majority of the on-campus incidents taking place in a university residence hall or dorm.<sup>50</sup> This study confirms earlier study findings that looked at both reported and unreported incidents and concluded that “almost 60 percent of the completed

42. Clery Act Handbook 2016, *supra* note 31, at 2-2.

43. *Id.* at 2-9 to 2-10.

44. Jacqueline C. Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 VIOLENCE AGAINST WOMEN 835, 844 (July 2009) (finding that sorority members were more likely to have experienced campus sexual assault than non members); Sarah K. Murnen & Maria H. Kohlmen, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 153 (July 2007) (performing a meta-analysis of numerous studies and concluding that athletes and fraternity members were more likely than non-athletes and non-fraternity members to hold attitudes of sexual aggression and, to a smaller extent, to self-report sexually aggressive behavior).

45. *Analysis of College Campus Rape and Sexual Assault Reports 2000–2011*, MA OFFICE OF PUBLIC SAFETY AND SEC. 7 (2012), <https://perma.cc/R42T-JC28>.

46. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS INS. 6 (2015), <https://perma.cc/6Z25-ZNQP>.

47. *See infra* Section III(A)(1) (discussing under-reporting problems).

48. Bonnie S. Fisher et al., *Characteristics of Nonconsensual Sexual Contact Incidents: Penetration or Sexual Touching by Force or While Incapacitated*, WESTAT 1 (May 23, 2016), <https://perma.cc/SWY9-RN4V>.

49. *Id.* at 46.

50. *Id.* The Fisher et al. study gets significantly more granular, dividing incidents between types of assault (forcible penetration, forcible sexual touching, incapacitated forcible penetration and incapacitated forcible sexual touching). It also divides responses based upon gender [including transgender] and graduate versus undergraduate status. The data about assault location varies somewhat depending upon gender, type of assault, and whether it involved graduate or undergraduate students. *Id.* at 43–57.

rapes that occurred on campus took place in the victim's residence, 31 percent occurred in other living quarters on campus, and 10.3 percent took place in a fraternity."<sup>51</sup>

More data on exactly where campus sexual assaults occur would be useful, and questions about assault location should be incorporated into future studies and surveys.<sup>52</sup> However, even without these studies, existing data indicates that when it comes to on-campus sexual assaults, the vast majority occur where on-campus students live (i.e., college dorm rooms).

### 3. *Why Where Assaults Occur Matters*

#### a. *Current Prevention Efforts May Create a False Sense of Security*

Failing to inform students that the majority of on-campus rapes occur in dorm rooms means students may not realize the need to engage in precautionary measures in the dorms—especially because most of the sexual assault awareness and risk reduction education and training focuses on risks *external* to the dorms. For example, to satisfy the statutory sexual violence prevention and awareness education requirements,<sup>53</sup> many colleges and universities require new students to complete an online training program<sup>54</sup> and also offer additional sexual assault awareness and risk reduction programs.<sup>55</sup> However, it is likely that many of these programs fail to emphasize that the highest risk area on campus is college dorm rooms.<sup>56</sup> This is true despite the fact that many schools require freshmen to live in on-cam-

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51. Fisher et al., *supra* note 9, at 18. This study did find that overall, off-campus victimization was more common than on-campus sexual victimization. *Id.* at 19.

52. Future studies should look at not just whether an assault occurred in a dorm, but also should identify that dorm's characteristics: was it a dorm that housed a particular cohort of students such as international students, honor students, religious students, athletes, etc.; was it a single-sex or co-ed dorm; if co-ed, was it co-ed by floor, room, or hall. This data could help better identify if any particular type of dorm, or dorm configuration, presents higher risks of assault and would allow for better risk reduction targeting.

53. See *infra* text accompanying notes 116–117 (discussing statutory requirements for awareness and prevention education).

54. See Robin Wilson, *Why Campuses Can't Talk About Alcohol When It Comes to Sexual Assault*, THE CHRON. OF HIGHER EDUC. 9 (Sept. 4, 2014), <https://perma.cc/T4NE-57HM> (noting that many campuses offer educational programs that are often online courses, that warn about the dangers of sexual assault and how to prevent it). A wide range of online programs such as Haven, Campus Clarity, Unless There is Consent, and Every Choice are available to colleges and universities.

55. See, e.g., Tovia Smith, *How Campus Sexual Assaults Came to Command Attention*, ALL THINGS CONSIDERED (Aug. 12, 2014), <https://perma.cc/E6RM-Y8X4> (describing a skit at Rutgers' required orientation in which a young woman ends up in a young man's room, resisting his increasingly aggressive advances).

56. For example, on August 23, 2016, the author's daughter was enrolled at Georgia State University and the author sat through her daughter's online Haven sexual violence training. In that training, one slide out of hundreds noted that 60% of all campus assaults occur in campus residence halls. Another

pus housing,<sup>57</sup> freshmen are the most vulnerable to campus sexual assault,<sup>58</sup> and the data indicates that the majority of on-campus assaults occur in campus housing.<sup>59</sup>

Not only do education programs barely mention the risk of dorm-based assaults, many assault reduction education efforts focus on threats *external* to the dorm. For example, students are told to watch their drinks, take buddies to parties, and leave people and places that might make them feel unsafe.<sup>60</sup> Campus safety precautions also focus on preventing stranger attacks. For example, schools emphasize the presence of blue call boxes along campus paths, security escorts, and the swipe cards or other identification methods that limit entry into a dorm.<sup>61</sup> This focus on security measures external to the dorms may give students a false sense of security when they reach their dorms because no one talks to them about the fact that the majority of on-campus rapes occur *in* the dorms. The lack of awareness of risks present in dorms leaves students unprepared for situations in which the risks manifest into realities.

*b. Ignoring Assault Location Means Potential Missed Opportunities for Risk Reduction*

Ignoring the data about where most on-campus rapes occur means many schools are not focusing on risk reduction strategies for one of the highest risk areas on campus—the dorms. Dorm-based risk reduction programs may be effective in lowering campus sexual assaults. A building level intervention ties prevention efforts to a particular building. The CDC found that a building level intervention program, *Shifting Boundaries*, was one of three interventions that had rigorous evidence demonstrating effectiveness in preventing sexual violence.<sup>62</sup> *Shifting Boundaries* combined

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slide noted that going to someone's room was not consenting to sex. There was no other reference to the risk of sexual assault occurring in dorm rooms.

57. Danielle Douglas Gabrielle, *Freshmen Residency Rules Sometimes Force Students to Pay Prohibitive Costs*, WASHINGTON POST (Sept. 29, 2015), <https://perma.cc/2H9J-54QC> (noting that at least 87 colleges require freshmen to live in on-campus housing).

58. Kimble et al., *supra* note 8.

59. *See supra* Section II(B) (discussing data on campus sexual assault location).

60. *See The Realities of Sexual Assault*, BESTCOLLEGES.COM (2016), <https://perma.cc/P4FX-DUPA> (advising students to watch their drinks, party with friends, and leave people and places that make you feel unsafe); *Sexual Assault Risk Reduction Strategies*, CORNELL COLLEGE (2016), <https://perma.cc/Z9WD-7WDZ> (Cornell College risk reduction guidelines which focus attention on campus parties).

61. Over 25 years ago, it was noted that these kinds of external security measures misdirect attention to stranger rape on campus when the real problem is acquaintance rape. Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 40, 48 (1991).

62. Sarah DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 16 AGGRESSION AND VIOLENT BEHAVIOR 346, 352 (2014).

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classroom education efforts about respecting others' boundaries<sup>63</sup> with building-based interventions such as placing posters throughout the building to increase awareness of sexual violence dangers and encourage reporting and identifying hot spot areas that required greater faculty and security supervision.<sup>64</sup> Those interventions reduced middle school sexual assaults.<sup>65</sup> While all of the *Shifting Boundaries* interventions may not be directly applicable to college dorms, some of them may be transferrable. In particular, visible reminders of risk factors, risk reduction techniques, and the need to report assaults could be placed throughout dorms via posters, or even flyers posted on the back of all dorm bathroom stall doors. Personal boundary education could also potentially be introduced in dorm-based settings.

The *Shifting Boundaries* interventions are simply one example of what colleges might do if they paid attention to where most on-campus rapes happen. They also could experiment with other building-level interventions to see if they resulted in risk reduction. Do bigger scale interventions such as strict enforcement of “no overnight guest rules” and “no alcohol” policies significantly reduce assault risks?<sup>66</sup> Does it make a difference if dorms are single sex, co-ed by floor, co-ed by hall, or co-ed by room? Are there particular kinds of dorm populations<sup>67</sup> and dorm configurations that put students at greater risk? None of this suggests that schools would have an obligation to go back to single sex dorms or “no overnight visitors” policies, but if studies indicated certain dorm configurations or dorm policies presented a significantly smaller risk, schools might have an obligation to disclose that information to students and parents. However, as long as schools ignore where assaults occur, information is unlikely to be developed or disclosed.

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63. Bruce G. Taylor et al., *Shifting Boundaries: Final Report on an Experimental Evaluation of a Youth Dating Violence Prevention Program in New York City Middle Schools*, U.S. DEP'T OF JUST. 238–42 (Oct. 2011), <https://perma.cc/FZ4F-ADE7> (setting forth the Restricting Boundaries Agreements).

64. *Id.* at 5.

65. *Id.* at 71.

66. One study published in an online blog suggests that alcohol bans combined with bans on overnight guests significantly reduce campus sexual assault risks. B. Richardson and J. Shields, *The Real Campus Sexual Assault Problem and How to Fix It*, COMMENTARY (Oct. 1, 2015), <https://perma.cc/FAS4-2RG7>. While that study was not peer reviewed, it does raise interesting questions. While it is unlikely that colleges, parents, and students will agree that a return to the 1950s type of dorm regulations are viable or desirable, valid and reliable studies can provide parents and students with information that may be useful as they choose colleges or make dorm selections.

67. Earlier studies suggested that men living in all-male dorms, when co-ed dorms were also an option, were more likely to commit sexual assaults than those living in co-ed dorms. BOHMER & PARROT, *supra* note 3, at 22. Whether that has changed since the study was done decades ago is another issue worth examining.

### III. LEGISLATION, REGULATORY LIMITS AND COLLEGES' MOTIVATION TO ADDRESS INSTITUTIONAL FAILURES

#### A. *The Limited Utility of Transparency Regulations*

The question remains: what will force schools to pay attention to the risk of dorm-based sexual assaults? One solution may be to strengthen regulatory disclosure requirements in the hope that disclosure will both allow students to better protect themselves and pressure schools to engage in meaningful risk reduction efforts. However, for the reasons discussed below, transparency regulations, standing alone, are unlikely to significantly reduce the risk of dorm-based sexual assaults.

