



## NOTE

## Opening the Door: Expanding Civil Redress for Sexual Assault Through Fraternity Insurance

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**Abstract.** Campus sexual assault prevention efforts have traditionally focused on criminal prosecution and Title IX adjudication as avenues of deterrence and redress. This focus has largely ignored civil litigation, which could be a route for survivors to obtain critically helpful economic damages. While civil lawsuits often do not go forward because the tortfeasor is judgment-proof, for the significant portion of campus sexual assaults that involve fraternities, there is an opportunity for survivors to hold the national fraternity organization liable for negligent supervision. This litigation theory is premised on the significant control that national fraternity organizations exert over their chapters, and thus their members, particularly in the form of powerful punitive mechanisms. Undergirding national fraternity control and this litigation strategy is the fraternity insurer, which indemnifies the national fraternity organization for third-party liability arising from harms inflicted by its members and enforces internal fraternity control structures.

This Note brings together scholarship on civil remedies for sexual assault, the relationship between tort liability and fraternity structure, and insurance as regulation to highlight an underutilized strategy in the campaign to reduce campus sexual assault. It surveys how, in the presence of a deep pocket, civil remedies are particularly appropriate for certain survivors. It also explains that, contrary to the conclusions of many courts, national fraternity organizations exert significant control over their chapters, and therefore their members, particularly through insurance mandates. I contend that national fraternity organizations should therefore be more frequently held liable for negligent supervision in cases of campus sexual assault and demonstrate how to build such a case. Doing so will provide needed economic remedies for survivors while reinforcing fraternity responsibility.

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## Introduction

In the past decade, sexual assault has been an inescapable topic on college campuses.<sup>1</sup> In 2010, many colleges and universities lacked clear procedures for adjudicating sexual assault claims.<sup>2</sup> Then came the 2011 “Dear Colleague” letter from the Department of Education. The letter clarified and supplemented preexisting guidance, including requiring equal time spent hearing each side, publication of grievance procedures, and the hiring of a Title IX coordinator to oversee all Title IX complaints and ensure compliance.<sup>3</sup> It also emphasized that the Department of Education’s Office of Civil Rights would be monitoring whether complaints were resolved in a timely manner.<sup>4</sup> The letter’s required reforms triggered a wave of policy overhauls and hiring of Title IX administrators.<sup>5</sup> It also started a debate about how to effectively (and fairly) reduce the rate of campus sexual assault, particularly how best to balance fair consequences with due process protections.<sup>6</sup> The current Department of Education recently re-stoked the furor by repealing these Obama-era reforms and promulgating new standards for Title IX adjudication.<sup>7</sup>

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1. See, e.g., Michelle J. Anderson, Feature, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1973-81 (2016) (summarizing the administrative adjudication requirements issued by the Department of Education’s Office for Civil Rights (OCR) in 2011 and 2014, the publication of names of universities under investigation by OCR, and the adoption of affirmative consent rules for campuses); Alexandra Brodsky, *Against Taking Rape “Seriously”: The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 HARV. C.R.-C.L. L. REV. 131, 132-43 (2018) (describing the rise of a national student movement pressuring college administrations to improve their responsiveness (including a surge of federal Title IX complaints) since 2011, the increase in OCR enforcement efforts, and the backlash of “mandatory referral” laws proposed in state legislatures by men’s rights activists, conservative donors, and universities).
  2. Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (updated Feb. 10, 2017, 5:06 PM), <https://perma.cc/NLQ4-BFMX>.
  3. Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter 6-9* (Apr. 4, 2011), <https://perma.cc/QQC4-VKFH>.
  4. *Id.*
  5. Wilson, *supra* note 2.
  6. See generally, e.g., Elizabeth Bartholet et al., *Fairness for All Students Under Title IX* (2017), <https://perma.cc/S4UJ-PZ5E> (criticizing, among other features of Title IX adjudications, the lack of procedural protections); Jon Krakauer & Laura L. Dunn, Opinion, *Don’t Weaken Title IX Campus Sex Assault Policies*, N.Y. TIMES (Aug. 3, 2017), <https://perma.cc/QH67-DXYK> (defending Title IX adjudications). For further discussion, see note 23 and accompanying text below.
  7. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

While the debate over the appropriate strategy rages on, no one disputes that reducing rates of campus sexual assault will require significant further change. According to recent studies, about 22% of female undergraduates experience sexual assault while in college, as do around 6% of male undergraduates.<sup>8</sup> At some schools, the rate is as high as one in two women.<sup>9</sup> Notably, fraternity members commit a disproportionate number of these assaults. Multiple studies have found that fraternity men are three times more likely to engage in sexually aggressive behavior—including rape—than other male college students are.<sup>10</sup>

Pursuing individual perpetrators through criminal prosecution and campus administrative adjudication is not enough. These processes are deeply flawed and widely controversial, and their institutional defects reduce their ability to deter future assaults and provide redress to survivors.<sup>11</sup> Moreover, even if a conviction or finding of guilt is appropriately reached (through prosecution or adjudication, respectively), the subsequent punishments of jail time or expulsion may not fit the goals or needs of survivors.<sup>12</sup> In particular,

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8. See Anderson, *supra* note 1, at 1970 (stating, based on a study of twenty-seven colleges and universities, that “the prevalence rate for completed sexual assault since entering college among female undergraduates was 21% and among male undergraduates was 7%” (citing CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 249545, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 73-74 (2016), <https://perma.cc/S26T-NKBN>); *Campus Sexual Violence: Statistics*, RAINN, <https://perma.cc/F8DU-42PF> (archived May 2, 2020) (“Among undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation.”).

Survivors of all gender identities have been affected by campus sexual assault. See *Prevalence Rates, END RAPE ON CAMPUS*, <https://perma.cc/RW8Y-SJ2Y> (archived May 2, 2020) (“Nearly 1 in 4 undergraduate students who are transgender or gender non-conforming experience sexual assault in college.”); *supra* note 8 and accompanying text. For sheer readability, this Note uses “she” as the pronoun for survivors, but references to survivors are intended to incorporate all gender identities and preferred pronouns.

9. Lydia O’Connor & Tyler Kingkade, *If You Don’t Get Why Campus Rape Is a National Problem, Read This*, HUFFPOST (updated June 24, 2016, 7:39 AM ET), <https://perma.cc/XF48-ZL9L>.

10. See, e.g., John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 NASPA J. 728, 735, 739 (2007) (finding “8% of first-year men who joined fraternities committed a sexually coercive act compared to 2.5% of men who did not join fraternities” in a study of 565 male freshmen at a “small to midsized public, southeastern university”); Catherine Loh et al., *A Prospective Analysis of Sexual Assault Perpetration: Risk Factors Related to Perpetrator Characteristics*, 20 J. INTERPERSONAL VIOLENCE 1325, 1329, 1339-40 (2005) (finding fraternity members were more than three times more likely than nonfraternity men to “engage in sexually aggressive acts”—defined as rape, attempted rape, sexual coercion, or unwanted sexual contact—in a study of 325 male undergraduates at a “large midwestern university”). These are the two major studies in this area, underscoring the need for further empirical work.

11. See *infra* text accompanying notes 23-30.

12. See *infra* text accompanying notes 46-47.

these processes do not compensate survivors for sexual assault's economic consequences.<sup>13</sup>

It is time to focus more on a litigation strategy that will both hold institutions accountable for the behavior they foster and produce economic remedies that provide a different form of recovery from assault, through a process more accommodating to survivors. This Note proposes a litigation roadmap to open up civil redress for a significant number of survivors and hold fraternities responsible for their contribution to campus sexual assault. Part I makes the broad case for these lawsuits, discussing (1) the disproportionate assault rate among fraternity members compared to their non-Greek peers, and (2) the benefits of civil litigation as an alternative avenue of redress for survivors, facilitated by targeting the national fraternity as a third-party deep pocket. Part II argues that national fraternity organizations should be liable for sexual assaults committed by their members due to the national organizations' control of their membership through policies, insurance, and other mechanisms, as well as their expertise on fraternity risk. Part III discusses why negligent supervision is the best tort theory to capture national fraternities' third-party liability. Holding national fraternity organizations liable as third parties for negligent supervision would reflect the responsibility and control national organizations have over their chapters and the foreseeability of sexual assault in fraternity social settings. Part IV defends the long-term viability of this litigation strategy by (1) surveying why this strategy will not simply cause insurers to leave the field in an attempt to negate liability and (2) exploring how this litigation strategy could encourage more rigorous sexual assault monitoring and prevention. If plaintiffs' lawyers make themselves more available to help survivors seek civil damages and make clear to the courts the full extent of fraternity control mechanisms, this litigation strategy is poised to become a strong contribution to campus sexual assault prevention.

### **I. National Fraternities Should Be Held Liable for Their Members' Actions**

A litigation strategy focusing on national fraternity organizations has both moral and practical motivations. Fraternity chapters are the loci of a disproportionate percentage of campus sexual assaults.<sup>14</sup> This fact alone merits a reckoning about what responsibilities fraternities should bear as part of sexual assault prevention and reform efforts. But equally, if not more, important are the potential benefits for survivors.

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13. See *infra* text accompanying notes 42-43.

14. See *supra* note 10.

A. The Moral Case: Campus Sexual Assault and Fraternity Culture

A disproportionate number of sexual assaults are committed by fraternity members. Indeed, fraternity men are three times more likely to commit rape than other male college students are.<sup>15</sup> Studies of Greek life at individual universities also reveal disproportionate assault rates at fraternity houses.<sup>16</sup> Fraternity members are far from the sole perpetrators of sexual assault at colleges and universities. But the pattern is clear.

Scholars in other disciplines continue to explore whether this pattern is solely because fraternities are often major campus social hubs or whether this pattern reflects a cultural or sociological problem within these institutions. Some sociological research has found that elements of fraternity culture encourage sexual assault.<sup>17</sup> Other sociologists have highlighted that the safety of the fraternity depends on the fraternity's individual culture.<sup>18</sup> Still others have suggested that the true problem is the fraternity member's individual self-control,<sup>19</sup> or masculine identity writ large.<sup>20</sup> Reconciling these findings (which are as complementary as they are potentially conflicting) is a question for further research, but the studies suggesting causal or correlative relationships between fraternity culture and sexual assault reinforce the importance of litigation incorporating fraternities as institutions.

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15. See *supra* note 10 and accompanying text.

16. See, e.g., JOHN HECHINGER, *TRUE GENTLEMEN: THE BROKEN PLEDGE OF AMERICA'S FRATERNITIES* 84 (2017) (noting that while only 12% of undergraduate men at Indiana University were part of fraternities, 23% of reported sexual assaults occurred in chapter houses).

17. See, e.g., Scot B. Boeringer et al., *Social Contexts and Social Learning in Sexual Coercion and Aggression: Assessing the Contribution of Fraternity Membership*, 40 *FAM. REL.* 58, 58, 62 (1991) (finding that “[f]raternity members were significantly more likely . . . to engage in nonphysical coercion and in the use of drugs and alcohol as a sexual strategy” and “[f]raternities are one type of male social setting in which . . . ‘rape myths’ and [objectifying] sexual attitudes are passed along”); Cortney A. Franklin et al., *Sexual Assault on the College Campus: Fraternity Affiliation, Male Peer Support, and Low Self-Control*, 39 *CRIM. JUST. & BEHAV.* 1457, 1473-74 (2012) (citing prior research and independent findings that “fraternity members experienced greater levels of peer pressure to have sex, which, in turn, increased the likelihood of sexual assault” and “[f]raternity membership indirectly predicted sexual assault through alcohol consumption and illegal drug use”).

18. See, e.g., A. Ayres Boswell & Joan Z. Spade, *Fraternities and Collegiate Rape Culture: Why Are Some Fraternities More Dangerous Places for Women?*, 10 *GENDER & SOC'Y* 133, 137 (1996) (“Men attending parties at high-risk [fraternity] houses treated women less respectfully . . . . Men were openly hostile, which made the high-risk parties seem almost threatening at times.”).

19. See, e.g., Franklin et al., *supra* note 17, at 1458.

20. See, e.g., Sarah K. Murnen et al., *If “Boys Will Be Boys,” Then Girls Will Be Victims? A Meta-Analytic Review of the Research That Relates Masculine Ideology to Sexual Aggression*, 46 *SEX ROLES* 359, 359 (2002).

B. The Practical Case: The Benefits of Civil Litigation Against an Institutional Actor

For survivors of sexual assault seeking redress, civil litigation against a national fraternity organization can present a route to critically helpful damages, offer a preferable adjudicatory process, and/or provide for the possibility of encouraging internal reforms to prevent future incidents. While a favorable Title IX finding or criminal conviction will punish the person or persons responsible, punitive remedies do little to recompense the (possibly severe) economic costs of sexual assault.<sup>21</sup> A third option—civil litigation—is generally infeasible against an individual perpetrator, who is typically judgment-proof. But it is possible against a well-resourced institution.

Discussions of redress for survivors of campus sexual assault typically focus on a binary: Title IX or criminal prosecution.<sup>22</sup> But both routes have entrenched procedural flaws and often do not address survivors' needs. They are also controversial. In Title IX proceedings, universities have shown a greater readiness to hand down harsher remedies like expulsion to students of color.<sup>23</sup> And many students have successfully sued their former schools for due process violations.<sup>24</sup> The DeVos-led Department of Education's Title IX reforms have only increased the controversy.<sup>25</sup> As for criminal prosecution, judges often hand minimal sentences to convicted rapists, especially those with race and/or class privilege.<sup>26</sup> A survivor might rightly lack confidence in these traditional options.

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21. See *infra* text accompanying notes 42-43.

22. See Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 963 (2016) ("As campus sexual assault has finally ascended to the status of a national concern, . . . two main camps have emerged: those who believe campus sexual assault is a *crime*, and thus best dealt with in the criminal courts, using criminal law tools; and those who believe campus sexual assault is a *civil rights violation*, and thus best dealt with through university disciplinary proceedings, using Title IX.").

23. See Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), <https://perma.cc/34NT-LSW8>. Evidence of racial bias has led Janet Halley to call for "reduc[ing] the Title IX Office to a compliance-monitoring role, and get[ting] it out of the business of adjudicating cases." Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 108 (2015).

24. Anderson, *supra* note 1, at 1988.

25. See *infra* note 29 and accompanying text.

26. See, e.g., Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://perma.cc/CL7J-DGAW> (reporting that a former Stanford University swimmer was convicted of three counts of sexual assault but was only sentenced to six months in jail with three years' probation); see also Julie Bosman, *Elite Kid Justice: Are Privileged Teenagers More Likely to Get a Slap on the Wrist?*, N.Y. TIMES (July 5, 2019), <https://perma.cc/YJH3-6SDX> (describing the pattern of judges  
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Practically, when a fraternity is implicated in a case, civil litigation is an equally, if not more, viable alternative. Civil litigation offers significant procedural advantages over both criminal prosecution and Title IX adjudication. Moreover, rape is an injury redressible in tort. Civil litigation, the forum for tort law, is the route to obtaining damages, which may be helpful in compensating for the harms ensuing from the assault. As long as there is a deep pocket available to pay for these damages—justifying the lawsuit—civil litigation can meet the needs of certain survivors far better than Title IX adjudication or criminal prosecution.