The Clery Act already mandates that schools disclose campus sexual violence crimes and where those crimes occur.<sup>68</sup> The hope was that the Clery Act's transparency requirements would inform students and parents of potential dangers<sup>69</sup> and would create pressure for colleges to actively address crime problems, thus making college campuses safer.<sup>70</sup> Unfortunately, due to underreporting,<sup>71</sup> confusion about the data,<sup>72</sup> and consumer access to and use of the data,<sup>73</sup> the Clery Act's goals have not materialized when it comes to campus sexual assaults.<sup>74</sup> Unless policymakers study why the Clery Act has been relatively ineffective and make the necessary changes to account for its problems, it is likely that the same problems that plague existing Clery Act reports would occur if regulators mandated that schools disclose the number of sexual assaults occurring in their dorms.

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68. 20 U.S.C.A. § 1092(f)(1)(F) (West 2013).

69. Susan P. Stuart, *Participatory Lawyering & the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech*, 35 J.C. & U.L. 323, 381 (2009) (noting "[t]he Act was intended to increase student awareness of criminal activity on campus and thereby make the students safer").

70. Cantalupo, *supra* note 3, at 244 (noting that the Act's goal was to increase public awareness of crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend and to move from a culture in which schools turned a blind eye toward criminal activity, including campus sexual assaults).

71. See *infra* Section III(A)(1) (discussing under-reporting).

72. See *infra* notes 90–94 (discussing confusion about Clery Act data).

73. See *infra* notes 105–110 (discussing the general public's lack of awareness of Clery Act data and its relative inaccessibility).

74. See, e.g., Bonnie Fisher et al., *Making Campuses Safer for Students: The Clery Act as Symbolic Legal Reform*, 32 STETSON L. REV. 61, 88 (2002) (concluding that the Clery Act has not fulfilled its goal of providing campus communities with valid and reliable safety information); see also Cantalupo, *supra* note 3, at 244–52 (discussing how the Clery Act has failed to increase parents' and students' awareness of campus sexual assaults and thus also failed to create the hoped-for public pressure on schools to better respond to campus sexual assault issues).

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### 1. Underreporting Problems

One reason the Clery Act reports have had minimal impact is that they vastly understate the campus sexual assault problem. Despite studies showing the widespread occurrence of acquaintance rape on college campuses, 91% of college campuses reported zero rapes in 2014.<sup>75</sup>

The gap between the studies and Clery Act reports is due, in part, to students' reluctance to report.<sup>76</sup> Students' reluctance to disclose sexual assaults occurs for numerous reasons,<sup>77</sup> including actual, or perceived, inhospitable reporting environments.<sup>78</sup> Regulations attempt to address this inhospitable reporting environment in order to increase students' willingness to report sexual violence.<sup>79</sup> However, even when students do report, schools often fail to accurately account for what they have learned.<sup>80</sup>

One study found that during Department of Education audits, "universities submit sexual assault incident reports that are an estimated 44% higher than prior submissions. When the investigation is complete, reported rates of sexual assault return to levels prior to intervention by the DoE."<sup>81</sup> This data suggests that schools underreport known instances of sexual assaults unless they are under heightened government scrutiny.<sup>82</sup> The study's author further noted that audits only look at existing records—if no record exists, it cannot be part of the audit. Thus, the actual rate of undercounting could be far higher than the study demonstrates if schools fail to put anything in writing.<sup>83</sup> The reasons schools underreport for Clery Act purposes are also likely to be reasons schools are reluctant to confront the fact that the majority of on-campus rapes happen in dorm rooms. Thus, the next section explores why some schools underreport.

75. *91% of Colleges Reported Zero Incidents of Rape in 2014*, AAUW (Nov. 23, 2015), <https://perma.cc/J9GB-5Q5N>.

76. Some estimate that more than 90% of rapes go unreported. Fisher et al., *supra* note 9, at 24.

77. See Cantor et al., *supra* note 21, at 36 (the most often heard reason for not reporting was that the incident was not serious enough to report, followed by students' feelings of embarrassment, shame or concerns it would be emotionally distressing; 29% stated that they did not report because they believed nothing would be done about it). Many of these reasons are rooted in explicit and implicit gender bias stereotypes that are prevalent in society and about which IHEs could and should educate students.

78. Cantalupo, *supra* note 3, at 213 (noting that studies found reluctance to report exists for many reasons, including fear of not being believed, fear of hostile treatment by the authorities and feeling like even if the assault was reported, nothing would happen).

79. 20 U.S.C.A. § 1092 (f)(1)(F) (West 2013).

80. See Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL'Y & L. 1, 6 (2015).

81. *Id.* at 6.

82. *Id.*

83. *Id.* at 7.

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## 2. *Financial and Reputational Reporting Disincentives*

If schools accurately report crimes and sexual assaults, they admit a problem exists on their campus—a challenging admission for many university officials. In a 2015 survey of college and university presidents, one-third agreed that sexual assault is prevalent at American colleges and universities, but only six percent agreed it was prevalent at their own institution.<sup>84</sup> Given the widespread publicity about the high rate of campus sexual assaults, why do only one-third surveyed think it is a problem, and why do so few university administrators admit the problem exists on their own campus?<sup>85</sup> Most likely their denial springs from fears that accurate reporting, or even acknowledgement of the problem, puts schools at a competitive disadvantage<sup>86</sup> and requires colleges to allocate funds to combat campus peer sexual violence.

A school that underreports maintains the illusion of a bucolic safe campus environment.<sup>87</sup> Schools that accurately report campus sexual violence must combat the misconception that they are uniquely dangerous places, putting those schools at a potential competitive disadvantage when recruiting students and even raising money from alumni and community members.<sup>88</sup> As Professor Nancy Chi Cantalupo thoughtfully explains, schools that seek to accurately identify the extent of the problem “are left with having not only to explain why increased reports of sexual violence are a good thing, but also why the vast majority of campus sexual violence cannot be addressed through better lighting, blue light phones, and police escort services.”<sup>89</sup> To combat societal misunderstandings and misconceptions about stranger rape myths, to shift to understanding that most on-campus assaults occur in dorms and are committed by friends and acquaintances, and to explain why schools with a large number of reports actually

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84. *The 2015 Inside Higher Ed Survey of College and University Presidents*, GALLUP & INSIDE HIGHER EDUC. 18 (2015), <https://perma.cc/NU4T-DNP7>.

85. As Michael Kimmel points out, in some cases, the denial may be accurate. For example, community college presidents who head campuses with no living quarters or campus parties may, in fact, accurately assess the risk on their campuses. Michael Kimmel, *A Recipe for Sexual Assault*, THE ATLANTIC (Aug. 24, 2015), <https://perma.cc/YK8E-TZ8P>.

86. “Higher education in the United States is a competitive business, and those institutions competing for students are overwhelmingly private entities. Even publicly-funded state schools still compete for the best students, tuition dollars, and future alumni donations. A school’s reputation is critically important in such a competitive system. Although factors such as academic reputation, curriculum, and cost likely count as the most important criteria for most students and parents, a reputation as a dangerous place—especially as a place where a large number of daughters and young women are victims of rape—must be damaging to a school.” Cantalupo, *supra* note 3, at 224.

87. *Id.* at 219.

88. *Id.* at 224.

89. *Id.* at 221.



are likely doing a better job addressing the campus sexual assault problem<sup>90</sup> are expensive, time-consuming, uphill battles.<sup>91</sup> It is much easier to turn a blind eye and pretend sexual violence, and in particular sexual violence in college dormitories, is not an issue. Additionally, once schools identify the scope of the problem, they must devote resources to addressing it. In terms of student recruiting, alumni fundraising, and taking steps to address the problem, schools currently have strong financial disincentives to downplay the extent of campus sexual violence and *where* that violence occurs.

### 3. *Legal Liability Disincentives*

Existing regulations and legal frameworks create an odd assortment of incentives and disincentives when it comes to accurately reporting campus sexual violence. Failure to comply with the Clery Act reporting requirements may result in substantial fines.<sup>92</sup> Additionally, failure to develop appropriate post-assault reporting procedures can lead to Title IX enforcement actions and civil litigation.<sup>93</sup> Thus, on the one hand, the Clery Act and Title IX provide legal incentives to accurately report and appropriately deal with reports of campus sexual violence.

However, on the other hand, Title IX liability for failure to take appropriate preventative action requires proof a school had actual knowledge of sexual violence.<sup>94</sup> This actual knowledge requirement incentivizes underreporting. As Justice Stevens noted in his dissent in *Gebser v. Lago Vista Independent School District*,<sup>95</sup> the actual knowledge requirement encourages schools to find ways to avoid actual knowledge and thus avoid Title IX liability for failure to intervene to protect the plaintiff from peer sexual violence.<sup>96</sup> Additionally, existing tort law frameworks also serve as a disin-

90. *Id.* at 223.

91. See generally Teresa Amott, *Increased Reporting of Sexual Assaults is a Positive Trend*, THE REGISTER-MAIL (June 16, 2016), <https://perma.cc/RQ82-2R3J> (explaining why Knox Colleges' high reported assaults in a 2016 Washington Post story was a positive, rather than negative, development).

92. "When a student feels his or her school has not acted in accordance with its responsibilities under the Clery Act, the student may file a complaint with the United States Department of Education, which has the capacity to fine schools up to \$35,000 per violation. The largest fine to date has been \$350,000." Schroeder, *supra* note 5, at 1214 (footnotes omitted).

93. See, e.g., MJ Slaby & Dustin Doparik, *University of Tennessee Settles Title IX Lawsuit for 2.48 Million*, KNOXVILLE NEWS SENTINEL (July 5, 2016), <https://perma.cc/3MER-Y86B> (detailing Title IX lawsuit allegations alleging mishandling of assault reports by University of Tennessee); Jake New, *Major Sexual Assault Settlement*, INSIDE HIGHER EDUC. (July 21, 2014), <https://perma.cc/9TYN-F6L3> (describing University of Connecticut's 1.3 million dollar settlement based on Title IX lawsuit alleging deliberate indifference with regard to sexual assault complaints).

94. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998).

95. 524 U.S. 274 (1998).

96. *Id.* at 300–01 (Stephens, J., dissenting) (noting that the majority's "actual knowledge requirement" incentivizes schools to insulate themselves from knowledge of sexual misconduct in order to immunize themselves from damages liability).

centive to acknowledge and address campus sexual violence. In the context of determining a school's negligence, courts currently rely heavily on evidence of prior similar incidents occurring in or near where the plaintiff's alleged assault occurred to determine foreseeability—a predicate to a successful negligence claim.<sup>97</sup> To the extent schools comply with Clery Act reporting requirements, they create potential tort liability by establishing foreseeability of future acquaintance assaults. Thus schools have potential legal liability reporting disincentives both when it comes to reporting generally and when it comes to disclosing the fact that most of the on-campus assaults are occurring in their dorms.

*B. The Clery Act: Individual Decision-Making Processes and Schools' Superior Knowledge of the Risks*

Forcing disclosure, and hence transparency, has become a widespread regulatory approach to a huge range of public policy problems.<sup>98</sup> The theory is that disclosure allows people to make informed decisions that will then incentivize institutional change.<sup>99</sup> That was the hope when the Clery Act was enacted.<sup>100</sup> However, that hope has not materialized.

Schools compile the Clery Act data and know, or should know, that a significant percent of reported campus sexual assaults occur in dorm rooms. They know, or should know, that their own Clery Act data is just the tip of the iceberg given the vast underreporting problem.<sup>101</sup> Their Title IX officers know, or should know, about the national studies indicating the high incidence of dorm-based campus sexual assaults.<sup>102</sup> In contrast, parents and students are unlikely to have the same knowledge about the high risk of peer rapes occurring in campus housing. Two different studies suggest the vast majority of students were completely unaware of Clery Act data and

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97. See *infra* text accompanying note 185. Tyler Brewer, *The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses By Recognizing the College-Student Relationship*, 44 J.L. & EDUC. 345, 357 (2015).

98. ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 23–24 (2007).

99. *Id.* at 28–30.

100. “Proponents of the Act hoped to reduce individual risk. By notifying students, faculty, staff, and visitors of criminal activity occurring on campus, institutions can make individuals aware of the potential risks so they can make active choices about their personal behavior.” Dennis E. Gregory and Steven M. Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 40 (2002) (footnotes omitted).

101. See *supra* Section III(A)(1) (discussing underreporting).

102. See *supra* Section II(B) (discussing data about the high incidence of campus sexual assaults occurring in college dorms).

did not consider it when deciding where to attend college.<sup>103</sup> Those study results are not surprising.

Before information is used to make choices, it must be easily accessible at a time and place when it is likely to be used.<sup>104</sup> Thus, for example, data about campus sexual assaults occurring in college dorm rooms would likely be most useful if it appeared in a prominent place on campus housing web pages. However, this is not where one is most likely to see Clery Act data. Many colleges disclose Clery Act data through a series of website links and then bury it at the end of a lengthy document.<sup>105</sup> Alternatively, it can be accessed on a government website<sup>106</sup>—somewhere most people do not go unless they are involved in a particular research project. Additionally, as noted earlier, the information itself is hard to comprehend<sup>107</sup> and is subject to misapprehensions and misinterpretations.<sup>108</sup>

In sum, while schools are, or should be, aware of the high rate of dorm-based peer rapes, parents and students likely do not have that same level of awareness. Unless policymakers address the issues identified above, transparency regulations are unlikely to increase public awareness of the “dangers in the dorm” and hence are unlikely to increase public pressure on IHEs to engage in meaningful dorm-based sexual assault risk reduction.

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103. Gregory & Janosik, *supra* note 100, at 41–43 (2002) (reviewing studies showing most students had no knowledge about the data). One study also found that only about 10 percent of students reported using the data as part of their college selection decision-making process. Gregory & Janosik, *supra* note 100, at 46.

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104. FUNG ET AL., *supra* note 98, at 56–57 (discussing how information has to be provided in a time and place that makes it accessible and available when people are about to make decisions).

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105. For example, Harvard’s Clery Act disclosure may be found by clicking through a series of links on the Harvard University Police Department homepage, which is not itself accessible from the harvard.edu sitemap. See *Sitemap*, HARVARD UNIVERSITY (2017), <https://perma.cc/YNG4-FZDB>; *Clery Act Statistics*, HARVARD UNIVERSITY POLICE DEPARTMENT (2017), <https://perma.cc/TZF8-EUCE>. See also *University of Michigan Annual Security Report & Annual Fire Safety Report*, THE REGENTS OF THE UNIVERSITY OF MICHIGAN (2016), <https://perma.cc/752Y-6KKT> (accessible from the University of Michigan’s primary website by selecting Menu>Life at Michigan>Public Safety and Security>Statistics and Clery Act Compliance>Annual Security Report and Annual Fire Safety Report, *University of Michigan*, UNIVERSITY OF MICHIGAN (2017), <https://perma.cc/HG9N-8LQ3>).

106. USDE Data Analysis, *supra* note 38.

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107. FUNG ET AL., *supra* note 98, at 59 (noting that material that is difficult to comprehend is one reason transparency regulations fail to achieve their goals).

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108. *Id.* at 73–74 (noting that confusing information is another reason transparency regulations fail). As noted *supra* in text accompanying notes 79–85 and 90–92, the Clery Act data itself likely is misleading due to vast under reporting, and the data itself is subject to misinterpretation in that most people likely assume that fewer reports mean a safer campus, rather than understand that more reports indicate a campus that is responsive to complaints of sexual assault and is creating an atmosphere hospitable to reporting and addressing the problem).

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## REGULATORY LIMITS AND TORT LAW

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*C. The Limited Utility of Existing Prevention  
and Education Regulations*

*1. Ramstad Amendment*

In 1992, Congress passed the Ramstad Amendment to the Higher Education Act which required schools to engage in awareness and prevention education, identify the procedures that would be followed when a sex offense occurs, and to publicize possible sanctions that could be imposed following a disciplinary proceeding adjudication.<sup>109</sup> Despite the Ramstad Amendment, for over two decades many colleges turned a blind eye to campus acquaintance assaults and did little to help those who had the courage to report those assaults.<sup>110</sup> Recent regulations attempt to remedy that problem.

*2. VAWA Regulations Requiring Awareness and Prevention Education*

Title IX prohibits schools receiving federal funding from discriminating on the basis of sex.<sup>111</sup> As Title IX law developed, its prohibition of discrimination based upon sex began to encompass discrimination occurring as a result of student-on-student sexual violence.<sup>112</sup> Over the years, Title IX spawned numerous rules and regulations designed to help reduce the high rate of campus sexual assaults,<sup>113</sup> among them a recommendation that schools engage in sexual assault prevention education.<sup>114</sup> That recom-

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109. 20 U.S.C.A. § 1092(f) (West 2013).

110. See, e.g., Edwin Rios & Madison Pauly, *This Explosive Lawsuit Could Change How Colleges Deal with Athletes Accused of Sexual Assault*, MOTHER JONES (Mar. 3, 2016), <https://perma.cc/WN5J-KXMK> (discussing allegations of the University of Tennessee's institutional indifference to campus sexual assaults); see *Simpson v. Univ. of Colo.*, 500 F.3d 1170 (10th Cir. 2007) (detailing how the University of Colorado ignored known issue of assaults committed by football players); Sarah L. Sawn, *Bystander Interventions*, 2015 WISC. L. REV. 975, 1020 (2015) (noting that until recently, the law has allowed colleges to ignore the campus sexual assault problem). Vice President Joe Biden also noted that colleges have historically turned a blind eye toward campus sexual assault. See Aamer Madhani & Rachel Axon, *Biden: Colleges Must Step Up to Prevent Sexual Assault*, USA TODAY (Apr. 29, 2014), <https://perma.cc/PJ2W-386Z>. Not all colleges have ignored the problem. Some colleges were early leaders in the movement to reduce campus sexual assault risks. See, e.g., BOHMER & PARROT, *supra* note 3, at 129 (discussing Cornell University's sexual assault and prevention programs that began in the early 1980s).

111. Letter from Russlynn Ali, Assistant Sec'y of Civ. Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011), <https://perma.cc/8Z7L-L3R6> [hereinafter Dear Colleague Letter] (addressing sexual violence as a form of sexual harassment under Title IX and listing protocols and requirements that would be used to assess schools' compliance with Title IX); see also 20 U.S.C.A. § 1092(f)(1)(F) (West 2013) (embedding many of the 2011 Dear Colleague Letter protocols and requirements into legislation).

112. For an excellent summary of Title IX's development into a statute recognizing that peer-on-peer sexual assaults can be a form of educational sexual discrimination, see Wendy Adele Humphrey, "Let's Talk About Sex": *Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35, 41–55 (2016).

113. Dear Colleague Letter, *supra* note 111.

114. *Id.*

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mendation became a mandate in 2013 when Congress imposed additional obligations on colleges and universities as part of the Violence Against Women Reauthorization Act.<sup>115</sup>

Today, colleges and universities must develop “education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking.”<sup>116</sup> These education programs must include primary prevention and awareness programs for all incoming students and new employees and ongoing prevention and awareness campaigns for existing students and faculty on the following topics: (1) the school’s prohibition of domestic violence, dating violence, sexual assault and stalking; (2) a jurisdictional definition of those terms; (3) a jurisdictional definition of consent in reference to sexual activity; (4) safe options for bystander intervention to prevent harm or intervene in risky situations; and (5) recognition of signs of abusive behavior and how to avoid potential attacks.<sup>117</sup> How schools educate students about these topics is left to schools’ discretion<sup>118</sup> so that they can experiment with content and methodology.<sup>119</sup> However, these non-prescriptive education and awareness regulations may have a limited risk reduction impact for the reasons discussed below.

### 3. *Regulations Do Not Require Schools to Address Where Most On-Campus Assaults Occur*

Existing regulations do not require schools to educate students about where most assaults occur. While educating students about *where* assaults occur is not as important as engaging students in both attitude and behavioral change education,<sup>120</sup> identifying college dorm rooms as a high risk area when it comes to campus rapes is an important component in risk reduction efforts. Current regulations require bystander intervention strategy education.<sup>121</sup> Before bystanders intervene, they must become aware of the

115. Violence Against Women Reauthorization Act of 2013 § 304, 20 U.S.C.A. § 1092(f)(8) (West 2013).

116. 20 U.S.C.A. § 1092(f)(8)(B)(i).

117. *Id.*

118. The regulations do not mandate specific content beyond the topics identified and do not mandate a mode of delivery because there is a hope that allowing flexibility will encourage research on a range of practices that may be both cost-efficient and effective in prevention efforts. *See* 34 C.F.R. § 668.46(j) (2015).

119. *See* Dear Colleague Letter, *supra* note 111. Letter from Catherine E. Lhamon, Assistant Sec’y of Civ. Rights, U.S. Dep’t of Educ., to Colleagues, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), <https://perma.cc/2HGT-KUM8>.