### 1. Evidentiary standard

The more permissive evidentiary standard in civil litigation may make tort lawsuits more appealing to survivors, as well as provide greater protection against retraumatization. For criminal cases, an alleged perpetrator must be found guilty beyond a reasonable doubt.<sup>27</sup> While the new Title IX rule allows schools to set the burden of proof to either preponderance of the evidence or beyond a reasonable doubt, the school's obligation is only to respond to sexual harassment in "a manner that is not deliberately indifferent."<sup>28</sup> Moreover, the regulation adopts the narrow definitions of sexual assault and dating violence used by the FBI and found in the criminal code, despite the milder penalties at stake.<sup>29</sup>

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who sympathized with privileged male defendants and emphasized how much these young men had to lose with a long sentence).

27. *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

28. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,574 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Experts have criticized the steep deliberate indifference standard for pursuing a case, noting that "many students would be forced to endure repeated and escalating levels of abuse" either because they fear they do not meet the standard or because the school has been forced to ignore their complaint. *E.g.*, Elizabeth Tang, *Three Reasons Why Betsy DeVos's Proposed Title IX Rules Would Hurt Survivors*, NAT'L WOMEN'S L. CTR. (Nov. 16, 2018), <https://perma.cc/G8DM-C9HD>.

29. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,574 (citing 20 U.S.C. § 1092(f)(6)(A)(v); and 34 U.S.C. § 12291(a)(8)). Furthermore, section 106.44(a) of the new rule only holds a recipient school responsible for responding to conduct that occurs within its "education program or activity." *Id.* This section implies that conduct that occurs off campus is not within the school's adjudicatory purview (the examples listed are computer labs and sporting events), a narrowing that will dramatically restrict viable Title IX claims because, at many schools, sexual assault more frequently occurs off campus. *See* Collin Binkley, *At Major Colleges, Sexual Assaults Most Likely Off Campus*, AP NEWS (Feb. 12, 2019), <https://perma.cc/3REY-R2LH> ("The AP asked the nation's 10 largest public universities for several years of data on the location of sexual assaults. Out

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By contrast, in civil suits, an alleged perpetrator must simply be found liable by a preponderance of the evidence.<sup>30</sup> This is a critical difference for survivors, who are often the primary witnesses to their own assault and lack the concrete evidence necessary to overcome their attacker's denials.<sup>31</sup> To be sure, none of the available fora will—or should—render an adverse finding against the accused based on a mere allegation. But civil litigation opens a door to cases that might never have crossed the threshold in either criminal prosecution or campus adjudication. Under the civil preponderance-of-the-evidence standard, cases with substantial evidence, but not enough to be either clear and convincing (for Title IX)<sup>32</sup> or beyond a reasonable doubt (for criminal prosecution), may still result in redress for a survivor.

## 2. Testimony

Relatedly, testifying in a civil lawsuit is likely to be less traumatic for survivors than the equivalent in criminal proceedings or campus adjudication.<sup>33</sup> This is because there is no specific tort for rape. A civil lawsuit is instead brought under broader causes of action, such as assault, battery, or intentional infliction of emotional distress.<sup>34</sup> According to Ellen Bublick, a leading torts scholar, and Sarah Swan, a law professor who studies third-party tort liability, satisfying these broader causes of action does not require highly detailed testimony to prove the tort elements, thereby sparing plaintiffs from lurid and intrusive questioning about the mechanics of the assault.<sup>35</sup> Moreover,

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of eight that provided data, five had more reports from off campus than on school property . . .”). This is in part because many fraternities operate off campus. See Britton O'Daly, *Big Brother: The Future of Fraternities in the Ivy League*, YALE DAILY NEWS (May 5, 2018), <https://perma.cc/Z62W-W6TN>.

30. 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 3:8 (West 2020).

31. See SUSAN ESTRICH, REAL RAPE 21 (1987) (“In most [rape] cases there are no witnesses. . . . Unless the [survivor] actively resists, her clothes may be untorn and her body unmarked. . . . In short, rape is a crime for which corroboration may be uniquely absent.”).

32. The final rule introduced clear and convincing evidence as a permissible alternative standard to the previous preponderance of the evidence rule. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. at 30,575.

33. See, e.g., Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 424-25 (2013).

34. *Id.* at 424. Other possible causes of action include false imprisonment, outrage, seduction, violation of 42 U.S.C. § 1983, invasion of privacy, negligent infliction of emotional distress, or statutory claims. 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, 71-72 (2006).

35. Swan, *supra* note 33, at 424-25 (“[A] grossly intrusive technical interrogation into ‘insufferable details about exactly which digit touched which orifice’ will usually not be  
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this testimony will be counseled, unlike the experience many survivors will soon face under Title IX. The new rule makes room for parties to cross-examine each other through an advisor or lawyer (rather than personally).<sup>36</sup> But while a less-than-wealthy survivor can secure a skilled lawyer for a civil suit through the contingent-fee system, parties in campus adjudications who are unable to afford a lawyer will not benefit from an attorney's experience with witness preparation and cross-examination. To be sure, many survivors likely dread testimony. Nonetheless, civil litigation offers the gentlest combination of circumstances possible for someone looking to bring a case.

### 3. Agency

Civil litigation can also provide an empowering alternative—or supplement—to criminal prosecution and campus adjudication. While civil litigation, like criminal prosecution, enables a survivor to step outside the campus disciplinary process, it does not require the survivor to surrender their agency to do so. A survivor who brings a civil suit has full control over how the case progresses. If she reports the incident to the police instead, she cedes control over how any criminal case proceeds. Even if she does not want a case to be brought, she can find herself forced to participate in an unwanted trial.<sup>37</sup> Such an experience can be re-traumatizing: “The denial of subjectivity inherent

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necessary to make out the elements of the tort.” (quoting Bublick, *supra* note 34, at 72)); *see also* Bublick, *supra* note 34, at 73 (“Traditional staples of the criminal law rape case, such as penetration, are simply not required in tort. And unlike the criminal law, no [survivor] need show that a finger touched an unwanted place inside her vagina rather than outside her vagina in order to recover. Similarly, the element of force is irrelevant as long as the [survivor] can prove the defendant had an actual intent to harm or offend.”). The continued possibility of cross-examination is addressed below. *See infra* notes 64-69 and accompanying text.

36. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,577.

37. Swan, *supra* note 22, at 972-73 (“[E]ven when [survivors] desperately want claims pursued, prosecutors frequently choose to nevertheless abandon charges. And a [survivor] who adopts the contrary position, and prefers not to invoke the criminal process, may find that her consent or willingness to pursue a criminal complaint is unnecessary; her unwillingness is not enough to deter prosecution.”). In generally covering criminal prosecution of sexual assault, this Note does not discuss the recent state legislative phenomenon of mandatory referral bills, proposed laws that require university administrators to turn over survivors’ reports to law enforcement. For an explanation of the pitfalls of these bills, see generally Brodsky, *supra* note 1. The only bill that has become law so far is a heavily “softened” Virginia statute requiring a school committee, with a required law enforcement member, to determine whether campus and public safety requires the school to notify criminal authorities of a reported sexual assault. *Id.* at 140-41. Even if similar laws go into effect in other states, the lack of agency in these laws makes them only peripherally relevant to this discussion about the options facing survivors.

in a forced legal process is particularly problematic in the context of sexual assault.<sup>38</sup> This process “exacerbates part of the harm of sexual assault itself” because it “mimics [the] objectification [of the rape]” in its “denial of a [survivor’s] autonomy and subjectivity.”<sup>39</sup> What may have been a plea for immediate help (calling the police) can become an intensely painful way of reliving the assault experience.

In the civil context, by contrast, unless the case is dismissed, a survivor is in full control of whether to continue litigating or settle. In fact, she may never even have to go to trial. Like most civil tort defendants, the opposing party here is statistically unlikely to force the case to a verdict.<sup>40</sup> Indeed, of the recent sexual assault lawsuits studied for this Note that survived a motion to dismiss, most ended in settlement or summary judgment.<sup>41</sup>

#### 4. Remedies

Critically, civil litigation provides the possibility of financial redress, through either settlement or a favorable verdict. Damages can help a survivor with many of the aftereffects of sexual assault: Beyond causing emotional trauma, sexual assault may harm the survivor’s health, education, privacy, and employment.<sup>42</sup> The resulting financial burden can be enormous, including bills for hospital stays and therapy, lost tuition, insurance administration costs, and lost wages.<sup>43</sup> Civil damages are the only form of legal redress that directly

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38. Swan, *supra* note 22, at 973.

39. *Id.*

40. Of filed tort cases, approximately 70% to 80% settle. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 122 (2009).

41. *See, e.g.*, Opinion, Memorandum & Order at 1, *Roe v. Saint Louis Univ.*, No. 4:08-cv-01474 (E.D. Mo. Oct. 31, 2012), ECF No. 318 (granting motions for summary judgment filed by Sigma Tau Gamma Epsilon Xi Chapter and Sigma Tau Gamma Fraternity); *Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity*, 359 P.3d 436, 439-40, 453-58 (Or. Ct. App. 2015) (affirming a grant of motion for summary judgment); Stipulation of Dismissal with Prejudice as to Beta Theta Pi & Zeta Lambda Chapter of Beta Theta Pi at 1, *Roe v. Furman Univ.*, No. 6:18-cv-01327 (D.S.C. July 18, 2019), ECF No. 209; Joint Stipulation for Dismissal with Prejudice Pursuant to FRCP 41(a)(1)(A)(ii) at 1, *Doe v. Brown Univ.*, No. 1:16-cv-00562 (D.R.I. June 26, 2018), ECF No. 101. Stipulations of dismissal with prejudice under Rule 41(a) typically indicate that the parties have come to an out-of-court settlement. *See* ROBERT I. WEIL ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ch. 11-A, at 11:5 (West 2019) (“Absent settlement, there is no reason to dismiss with prejudice.”).

42. Swan, *supra* note 33, at 451; *see also* Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 33-34 (2011) (citing Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 775 (2002)).

43. *See* Post et al., *supra* note 42, at 775; Swan, *supra* note 33, at 451.

reduces this financial burden. Therefore, the more available these damages are, the more likely survivors will pursue them as either a supplement or alternative to other actions.<sup>44</sup>

Another possible incentive to seek damages—specifically as an alternative to other forms of redress—is that economic penalties are less daunting to the accuser than expulsion or jail time. Since most campus sexual assaults are acquaintance rapes (that is, assaults perpetrated by someone the survivor knew), the survivor may be reluctant to seek such harsh consequences for her attacker.<sup>45</sup> Indeed, some schools are implementing restorative justice programs to assist survivors reluctant to participate in formal processes, which can allow survivors and respondents to gain closure without severe penalties.<sup>46</sup> While

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44. While survivors with health insurance will find some of these costs are covered, they will at minimum be responsible up to the deductible and for copays. A recent study found that only 12% of rape survivors had insurance coverage at all, and even those insured bore a significant portion of the financial burden. See Ashley M. Tennessee et al., *The Monetary Cost of Sexual Assault to Privately Insured US Women in 2013*, 107 AM. J. PUB. HEALTH 983, 985 (2017).
45. See, e.g., DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT: STANFORD UNIVERSITY 22-23 (2019), <https://perma.cc/A56Y-XHSA> (reporting that 31.7% of Stanford University undergraduates who experienced nonconsensual sexual penetration—and 18.3% who experienced unwanted sexual touching—did not contact a school program or resource after their assault because they did not want to get the perpetrator in trouble). There is a debate between advocates of restorative justice and survivor advocates over whether some accusers might be reluctant to “ruin” their attackers’ lives. See Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://perma.cc/9TT9-5EPA> (quoting a student’s statement to their attacker (“I am not out to ruin your life”) and a survivor advocate dismissing this reason as a “red herring”).
46. See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 189 (2016) (“A restorative approach is responsive to individual incidents of misconduct as well as to the broader cultural contexts that support such behavior by offering non-adversarial options for prevention education, resolution, and pathways to safe and accountable reintegration.” (quoting DAVID R. KARP ET AL., SKIDMORE COLL. PROJECT ON RESTORATIVE JUSTICE, CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2 (2016), <https://perma.cc/K2EG-UYTC>)); Mangan, *supra* note 45 (“In a restorative-justice approach, the [survivor] and the offender . . . participate in active and often brutally honest discussions about how someone was harmed and what it would take to heal. They also discuss steps . . . to ensure it doesn’t happen again.”); *id.* (noting the appeal of “[a]pproaches that start with the offender admitting responsibility and agreeing to repair the harm . . . to some students who aren’t interested in seeing someone suspended or expelled”). The PRISM Report lists the University of California at Berkeley, the University of San Diego, and Michigan State University as campuses with well-developed restorative justice programs, while Michigan State University, Swarthmore College, and the University of North Carolina at Chapel Hill are listed as campuses whose policies include language supporting restorative responses. KARP ET AL., *supra*, at 41.

these initiatives are still in their infancy, students are pushing for them at many schools,<sup>47</sup> demonstrating a strong interest in achieving closure through a route other than campus adjudication. Civil litigation will also avoid those harsh consequences—often without forcing the parties to be in the same room—and can similarly involve the perpetrator agreeing to certain treatment or behavioral modifications as part of a settlement.

### 5. Lingering concerns

The civil litigation path is an option that has particular appeal for potential plaintiffs (or complainants) who need economic damages and/or want to hold an institution responsible. Survivors' lack of decisionmaking power in criminal prosecution, the dramatically reduced scope and procedural flaws of Title IX campus adjudication, and the high burden of proof in both make civil litigation an increasingly viable alternative. But it is not a perfect solution. Civil litigation has its own flaws, meaning it may not fit every survivor's goals. For example, litigation is usually a long process, and delays can be frustrating and upsetting.<sup>48</sup> While a potential plaintiff should be apprised of these flaws when deciding whether to bring a case, many of these problems are more minor than they initially appear.

Civil lawsuits can trigger objections to the monetization of rape, from both opponents and survivors. Survivors are accused of concocting their stories solely to force a payout,<sup>49</sup> an accusation that will likely continue as fraternity insurers are more frequently named in lawsuits. On the other hand, survivors may blanch at "blood money," or being paid off by the person who harmed them.<sup>50</sup>

These concerns about "blood money" are overblown. Many survivors do in fact welcome compensation.<sup>51</sup> While the settlement often fulfills a significant economic need,<sup>52</sup> plaintiffs' attorneys also insist that holding the perpetrator

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47. See Kerry Cardoza, *Students Push for Restorative Approaches to Campus Sexual Assault*, TRUTHOUT (June 30, 2018), <https://perma.cc/Q89L-VPLM>.