120. For a discussion of the key components of effective college assault prevention education efforts, see DeGue et al., *supra* note 62 at 356-58 (discussing evidence-based, successful risk reduction programs, most of which focus on attitudes and behavioral changes).

121. 20 U.S.C. § 109(f)(8)2(B)(i)(1)(dd) (2015).

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problem and how to identify potentially risky situations. To put it simply: to avoid a risk, one must be aware of that risk. If colleges do not affirmatively alert students to the fact that most on-campus peer rapes occur in dorm rooms, students may have no idea that they need to engage in risk reduction strategies in their dorms or be ready to intervene in their dorms. If schools are not confronting the reality of what happens in dorms, their mandatory risk reduction education will not provide strategies for these situations.

#### 4. *Some Schools Are Satisfying the Regulations Using Ineffective Education Methods*

Many schools currently comply with the regulatory mandates by requiring incoming students to engage in a video training session<sup>122</sup> that is unlikely to be an effective education tool. While that programming may satisfy the letter of the regulatory requirements, it is unlikely to satisfy the intended goal of reducing sexually violent behaviors, resulting in risk reduction.<sup>123</sup> While programs that can be completed via a one-time online course may be cost-effective, there is no evidence that that type of educative program has any benefits when it comes to sexual violence risk reduction.<sup>124</sup>

As college educators should know, long-term retention and transferability of learning occurs when students are given information in manageable chunks and have multiple opportunities, across multiple situations, and in multiple formats to retrieve and apply the information they are asked to learn.<sup>125</sup> While some schools may be engaging in broad-ranging and more effective student awareness and risk reduction education, others may be simply “checking the education box” via a one-time video. In part, this may be due to the fact that the regulations are relatively new and schools are still working out how best to comply. It may also be due to the fact that the regulations impose significant additional burdens upon schools without providing funding that enables schools to do anything more than engage in minimal compliance.<sup>126</sup> Whatever the reason, regulations that are vague as

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122. EverFi, the company developing and marketing the Haven online sexual assault video modules, claims that they are in use at “over 650 institutions across the country.” *Haven—Understanding Sexual Assault*, EVERFI (Oct. 27, 2016), <https://perma.cc/29PY-T4GQ>.

123. See DeGue, *supra* note 62, at 357 (discussing the limited impact of single-session prevention efforts).

124. *Id.* at 358–59 (noting a need to shift away from low-dose educational programs).

125. Diane F. Halpern & Milton D. Hakel, *Applying the Science of Learning to the University and Beyond*, 35(4) *CHANGE* 36, 38–39 (2003).

126. Eric Kelderman, *College Lawyers Confront a Thicket of Rules on Sexual Assault*, *CHRON. OF HIGHER EDUC.* (June 25, 2014), <https://perma.cc/YS7X-VLR8> (noting that schools have numerous regulations they must comply with and limited resources to engage in compliance as well as prevention measures).

to content, structure, and delivery of awareness and prevention information may not motivate schools to engage in meaningful education and awareness efforts, and they certainly will not motivate schools to disclose what is happening in their own dorms.

*D. What Has Motivated Change: Litigation and Enforcement Actions*

While the Ramstad Amendment and Clery Act have not worked as hoped, and the mandated prevention and awareness education requirements likely will not be terribly effective at reducing assault risks at many schools, one set of regulations, combined with litigation and enforcement actions, has created momentum for change. In 2011, the Department of Education's Office of Civil Rights (OCR) issued what has become known as the "Dear Colleague Letter,"<sup>127</sup> which laid out procedures for how schools should investigate and adjudicate sexual assault reports.<sup>128</sup>

The Dear Colleague Letter, although controversial for a host of reasons,<sup>129</sup> provided plaintiff's lawyers the ammunition they needed to begin holding schools accountable for how they handled sexual assault reports. The specificity of the required procedures laid the groundwork for allegations that schools had violated Title IX. By the end of 2013, two years after the Dear Colleague Letter, a higher education insurance company found that claims against universities arising from campus sexual assaults had doubled.<sup>130</sup> Victims' claims consisted of demand letters, claims filed with the OCR, and civil lawsuits.<sup>131</sup> Virtually all victims' claims focused on how schools dealt with assault reports in violation of the Dear Colleague Letter advisory guidelines. The allegations included: discouraging pursuit of a complaint, failure to timely investigate, inadequate sanctions, negligent training of staff in terms of investigation and handling assault reports, and failure of a school to follow its own procedures.<sup>132</sup> Approximately one-third

127. Dear Colleague Letter, *supra* note 111.

128. *Id.* at 2.

129. See, e.g., Amy Chmielewski, Note, *Defending The Preponderance of The Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 145–46 (2013) (discussing the debate about the Dear Colleague Letter's preponderance of the evidence standard for campus sexual assault disciplinary hearings); Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 898–99 (2016) (noting that there is an ongoing debate as to whether the Dear Colleague Letters constituted rulemaking without following the process proscribed by the Administrative Procedures Act).

130. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, EDURISK SOLUTIONS 3 (Jan. 2015), <https://perma.cc/8GKM-X49P> [hereinafter *Higher Education Claims*].

131. *Id.* at 14, 16.

132. *Id.* at 15–16.

of the claims were filed by the accused, challenging the fairness of the institution's adjudicatory process and alleging a lack of due process.<sup>133</sup>

Publicity arising from Title IX litigation has exposed widespread institutional failures including schools' cover-ups of sexual assault occurrences.<sup>134</sup> Litigation and resulting publicity has caused schools to sit up and take notice of the problem. Schools realize that failure to properly handle assault reports may result in loss of federal funding<sup>135</sup> and have reputational and compensatory damage costs.<sup>136</sup> Thus, exacting regulations, actions to enforce those regulations, and resultant publicity have made schools pay attention to how they handle assault reports.<sup>137</sup>

The question is whether Title IX actions are likely to motivate schools to pay attention to dorm-based assaults or to engage in meaningful and effective risk reduction programs. The answer is "probably not." Title IX requires proof of actual knowledge of the alleged danger<sup>138</sup> and a response

133. *Id.* at 17; see also Jake New, *Out of Balance*, INSIDE HIGHER EDUC. (Apr. 14, 2016), <https://perma.cc/D679-XUZP> (discussing numerous cases in which courts found for alleged perpetrators who claimed the universities' procedures failed to provide them sufficient due process).

134. See, e.g., Manohla Dargis, *Review: 'The Hunting Ground' Documentary, A Searing Look at Campus Rape*, N.Y. TIMES (Feb. 26, 2015) (discussing documentary about campus rape and institutional cover-ups). The documentary itself spawned publicity. See, e.g., Emily Yoffe, *The Hunting Ground—A Closer Look at the Influential Documentary*, SLATE (June 1, 2015), <https://perma.cc/K927-Q3EJ>; Ana Merlan, *What Emily Yoffe Left Out of her Polemic on The Hunting Ground*, JEZEBEL (Dec. 4, 2015), <https://perma.cc/HMX8-ZZRN>.

135. Government agencies that fund schools and school loan programs may enforce compliance with Title IX via the ultimate penalty of withdrawing that funding for noncompliance. See 20 U.S.C. § 1682 (1972).

136. See, e.g., Anita Wadhvani, *Settling Sex Assault Lawsuits Costs Universities Millions*, THE TENNESSEAN (July 6, 2016), <https://perma.cc/F5AM-ZMHT> (noting the following settlements of sexual assault claims: In January 2016, Florida State settled a lawsuit for \$950,000; in August 2015, the University of Oregon settled a lawsuit for \$800,000; in July 2014, the University of Connecticut settled a suit for \$1.28 million; in Sept 2013, Occidental College agreed to a confidential settlement with 37 students; and in 2007, the University of Colorado settled a claim for \$2.5 million dollars).

137. Kelderman, *supra* note 126 (noting that stricter enforcement of Title IX, the "Know Your IX" national movement informing students how to file federal complaints, the DOE's investigations, and lawsuits against institutions have schools grappling with how best to investigate and resolve campus sexual assault reports). For an example of the publicity a Title IX suit may engender, see Duke Student Pub. Co., *Duke Sued for Mishandling Sexual Assault Investigation*, DUKE CHRONICLE (Aug. 17, 2016), <https://perma.cc/M9WS-9TXN>; Tyler Kingkade, *UNC Sexual Assault Response to Be Investigated by U.S. Department of Education*, HUFFINGTON POST (Mar. 6, 2013), <https://perma.cc/5LND-9PD2>; Tyler Kingkade, *Occidental College Seizes Faculty Laptops As Feds Investigate Sexual Assault Cases*, HUFFINGTON POST (Sept. 27, 2013), <https://perma.cc/2GVJ-G7NJ>; Eliana Dockterman, *Students File Title IX Sexual Assault Complaint Against Columbia University*, TIME (Apr. 24, 2014), <https://perma.cc/NE56-XJLD>; Jessica Bennett, *The Title IX Complaint Against Yale*, THE DAILY BEAST (Apr. 2, 2011), <https://perma.cc/V324-38JE>.

138. *Gebser*, 524 U.S. at 290. Actual notice is a difficult standard to satisfy and it does not encompass "inquiry" notice (i.e., the obligation to undertake an investigation on the knowledge one possesses which would then likely result in actual knowledge). Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.—C.L. L. REV. 95, 108 n.92 (2010).



that exhibits a deliberate indifference<sup>139</sup> with regard to that danger. This is an extremely difficult standard to satisfy.<sup>140</sup> Unless schools ignore their duty to educate altogether, it will be difficult for plaintiffs to successfully assert a Title IX case based on the inadequacy of schools' assault awareness and prevention education, although a negligence claim could raise that issue.

Negligence claims may provide a basis for liability because, unlike the Title IX "actual knowledge" standard, negligence claims allow for liability if a school knew or should have known of a risk.<sup>141</sup> Additionally, unlike the high bar of the Title IX "deliberate indifference" standard, negligence claims may succeed upon proof the defendant failed to act with reasonable care in light of the circumstances, a calculus that often involves calculating the risk of harm and the cost of preventing that harm.<sup>142</sup> Thus, negligence claims may fill a regulatory and Title IX enforcement action gap when it comes to motivating schools to engage in meaningful awareness and risk reduction education.

#### IV. THE PROMISE OF NEGLIGENCE CLAIMS FRAMED AS INSTITUTIONAL FAILURE

As Professor Timothy Lytton explains, tort litigation provides an opportunity for both external and self-regulatory policy changes because it provides an alternative venue to the regulatory process *and* provides an opportunity to frame issues in a way that generate both public awareness and public pressure for meaningful institutional changes.<sup>143</sup> He notes:

139. *Gebser*, 524 U.S. at 290.

140. *See* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that a Title IX plaintiff suing a school for damages resulting from peer-on-peer sexual harassment must demonstrate: actual knowledge, deliberate indifference, severe, pervasive and objectively offensive peer sexual harassment, and a deprivation of educational opportunities. Once those elements are met, a court then must decide whether the institution's conduct was "clearly unreasonable"); *see also* Walker, *supra* note 138, at 101 (noting that securing monetary or injunctive relief under Title IX is "exceedingly difficult" because the standard "allows negligent and reckless schools to avoid institutional liability so long as their response to an elevated risk of assault or a specific incident is 'not clearly unreasonable'").

141. *See, e.g.*, *Ross v. Univ. of Tulsa*, No. 14-cv-484-TCK-PJC, 2016 WL 1545138, at \*21 (N.D. Okla. Apr. 15, 2016) (noting that "[u]nlike Title IX's 'actual knowledge' standard, the question of duty in a negligence action can also encompass inquiry notice—what TU should have known about Swilling in the exercise of reasonable diligence," but deciding "it could not conclude" that the exercise of reasonable care would have alerted TU to the risk to all students posed by the alleged rapist student given only one unprosecuted prior report of an alleged rape by the student who raped the plaintiff at an off-campus apartment).

142. Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1015–16 (1994) (noting that "the proposition that negligence means creating an 'unreasonable risk,' defined as one whose expected costs exceed the costs of avoiding it, has been explicitly endorsed by the Restatement of Torts, by the leading treatises, and by courts in most states").

143. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*,

[There are] six distinct ways in which litigation influences policy making: by (1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions.<sup>144</sup>

While campus sexual assault is already on policymaking institutions' agendas,<sup>145</sup> tort negligence litigation can serve some of the other purposes Professor Lytton identifies. In particular, it can help frame the issue of campus sexual assaults as institutional failures rather than as a problem of individual drunken, immature, or irresponsible students. It may produce information in discovery that is useful when it comes to policymaking and future regulations. It also can encourage IHE self-regulation via public disclosures and media exposure, resulting in public pressure for schools to engage in effective education and risk-reduction programs that include dorm-based risk reduction strategies.

#### A. *Changing Perceptions by Changing Framing*

Title IX suits and OCR complaints based upon how schools have handled assault reports and how schools have allowed an "assault culture" to flourish frame the issue as one of institutional failure.<sup>146</sup> That same framing could be used in suits based upon schools' failing to address the problem in campus dorms. Studies recognize that campus sexual assault, and all sexual assault, is both an individual and societal problem.<sup>147</sup> IHEs' institutional failures are part of the societal problem. As Professor Chi Cantalupo explains:

Sociologists and criminologists studying campus peer sexual violence have used a theory called the Routine Activities Theory to posit that sexual violence occurs so frequently on college campuses because there is a surfeit of 'motivated offender[s] [and] . . . suitable target[s] and an absence of capable guardians all converg[ing] in one time and space.' They suggest that all three elements must be present for there to be a significant crime problem and that the failure of schools to act as 'capable guardians' elevates the influence of

86 TEX. L. REV. 1837, 1841 (2008) (noting that "when an issue falls under a different institutional jurisdiction, the change in venue may bring with it new ways of approaching the problem and different tools for responding to it.")

144. *Id.* at 1838.

145. See, e.g., Krebs, *supra* note 25; *Campus Sexual Assault, Suggested Policies and Procedures*, AM. ASSOC. OF UNIV. PROFESSORS (Nov. 2012), <https://perma.cc/367F-PL75>; *Not Alone: First Report of the White House Task Force to Protect Students from Sexual Assault*, WHITEHOUSE.GOV (Apr. 2014), <https://perma.cc/5JAR-JS65>.

146. See, e.g., *Jane Does v. Univ. of Tenn.*, No. 3:16-cv-199, 2016 WL 1253004 (M.D. Ten. Mar. 29, 2016); *Complaint ¶¶ 73–74, 77–80, Daisy Tackett v. Univ. of Kan.*, (Mar. 21, 2016) (No. 2016-cv-000116).

147. See Breiding, *supra* note 13.

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peer support to commit assaults by ‘motivated offenders.’ In other words, cultures supportive of sexual violence can lead to higher incidences of sexual violence. Additionally, if the institution itself ignores the problem and fails to act as a ‘capable guardian,’ it too helps to create the problem.<sup>148</sup>

Thus, framing negligence claims against universities for their institutional failures is grounded in both theory and reality. Litigation that frames campus acquaintance assault as institutional failures takes the focus off what a few “bad boys” have been doing and places it on how colleges have facilitated that conduct by ignoring the problem, and in particular ignoring where it most often occurs.

Currently, tort negligence law is unlikely to help create meaningful institutional change because many judges do not see the problem as one of institutional failure. Using both a popular culture and a historical framing,<sup>149</sup> courts often characterize peer-on-peer rapes and sexual assaults as problems attributable to individual “bad boy” students,<sup>150</sup> or irresponsible, often drunk, college students<sup>151</sup>—a problem outside the purview and control of colleges. The judicial approach to dorm life absolves schools of all responsibility for what happens in their campus residence halls. It assumes colleges play no role in defining and regulating acceptable behaviors within their dorms or in educating students about how to avoid serious risks—even when schools have superior knowledge of those risks.<sup>152</sup>

### B. *Judicial Perceptions and Framing the Issue as One of Institutional Failure*

Some plaintiff’s lawyers have already implicitly attempted to frame campus sexual assault litigation against universities as an issue of institutional failure.<sup>153</sup> For example, in *Facchetti v. Bridgewater College*,<sup>154</sup> the plaintiff alleged both that the college was negligent in its failure to engage in reasonable protective measures and that it attempted to cover up her as-

148. Cantalupo, *supra* note 3, at 221.

149. Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DIS. RES. 43, 61–62 (2015) (noting that myths about women’s sexuality and sexual assault crimes perpetuated by the media and pop culture are so influential that even brief exposure temporarily triggers negative thoughts about sexual assault victims and heightens thoughts of victim-blame).

150. Aviva Orenstein, *No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 677–78 (1998) (noting that a persistent rape myth is that rapists are violent, brutish sex-crazed male aggressors who use extreme force against their victims).

151. *See* Tanja H. v. Regents of Univ. of Cal., 228 Cal. App. 3d 434, 438–41 (1991); *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627, 641–42 (W.D. Va. 2016).

152. *See supra* Section III(B) (discussing schools’ superior knowledge of the risks of dorm-based assaults).

153. *See, e.g.*, Complaint, *Daisy Tackett v. Univ. of Kan.*, ¶¶ 73–74, 77–80, (Mar. 21, 2016) (No. 2016-CV-000116), available at <https://perma.cc/7GDN-YMGG> (alleging facts that point to institutional failure).

154. 175 F. Supp. 3d 627 (W.D. Va. 2016).

sault report.<sup>155</sup> She sued the university both under Title IX and for negligence. Her negligence claim alleged the school owed her a duty to use reasonable care to warn of, and protect against, her assault.<sup>156</sup> In support of her negligence claim, she pointed to widespread knowledge of campus sexual assault issues<sup>157</sup> and the college's own knowledge that in the prior year, there had been five reported instances of acquaintance assault in its dorms—facts that implicitly raise institutional failure issues.<sup>158</sup> The court did not address the widespread knowledge allegation, and it rejected the notion that the school could foresee the assault, finding that foreseeability was not met by five reported incidents of acquaintance assault in the last year occurring in the dorms on a small college campus.<sup>159</sup> It also noted that the college could not have caused the assault because the plaintiff invited the boy into her room.<sup>160</sup>

*Facchetti* could be analyzed as a case in which incredibly naïve college students would have benefitted greatly from education about the danger of acquaintance assault in dorms and how to mitigate those risks,<sup>161</sup> or it could be analyzed through the lens of “what do you expect a college to do when a young woman invites a young man into her room and then falls asleep while he is still there?” The court chose the latter approach, discounting evidence of prior sexual assaults to absolve the college of responsibility to warn and educate students about the risks of acquaintance assaults in college dorm rooms.<sup>162</sup>

In *Tanja H. v. Regents of University of California*,<sup>163</sup> a case in which a young woman was brutally assaulted in a dorm after returning from a party, a California court cited the oft-heard proposition that colleges are not insurers of student safety.<sup>164</sup> Working from that premise, the court went on to determine that colleges had no ability to save young people from them-

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155. Complaint ¶¶ 46–48, 98–107, *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627 (No. 5:15-CV-00049).

156. *Id.* ¶¶ 98–107.

157. *Id.* ¶ 105.

158. *Id.* ¶ 26.

159. *Facchetti*, 175 F. Supp. 3d at 644. In addition to making that judgment call, the court noted that plaintiff's foreseeability argument failed because the school did not have notice the assailant himself had committed any of the five reported prior attacks. The court's analysis collapsed two different foreseeability analyses: foreseeability that a *person* presents a significant risk versus foreseeability that a particular *location* presents a significant risk of harm.

160. *Id.*

161. The need for education is particularly acute when it comes to international students who may have different cultural norms. International Student Insurance created a sexual assault awareness and education video aimed specifically at international students. See *Sexual Assault Laws in the U.S.*, INT'L STUDENT INS., <https://perma.cc/M7CP-D3ST>.

162. *Facchetti*, 175 F. Supp. 3d at 644.

163. 228 Cal. App. 3d 434, 435 (Cal. Dist. Ct. App. 1991).

164. *Tanja H.*, 228 Cal. App. 3d at 438.

selves and no responsibility to try to do so.<sup>165</sup> *Tanja H.* was decided in 1990. Since then, the Department of Education<sup>166</sup> and federal legislators<sup>167</sup> have explicitly stated that schools do, in fact, have a legal responsibility to engage in campus sexual assault risk reduction awareness and education. Perhaps future courts will roundly reject the *Tanja H.* reasoning as outdated both from a social and cultural perspective and because of legislative enactments. However, as *Facchetti* illustrates, many judges still believe that schools' lack of meaningful warnings and education do not play a role in acquaintance sexual assaults occurring in college dorm rooms.

Both *Facchetti* and *Tanja H.* illustrate judicial reluctance to hold institutions accountable and an unwillingness to view the problem as one of institutional failure rather than one of individual bad actors. This framing is not unlike what one saw at the start of clergy sexual abuse cases in which courts and the public initially thought about the problem as one of an individual priest's failings,<sup>168</sup> and initial plaintiffs faced allegations that they had contributed to their own abuse.<sup>169</sup> However, over time litigation exposed church malfeasance—demonstrating that the church simply transferred molester priests to new parishes and failed to warn parishioners. This information about the church's active role in covering up its priests' misconduct re-framed the issue and led to national media coverage.<sup>170</sup> As litigation increased, and allegations of church malfeasance began to be substantiated by discovery documents and other investigation, courts and the public began to look at the issue as one of institutional, rather than individual, failure.<sup>171</sup> The more wrongdoing that was exposed, the more press coverage, and the greater internal and external pressure for change, all of which

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165. *Tanja H.*, 228 Cal. App. 3d at 438.