48. See ELLEN BUBLICK, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, CIVIL TORT ACTIONS FILED BY VICTIMS OF SEXUAL ASSAULT: PROMISE AND PERILS 4 (2009), <https://perma.cc/W2F5-GVKK>.

49. See Swan, *supra* note 33, at 452.

50. See *id.* at 429. This is a concern that frequently arises in personal injury litigation. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 276 (2001).

51. See Swan, *supra* note 33, at 428-29; see also Elizabeth Adjin-Tettey, *Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery*, 39 U.B.C.L. REV. 3, 8-9 (2006).

52. See *supra* text accompanying notes 42-43.

accountable is more important than the money.<sup>53</sup> A damages award “constitutes recognition of the violation of a [survivor’s] bodily autonomy and dignity” as well as “a legal acknowledgement that there was a wrong committed.”<sup>54</sup> Moreover, distaste over monetization should be muted when the money comes from an insurer. Tom Baker, an insurance law expert, has noted that plaintiffs see blood money, which is “paid directly to plaintiffs by defendants out of their own pockets,” as different from “insurance money.”<sup>55</sup> For example, having the insurer pay obviates concerns that compensation will bankrupt the tortfeasor. Finally, plaintiffs who are truly compensation-averse can request alternative remedies during settlement negotiations.<sup>56</sup> Alternative options range from the perpetrator apologizing to the survivor to the institution changing its policies to reduce the risk of future incidents.<sup>57</sup>

Bias may also play a role in civil litigation. Judges and jurors may carry outdated and stereotyped notions about sexual assault, particularly that rape always involves physical force, into both criminal and civil trials.<sup>58</sup> And Sarah Swan has noted that the fate of sexual assault cases at summary judgment correlates with the political leanings of the presiding judge.<sup>59</sup>

Nevertheless, the potential for bias should still be less concerning in the civil litigation context, in comparison with criminal or campus adjudications. If the myth that “true rapes” are violent is a common source of resistance to rape claims, there is less room for that myth in civil sexual assault litigation, where “the element of force is irrelevant as long as the [survivor] can prove the defendant had an actual intent to harm or offend.”<sup>60</sup>

It is also possible, maybe probable, that the frankness and balance of views with which sexual assault is discussed these days has changed minds; the cited bias studies rely on data that is now at least twenty-five years old,<sup>61</sup> when

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53. See Shen, *supra* note 42, at 38.

54. Swan, *supra* note 33, at 428 (quoting Adjin-Tettey, *supra* note 51, at 8).

55. Baker, *supra* note 50, at 276.

56. Swan, *supra* note 33, at 429.

57. See *id.*

58. See Shen, *supra* note 42, at 34-35.

59. Swan, *supra* note 33, at 443-44 (noting that conservative judges tend to find no duty by the third party to warn of the risk of, or otherwise try to prevent, sexual assault, rather than leave the question to the jury).

60. Bublick, *supra* note 34, at 73.

61. See, e.g., Shen, *supra* note 42, at 18 & n.53 (citing Gary D. LaFree et al., *Jurors’ Responses to Victims’ Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 390 (1985)); *id.* at 20 & n.63 (citing Hubert S. Feild, Note, *Rape Trials and Jurors’ Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261, 264 (1979)); *id.* at 25 & n.86 (citing Linda Jane Coates, *Discourse Analysis of Sexual Assault Trial Judgments: Causal Attributions and Sentencing* 98-109  
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sexual assault was discussed less honestly and with less sympathy for survivors.<sup>62</sup> To be sure, a sufficiently comprehensive study evaluating the effect of assault prevention reforms on popular conceptions of rape may still be years away. But recent college graduates, this Author among them, have witnessed a drastic improvement in general understanding about the circumstances that lead to rape and what sexual assault can look like.<sup>63</sup> This improved understanding will hopefully influence civil proceedings in the coming years as a generation better informed about the realities of sexual assault comprises a greater proportion of juries.

A concern that civil litigation shares with criminal and campus adjudications, however, is the chance—depending on how far the lawsuit

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(1996) (unpublished Ph.D. dissertation, University of Victoria), <https://perma.cc/D6LP-PJKQ>).

62. See, e.g., Gerald Eskenazi, *The Male Athlete and Sexual Assault*, N.Y. TIMES (June 3, 1990), <https://perma.cc/X36L-RQSM> (describing revelations that “athletes are involved in a disproportionate number of rapes and other sexual assaults” on college campuses, but that “researchers say a crime is often not even perceived by society as having occurred when an athlete, or group of athletes, is involved” because “[i]n almost all cases, there was drinking, and that creates a negative image of the [survivor]”).
63. This anecdotal observation is supported by other accounts of shifting attitudes towards sexual assault held by current college students and recent college graduates. See, e.g., *Student Attitudes Toward Sexual Misconduct at Amherst College*, AMHERST C., <https://perma.cc/P8QL-X3YE> (archived May 2, 2020) (compiling student responses that suggest a more comprehensive understanding of dangerous behaviors by listing verbal and cyber sexual harassment, catcalling and lewd commentary, and nonconsensual touching as examples of sexual misconduct that the college should be better at addressing). The resurgence of student activism insisting on greater accountability for sexual assault and other harmful behavior also reflects an increased sense of the importance and scale of the issue. See Anemona Hartocollis, *New Wave of Student Activism Presses Colleges on Sexual Assault*, N.Y. TIMES (June 8, 2019), <https://perma.cc/LM8J-KNRJ>; see also Rebecca Nathanson, *How “Carry That Weight” Is Changing the Conversation on Campus Sexual Assault*, ROLLING STONE (Dec. 1, 2014, 9:13 PM ET), <https://perma.cc/3B3H-455T> (citing a protest at Columbia University where students left twenty-eight mattresses outside the university president’s house to represent the twenty-eight students who had filed Title IX complaints against Columbia, and the days of action in solidarity organized at 130 other schools); Vanessa Romo, *Swarthmore Fraternities Disband over Leaked Documents That Detailed Misogyny*, NPR (May 2, 2019, 9:42 AM ET), <https://perma.cc/2J86-L2MY> (“The only two fraternities at Swarthmore College have unanimously agreed to disband and give up their houses, ending a four-day sit-in and weeks of protest by outraged students after the publication of documents chronicling years of misogynist, racist and homophobic remarks, as well as jokes alluding to sexual assault by members.”); Jia Tolentino, *Is There a Smarter Way to Think About Sexual Assault on Campus?*, NEW YORKER (Feb. 5, 2018), <https://perma.cc/SVY6-PV6E> (describing student activism at Columbia University in the 1990s); Alanna Vagianos, *A Sexual Assault Survivor at Princeton Tried to Protest. Instead, She Was Fined \$2,700*, HUFFPOST (updated May 16, 2019), <https://perma.cc/6JJF-CY3W> (describing the 150-student sit-in protesting Princeton University’s fining a survivor for writing “Princeton Protects Rapists” on walkways around campus).

progresses—that plaintiffs may still have to testify. Either in a deposition or on the stand, the plaintiff may be vulnerable to rigorous cross-examination on the circumstances leading up to the assault, the identity of the attacker, and consent. Cross-examination is the primary method of challenging a witness’s credibility.<sup>64</sup> Therefore, a defense attorney will logically do everything permissible to undermine the plaintiff’s testimony.<sup>65</sup> A skilled attorney can manipulate a vulnerable witness into distorted or inaccurate testimony that undermines the plaintiff’s case.<sup>66</sup> Such an experience has long been recognized as “revictimizing” the survivor.<sup>67</sup>

While the potential for cross-examination remains a deterrent to litigation, it should be a weaker one in the civil litigation context. Overly intrusive questioning intended to undermine the plaintiff can be blocked by an objection for seeking information that is irrelevant or unlikely to lead to the discovery of admissible evidence.<sup>68</sup> Additional protections may also be available: Federal law and at least one state have recently extended rape-shield protection to civil suits,<sup>69</sup> potentially a sign of a burgeoning trend. Ultimately,

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64. See FED. R. EVID. 608(b) (noting that “extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack . . . the witness’s character for truthfulness” except during cross-examination if the specific instances of conduct “are probative of the character for truthfulness or untruthfulness of . . . the witness”); see also Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 775 (2007) (“[T]he classic role of cross-examination [is] in exposing mistake, and in the case of modern expansive interpretations of excited utterances, highlighting the possibility of fabrication.”).

65. Cf., e.g., H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the “Greatest Legal Engine Ever Invented,”* 27 CORNELL J.L. & PUB. POL’Y 145, 174-75 (2017) (noting that “some cross-examinations have served no purpose other than to intimidate or abuse,” which “harm[s] [the] testifying witness”).

66. See *id.* at 164-65 (summarizing studies suggesting that stress and uncertainty can cause witnesses to “change accurate answers to inaccurate answers” and that survivors of sexual assault are especially vulnerable to these effects).

67. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1355 (2005) (“The characterization of cross-examination as ‘revictimization’ is hardly a fresh insight.”); see also ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 111 (1999) (calling public trials the “second rape” of rape [survivors] by defense counsel”).

68. See, e.g., WIS. STAT. § 906.11 (2019) (“The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . [p]rotect witnesses from harassment or undue embarrassment.”).

69. Rape shield statutes generally block defendants in rape cases from introducing evidence of the survivor’s sexual history or reputation to prove that the survivor did in fact consent to the alleged assault. DAVID A. SKLANSKY & ANDREA L. ROTH, *EVIDENCE: CASES, COMMENTARY, AND PROBLEMS* 312 (5th ed. 2020). Federal law only admits “evidence offered to prove . . . [the] sexual behavior or sexual predisposition” of the plaintiff if “its probative value substantially outweighs the danger of harm to any [survivor] and of unfair prejudice to any party.” FED. R. EVID. 412(b)(2). Wisconsin precludes admission of evidence regarding the survivor’s sexual conduct to prove a certain sexual disposition. WIS. STAT. § 901.08(2). These statutes are intended to protect

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civil litigation, with its lower burden of proof, general causes of action, and ability to hire counsel on contingency, is likely to involve the least traumatic version of such interrogation. Many survivors will likely find that these benefits, plus final say over the progression of the case and the economic damages in play, make undergoing cross-examination worthwhile. But as long as evidence-gathering practices in the American legal system remain as they are, these pros and cons should be the subject of a serious conversation between a potential plaintiff and her lawyer.

#### 6. The deep pocket

Even once a survivor has weighed the benefits and costs, the civil litigation strategy only comes together if there is a defendant with the capacity to pay. Plaintiffs' attorneys, pragmatically protecting their contingency-fee income, typically refuse to take a case without a "deep pocket": a defendant that is well-resourced or insured.<sup>70</sup> Since insurance policies generally do not cover intentional torts,<sup>71</sup> such as sexual assault, all but the wealthiest individual perpetrators are impracticable civil defendants on their own. The obtainable payout simply will not justify the legal fees for the plaintiff and her attorney.<sup>72</sup>

Therefore, civil redress for sexual assault is most appropriate against an institution with a supervisory role over the tortfeasor. This supervisory role gives rise to a plausible claim of third-party negligence. These institutions are not judgment-proof because their third-party negligence liability for the injury is still covered by insurance.<sup>73</sup> In the campus sexual assault context, survivors have brought Title IX or tort claims against their college or university.<sup>74</sup>

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the accuser from attacks intended primarily to intimidate them or damage their reputation in front of the factfinder. *See, e.g.*, FED. R. EVID. 412 advisory committee's note to 1994 amend. ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

70. *See* Tom Baker, Essay, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 4 (2005).

71. *See* 4 HOWARD FRIEDMAN & CHARLES J. DiMARE, LITIGATING TORT CASES § 50:5 (West 2019); *see also* Bublick, *supra* note 34, at 100.

72. *See, e.g.*, Bublick, *supra* note 34, at 77. Survivor plaintiffs are also not able to draw on traditional legal service programs or public funding to pursue tort actions. *Id.*

73. *See, e.g.*, 4 FRIEDMAN & DiMARE, *supra* note 71, § 50:5 ("If the insurance policy does not cover intentional torts, it may cover negligence-based claims like negligent retention of an employee after the employer had notice of the employee's improper conduct."); *see also infra* note 77.

74. *See* Wendy N. Davis, *From Campus to Courtroom: Sex Assault Investigations Have Become Polarized and Political*, A.B.A. J., Dec. 2017, at 54, 54-55 (describing "a groundswell of legal complaints against colleges and universities—by . . . students who say they were victims of sexual assault on campus").

But there are additional institutions that bear more direct responsibility for a significant subset of campus assaults: fraternities. Fraternity chapters are responsible for a disproportionate percentage of campus sexual assaults.<sup>75</sup> Yet they often operate off campus, beyond the immediate control of the university.<sup>76</sup> While the fraternity member's assault is not covered by the national fraternity's insurance policy because it is a crime and an intentional tort (and thus outside fraternity policy), the national fraternity organization itself is indemnified for the abovementioned third-party liability.<sup>77</sup> As discussed in Part II below, national organizations' expertise, information sharing, and monitoring make them constructively aware of the risk of sexual assault. And national organizations exercise a degree of control over their chapters and members that merits a finding of a duty of care and thus (potentially) liability.<sup>78</sup>

## II. Conceptualizing Fraternity Liability: Control and Responsibility

For all the potential upsides of this strategy, civil litigation against a fraternity for sexual assault requires a complex form of proof. A national fraternity organization's tort liability depends on the fraternity's structure and the degree of the national organization's supervision and control over its chapters and members. Indeed, in slightly different contexts, courts have made

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75. See *supra* text accompanying notes 15-16.

76. Courts have considered and rejected the proposition that universities have a duty to protect students from the criminal acts of other students while off campus. See, e.g., *Doe v. Emerson Coll.*, 153 F. Supp. 3d 506, 514-15 (D. Mass. 2015); *A.M. v. Miami Univ.*, 88 N.E.3d 1013, 1023 (Ohio Ct. App. 2017); *Boyd v. Tex. Christian Univ., Inc.*, 8 S.W.3d 758, 760 (Tex. App. 1999).

77. See, e.g., *General Liability Insurance*, SIGEP, <https://perma.cc/AS7B-ZB73> (archived May 2, 2020) ("The general liability policy offers protection (defense and indemnification) in the event that someone suffers an injury or property damage and alleges negligence on the part of the Fraternity. . . . There are certain *exclusions* to the general liability policy which relate to intentional acts such as hazing, sexual or physical assault. The individual(s) directly involved in these acts will not be covered."); see also *Delta Sigma Pi, Insurance & Risk Management FAQ's 1*, <https://perma.cc/5RCE-F63H> (archived May 2, 2020) (describing, as an example, that if someone is injured during a chapter event and a lawsuit is initiated, the insurance will cover both the fraternity and the members named as defendants, so long as the latter was in compliance with fraternity policies and "acting in good faith," and then adding that "[a]ny member whose illegal or intentional actions result in . . . injury to an individual" is not covered by the policy).