166. Dear Colleague Letter, *supra* note 111.

167. See *supra* Section III(C) (discussing VAWA regulations, which may incorporate many of the Dear Colleague Letter recommendations).

168. LYTTON, *supra* note 19, at 102 (noting that “the church portrayed itself as the victim of abusive priests who concealed their crimes from diocesan officials”).

169. *Id.* at 66 (noting that some defense lawyers alleged victims were negligent or assumed the risk of abuse by continuing to spend time with priests who had abused them; others alleged that victims' parents were negligent for allowing their children to spend time with priests the parents should have known were abusers because the priests showed excessive interest in their children).

170. *Id.* at 87–94.

171. *Id.* at 152 (noting that initially discovery was limited to documents concerning only the priest named in the complaint but as judges became more aware of the institutional failures, they allowed broader discovery which in turn raised awareness of the extent of the institutional cover ups of priests' wrongdoing).

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led to institutional self-regulation<sup>172</sup> as well as external policy and legislative reforms.<sup>173</sup>

That also has been the pattern with Title IX suits about how schools have handled reports of campus sexual violence. The more lawsuits, the more publicity about how institutions have covered up or encouraged a culture of sexual misconduct, especially among its athletes, the greater the internal and external pressure for change.<sup>174</sup> Whether tort litigation about dorm-based assaults framed as institutional failure has the potential to motivate self-regulation, complement existing regulatory schemes, and potentially provide information useful to policymakers and regulators depends upon whether judges are willing to recognize schools' duty to engage in meaningful education and risk reduction programs.

## V. RE-THINKING COLLEGES' DUTY OF CARE IN DORM-BASED ACQUAINTANCE ASSAULT CLAIMS

### A. *The Cost of Institutional Failure*

To the extent one suggests, as the author of this essay does, that IHEs have a legal obligation to develop effective sexual assault risk reduction programs aimed at lowering the incidence of dorm-based assaults, one must balance the burden of developing and implementing those programs against

172. *Id.* at 172–76 (describing the church's assault prevention efforts and attributing many of those efforts to litigation). *But see* Mark Chopok, *A Response to Timothy Lytton: More Conversation is Needed*, 39 CONN. L. REV. 897, 900 (2007) (arguing that the self-regulatory efforts were borne out of the church's concern for its congregants rather than litigation induced).

173. "Most of what is publicly known about clergy sexual abuse was discovered by lawyers or comes from studies and investigations that (but for the litigation) would likely never have been undertaken. Litigation drew attention to the role of Church officials in facilitating child sexual abuse, placed the issue on the agendas of Church and government policy makers for the first time, and generated pressure on them to address the problem. The results of the litigation include a public accounting of the role of Church officials in facilitating decades of child sexual abuse, mandatory nationwide Church policies, and a host of law enforcement and legislative reforms." Lytton, *supra* note 143, at 1863.

174. Title IX suits and OCR enforcement actions often generate intense publicity and may result in self-regulatory changes. *See, e.g.,* Zac Ellis, *A Timeline of the Baylor Sexual Assault Scandal*, SPORTS ILLUSTRATED (May 26, 2016), <https://perma.cc/9YBC-3ZBV>; *Baylor Fires Head Coach Art Briles amid Rape Scandal*, SPORTS ILLUSTRATED (May 26, 2016), <https://perma.cc/PV6V-PVPG> (discussing how public exposure of Baylor's mishandling of sexual assault reports led to the dismissal of its football coach and the removal of university president Ken Starr). At Florida State, after considerable publicity about the mishandling of a sexual assault report, the school settled and agreed to internal reforms. *See* Rachel Axon, *Florida State Agrees to Pay Winston Accuser \$950,000*, USA TODAY (Jan. 15, 2016), <https://perma.cc/Z6QE-TMZS> (noting that part of the settlement of plaintiff's Title IX claim included changes in FSU's sexual assault policies and programs). However, many Title IX enforcement actions are not widely publicized. *See* Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than People Know*, HUFFINGTON POST (June 16, 2016), <https://perma.cc/357C-MYQ4> (discussing the significant number of schools that have flown under the radar when it comes to publicity about alleged Title IX violations and providing a link to a list of schools under Title IX investigation for their handling of sexual assault reports).

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the costs to both victims and alleged perpetrators of failing to do so.<sup>175</sup> Campus sexual violence survivors' costs often include significant emotional trauma, resulting psychological disorders, and education interruption. Many survivors experience significant psychological damage that includes "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction."<sup>176</sup> The trauma results in many survivors experiencing a significant drop in academic performance, often leading to withdrawing from courses, and in some cases withdrawing from school altogether as survivors take years to put their lives back together.<sup>177</sup>

In a moving essay, Laura Hilgers, whose daughter was raped on campus during her freshman year, detailed the financial costs of that rape. These costs included her daughter's lost wages resulting from being unable to finish school on time, her own lost wages resulting from having to care for her traumatized daughter, the cost of in-patient psychiatric care for trauma and addiction (an addiction her daughter developed to numb the pain caused by the assault), the cost of lost tuition for college work attempted but unable to be completed, the cost of therapists, medication, and other medical expenses, all of which added up to over \$245,000.<sup>178</sup> The economic costs Ms. Hilgers reports are consistent with a White House report which estimates that the monetary cost to a rape survivor can range from \$87,000 to \$246,000.<sup>179</sup> However, the financial cost tells only part of the story. It does not account for the emotional cost to the survivor and her family. As Ms. Hilgers eloquently writes, "It would be impossible for me to describe in the space of a newspaper article the emotional toll this took on Willa and our family: the grief we felt that our child's body (and soul) had been violated; the anger that we (and the college) could not protect her; the fear that our once spirited, ambitious daughter might never be more than a shell of herself."<sup>180</sup>

Campus sexual violence suspects also incur significant costs in terms of disrupted educations, lost tuition, legal fees, damage to reputation, and

175. This classic formulation was articulated by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

176. Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus Save Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 446 (2014).

177. *Campus Sexual Assault, Suggested Policies & Procedures*, AM. ASSOC. OF UNIV. PROFESSORS (Oct. 2012), <https://perma.cc/CNY3-4N5H>.

178. Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), <https://perma.cc/HA9J-QG43>.

179. White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action*, WHITEHOUSE.GOV (Jan. 2014), <https://perma.cc/6UGP-B4VT>.

180. Hilgers, *supra* note 178.

the emotional toll of a sexual assault investigation and proceeding.<sup>181</sup> Costs to both the alleged perpetrator and victim when schools fail to engage students in effective sexual assault risk reduction programs should be part of the calculus as courts grapple with defining institutional duty and the applicable standard of care. Rather than dismiss schools' duty out of hand as some courts have done,<sup>182</sup> judges should employ the long-accepted negligence formulation in which one balances the foreseeability of the harm, the severity of the harm, and the cost/burden of protecting against or eliminating the harm based upon public policy reasons.

*B. Re-framing Duty: Moving from Individual to Institutional Failure*

*1. General Duty Rules*

It is one thing to suggest that tort claims be framed as institutional failures and another to conceptualize how to move courts in that direction. Courts have expressed two main reasons for absolving universities from liability for dorm-based acquaintance assaults: a judgment that it is wrong to shift moral and legal responsibility from student perpetrators to universities,<sup>183</sup> and a fear that requiring colleges to protect students from acquaintance assault places a high burden on colleges that would concomitantly require significant incursions upon student autonomy and impose a costly and high burden on universities.<sup>184</sup> This section suggests that those conceptualizations misconstrue colleges' duty and the appropriate standard of care.

Tort negligence claims against a university for third-party sexual assaults require plaintiffs to prove that: the university owed them a duty to exercise due care with regard to their safety, it breached that duty, and the breach of duty was a cause of their injuries.<sup>185</sup> The general rule is that no legal duty exists to protect against criminal conduct of a third party unless the defendant has a special relationship with either the assailant or injured party that, for policy reasons and societal expectations, creates a special duty of care.<sup>186</sup>

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181. Matt Rocheleau, *College Students Fight Sexual Assault Accusations*, BOS. GLOBE (June 27, 2014), <https://perma.cc/62ZH-4SA8>.

182. See, e.g., *Tanja H.*, 228 Cal. App. 3d 434; The no duty rule announced in *Tanja H.* has been adopted by numerous California courts, see, e.g., *Nagash v. Bd. of Trs.*, 2016 WL 4056407 (Cal. 3d Dist. Ct. App. July 29, 2016), as well as courts in other jurisdictions, see, e.g., *L.W. v. Westerns Golf Ass'n*, 675 N.E.2d 760 (Ind. Ct. App. 1997); cf. *Nero v. Kan. St. Univ.*, 861 P.2d 768 (1993) (finding duty based on landlord tenant relationship); *Stanton v. Univ. of Me.*, 773 A.2d 1045 (2001) (finding college owed student duty of care based upon business invitee relationship).

183. *Tanja H.*, 228 Cal. App. 3d at 438.

184. *Id.* at 438–39.

185. David G Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1672–86 (2007) (explaining duty, breach, causation and damages).

186. RESTATEMENT (SECOND) OF TORTS § 315 (1963); *Nero*, 861 P.2d at 780.



When it comes to IHEs' duty to engage in measures that seek to reduce the risk of dorm-based sexual assaults, courts may choose to articulate IHEs' special duty to dorm residents in any number of ways.<sup>187</sup> Whichever special duty formulation is utilized, courts should begin by distinguishing dorm-based sexual assaults involving stranger rapes<sup>188</sup> and those involving acquaintance rapes.<sup>189</sup> Currently, most courts analyze both stranger and acquaintance rapes under the special duty theories developed in premises liability cases, which look largely at prior similar instances in the vicinity of the alleged assault.<sup>190</sup> However, stranger and acquaintance assault claims give rise to different considerations when assessing reasonable care and foreseeability.<sup>191</sup> For example, the known high rate of acquaintance assault underreporting would be irrelevant in a stranger attack case but may come into play in assessing foreseeability in a dorm-based acquaintance attack. Broken building locks may demonstrate lack of reasonable care in a stranger assault case but have no bearing on a school's reasonable care in a dorm-based acquaintance assault claim. Because peer-on-peer acquaintance rapes raise different issues than stranger attacks, courts should look beyond premises liability theories when assessing an IHE's duty to dorm residents who have allegedly been sexually assaulted by fellow students. The next section outlines various duty formulations courts could employ.

## 2. *Articulating a Special Duty*

### a. *Existing Duty Analyses*

Scholars, looking broadly at IHEs' duty to their students, have developed various formulas. One suggestion is that a special duty exists between

187. See generally Brewer, *supra* note 97, at 389 (arguing that courts adopt the Restatement (Third) approach to school/student special duty); Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 465 (2007); see also ALIZA M. MILNER, CAUSE OF ACTION AGAINST COLLEGE OR UNIVERSITY FOR INJURY INFLICTED ON STUDENT BY THIRD PARTY, 31 CAUSES OF ACTION 2d 675 at § 7 (noting that courts have analyzed third-party assault claims against colleges using a wide range of special duty formulations, including a duty based on custodian-charge, business-invitee, landlord-tenant, and protector protectorate relationship).

188. See, e.g., *Wheatley v. Marietta Coll.*, 48 N.E.3d 587 (Ohio Ct. App. 2016); *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112 (2nd Cir. 2006); *Lees v. Carthage Coll.*, 714 F.3d 516 (2013).

189. See, e.g., *Facchetti*, 175 F. Supp. 3d 627; *Tanja H.*, 228 Cal. App. 3d 434; *Stanton*, 773 A.2d 1045.

190. Brewer, *supra* note 97, at 347.

191. See, e.g., *Lees*, 714 F.3d at 523–26 (finding that in case where student was raped in her dorm by a stranger, plaintiff's expert inappropriately relied upon reports of dorm-based acquaintance rapes to assess foreseeability, especially in light of the different measures necessary to prevent acquaintance rape versus stranger rape); *Williams*, 453 F.3d at 118 (in suit alleging liability based on an attack by an unidentified assailant, the court found that campus crime statistics and a security company's warning that the school needed to monitor an entrance raised issues of foreseeability for the jury to decide; neither of those considerations would be relevant in an acquaintance assault case).

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IHEs and their students simply by virtue of the student/school relationship.<sup>192</sup> Another duty formulation, proposed by Professors Bickel and Lake, suggests courts use a “facilitator” model—a model that sets out various factors courts could use to balance a university’s responsibility to provide guidance with student autonomy.<sup>193</sup> The “millennial” model suggests courts find that the college-student relationship gives rise to an affirmative duty to act based on a student’s detrimental, *reasonable* reliance on a college’s act that is tangentially related “to the college’s *overall* mission.”<sup>194</sup> These duty formulations account for the reality that today’s college freshmen do not have the same level of maturity and judgment as adult tenants or adult business invitees,<sup>195</sup> and they also account for the fact that universities, as educational institutions, have some level of responsibility for guiding students as they negotiate the path from teen to adult.

*b. An Alternative Approach: Recognizing a Special Duty Based on Superior Knowledge and Ability to Regulate Dorm Life*

Any one of the above-suggested formulations for finding a duty would be a viable basis for finding a duty to use reasonable care to reduce the risk of dorm-based acquaintance assault. However, the above models create a broad IHE/student duty. If courts sought a more limited duty articulation applicable to cases of dorm-based acquaintance assault, courts could find a special duty exists based upon IHEs’ superior knowledge of where most on-campus assaults occur<sup>196</sup> and their ability to regulate dorm life.<sup>197</sup> This duty formulation may make particular sense in light of the fact that many schools require, or strongly recommend, that freshmen live in campus housing.<sup>198</sup>

192. Brewer, *supra* note 97.

193. The factors include: (1) foreseeability of harm; (2) nature of the risk; (3) closeness of the connection between the college’s act or omission, and student injury; (4) moral blame and responsibility; (5) the social policy of preventing future harm (whether finding duty will tend to prevent future harm); (6) the burden on the university and the larger community if duty is recognized; and (7) the availability of insurance. Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations from “In Loco Parentis” To Bystander to Facilitator*, 23 J.C. & U.L. 755, 789–92 (1997).

194. Peters, *supra* note 187, at 467.

195. For an excellent overview of adolescent brain development and why adolescent decision making differs from that of adults, see Michael N. Tension & Amanda C. Pustilnick, “*And if Your Friends Jumped Off A Bridge, Would You Do It Too?*”: *How Developmental Neuroscience Can Inform Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533 (2015).

196. See *supra* *infra* Section V(C) (discussing colleges’ superior knowledge of where on-campus sexual assaults occur).

197. See *infra* Section V(C) (discussing colleges’ ability to regulate various aspects of college dorms and dormitory life).

198. Danielle Douglas Gabrielle, *Freshmen Residency Rules Sometimes Force Students to Pay Prohibitive Costs*, WASH. POST (Sept. 29, 2015), <https://perma.cc/6D66-V5TC> (noting that at least 87 colleges require freshmen to live in on-campus housing).

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In other contexts, courts have found that a college's superior knowledge and control over the premises creates a special duty. For example, in *Furek v. University of Delaware*,<sup>199</sup> a fraternity hazing case, the Delaware Supreme Court noted:

The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. That duty extends to the negligent or intentional activities of third persons. Because of the extensive freedom enjoyed by the modern university student, the duty of the university to regulate and supervise should be limited to those instances where it exercises control. Situations arising out of the ownership of land, within the contemplation of Restatement § 344, involving student invitees present on the property for the purposes permitted them are within such limitations.<sup>200</sup>

The court relied upon the reasoning in *Mullins v. Pine Manor College*,<sup>201</sup> a case involving a stranger attack and rape of a dorm student. In *Mullins*, the Massachusetts Supreme Court articulated the idea that schools often have superior knowledge of risks and also have control of the premises, and these two factors may serve as the basis for a special duty to use reasonable care to protect students living in dorms against third-party acts.<sup>202</sup> As it noted:

"The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students."<sup>203</sup>

Based upon the university's superior knowledge and ability to control the premises, the *Mullins* court found that the university had assumed a duty to use reasonable care to protect its dorm residents against third-party criminal acts.<sup>204</sup>

As *Furek* and *Mullins* demonstrate, articulating a special duty based upon a university's superior knowledge and control over the premises is not without precedent. This conceptualization does not create a blanket special

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199. 594 A.2d 506 (Del. 1991).

200. *Furek*, 594 A.2d at 522. Restatement of Torts § 344 (1934), upon which the *Furek* court relied, states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to: (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

201. 449 N.E.2d 331 (Mass. 1983).

202. *Id.* at 335–37.

203. *Id.* at 335.

204. *Id.*

duty to protect students from injuries by third parties, something that courts have thus far resisted.<sup>205</sup> Instead, it focuses on a key policy reason for the development of third-party liability—a recognition that when institutions have superior knowledge of potential risks and have the ability to exercise some level of control over those risks, imposing liability in those situations “deter[s] entities from creating, ignoring, or disguising safety hazards.”<sup>206</sup>

In the final analysis, duty is a policy decision.<sup>207</sup> When judges declare that schools have no duty to address campus acquaintance sexual assaults, they engage in policy decision-making that conflicts with legislative enactments that indicate colleges do, in fact, owe their students a responsibility when it comes to sexual violence awareness and prevention.<sup>208</sup> Looking at duty in light of long-standing institutional failures, expressed legislative policy decisions, the data available to schools that is unlikely to be well-known by students and parents,<sup>209</sup> and schools’ ability to engage in reasonable precautionary measures in the dorms they manage and control, illustrates how institutions have contributed to, and failed to address, a long-standing problem that has significant social costs.<sup>210</sup>

### C. Using Schools’ Superior Knowledge and Control Over the Premises to Establish Duty and Standard of Care

This essay suggests that it is the combination of schools’ superior knowledge and their ability to exercise regulatory authority over dormitories that creates the special duty to dorm residents. Schools’ superior knowledge of the risks of dorm-based assaults can be established through numerous avenues such as: (1) a school’s own historical Clery Act reports, which likely indicate the majority of their reported on-campus sexual assaults have occurred in their dorms; (2) the lack of easy accessibility and comprehensibility of the school’s Clery Act reports by the general public<sup>211</sup>; (3) national data that indicates that sexual violence victims often do

205. See MILNER, *supra* note 187, § 7.

206. Ellen M. Bublick, *Citizen No Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1423 (1999) [hereinafter Bublick, *Citizen No Duty Rules*].

207. *Mullins*, 449 N.E. 2d at 335 (noting that “duty finds its “source in existing social values and customs” and that schools’ duty to use reasonable care to protect students living in dorms against third-party attacks is a duty that is “firmly embedded in a community consensus”).

208. See *supra* Section III(C)(1) (discussing Ramstad Amendment) and Section III(C)(2) (discussing VAWA regulations).

209. See *supra* Section III(B) (discussing Clery Act and schools’ superior knowledge).

210. See, e.g., Duncan, *supra* note 176, at 446 (noting the costs to victims of campus sexual assaults); see also *supra* text accompanying notes 177–184 (discussing the costs of campus sexual assaults to victims and alleged perpetrators).

211. See *supra* Section III(B) (discussing why the public is unlikely to have equal access to, or understanding of, the information in the Clery Act reports).

not report,<sup>212</sup> thus alerting schools to the fact that their own data likely understates the problem in their dorms; and (4) other information potentially in a school's possession and not part of the current public information domain.

In addition to schools' superior knowledge, a duty arises because schools have far-reaching control over dorms and dorm life. Schools decide whether dorms are single-sex or co-ed; if co-ed, they decide if they are co-ed by floor, hall, or room. Schools decide who lives in the dorms, e.g., they may mandate that all freshmen must live in a school dorm, and they may designate some dorms as "freshmen only." Schools decide whom to hire as resident assistants (RAs), how many RAs to hire, how to train them, and how many to place in each dorm.

Schools also exercise substantial control when it comes to what information dorm residents receive and how they receive it. Schools can dictate what information may be posted and where it may be displayed. For example, schools could post flyers on the back of every bathroom stall door with basic facts about sexual assault risk factors, risk reduction methods, and contact information for assault reporting. They could put up posters with that information. Or, they could choose not to post anything. Schools could mandate participation in dorm-based sexual assault risk reduction training as a condition of living in the dorm. Schools also have the power to regulate dorm-based alcohol consumption and overnight guests and can decide how stringently to enforce those regulations. Unlike apartment managers or businesses, because of the unique relationship between schools and dorm residents, schools have significant regulatory control when it comes to dorm life.