78. To be sure, the fraternity chapters that own their own houses may have sufficient assets to provide the deep pocket for litigation. But chapter-specific ownership is not sufficiently universal for chapters to be the focus of a proposed litigation strategy. See *infra* note 146 and accompanying text. Moreover, as explained in the following Parts, this litigation strategy focuses on fraternity policies and mechanisms of control enforced by insurance, both of which are controlled by the national fraternity office.

incorrect factual findings about fraternity structure, supervision, and control, leading to no-duty findings.

This Part argues that such routine dismissal is incompatible with our contemporary understanding of control relationships between national fraternity organizations and their local chapters. While national organizations are not Big Brother, they wield key financial and other levers to regulate chapter and member behavior and thus reduce expensive high-risk activity. This Part surveys fraternities' top-down command structure, the creation of incentives through manipulation of fees, and how fraternity insurance reinforces these mechanisms. These features highlight the significant degree of influence national organizations exert over their chapters and members.

#### A. Structures of Control and Incentives

National fraternity organizations control a top-down command structure that stipulates rules governing many aspects of fraternity life. The national office, often referred to by members as "nationals," authors policies on everything from recruitment to sexual assault. As the command center for disciplinary action against both members and local chapters, the national organization is aware of significant incidents of noncompliance. And when such noncompliance occurs, the national organization holds the financial levers through their fraternity-wide insurance policy to bring chapters, and therefore members, back in line.

To be sure, the traditional model and understanding of fraternity organization is as a highly decentralized entity. Chapters were seen as largely autonomous, with the national organization solely providing guidance and retaining the ability to temporarily suspend a chapter's charter.<sup>79</sup> Indeed, more than one commentator has attributed this hands-off organizational structure in part to a legal strategy to reduce the national organization's liability.<sup>80</sup>

But this traditional conception is no longer accurate. In conversations with fraternity leadership, the influence of the national organization on chapter activities is clear. National leadership provides branding requirements, risk-management policies, liability trainings, and more in the raft of detailed instructions sent to the chapters.<sup>81</sup> The chapters surveyed stated that they are

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79. See HECHINGER, *supra* note 16, at 218; Byron L. Leflore, Jr., Note, *Alcohol and Hazing Risks in College Fraternities: Re-Evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 205-06 (1988) ("[T]he national office and organization exist[] for the benefit of the local chapters. . . . [A]ny authority to regulate the local chapter is granted to the national office by the local chapter itself." (footnote omitted)).

80. See HECHINGER, *supra* note 16, at 218; Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC (updated Sept. 9, 2019, 2:00 PM ET), <https://perma.cc/M25N-XH3X>.

81. Telephone Interview with A.S., Former President, Sigma Chi Epsilon, [chapter name redacted], [university name redacted] (Mar. 7, 2018). In the course of researching this  
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also assigned a “counsel” or “consultant” to monitor their compliance.<sup>82</sup> The chapter counsel is often the main point of contact between the national organization and the chapters they oversee.<sup>83</sup>

When things go awry within a chapter, reporting and disciplinary procedures are routed straight to the national leadership.<sup>84</sup> Typical fraternity emergency response instructions first require members to notify the fraternity’s regional director as soon as an incident occurs (contacting the university is a subsequent step).<sup>85</sup> The disciplinary process is similarly centralized. For example, if a Sigma Chi chapter decides to expel a member, the chapter president must submit a form to the national organization.<sup>86</sup> Then the executive board at Sigma Chi’s national office conducts an investigation and determines whether to expel the member.<sup>87</sup> Sigma Alpha Epsilon similarly limits local chapters’ disciplinary authority to temporarily suspending a member accused of assault, pending the outcome of Title IX or national organization investigations.<sup>88</sup> Under both rules, the decision is outside the chapter’s control—even if they *would* like to expel the member, they are unable to do so.

National organizations also can, and do, shut down chapters.<sup>89</sup> For example, Bradley Cohen, during his tenure as national president of Sigma

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Note, the Author conducted a series of telephone interviews with then-current officers of various fraternities to gather qualitative examples of national-chapter relations and how national policies affect chapter practices; citations to these interviews reflect the Author’s notes and recollections of those discussions.

82. *Id.* Chapter consultants typically oversee five to six chapters, which they visit three or four times a year. Telephone Interview with S.H., Former Soc. Chair, Zeta Psi, [chapter name redacted], [university name redacted] (Feb. 16, 2019); Telephone Interview with D.L., Member, Phi Delta Theta, [chapter name redacted], [university name redacted] (Feb. 18, 2019).

83. Telephone Interview with S.H., *supra* note 82.

84. *Id.*

85. *See, e.g.*, Sigma Alpha Epsilon Fraternity, *Minerva’s Shield: The Health & Safety Policies of Sigma Alpha Epsilon* 19 (2018), <https://perma.cc/PD2T-8Z8F> [hereinafter *Minerva’s Shield*].

86. Telephone Interview with A.S., *supra* note 81.

87. *Id.*

88. *Minerva’s Shield*, *supra* note 85, at 19.

89. *See, e.g.*, HECHINGER, *supra* note 16, at 227; Seth Slabaugh, *Ball State’s Oldest Fraternity Is Shut Down for Violations of National Code of Conduct*, USA TODAY (updated Oct. 4, 2018, 2:28 PM ET), <https://perma.cc/8QYL-CE77> (reporting that officials at Theta Chi’s national office revoked the charter of the Ball State chapter for “confirmed violations” of the national fraternity’s policies); *see also* Telephone Interview with S.H., *supra* note 82 (describing how “nationals” can shut down a chapter without consulting with the entity that regulates Greek life at the relevant college or university).

Alpha Epsilon,<sup>90</sup> shut down nineteen high-risk chapters to reduce overall liability costs.<sup>91</sup> A 2015 Chronicle of Higher Education article published a list of the eight fraternity chapters shut down, suspended, or otherwise sanctioned in just the first two weeks of March that year.<sup>92</sup> The shutdowns continue. In 2019, Lambda Phi Epsilon closed its University of Pennsylvania chapter for hazing,<sup>93</sup> Alpha Tau Omega dissolved its University of Kentucky chapter after a pledge struck and killed a child while driving under the influence,<sup>94</sup> and Alpha Kappa Lambda shut down its chapter at Virginia Commonwealth University, also for hazing.<sup>95</sup> Chapter shutdown is no idle threat.

This top-down disciplinary authority and dictation of standards belie national fraternity organizations' insistence that they have little control over their chapters.<sup>96</sup> While the national organization cannot directly monitor the day-to-day activities of its chapters, it has a regular source of information from the chapter counsel.<sup>97</sup> National organizations also have significant normative influence as the authors of fraternity-wide standards.<sup>98</sup> Moreover, the national organization wields powerful coercive mechanisms. For example, Sigma Chi

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90. The national president's title is officially "Eminent Supreme Archon." HECHINGER, *supra* note 16, at 215, 218.

91. *See id.* at 226-27.

92. Andy Thomason, *The List of Fraternities That Are Getting Shut Down Just Keeps Growing*, CHRON. HIGHER EDUC. (Mar. 20, 2015), <https://perma.cc/8K8H-RCY8>.

93. Madeleine Ngo & Ashley Ahn, *Penn's Lambda Phi Epsilon Banned Indefinitely After "Significant" Evidence of Hazing*, DAILY PENNSYLVANIAN (Jan. 21, 2019, 8:06 PM), <https://perma.cc/38UB-SSVA>.

94. Linda Blackford, *National ATO Fraternity Dissolves UK Chapter After Death of Four-Year-Old*, LEXINGTON HERALD LEADER (Sept. 19, 2018, 4:24 PM), <https://perma.cc/U2W9-HMLR>.

95. Celeste Chance, *Fraternity Chapter Shuts Down Following Hazing Allegation*, COMMONWEALTH TIMES (Jan. 10, 2019), <https://perma.cc/U6BK-QF9H>. For shutdowns or suspensions in 2018, see, for example, Katie Caviness & Tyler Hardin, *ECU Fraternity Chapter Closing, Effective Immediately*, NEWS CHANNEL 12 (Oct. 25, 2018), <https://perma.cc/766N-B3S8> (describing the shutdown of Pi Kappa Phi at East Carolina University); Elizabeth Hernandez, *Fraternity Shuts Down Boulder Chapter amid Allegations CU Students Were Drugged on University Hill*, DENV. POST (updated Nov. 2, 2018, 2:11 PM), <https://perma.cc/4QWX-CPRX> (describing the shutdown of Sigma Pi at the University of Colorado Boulder); and Slabaugh, *supra* note 89 (describing the shutdown of Theta Chi at Ball State).

96. *See, e.g.*, Defendant Sigma Tau Gamma Fraternity, Inc.'s Reply Brief in Support of Its Renewed Motion for Summary Judgment at 6-7, *Roe v. Saint Louis Univ.*, No. 4:08-cv-01474 (E.D. Mo. Mar. 22, 2012), ECF No. 236 (insisting that imposing a duty of care on the national organization "would be overly burdensome and unfair" because the national organization does not have the resources "to supervise the activities of every local chapter").

97. *See supra* text accompanying notes 83-84.

98. *See* sources cited *infra* note 101.

mandates that the relevant chapter president (or “consul”) be named in any lawsuit brought against the fraternity.<sup>99</sup> And if chapters are unresponsive to mandates and continue to engage in harmful behavior, the national organization can pull the plug.<sup>100</sup> These powers illustrate the many ways in which national fraternities do influence their chapters, and thus have a responsibility for chapter conduct.

Far from distancing themselves from chapter policies and enforcement to avoid establishing a duty of care, national organizations are the direct source of the regulations governing chapter and member conduct. All the policies consulted for this Note were issued under the auspices of national organizations, and none show signs of having been tailored to individual chapters.<sup>101</sup> Nor does a national organization’s retaining full authority to expel members sound like hands-off enforcement.<sup>102</sup> These conflicting models can be reconciled by looking at the recent surge in attention toward fraternity incidents. John Hechinger, one of the commentators who has cited the traditional view, describes how the national organization at Sigma Alpha Epsilon tightened its grip on the chapters in response to a slew of bad press about deaths at the fraternity and their insurer’s threats to drop coverage.<sup>103</sup> With decentralization no longer feasible, national fraternity organizations are now attempting to reduce liability through control. But when these mandates fail, this significant degree of top-down control is critical to national fraternity third-party liability for sexual assault.

#### B. Reinforcement Through Insurance

A key vehicle for a national fraternity organization to reinforce this top-down control may seem like an unlikely source: the fraternity insurance

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99. Telephone Interview with A.S., *supra* note 81.

100. *See supra* notes 89-95 and accompanying text.

101. *See, e.g.*, Alpha Delta Phi, Risk Management Policy of Alpha Delta Phi 1 (rev. ed. 2019), <https://perma.cc/2QMV-UUHN> (“The Risk Management Policies of Alpha Delta Phi are intended to provide education and guidance to chapter officers in performing their responsibilities.”); Phi Kappa Sigma Int’l Fraternity, Inc., Risk Management Policies 1 (rev. ed. 2016) (“The Risk Management Policies of Phi Kappa Sigma, as adopted by the Executive Committee of Phi Kappa Sigma, shall apply to all entities and all levels of fraternity membership.”) (on file with author); Sigma Tau Gamma Fraternity, Insurance and Claim Manual 3 (2018-2019), <https://perma.cc/JD68-H4BP> (“The final responsibility for the success of the insurance program rests with Sigma Tau Gamma Fraternity and its chapters.”); *see also* Minerva’s Shield, *supra* note 85, at 6 (“We expect you and all of our members to comply with our health-and-safety policies and guidelines and our crisis-management procedures. . . . This document is your obligation to Sigma Alpha Epsilon Fraternity . . .”).

102. *See supra* text accompanying notes 89-95.

103. HECHINGER, *supra* note 16, at 222-29.

policy. Besides ensuring financial viability, liability insurance is now also necessary for fraternities to participate in university life. Coverage is increasingly mandated by colleges and universities.<sup>104</sup> The insurance policy is issued to the national fraternity, covering the chapters enumerated in the policy.<sup>105</sup> While each chapter sets broader membership dues,<sup>106</sup> those dues include a stipulated contribution to the national fraternity insurance bill.<sup>107</sup> Manipulating these dues is both a carrot and stick for the national organization. The degree to which insurance, beyond providing litigation coverage, undergirds national fraternity control of its chapters, particularly in providing prevention incentives, further highlights national organizations' responsibility for their members' actions. This Subpart briefly surveys the fraternity insurance system, then discusses the levers that insurers use to incentivize fraternities to reduce risk. These levers are in turn used by national organizations to influence their chapters.

### 1. An overview of fraternity insurance

Fraternity insurance is a highly specialized industry, with only a few insurers occupying the market.<sup>108</sup> This specialization is due to two factors.

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104. See Willis, Insurance & Risk Management FAQ's 1 (2012) (on file with author). For example, Oregon State University requires proof of liability insurance with liability limits of \$1 million per occurrence and \$2 million annual aggregate. The policy must cover sexual assault and molestation. *Oregon State University Affiliated First Year Housing Program*, OR. ST. U. (updated Jan. 2017), <https://perma.cc/37ZG-SQJT>. Johns Hopkins University requires each fraternity chapter to show proof of a \$2 million insurance policy that "cover[s] host liquor liability, sexual misconduct, and sexual assault"; "coverage must protect the university, as well as the fraternity." HECHINGER, *supra* note 16, at 97. These policies are verified annually. The University of Cincinnati requires a current Certificate of Liability Insurance be provided as part of mandatory Greek registration with the Office of Student Activities within the first thirty days of the fall semester. U. Cincinnati, Fraternity & Sorority Life Community Guidelines 2 (2014), <https://perma.cc/7YM8-BEEP>.

105. See, e.g., James R. Favor & Co., Fraternity/Sorority Insurance Program General Liability Coverage: Fraternity/Sorority Additional Definitions 1 (2010), <https://perma.cc/ABF6-ZWZL>; James R. Favor & Co., Fraternity/Sorority Program General Liability Coverage: Who Is Insured 1 (2010), <https://perma.cc/K53P-L3KG> [hereinafter James R. Favor & Co., Who Is Insured].

106. See, e.g., Defendant Sigma Tau Gamma Fraternity, Inc.'s Reply Brief in Support of Its Renewed Motion for Summary Judgment, *supra* note 96, at 2-3.

107. See, e.g., Letter from Brian C. Warren, Chief Exec. Officer, Sigma Phi Epsilon Fraternity, to Members, Sigma Phi Epsilon Fraternity 1 (Jan. 20, 2017), <https://perma.cc/7DJH-6DBE> ("[The Insurance and Member Safety] [B]ill pays for our general liability and Member Accident Protection Program insurance, as well as the member safety resources and administrative services provided to you and your chapter.").

108. I have only been able to identify three currently active insurance companies or brokers that publicly acknowledge they provide this service: Holmes Murphy, Willis Towers Watson, and James R. Favor & Co. Cf. Shane Kimzey, Note, *The Role of Insurance in* footnote continued on next page

First, fraternities are immensely risky, so they are expensive to insure. According to one source, “fraternities ‘are the third riskiest property to insure behind toxic waste dumps and amusement parks.’”<sup>109</sup> Indeed, Willis Towers Watson, a risk-management company that liaises between fraternities and insurers, states that the broader insurance industry still is reluctant to insure Greek organizations because of the “loss experience” for fraternities and sororities.<sup>110</sup> Factors contributing to this “loss experience” include fraternities’ still-high underwriting risk, the poor public reputation of Greek organizations, and the concern that a “‘headline’ loss will impact everyone” affiliated with the fraternity.<sup>111</sup> Second, few insurers are willing to provide coverage where fraternity clients need it most: hazing and sexual assault.<sup>112</sup> Though the direct act of sexual assault is uninsurable,<sup>113</sup> fraternity liability insurance for third-

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*Fraternity Litigation*, 16 REV. LITIG. 459, 462 (1997) (describing a broker, now not traceable on the internet, as “one of the very few domestic insurance brokers that will provide insurance to fraternities”). Despite the niche nature of fraternity insurance, the few insurance companies that fill this niche also provide other products. Holmes Murphy, for example, broadly specializes in insuring employee benefits and property casualty. HOLMES MURPHY, <https://perma.cc/3KX4-NCXF> (archived May 2, 2020) (listing “employee benefits” and “property casualty” as the first two items on the homepage menu). For those concerned about loss spreading, it is possible that profit margins in these other areas provide sufficient protection to facilitate underwriting fraternity insurance. Additionally, the overall riskiness of insuring fraternities likely conceals significant risk variation among American fraternities.

109. Kimzey, *supra* note 108, at 467 (quoting Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261, 306 n.197 (1992)). In the 1990s, the National Association of Insurance Commissioners considered fraternities the sixth-greatest insurance liability, behind hazardous waste disposal companies and asbestos contracts. *Id.* (citing *Pi Kappa Phi Fraternity v. Baker*, 661 So. 2d 745, 747 (Ala. 1995)).
110. See Willis, *supra* note 104, at 2.
111. See *id.* That said, insurers and specialized brokers seem to feel the negative effects of fraternities’ collective reputation differently. James R. Favor & Co., a broker, declares its specialization at the top of its homepage. JAMES R. FAVOR & CO., LLC, <https://perma.cc/K3YD-6A43> (archived May 2, 2020) (“Exclusive Provider of *Lloyd’s of London* Insurance Products for Fraternities and Sororities since 1985.”). Holmes Murphy, on the other hand, insures a diverse array of clients. The sole mention of fraternity insurance on its homepage is where “Fraternal [Insurance]” is listed as one of many items in the “Our Specialties” pop-up menu. HOLMES MURPHY, *supra* note 108.
112. Kimzey, *supra* note 108, at 473.
113. All the publicly available policies examined for this Note include a coverage exception for any member of the fraternity “performing tasks outside of his responsibility” or committing an illegal act. See, e.g., Sigma Tau Gamma Fraternity, *supra* note 101, at 6-7 (noting that Sigma Tau Gamma’s insurance coverage does not include “[a]ny claim of bodily injury and/or property damage from an incident resulting when . . . [a]n illegal act was committed.”).



party negligence generally covers the chapter, the national organization, and the other members of the chapter.<sup>114</sup>

Other fraternities “self-insure.” For example, James R. Favor & Co., which, as of 2019, was reported to be owned by eight fraternities, directly underwrites coverage by Lloyd’s of London, a specialty insurance and reinsurance market, for these and other fraternities.<sup>115</sup> This arrangement is advertised as “Insurance by Fraternities, For Fraternities.”<sup>116</sup> The term “self-insurance” is misleading, however. When Sigma Chi says it provides insurance services to its chapters, what it means is that the broker, James R. Favor & Co., which is co-owned by Sigma Chi, underwrites a Lloyds insurance policy for the fraternity.<sup>117</sup> The scope of insurance coverage is the same as the arrangements described above.<sup>118</sup>

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114. Liability coverage, both in terms of incident types and parties covered, is largely consistent across fraternities, insurance companies, and broader insurance structure. For example, the dominant fraternity insurer, Holmes Murphy, provides general monoline liability coverage, which protects the national fraternity and its local chapters from liability for hazing, sexual abuse, and assault and battery. *General Liability—Monoline Liability Coverage*, HOLMES MURPHY, <https://perma.cc/Y893-XQTJ> (archived May 2, 2020). Holmes Murphy also insures groups of fraternities, such as the Fraternity Risk Management Trust (FRMT), which includes thirty-two of the sixty-five recognized Greek organizations. FRMT, LTD, <https://perma.cc/5228-6N4C> (archived May 2, 2020) (listing a Holmes Murphy email address as the contact for further information); *Member Fraternities*, N. AM. INTERFRATERNITY CONF., <https://perma.cc/U59N-JPYG> (archived May 2, 2020) (listing the sixty-five fraternities that belong to the conference). The FRMT is an offshore vehicle enabling the member organizations to pool their resources to purchase insurance. Kimzey, *supra* note 108, at 471.
115. *RMF Insurance Brokers: James R. Favor & Co.*, RISK MGMT. FOUND., <https://perma.cc/PML5-B5PW> (archived May 2, 2020). The eight fraternities are: Lambda Chi Alpha, Pi Kappa Alpha, Sigma Chi (listed as Risk Management Foundation), Sigma Alpha Epsilon, Sigma Alpha Mu, Tau Kappa Epsilon, Triangle, and Phi Delta Theta (listed as Walter B. Palmer Foundation). The Board of Managers has traditionally been composed of representatives from these fraternities. *See About Us: Organizational Structure*, JAMES R. FAVOR & CO., LLC, <https://perma.cc/S4YW-SJVV> (archived Sept. 10, 2019).
116. *James R. Favor & Co.*, SAE FIN. & HOUSING CORP., <https://perma.cc/98MK-ZTXH> (archived May 2, 2020).
117. *See supra* note 115 and accompanying text. Sigma Chi maintains a degree of distance through its Risk Management Foundation (RMF), which is the entity that actually has an ownership stake in the broker. The RMF’s purported independence, however, is belied by Sigma Chi’s approval authority over the RMF’s risk-management program. *FAQ*, SIGMA CHI RISK MGMT. FOUND., <https://perma.cc/3K99-LMB3> (archived May 2, 2020).
118. The James R. Favor & Co. policy states that named chapters, housing organizations, officers, and other members are covered for specific categories of “bodily injury” and “property damage.” *See* James R. Favor & Co., Certificate of Insurance: General Declarations; Fraternity/Sorority Insurance Program 1 (2013), <https://perma.cc/Z8TM-R9WV>. But coverage is only applicable when the insureds are “acting in accordance  
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## 2. Regulation through insurance

Whether the insurer is an outside specialist or a “self-insurance” scheme, it strengthens and reinforces the national organization’s control mechanisms discussed above through manipulation of incentives. Insurers steer customers concerned about liability into implementing measures to reduce risk.<sup>119</sup> In particular, fraternity insurers provide the carrot of distributing risk-reduction information among clients, and the stick of tailoring premiums to fit individual clients’ risk profiles.<sup>120</sup>

First, the stick: Fraternity insurers, like all insurance companies, adjust their premiums through both feature rating and experience rating. Feature rating is the process of determining, at the point of purchase, initial premiums based on the prospective insured’s risk characteristics.<sup>121</sup> Experience rating then adjusts prices down the road based on the accidents the insured has sustained during the policy period.<sup>122</sup> These rating practices incentivize clients to keep costs down and to do so by being responsive to their insurers.

One way to do this is by implementing insurers’ safety and risk-management suggestions—the carrot. Insurers are repeat players, so they are able to provide aggregated information to help their clients reduce risky behavior. Generally speaking, insurance companies gather and analyze information to determine how certain behaviors affect risk to better evaluate how risky their clients are.<sup>123</sup> They then distribute this information to “educate’ their insureds on how to avoid and reduce risks.”<sup>124</sup>

This is equally true in the specific context of fraternity insurance. Holmes Murphy provides resources on its website to assist national organizations in creating regulations and trainings that will lower premiums; topics include alcohol, event planning (including crisis management), property management, fire prevention, and health and safety.<sup>125</sup> In designing these modules for

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with the ‘First Named Insured’s policies and procedures.’” See James R. Favor & Co., *Who Is Insured*, *supra* note 105, at 1.

119. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 203, 205-16 (2012).

120. In self-insurance schemes, even though there is no external actor to wield this carrot and stick, the conglomerate still has to purchase a policy, *see supra* notes 115-18, meaning the incentives to share information and mitigate risk to reduce the price of insurance remain.

121. Ben-Shahar & Logue, *supra* note 119, at 206.

122. *Id.* at 206-07.

123. *Id.* at 203.

124. *Id.* at 210.

125. *Resources for Sororities and Fraternities*, HOLMES MURPHY, <https://perma.cc/7LVY-GEZN> (archived May 2, 2020). For example, one resource is a module for training fraternity members to recognize and reduce risk (to better adhere to the insurance policy).

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national distribution, Holmes Murphy confers with individual fraternities and the North American Interfraternity Conference (NIC) to incorporate currently successful practices.<sup>126</sup> Similarly, James R. Favor & Co. manages the Fraternal Health & Safety Initiative, which provides its eight fraternity members (as well as others involved in the Fraternal Health & Safety Initiative Consortium) with risk-management curricula, including sexual misconduct prevention.<sup>127</sup> Applying the model discussed above, when fraternity clients or members implement safety measures and avoid accidents, their premiums decrease; if the fraternity frequently draws on its insurance, rates increase.<sup>128</sup> Insurers' ability to adjust premiums based on a fraternity's accident history and risk profile provides a financial incentive for fraternities to preempt accidents as much as possible, particularly through adopting the suggested safety precautions.

In this partnership, morality intersects with financial motives. By promoting sexual assault prevention education, the national organization and its insurer each hope to reduce their long-term risk. By sharing data on its risk-management practices and accident history with its insurer, the national organization also signals its commitment to reducing liability, hoping to bring down its insurance premiums.<sup>129</sup> The insurance company therefore becomes the repository for up-to-date best practices and is well positioned to distribute this information to all its fraternity clients.<sup>130</sup> These fraternity clients then have a strong incentive to incorporate these recommendations into their national policies and requirements for chapters.

This negotiation is best illustrated by an example: In 2017, Sigma Phi Epsilon's Grand President unusually joined the national organization's staff's meeting with its insurance broker to present on "SigEp's current programs and

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Holmes Murphy, Risk Management Module 1, 4 (2017), <https://perma.cc/FZ8J-GN8S>. Another is a list of expectations for sober monitors at fraternity events. Holmes Murphy, Sober Monitor & Sober Officer Resource 1 (2017), <https://perma.cc/45L4-ASCG> (outlining sober monitor procedures for Pi Kappa Phi Fraternity).

126. See Holmes Murphy, Sober Monitor & Sober Officer Resource, *supra* note 125, at 2 (noting the "Sober Monitor & Officer Resource" was adapted from NIC's "BYOB" guidelines and materials used by Sigma Phi Epsilon and Pi Kappa Phi Fraternities).

127. See *The Fraternal Health & Safety Initiative*, JAMES R. FAVOR & CO., <https://perma.cc/YA4M-55PH> (archived May 2, 2020); *supra* note 115 and accompanying text.

128. See *supra* text accompanying notes 122-23.

129. For a description of this phenomenon in the insurance industry more generally, see Ben-Shahar & Logue, *supra* note 119, at 210 ("[Insurers] audit and inspect their clients, manage their prevention efforts, analyze their loss history, identify causes of accidents and how losses occur, and teach them how to avoid premium increases (or how to secure premium reductions).").

130. See *supra* text accompanying notes 124-25.

future initiatives to best position us as a reliable customer.”<sup>131</sup> Sigma Phi Epsilon’s insurance bill had spiked the previous year,<sup>132</sup> leaving the fraternity scrambling to prove the rigor of its risk-management practices. The topic of Sigma Phi Epsilon’s presentation—and its clear import to the Grand President—highlights how cost conscious fraternities are (as shown by their sensitivity to increased premiums) and how closely fraternity insurers scrutinize fraternities’ risk-management policies and practices.

Fraternities pass these costs and requirements on to their chapters as part of their top-down regulation scheme. The insurer’s premium adjustment practices affect how client national organizations regulate their chapters and manage costs through internal price discrimination. Since national organizations collect fees from their member chapters to purchase an overall liability insurance policy, the national organization acts as an extension of the insurer by charging the highest insurance premiums to its riskiest chapters.<sup>133</sup> Returning to the Sigma Phi Epsilon example, the insurance presentation coincided with the fraternity restructuring its fees to vary chapter premiums by each chapter’s individual risk “behavior.”<sup>134</sup> As of their spring 2017 billing cycle, the fraternity began charging a lower per-member rate to chapters that consistently complied with the risk-management policies and a higher rate to chapters found to have violated the policies.<sup>135</sup> Sigma Phi Epsilon is not alone. Sigma Chi varies membership dues for each chapter based on adherence to alcohol and drug policies, as well as the fraternity’s self-insurance policies.<sup>136</sup> This financial stranglehold over chapters—through insurance premiums—is one of the central ways that national organizations regulate chapter behavior. Such control undergirds the duty of care discussed in Part III.

### C. Bringing Together National Control and Insurance

While national fraternity organizations do not monitor every move each member makes, they still exert significant control by imposing codes of conduct, requiring rigorous risk reporting, having the final say on disciplinary actions (such as expulsion of a member or revocation of a chapter’s charter), and adjusting chapters’ insurance premiums accordingly. These rules are based on information from the fraternity insurer, and manipulation of rates is driven by a desire to keep insurance costs low. In turn, chapters seeking to

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131. Letter from Brian C. Warren to Members, *supra* note 107, at 1.

132. *Id.*

133. *See, e.g., id.*

134. *Id.*

135. *Id.*

136. *FAQ*, *supra* note 117.

avoid a spike in dues have a strong incentive to keep an eye on members and enforce rules and practices that reduce risk. These include practices that reduce the frequency of sexual assault in, or in connection with, fraternities.