Establishing IHEs' ability to regulate dorm life is not akin to arguing schools exercise control over students. Thus, the court in *Tanja H.*, which used colleges' presumed lack of control over students as a reason to find a university owed its dorm resident student no duty to protect her against an acquaintance's brutal assault, went down the wrong analytical path. That court reasoned that schools have no duty to students living in their dorms to protect against acquaintance assaults because to do so would require unrealistic measures such as "24-hour guards" in each room and would "impose onerous conditions on the freedom and privacy of resident students—which restrictions are incompatible with a recognition that students are now generally responsible for their own actions and welfare."<sup>213</sup> The question is not whether the school can control students but whether the school has control over its own actions.

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212. See *supra* Section III(A)(1) (discussing underreporting).

213. *Tanja H.*, 228 Cal. App. 3d at 438.

As Professor Bublick notes, “Although courts sometimes state that a third-party defendant’s duty is to ‘protect the victim’ from rape, that statement is inaccurate to the extent that it implies that the third party has a legal obligation to ensure a particular outcome (strict liability) rather than to take reasonable precautionary measures (to behave non-negligently.)”<sup>214</sup> Leaping to the conclusion that the duty to use reasonable care to protect against dorm-based acquaintance assaults requires colleges to engage in expensive and onerous restrictions on student freedom bypasses any true analysis about what might constitute reasonable care. This kind of all-or-nothing approach has significant analytical flaws. First, it obviates colleges’ responsibility to engage in reasonable precautionary measures despite colleges’ superior knowledge about campus sexual assault risk factors, including where most assaults occur, and despite the fact that as institutions of higher learning, colleges are particularly well suited to develop meaningful education programs that warn and inform about acquaintance assault risk avoidance. Second, this reasoning creates a false tension between student and university responsibility. It shifts all responsibility for student safety to teenage students. It also ignores the fact that schools do engage in protective measures that seek to ensure student safety either outside the dorm or from outsider attacks.<sup>215</sup> Thus, schools create a situation in which students may have a false sense of security once they enter the dorms despite the fact that the dorms are likely the highest risk location for on-campus acquaintance assault.

Conceptualizing schools’ duty to students in their dorms as a special relationship arising from schools’ superior knowledge and ability to regulate many aspects of dorm life does not mean courts will develop a standard of care that requires schools to post 24-hour armed guards in dorms. What it does mean is that courts should recognize that educational institutions should not get a free pass for institutional failures to address serious risks the institution knows to exist and to harm both victims and accused perpetrators.

Articulating a duty and standard of care as one requiring schools to take reasonable precautionary measures comports with basic tort law principles that balance the foreseeability of the harm, the severity of the harm and the cost/burden of protecting against or eliminating the harm based upon public policy reasons.<sup>216</sup> As one judge noted:

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214. Bublick, *Citizen No Duty Rules*, *supra* note 206, at 1424.

215. *See supra* Section (I)(B)(3)(a) (discussing how schools may be misleading students into thinking their dorms are a “safe space”).

216. This classic formulation was articulated by Judge Learned Hand in *Carroll Towing Co.*, 159 F.2d 169 at 173.

The magnitude of guarding against the risk and the consequences of placing the burden on the university are low. Colleges inundate their students with a vast amount of information regarding classes, housing, campus clubs and recreation. They also inform students of the best ways to protect their rooms, apartments, cars and bicycles from theft or vandalism. Surely a woman's physical and mental health deserve as much protection as her clock radio and her hair dryer.<sup>217</sup>

What constitutes reasonable precautionary measures remains to be seen, although there are some basic guidelines that should inform how colleges implement dorm-based assault risk reduction programs.<sup>218</sup> Some colleges may point to the fact that they, along with many other schools, require students to watch a training video, and they thus may argue that they have met the standard of care when it comes to reasonable precautionary measures. However, this defense may prove inadequate given the literature that suggests this educational and prevention methodology is largely ineffective.<sup>219</sup> As Judge Learned Hand aptly noted, "courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."<sup>220</sup> Plaintiffs' lawyers and courts likely will rely upon experts to help determine what schools should be doing when it comes to engaging in reasonable risk reduction measures in light of the risk of harm and the cost and feasibility of preventative measures.<sup>221</sup> While tort litigation is not a panacea to the campus sexual assault problem, it can help define meaningful awareness and risk reduction measures and incentivize schools to engage in those measures.<sup>222</sup>

217. *Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 438 (Ill. App. Ct. 1993) (Breslin, J., dissenting).

218. *See, e.g., DeGue et al.*, *supra* note 62, at 356–58 (noting that research suggests that the principles of prevention that were strongly associated with positive effects when it comes to sexual violence prevention had the following characteristics: (a) comprehensive, (b) appropriately timed, (c) utilized varied teaching methods, (d) sufficient dosage, (e) administered by well-trained staff, (f) provided opportunities for positive relationships, (g) socio-culturally relevant, (h) theory-driven, and (i) included outcome evaluation).

219. *See supra* text accompanying notes 123–125 (discussing why a one-time instructional video is an ineffective risk reduction educational method).

220. *The T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737, 740 (2nd Cir. 1932).

221. *See, e.g., Lees*, 714 F.3d at 523 (analogizing the standard of care in dorm-based assaults to the standard of care in professional negligence claims and noting that "expert testimony is required to establish the standard of care for ensuring the security of a campus residential environment."); *see also*, M. Mozaffarieh & A. Wedrich, *Malpractice in Ophthalmology: Guidelines for Preventing Pitfalls*, 25 MED. & L. 257, 258 (2006) (noting that "standards of care develop through a complex interaction within a profession, between a profession and the public and between a profession and the legal system.").

222. *See Herring v. United States*, 555 U.S. 135, 153 (2009) (Ginsberg, J., dissenting) (noting that "a foundational premise of tort law—that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care."); *see also* Amalea Smirniotopoulos, *Bad Medicine: Prescription Drugs, Preemption, and the Potential for a No-Fault Fix*, 35 N.Y.U. REV. L. & SOC. CHANGE 793, 814 (2011) (arguing "the threat of litigation incentivizes drug manufacturers to properly disclose pre-market and post-market safety information by creating the threat of substantial monetary damages and reputational costs in cases of misconduct.").

D. *Re-framing Negligence Claims and Long-Term Risk Reduction Goals*

Tort litigation raises numerous legal issues courts must grapple with. Even if courts accept that schools have a duty to develop effective risk reduction programs, tort litigation itself may not, at least initially, end in plaintiff victories.<sup>223</sup> Even if a plaintiff can overcome the duty and standard of care hurdles, she still must prove causation<sup>224</sup> and confront affirmative defenses and apportionment issues that often generate a “blame the victim” defense strategy.<sup>225</sup> Additionally, with state universities, plaintiffs must address potential sovereign immunity issues.<sup>226</sup>

However, tort claims do not have to be successful in order to change institutional behaviors. Even when plaintiffs initially lose, filing the claims can help frame the issue and change the narrative,<sup>227</sup> paving the way for eventual victories both in terms of lawsuits and self-regulatory policy changes.<sup>228</sup> Additionally, discovery may help disgorge information that further points to institutional failures, again changing the narrative, helping future plaintiffs, and leading to both self-regulatory changes and external policy changes that address the underlying problem.<sup>229</sup> “Although the civil justice system is often valued only for its capacity to deter and to compen-

223. For a general discussion of hurdles that tort litigation sexual assault victims must overcome, see Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 76–78 (2006).

224. *Id.* at 92–94. Causation is generally a jury question so plaintiffs’ attorneys likely will be trying to find the most convincing evidence that certain risk reduction methods are effective and meet the cost/benefit test. To the extent plaintiffs’ attorneys become involved in this issue, they may help all schools identify cost effective risk reduction methods.

225. Bublick, *Citizen No Duty Rules*, *supra* note 206, at 1433 (noting victims are blamed for not being constantly vigilant and self-protective).

226. Bublick, *supra* note 223, at 90 (noting that tort suits against public entities face state immunity defenses and that state actor immunity often depends upon “whether the public entity had purchased liability insurance coverage, was grossly negligent, or had a special duty to protect the plaintiff”). *But see Nero*, 861 P.2d at 782 (finding the discretionary function exception to the Kansas Tort Claims Act did not immunize Kansas State University from a lawsuit in which a young woman alleged KSU failed to use reasonable care to warn her and to use reasonable security measures to protect her against an assault by a fellow student the university knew had previously assaulted another student).

227. LYTTON, *supra* note 17, at 13 (noting that clergy sexual abuse claims happened in three waves: 1984–1991, 1992–2001 and 2001–present). What may seem like common public knowledge about church malfeasance today was not common knowledge just a few decades ago when incidents of clergy sexual abuse were thought to be “rare and isolated occurrences” involving just a few bad priests. LYTTON, *supra* note 17.

228. *See* Lytton, *supra* note 143, at 1868–69 (discussing David Hunter’s arguments that claims do not have to be successful to be impactful).

229. *See, e.g.*, LYTTON, *supra* note 17, at 137–60 (discussing the role of litigation in uncovering concealed information in clergy sexual abuse litigation). *See generally* Erica Golger & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius” of American Corporate Law*, 63 EMORY L.J. 1383 (2014) (discussing the role the discovery process plays in producing information benefits to third parties, developing self-regulatory corporate governance structures, and providing information to external policymakers).

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sate, the power of the common-law courts also entails the ability to facilitate investigation.”<sup>230</sup> Finally, the changed narrative and additional information gathered as a result of civil litigation can also play a role in the development of future regulations and create public pressure resulting in self-regulation, as happened in clergy sexual abuse claims.<sup>231</sup>

## VI. CONCLUSION

This essay highlights a problem known to colleges but not generally known to the public: the fact that the majority of on-campus sexual assaults occur in college dorm rooms. Many schools’ failure to forthrightly acknowledge the problem that most on-campus assaults occur in dorm rooms, and their concomitant failure to study this issue and potential dorm-based risk reduction mechanisms, indicates a continued and ongoing reluctance to acknowledge a long-standing problem. Litigation and enforcement actions and the publicity they generate help expose institutional failures. This essay suggests that negligence claims framing schools’ refusal to forthrightly acknowledge and deal with what is happening in college dorm rooms as an institutional failure may change judicial and public perceptions about IHEs’ silent complicity in a long-standing problem. That framing may generate publicity and public pressure that motivates schools to address this aspect of the campus sexual assault problem.

Schools, as educational institutions, are in a unique position to address the problem of campus sexual assault risk reduction education, and in particular risk reduction in campus dorms. Whether they do so may depend, in part, on courts’ willingness to force their hand.

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230. Alex Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265, 1284 (1991).

231. LYTTON, *supra* note 17, at 108–36 (discussing how litigation helped make addressing clergy sexual abuse a top priority within the Catholic church).