Fraternity reforms in the wake of increased attention to fraternity sexual assault suggest the power of a combined sense of responsibility and fear of the consequences of continuing to tolerate mitigable risk. National organizations are already starting to require policies and practices that make fraternity parties safer. These include banning hard alcohol and creating strict rules for serving alcohol at parties.<sup>137</sup> Members in charge of enforcing the alcohol policies are rigorously trained in the fraternity's risk-management practices and are aware of the financial consequences if alcohol-related incidents occur on their watch.<sup>138</sup> Fraternity chapters are also showing greater interest in, and buy-in to, bystander intervention and other sexual assault prevention trainings.<sup>139</sup> And chapters take disciplining members seriously, using their ability to recommend to the national office that a misbehaving member be dismissed.<sup>140</sup>

These practices are hardly a panacea for campus sexual assault, but they illustrate a key takeaway: the powerful effect of external and internal pressure. The responsiveness to pressure from the national organization (as evidenced by recent revisions of risk-management policies) highlights the control that leads to national organizations' duty of care, as will be discussed in Part III below. And both internal and external pressure will only rise as increased litigation puts insurance and risk-prevention schemes to the test.<sup>141</sup>

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137. Telephone Interview with S.H., *supra* note 82; *see also, e.g.*, Editorial Board, *Dartmouth College Tackles Campus Drinking with a Ban on Hard Alcohol*, WASH. POST (Jan. 31, 2015), <https://perma.cc/4S54-85ZK> (describing Dartmouth's hard alcohol ban, implemented in March 2015, and noting that Bates, Colby, and Bowdoin Colleges ban hard alcohol campuswide, all out of concerns for safety); Pamela Lehman, *Lehigh Unveils Greek Life Plan That Bans Hard Alcohol*, MORNING CALL (Mar. 5, 2019, 9:10 PM), <https://perma.cc/BT6V-T9EB> (noting that Lehigh University's recent ban on hard liquor in Greek houses followed twelve fraternities and sororities being cited for hazing violations due to alleged alcohol abuse during recruitment events); *NIC Fraternities Ban Hard Alcohol in Decisive Action*, N. AM. INTERFRATERNITY CONF., <https://perma.cc/EPU7-QEYT> (archived May 2, 2020) (announcing that NIC, an organization of sixty-six fraternities, had "adopted a Standard prohibiting hard alcohol from fraternity chapter facilities and events").

138. Telephone Interview with S.H., *supra* note 82.

139. Telephone Interview with D.L., *supra* note 82.

140. Telephone Interview with S.H., *supra* note 82; Telephone Interview with D.L., *supra* note 82.

141. For why increased litigation will not simply cause insurers to leave the fraternity insurance market, see Part IV below.

### III. Devising a Litigation Strategy: The Case for Negligent Supervision

The potential success of civil litigation against fraternities hinges on the choice of tort theory. A major barrier to litigation success has been that prior fraternity liability cases were generally argued under a premises liability theory.<sup>142</sup> Negligent supervision is a far better fit for fraternity assault. The theory has greater reach and more accurately captures national fraternity responsibility, but the concept is still new to many courts. Nonetheless, as our society becomes more familiar with the theory of broader fraternity liability, and the control mechanisms within fraternities become clearer, this theory is poised for success. This Part first discusses the flaws of a focus on premises liability, then makes the case for negligent supervision as a more effective liability theory due to its broader scope and conception of control, and more easily analogizable case law.

#### A. Failures of Premises Liability

Facially, premises liability seems to be a good fit for the house-centric activity of a fraternity. This nonfeasance liability theory encapsulates a landowner's (or land possessor's) responsibility to entrants for injuries sustained on the property due to the failure to take measures to make the property safe.<sup>143</sup> Modern doctrine includes liability for harms resulting from criminal conduct occurring on the premises.<sup>144</sup> Premises liability initially

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142. Since this Note focuses on holding national fraternity organizations *directly* liable for sexual assault, this Part focuses on theories in that family of liability and does not discuss theories of vicarious liability. Arguments that national fraternities are vicariously liable for chapter and member conduct based on an agency relationship have fallen flat. *See, e.g., Yost v. Wabash Coll.*, 3 N.E.3d 509, 521-22 (Ind. 2014) (“The designated facts show that the relationship between the national fraternity and local fraternity involves the national fraternity offering networking opportunities and a brand to the local fraternity, along with providing aspirational goals and encouraging good behavior by individual members. It is not an agency relationship between principal and agent.”); *Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity*, 359 P.3d 436, 439, 453-55 (Or. Ct. App. 2015) (applying agency principles to affirm the trial court’s grant of summary judgment for the fraternity and local chapter as to the plaintiff’s claim against Phi Kappa Psi because there was no genuine issue of material fact regarding whether Phi Kappa Psi “had the right to control the physical details of hosting and monitoring” the party at issue). Moreover, even if a court were to find a national fraternity vicariously liable for sexual assault, it would not be covered by insurance because sexual assault is an intentional tort. *See supra* text accompanying note 71. Since recovery of damages would be nearly impossible under a vicarious liability theory, it is not useful to plaintiffs. *See supra* notes 70-72 and accompanying text.

143. *See, e.g., MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 195 (8th ed. 2006).

144. *Id.* at 210-11.

seems fitting because it provides a concrete nexus between the injured party and the tortfeasor: The injury occurred on property owned or controlled by the tortfeasor (or a party responsible for the tortfeasor), creating a tangible relationship between the parties. Though a step removed, the local chapter leadership and the national fraternity would seem to be implicated in this relationship due to their supervisory roles.

This facial promise extends no further. Premises liability has a very limited range of applicability because neither the local chapter nor the national fraternity organization is liable if they do not own, possess, or occupy and fully control the property where the injury occurred.<sup>145</sup> This rule logically excludes assaults that occur after fraternity parties at someone's dormitory or apartment, and at venues rented for intra-Greek events. In other words, only assaults occurring within the fraternity house are covered. Finally, only a small subset of these cases implicates the national fraternity: The national organization is hardly the occupant, so therefore it can only be held liable for incidents occurring within the houses the organization—not any particular chapter—owns. Conveniently, national organization ownership of a chapter house appears to be rare.<sup>146</sup>

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145. See, e.g., Opinion, Memorandum & Order at 7-8, *Roe v. Saint Louis Univ.*, No. 4:08-cv-01474 (E.D. Mo. Oct. 31, 2012), ECF No. 318 (finding defendant Sigma Tau Fraternity did not own, possess, or control the apartment where the assault occurred as it was not a party to the lease and only two of the three tenants were members of the fraternity); *Rogers v. Sigma Chi Int'l Fraternity*, 9 N.E.3d 755, 759-60 (Ind. Ct. App. 2014) (noting that the house in question was leased by fraternity members (that is, not owned by the chapter or the national fraternity organization), it housed nonfraternity members, and chapter business was not conducted there); *Brakeman v. Theta Lambda Chapter*, No. 01-0250, 2002 WL 31640619, at \*2-3 (Iowa Ct. App. Nov. 25, 2002) (finding that the local fraternity owed no duty of care to a guest injured at a fraternity party held at a bar because the fraternity did not have the requisite control over the premises while the local establishment had bar staff on duty and served the alcohol, and the fraternity had no right to enter the property to cure any alleged defects).

146. While overall statistics on Greek house ownership are unavailable, news coverage and university websites suggest that chapter houses are frequently owned by a housing corporation organized by chapter alumni or by the university, which then leases the house to the chapter. See, e.g., Laura Entis, *For a Fraternity Treasurer, Managing \$100,000 or More Is Par for the Course*, FORTUNE (Aug. 11, 2016, 4:00 AM PDT), <https://perma.cc/54WY-JW3M> (noting that a housing board owns the house occupied by the University of Georgia's Phi Kappa Tau chapter); Alison Kuznitz, *Penn State Sues Beta Theta Pi Chapter to Regain Ownership of Shuttered Fraternity House*, DAILY COLLEGIAN (Nov. 20, 2018), <https://perma.cc/982H-LEUY> (referring to Penn State's transfer of a land deed to the Alpha Upsilon chapter of Beta Theta Pi fraternity in 1928); *Greek Chapter Housing at Penn*, U. PA., <https://perma.cc/5FYK-GJEL> (archived May 2, 2020) ("There are 32 official fraternity and sorority chapter houses on the University of Pennsylvania's campus, 24 of which are owned and operated by the University in conjunction with Campus Apartments, and 8 which are privately owned or leased by their respective organizations."); *Greek Living*, DEPAUW U., <https://perma.cc/UGL2-JA2L> (archived May 2, 2020) ("At DePauw, our Greek chapter facilities are either

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Even when applicable, however, the theory is a brittle basis for a sexual assault lawsuit. Regardless of the version of premises liability controlling in the relevant jurisdiction, the argument usually falls apart at the initial duty question. States take two main approaches to deciding landowners' duty of care. Under the traditional approach, the landowner's duty of care to the entrant depends on whether the entrant is an invitee, licensee, or trespasser.<sup>147</sup> Other jurisdictions follow the *Rowland v. Christian* approach,<sup>148</sup> replacing the above categories with the question of whether the injury was foreseeable.<sup>149</sup>

Premises liability claims against a national fraternity for sexual assault fall short under either approach. In jurisdictions where the duty of care varies by entrant category, cases can effectively only proceed if the plaintiff was an invitee.<sup>150</sup> An invitee is an entrant for business purposes or for the benefit of the occupant and requires a landowner or occupant to exercise ordinary care to keep the premises safe.<sup>151</sup> A plaintiff would have a decent chance of proving that ordinary care required more of the fraternity to keep the house safe during parties. But guests at fraternity events are typically assumed to be

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University-owned and operated or University-approved . . . Many of our Interfraternity and Panhellenic Council chapter facilities are owned by independent house corporations.”); see also LSU Greek Life Office, Fraternity/Sorority House Director Manual 9 (2018), <https://perma.cc/9XJB-3AZM> (covering “leased housing facilities and premises leased or operated by Greek sororities and fraternities or other approved organizations on property owned by the LSU Board of Supervisors”).

147. 3 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 14:2 (West 2020). Though the concept of premises liability originates from negligence, some courts distinguish between negligence and premises liability claims, typically along the lines that premises liability only applies when the injury at issue resulted from the property's condition. 62 AM. JUR. 2D *Premises Liability* § 1 n.7 (West 2020) (citing *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 469-72 (Tex. 2017); *Woodall v. Christian Hosp. NE-NW*, 473 S.W.3d 649, 658 (Mo. Ct. App. 2015); and *Card v. Dublin Constr. Co.*, 788 S.E.2d 845, 848-49 (Ga. Ct. App. 2016)). Other courts, however, have found premises liability applies to injuries caused by an activity on the property. *Id.* § 1 n.8 (citing *Double Quick, Inc. v. Moore*, 73 So. 3d 1162, 1165 (Miss. 2011)).

148. 443 P.2d 561 (Cal. 1968). In *Rowland*, the social guest of an apartment tenant injured himself on a broken faucet, which the tenant had previously told her landlord to fix. *Id.* at 562. The California Supreme Court determined that traditional categories of trespasser, licensee, and invitee did not control the analysis, primarily because “[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose.” *Id.* at 568. Instead the proper test was whether the land's owner, in managing his property, “acted as a reasonable man in view of the probability of injury to others.” *Id.*

149. See Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294, § 3[a] (West 2020).

150. See *id.* § 4.

151. 3 SPEISER ET AL., *supra* note 147, § 14:6; see also *id.* § 14:7.



attending for their own benefit, rather than for the members' benefit, so guests are found to be licensees.<sup>152</sup> Since licensees enter for their own benefit, the landowner only has a duty to refrain from injuring them through willful or wanton conduct,<sup>153</sup> a standard too high for a plaintiff to meet against the national fraternity organization. Depending on the jurisdiction, a plaintiff would have to establish that the national organization acted either intentionally or in a way that plaintiff's injury was a natural or probable consequence of the national organization's actions, or even that the national organization *intended* to cause the plaintiff harm.<sup>154</sup> Proving that the national fraternity deliberately harmed the plaintiff is, quite frankly, impossible. It would be similarly difficult to provide evidence supporting a conscious disregard or indifference on the part of the national organization.<sup>155</sup>

While there is more room under the *Rowland v. Christian* foreseeability approach, plaintiffs fare little better in the jurisdictions that follow it. If the assailant did not have a prior history of incidents, foreseeability is difficult to prove,<sup>156</sup> particularly regarding the assault happening at the house. And even if

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152. See, e.g., Opinion & Order Granting Kappa Sigma's & Delta Psi's Motions to Dismiss at 7-10, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, No. 1:15-cv-01191 (W.D. Mich. Nov. 23, 2016), 2016 WL 10733962, at \*3-5, ECF No. 48 [hereinafter *Kollaritsch Order*] (finding that (1) plaintiff was not an invitee because she came to the fraternity house for social purposes and the property was not open for a commercial purpose; and (2) plaintiff had not sufficiently pleaded that the fraternity had breached its duty to refrain from willful and wanton misconduct owed to a social guest); *id.* at 7, 2016 WL 10733962, at \*3 (noting that a guest is only an invitee if "the premises were held open for a commercial purpose" (emphasis omitted) (quoting *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 95 (Mich. 2000))); *id.* at 8, 2016 WL 10733962, at \*4 ("[A] social host is under no duty to make [a] premises safe for a guest other than to warn the guest of concealed defects that are known to the owner and to refrain from willful and wanton misconduct that injures the guest." (first alteration in original) (quoting *Taylor v. Laban*, 616 N.W.2d 229, 233 (Mich. Ct. App. 2000) (per curiam))).

153. 3 SPEISER ET AL., *supra* note 147, § 14:6 n.1. This standard requires the plaintiff to prove premeditation, or "knowledge and consciousness that injury is likely to result" from the act or omission. *Id.* § 10:3. For example, in Illinois proving willful or wanton conduct requires showing "an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILL. COMP. STAT. ANN. 10/1-210 (2019).

154. See 3 SPEISER ET AL., *supra* note 147, § 10:3.

155. See, e.g., *City of Jackson v. Gardner*, 108 So. 3d 927, 929 (Miss. 2013) (describing "willful and wanton conduct" as "accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow" (quoting *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000) (en banc))); see also Michael N. Giuliano & Anne E. Melley, *Willful and Wanton Misconduct Distinguished from Negligence*, in 28 ILLINOIS LAW & PRACTICE § 9 (West 2020) (explaining that inadvertence is not enough to establish "willful and wanton misconduct").

156. See 1 LOUIS A. LEHR, JR., PREMISES LIABILITY 3D § 3G:2 (West 2019) (citing *Peguero v. Tau Kappa Epsilon Local Chapter*, 106 A.3d 565, 567, 569-70, 573 (N.J. Super. Ct. App. Div. 2015) (finding the fraternity not liable to the plaintiff under premises liability because,

*footnote continued on next page*

there is a prior history, unless the plaintiff alleges that members of the national fraternity leadership were aware of a specific risk that the tortfeasor might assault someone, the national organization met its duty to exercise ordinary care.<sup>157</sup> To be sure, decisions denying the foreseeability of sexual assault in fraternities ignore a clear reality: With all the information we have about sexual assault at fraternity events, such incidents are in fact foreseeable. For courts that recognize this fact, duty is clear:

[A]llowing a group of eighteen-to-twenty-year-olds control over a residence where alcohol-related parties are held presents the potential for misconduct, including sexual assault. A national fraternity knows, or should know, that social events carried on in a building that houses one of its local chapters presents the potential for sexual assault, particularly where alcohol consumption is an integral part of the event.<sup>158</sup>

As described, the foreseeability of assault at a fraternity house was too obvious to deny a duty of care.<sup>159</sup> But even increasing acknowledgement of the broader foreseeability of sexual assault will not save premises liability as a litigation strategy. The intricacies of the doctrine and the limited scope of properties for which fraternities are liable severely weaken premises liability as a theory to emphatically hold fraternities accountable for sexual assault.

#### B. Turning to Negligent Supervision

Plaintiffs should focus instead on negligent supervision. This tort is premised on the notion that an entity in a supervisory role bears a degree of responsibility for its charges' actions.<sup>160</sup> This responsibility derives from the entity's authoritative position and guiding role, as well as the likelihood that the entity is aware of its charges' activities.<sup>161</sup> Though often seen in the

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even if the fraternity owned the premises, the shooting that caused the injury was not foreseeable); and *Meyer v. Beta Tau House Corp.*, 31 N.E.3d 501, 512-13 (Ind. Ct. App. 2015) (holding the owner of the chapter house was not liable on a premises liability theory for a fight that broke out at the house because the fight was not foreseeable, particularly given the lack of similar incidents in the past)).

157. *See, e.g., Kollaritsch Order*, *supra* note 152, at 8-10, 2016 WL 10733962, at \*4-5 (highlighting that the plaintiff did not allege that any member of the fraternity was aware either that the assailant had invited her or that she was at the house as a guest of the assailant).

158. *Brown v. Delta Tau Delta*, 118 A.3d 789, 793 (Me. 2015) (finding that a national fraternity had a duty to exercise reasonable care for the safety of its local chapter's social invitees).

159. *See id.*

160. *See* 4 ELIZABETH F. KUNIHOLM & KIM CHURCH, LITIGATING TORT CASES § 54:36 (West 2019).

161. This claim is distinct from *respondeat superior*, however. First, negligent supervision requires *direct* negligence by the supervisor. 29 AM. JUR. TRIALS 267 *Negligent Hiring and Retention of an Employee* § 1.5 (West 2020). Second, it applies outside the employment  
*footnote continued on next page*

employment context,<sup>162</sup> the theory extends to other supervisory roles, such as coaches.<sup>163</sup> Negligent supervision fits the fraternity context well. The national organization, as the producer and enforcer of policies regarding sexual assault prevention and other fraternity conduct,<sup>164</sup> should be found negligent if these codes are not sufficiently thorough or rigorously enforced.<sup>165</sup>

While negligent supervision cases have traditionally been brought against individuals, the theory also encompasses institutions. Negligent supervision claims have survived the dismissal and summary judgment stages against schools, universities, hospitals, and church dioceses.<sup>166</sup> While there is some

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relationship context: Schools, for example, are responsible for negligent supervision of students. See Karen M. Richards, *Is Danger Lurking in Our Schools? The Duty to Adequately Supervise Students*, MUN. LAW., Fall 2012, at 9, 9.

162. See 4 KUNIHOLM & CHURCH, *supra* note 160, § 54:36 (explaining that negligent supervision claims generally arise when “an employer learns of an employee’s inappropriate conduct” but “fails to intervene to prevent injury, or further injury, to others”).
163. WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 3:3 (West 2019) (noting that coaches can be held liable for negligent supervision for ignoring potentially dangerous activity).
164. See *supra* Part II.A.
165. As with premises liability, the national fraternity would be liable as a third party for assault. A national organization’s third-party role is critical for insurance indemnification: Rather than being vicariously liable for the intentional tort of assault (excluded from the policy), the national organization—who had no intent—is potentially liable for the accident of negligently supervising. See Bublick, *supra* note 34, at 102 (“[T]he sexual assault was not bodily injury ‘expected or intended from the standpoint of the insured’ . . .” (emphasis omitted) (quoting *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 652 (Iowa 2002))). Therefore, negligent supervision may be covered by the fraternity’s insurance policy. See also, e.g., *General Liability—Monoline Liability Coverage*, *supra* note 114 (explaining that Holmes Murphy’s monoline liability coverage “can also provide protection for hazing, sexual abuse and assault and battery except for the perpetrator of the act or anyone directing and/or acting in concert with the perpetrator”).
166. See, e.g., *Lozano v. Baylor Univ.*, No. 6:16-cv-00403, 2019 WL 4742302, at \*1-2, \*17-18 (W.D. Tex. Sept. 27, 2019) (denying the university’s motion to dismiss because plaintiff had plausibly stated a negligent training and supervision claim regarding the athletic department’s failure to protect plaintiff from domestic abuse by a member of the football team); *Doe YZ v. Shattuck-St. Mary’s Sch.*, 214 F. Supp. 3d 763, 785-88 (D. Minn. 2016) (denying defendant administrators’ motion for summary judgment because there was a genuine issue of material fact about whether administrators’ knowledge of a teacher’s inappropriate conduct with his students was sufficient to make the teacher’s sexual abuse of students foreseeable); *Malicki v. Doe*, 814 So. 2d 347, 351-52 (Fla. 2002) (holding that the Establishment Clause did not preclude negligent hiring and supervision claims asserted by parishioners against a church and archdiocese for alleged sexual assaults by a priest); *Eng v. NYU Hosps. Ctr.*, 101 N.Y.S.3d 320 (App. Div. 2019) (affirming the denial of a hospital’s motion for summary judgment on negligent hiring, training, supervision, and retention claims because there was a genuine issue of material fact regarding whether the hospital knew or should have known that the employee would use her credentials to gain unauthorized access to medical records).

state-by-state variation, a plaintiff consistently must plead and prove the standard negligence elements: The supervisor had a duty toward the plaintiff; the supervisor breached this duty; this breach was a cause-in-fact of the plaintiff's injury; and the breach was a proximate cause of the supervisee's wrongful act.<sup>167</sup>

### 1. Duty of care

To successfully plead that the supervising entity owed her a duty of care, the plaintiff must show (1) the foreseeability of the harm, (2) the extent of the supervisor's control over its charges' activities, and (3) whether the supervisor exercised reasonable care to prevent the harm from occurring.<sup>168</sup> This duty is not about direct, personal supervision. For example, an employer does not have to be in the room to be liable for negligent supervision of her employees. While the rules are guided by state law, the test for employer liability is typically whether the employer was constructively aware of the employee's propensity for tortious conduct; it does not require a direct supervisory relationship or an employer's physical presence.<sup>169</sup> Nor is constructive notice specific to the act or the individuals involved. The defendant's duty extends to "any person foreseeably within the zone of danger created by the defendant's negligence."<sup>170</sup> And, as one court has explained, the plaintiff "need not show that the very injury resulting from defendant's negligence was foreseeable, but merely that a reasonable person could have foreseen that injuries of the type

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167. For example, the Illinois Supreme Court recently highlighted the variation even within the state:

The appellate court below held that the elements of a negligent supervision claim are that "(1) the defendant had a duty to supervise the harming party, (2) the defendant negligently supervised the harming party, and (3) such negligence proximately caused the plaintiff's injuries." Other panels, however, have held that notice is required.

*Doe v. Coe*, 135 N.E.3d 1, 15 (Ill. 2019) (citations omitted) (quoting *Doe v. Coe*, 103 N.E.3d 436, 456 (Ill. App. Ct. 2018), *aff'd in part, rev'd in part, Doe*, 135 N.E.3d 1). By contrast, Louisiana's five elements are:

- (1) [T]he defendant had a duty to conform his or her conduct to a specific standard of care . . . ;
- (2) the defendant failed to conform his or her conduct to the appropriate standard . . . ;
- (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries . . . ;
- (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries . . . ; and,
- (5) actual damages . . . .

*Horton v. Blackrock Aggregates, LLC*, 213 So. 3d 429, 435-36 (La. Ct. App. 2017) (citing *Mathieu v. Imperial Toy Corp.*, 646 So. 2d 318, 322 (La. 1994)).

168. See 2 RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 41 cmt. c (AM. LAW INST. 2012).

169. See 25 KRISTINE CORDIER KARNEZIS, CAUSES OF ACTION 2D 99, § 5 (West 2020) (providing an overview of relevant state law).

170. *Id.*

suffered would be likely to occur under the circumstances.”<sup>171</sup> And while employment negligent-supervision cases typically focus on whether the employer should have foreseen that the specific employee would cause harm,<sup>172</sup> an employer may also be liable for a failure to train if that omission is the proximate cause of the resulting injury.<sup>173</sup>

Applying the above to the fraternity context, a national organization’s duty of care stems from its awareness of chapter-level activities and risks, and its powerful control mechanisms to influence these activities and risks. National organizations have sufficient knowledge of past incidents and of the risk factors to make these harms foreseeable. National offices (often staffed primarily by alumni) select every intricacy of the fraternity’s national policies, check in to ensure policies are being followed, and receive mandatory incident reports anytime something goes wrong within a chapter.<sup>174</sup> The *ex ante* and *ex post* mechanisms discussed above are reinforced by chapter leadership and chapter counsel, who report to the national organization and enforce fraternity policies.<sup>175</sup> In other words, national organizations are experts on fraternity life, particularly within their own chapters. Therefore, they are undeniably aware of the accidents and other incidents that accompany fraternity social life.<sup>176</sup>

This expertise, plus the supervisory role national organizations exert over their chapters and members, vests national fraternity organizations with the responsibility to prevent foreseeable injuries by feasible means. In fraternity hazing cases, which typically include negligent supervision claims, plaintiffs have had mixed success proving the control necessary to establish duty because courts have focused on how the national organization did not “exercise day to day control over local chapter activities.”<sup>177</sup> But requiring proof of “day to day” control is an inaccurate expectation for two reasons. First, as explained above,

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171. *Smith v. Archbishop of St. Louis ex rel. Archdiocese of St. Louis*, 632 S.W.2d 516, 521 (Mo. Ct. App. 1982) (*per curiam*); *see also* 25 KARNEZIS, *supra* note 169, § 5 (“[T]he precise injury suffered by the plaintiff need not be foreseen to establish that it was within the scope of the defendant’s duty.”).

172. *See* 25 KARNEZIS, *supra* note 169, § 5 (listing cases).

173. *See, e.g.*, 27 AM. JUR. 2D *Employment Relationship* § 375 (West 2020).

174. *See supra* Part II.A.

175. *See supra* Part II.A.

176. This liability theory does not hold the national fraternity responsible for every misdeed of its members; the focus is on the particular risks linked to fraternity social life.

177. *See, e.g.*, *Furek v. Univ. of Del.*, 594 A.2d 506, 514 (Del. 1991). *But see Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. Ct. App. 1999) (finding that, in part because the national organization had “the right to control intake, expel or suspend members, and revoke charters,” the organization had assumed a “duty to regulate, protect against and prevent hazing by its collegiate chapters”).

such control is unnecessary for negligent supervision liability.<sup>178</sup> Second, these courts ignored that, as discussed in Part II above, national organizations do in fact exert significant institutional control over their chapters and their members.<sup>179</sup> They provide detailed rules of conduct governing all aspects of fraternity life, including mandatory notification when something goes wrong<sup>180</sup> and rules of conduct that can—and should—include information and mechanisms to reduce sexual assault. Moreover, national organizations track—and punish—the chapters that are the greatest liabilities (that is, most frequently draw on insurance), which gives chapters strong incentives to closely monitor their own.<sup>181</sup> Finally, when needed, the national organization has full authority to expel a troublesome member or revoke the charter of an entire chapter.<sup>182</sup> The national organization may not control what the members eat for breakfast, but it holds the procedural and disciplinary levers necessary to control key safety practices relevant to liability and provide powerful incentives to avoid harmful behavior.

## 2. Breach

National fraternity organizations should only be found to have breached the above duty of care if they failed to take reasonable precautionary measures to prevent negligent behavior. Just as a university is not in breach of its duty to its students if it fails to guarantee perfect safety in dorms, the fraternity does not have to micromanage its chapters' activities.<sup>183</sup> But the reasonableness standard *does* require national fraternity organizations to use the tools available to them. In fraternity hazing cases, courts have found a national fraternity breached its assumed duty if the organization, aware of previous incidents, failed to take disciplinary action to prevent the hazing reoccurring.<sup>184</sup> Analogizing to

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178. See *supra* text accompanying notes 168-71.

179. See *supra* Part II.A.

180. See *supra* text accompanying note 85.

181. See, e.g., *supra* text accompanying notes 132-33, 135-36.

182. See *supra* notes 85-95 and accompanying text.

183. Cf. 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, 67 (2017) (describing “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” as ignoring schools’ ability to take “reasonable precautionary measures” based on colleges’ “superior knowledge about campus sexual assault risk factors”).

184. E.g., *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1116, 1119 (La. Ct. App. 1999) (“As for breach, the ineffectiveness of the national fraternity’s response to reports of hazing at its affiliate chapters is evidenced by the fact that such abuse continued even after promulgation and dissemination of Executive Order #2 [an anti-hazing policy].”).

the fraternity assault context, a national organization would be in breach of its duty if it knew a member had previously committed assault, or a chapter had a history of assault, but had not, for example, tightened its risk-management procedures, expelled the member, fined the chapter (including through raising its insurance rates), or revoked the chapter's charter.

### 3. Cause-in-fact

A plaintiff then has to demonstrate the causal connection between the national organization's negligence and the assault. Assuming, for the sake of argument, that a plaintiff is able to prove she was assaulted, she still must demonstrate that the assault would not have occurred but for the national organization's negligence.

Proving cause-in-fact should be straightforward if the tortfeasor had a history of sexual violence. Multiple recent studies have found that while only a small percentage of men commit sexual assault, the majority of these perpetrators are repeat offenders.<sup>185</sup> Therefore, by failing to expel the fraternity member, the national organization enabled future violence within that fraternity's social orbit.<sup>186</sup> But for his remaining in the fraternity, future sexual violence (at least through the Greek social scene) would not have occurred.

Proving causation is more difficult if the fraternity member did not have such a history; the argument would then need to target the fraternity's weak risk-management policies to contend that if the fraternity had established better rules (on paper *and* in practice), the assault would have been preventable. While this causal argument is less concrete than the one above, it is still viable. The plaintiff can point to, for example, a failure to monitor how much fraternity members and guests drank or an absence of sober monitors looking for worrisome behavior, then look to the national fraternity's policies on these

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185. See John D. Foubert et al., *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, 26 VIOLENCE AGAINST WOMEN 296, 304 (2020) (finding, in a survey of forty-nine campuses and over 10,000 male students, that "more than 87% of alcohol-involved sexual assault incidents were committed by serial perpetrators, who committed an average of at least five incidents each"); Heidi M. Zinzow & Martie Thompson, *A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in U.S. College Men*, 44 ARCHIVES SEXUAL BEHAV. 213, 217 (2015) (finding in a four-year study of nearly 800 subjects that, of those who had committed an act of sexual coercion and assault at school, 68% did so more than once); see also David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) (stating that the majority of undetected rapists (those not caught and convicted) are repeat offenders).

186. Cf., e.g., Alex Stuckey, *Rape Victim Says She Was Sixth to Report Utah State Student, Sues School for Not Acting*, SALT LAKE TRIB. (Nov. 8, 2016, 11:31 AM), <https://perma.cc/UY7V-GYAR> (noting that the then-Sigma Chi member had been reported by five women before he attacked the plaintiff).

topics, who was trained on these policies, and how these policies are enforced. And, since college is unfortunately often the first place where consent is discussed, it may also be relevant to examine whether the fraternity's policies and trainings on consent were sufficiently comprehensive.

#### 4. Proximate cause

The thornier causation problem for a plaintiff is establishing—after proving but-for causation—that the national organization's negligence was a *proximate* cause of her injuries (that is, proving that the assault was a foreseeable result of such negligence).<sup>187</sup> The national organization may be liable if it should reasonably have anticipated that its conduct could result in the assault. This foreseeability question is undeniably the most difficult element of the case against the national fraternity organization. But foreseeability is also precisely the reason that proximate cause is the crucial locus for applying our newfound and still-developing understanding of fraternity culture and responsibility.

Given the clearly established risk of sexual assault involving fraternities,<sup>188</sup> someone attending a fraternity event is a foreseeable victim of the defendant's negligence.<sup>189</sup> The same statistics support characterizing a plaintiff's sexual assault being an injury within the scope of the risk, and one that is foreseeable. We already know that sexual assault is a foreseeable injury at fraternity events. The key proof for the plaintiff would then be showing that the national organization's negligence (whether it be failing to educate their members about proper consent, failing to remove a student with a history of assault incidents, a lack of sober monitors, or an absence of other safety procedures) increased the risk of sexual assault at fraternity events.

Nor can the national organization point to the individual member's malfeasance as an intervening or superseding cause to negate its own liability. Criminal acts—like sexual assault—are not superseding causes.<sup>190</sup> As for assumption of the risk, even the boldest defendant will hopefully recognize that raising this affirmative defense would be so outrageous as to only damage its credibility.

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187. See 1 RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 cmt. j (AM. LAW INST. 2005).

188. See *supra* Part I.A.

189. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104-05 (N.Y. 1928) (Andrews, J., dissenting) (“[T]he natural results of a negligent act—the results which a prudent man would or should foresee—do have a bearing upon the decision as to proximate cause.”).

190. See, e.g., *Hines v. Garrett*, 108 S.E. 690, 691, 694-95 (Va. 1921) (finding a train company liable for the rape of a woman they forced to walk down the tracks back to her station, as the assault committed by the third party was not a superseding cause).



Returning to the above hypotheticals, these elements would be the least difficult to establish if the fraternity member who commits the assault has a history of sexual violence.<sup>191</sup> The next best option would be if the member's chapter has a documented history of problems with sexual assault (especially if there are witnesses able to speak to an enabling culture).<sup>192</sup> If the fraternity's reporting mechanisms are operating properly, the national organization should be aware of prior incidents involving the member (in relation to fraternity activities) or the chapter.<sup>193</sup> If so, the national organization should reasonably have anticipated that the fraternity member would commit another assault. This responsibility goes beyond the fact that the fraternity member continued to be able to take advantage of the social platform the fraternity provides. A fraternity member who did not face significant consequences for prior sexual violence logically also learned that he could get away with such attacks again. If the national organization was not aware of the fraternity member's history of sexual violence, however, that reveals a hole in the fraternity's reporting mechanisms, making it reasonably foreseeable that such an actor would be allowed to continue his predatory behavior.

Proving such a direct causal connection between poor risk-management practices and assaults by fraternity members (absent the above-mentioned facts) will be more challenging. The plaintiff will have to convince the judge or jury that the absence of strong risk-management policies and practices made her assault more foreseeable. Nonetheless, this proof is still possible. Knowing what we do about the greater likelihood of sexual assault in fraternity contexts, it is reasonable to expect national fraternities to require appropriate safety mechanisms and respond readily to incidents. For example, given the platform that fraternity membership provides attackers, evidence that the national organization has a history of not removing members who have committed assault should establish that the national organization was not doing enough to ensure a safe environment and was even indicating to its members that sexual assault would be tolerated. As for affirmative policies, it is

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191. To put it simply, courts are most receptive to foreseeability arguments when similar incidents previously occurred under similar conditions. For an example analysis of foreseeability (in the context of duty of care), see *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999) (finding the sexual assault to be foreseeable after noting two incidents of sexual assault or harassment at the chapter in the last two years, and also noting the broader correlation between campus sexual assault and drug and alcohol use, as the national fraternity had recently pointed out to the chapter), *abrogated by* *Rogers v. Martin*, 63 N.E.3d 316 (Ind. 2016).

192. *See, e.g.*, ALAN D. DESANTIS, *INSIDE GREEK U.: FRATERNITIES, SORORITIES, AND THE PURSUIT OF PLEASURE, POWER, AND PRESTIGE* 43-50, 99-100 (2007) (listing anecdotes of how fraternity members encourage and reinforce sexual competition and disrespectful attitudes towards women among themselves).

193. *See supra* text accompanying notes 84-88.

reasonable to expect fraternities to provide thorough trainings about appropriate conduct—underscored by clear punishments for member malfeasance. The more we learn about measures currently being developed and implemented to reduce the risk of sexual assault, the more robust evidence advocates will have about which policies and practices are effective. For example, students report significant changes from implementing sober-monitor and bystander training requirements.<sup>194</sup> And given inter-fraternity information-sharing practices (fostered by their insurers),<sup>195</sup> showing the successes of such programs will support an argument that a national fraternity is negligent in refusing to properly ensure its chapters take such steps.

#### **IV. Predicting the Future Success and Effects of Increased Litigation Against National Fraternity Organizations**

While Parts II and III outlined the legal and normative support for a negligent supervision claim against the national fraternity organization, this Part discusses the practical reasons to have confidence in—and prioritize—this claim. With traditional concerns about courts being unreceptive and insurers abandoning the field likely to be less salient moving forward, negligent supervision claims have an increased likelihood of success. Furthermore, implicating national organizations and their insurers in greater litigation should increase incentives for these entities to contribute to cooperative monitoring and prevention efforts, with positive effects for campus sexual assault prevention more broadly.

##### **A. Why This Strategy Will Work**

The litigation strategy discussed above hinges in large part on explaining the degree to which national fraternities do in fact control their chapters, and therefore their members, and so cannot avoid liability for sexual assault committed by their members. But it also involves bringing our contemporary understanding of campus sexual assault into the courts. Much of the aforementioned misapplication of negligent supervision in the fraternity context is cultural. Continuing to characterize campus sexual assault as involving isolated incidents borne out of individual foibles ignores the patterns, the foreseeability of many assaults, and the way institutional attitudes can shape approaches to sex and consent. As our society increasingly recognizes the inaccuracy of this view, litigation opportunities will expand. Moreover, this expansion in litigation is not something to fear: While readers may worry that,

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194. Telephone Interview with D.L., *supra* note 82.

195. *See supra* text accompanying notes 130-31.

faced with a surge in litigation costs, fraternity insurers will do what homeowner insurers have done in disaster-prone areas and stop offering coverage, such a move would be inconsistent with the incentive structure of this specialized industry.

1. Early signs of promise

Successfully arguing negligent supervision to the courts requires a strong dose of cultural receptivity in addition to proving the doctrinal merits. Fortunately, shifts in the legal landscape suggest that conditions are ripe for increased efforts. Even though negligent supervision claims are relatively new and sexual assault tort cases tend to settle out of court, there are notable indicia of early success.<sup>196</sup>

Recently filed complaints reflect the broader shift in our legal-cultural understanding of fraternity responsibility. For example, a complaint filed in late 2016 asserted a negligence claim against Alpha Epsilon Pi for failing to “take proper precautions” and “develop adequate policies and procedures” to protect against sexual assault.<sup>197</sup> Plaintiff’s counsel declared that “[a] responsible national chapter would never allow a chapter to exist that was that far off base from what was safe and healthy.”<sup>198</sup> In February 2018, a sexual assault suit filed against the Phi Delta Theta chapter at Baylor University included a negligence claim against the national fraternity organization for failing to provide and enforce adequate risk-management policies and procedures, failing to investigate and protect against incidents—and perpetrators—of sexual assault, and failing to adopt and enforce sanctions for sex offenses.<sup>199</sup>

That plaintiffs have only recently begun to take up this theory highlights how the fraternity sexual assault problem is far more widely understood and recognized than it was even five years ago. And this language, echoed in other cases,<sup>200</sup> shows a stronger understanding of the authority national fraternities exert and the growing cultural sense that sexual assault is an institutional problem.

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196. This Note defines success to include both settlements and favorable verdicts. *See also supra* note 41 and accompanying text.

197. Deanna Pan, *Alleged Rape Victim Sues College of Charleston, Alpha Epsilon Pi Fraternity*, POST & COURIER (Dec. 19, 2016), <https://perma.cc/6DMT-LYRG>.

198. *Id.*

199. Plaintiffs’ First Amended Petition & Request for Disclosure at 5, 9-10, *Doe v. Phi Delta Theta*, No. 2018-509-5 (Tex. Dist. Ct. Feb. 19, 2018).

200. *See, e.g.*, Notice of Removal, exhibit A at 6-7, *Roe v. Furman Univ.*, No. 6:18-cv-01327 (D.S.C. May 15, 2018), ECF No. 1 (alleging, inter alia, in the complaint from the Greenville Court of Common Pleas, negligent supervision against Beta Theta Pi and Furman University’s Zeta Lambda Chapter of Beta Theta Pi).

A critical bellwether is the increase in high-profile plaintiffs' lawyers bringing these lawsuits.<sup>201</sup> This increase suggests that plaintiffs' lawyers are confident that lucrative settlements (or verdicts) are achievable.<sup>202</sup> Increased confidence in the likelihood of settlement implies that national fraternities are less willing to push a case to judgment. It is also no doubt related to the increasing rate of denial of fraternities' motions to dismiss.<sup>203</sup>

Both of these changes suggest an expectation that judges will be increasingly receptive to these claims. Two recent denials of a motion to dismiss exemplify these trends. In January 2018, Phi Kappa Psi lost its motion to dismiss a sexual assault lawsuit stemming from an incident at Brown University.<sup>204</sup> The plaintiff alleged, among other claims, that Phi Kappa Psi authorized and supervised the operation of the chapter, had the authority to discipline the chapter, and was aware of the prior disciplinary measures taken by the university against the chapter.<sup>205</sup> In December 2019, advisers to Pi Kappa Alpha lost their motion to dismiss negligent supervision claims concerning a sexual assault at a chapter party after the plaintiff was over-served alcohol.<sup>206</sup> Though not rulings on the merits, the courts' denials of these motions demonstrate receptiveness to the claims. Indeed, in the Phi Kappa Psi case, the court insisted on finding the case-specific facts necessary to the duty analysis, rather than dismissing the negligent supervision claim outright.<sup>207</sup>

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201. See Frank DiMaria, *Lawsuits Against Fraternities: Reveal Risks and Responsibilities*, INS. NEWS NET (July 25, 2014), <https://perma.cc/P7EJ-BKPA> (citing an interview with Caitlin Flanagan, who wrote one of the major pieces of journalism on fraternity-related injuries and insurance, see *supra* note 80).

202. See *id.* (citing an interview with Caitlin Flanagan).

203. See, e.g., *Doe v. Brown Univ.*, 304 F. Supp. 3d 252, 267 (D.R.I. 2018); Order on Motion to Dismiss at 1, *Doe No. 62 v. Ind. Univ. Bloomington*, No. 1:16-cv-01480 (S.D. Ind. Dec. 12, 2016), ECF No. 58 (denying motions to dismiss filed by Delta Tau Delta fraternity and Beta Alpha Shelter chapter of Delta Tau Delta); Minute Entry, *Furman Univ.*, No. 6:18-cv-01327 (D.S.C. Feb. 8, 2019), ECF No. 134 (denying motions to dismiss filed by Beta Theta Pi fraternity and Zeta Lambda chapter of Beta Theta Pi). But note that while plaintiffs' claims have been increasingly surviving motions to dismiss, there have been some adverse rulings on summary judgment. See, e.g., *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 687-91 (Ct. App. 2019) (finding that the national fraternity had no duty to control their local chapter).

204. *Brown Univ.*, 304 F. Supp. 3d at 262. The case was subsequently dismissed under a joint motion. Joint Stipulation for Dismissal with Prejudice Pursuant to FRCP 41(a)(1)(A)(ii), *supra* note 41.

205. *Brown Univ.*, 304 F. Supp. 3d at 262-63.

206. *Jones v. Pi Kappa Alpha Int'l Fraternity, Inc.*, No. 2:16-cv-07720, 2019 WL 6888440, at \*1-2, \*11 (D.N.J. Dec. 18, 2019). Notably, here the national fraternity organization itself did not challenge the negligent supervision claim. Peter Hayes, *Fraternity Advisers Face Liability for Sex Assault at Keg Party*, BLOOMBERG LAW (Dec. 18, 2019, 1:41 PM), <https://perma.cc/MV3R-PBV6>.

207. *Brown Univ.*, 304 F. Supp. 3d at 264.

More importantly, the court ruling on the Phi Kappa Psi motion allowed plaintiffs to assert a connection between alcohol, fraternities, and sexual assault as part of their case.<sup>208</sup> The fraternity had tried to strike a section in the complaint discussing how campus sexual assault was facilitated by alcohol served at fraternities, arguing that the information was not relevant, or was at least prejudicial.<sup>209</sup> The court ruled instead that data on the prevalence of campus sexual assault was relevant to establishing duty for the negligent supervision claim, particularly the foreseeability of the alleged harm.<sup>210</sup> With sexual assault a topic of widespread discussion on college campuses, the court refused to let the fraternity pretend it operated in a vacuum and deny all knowledge or anticipation of a logically foreseeable incident despite the broader context. This suggests that negligent supervision provides a more expansive lens for examining foreseeability, one that recognizes national fraternities' potential responsibility for foreseeable harms.

## 2. The insurance landscape is unlikely to change

Readers would be justified in fearing that once national fraternity liability for sexual assault by fraternity members becomes a more widely accepted concept, insurers will withdraw from the field due to rising litigation costs. Indeed, they have done so before. In the 1990s, accidents in fraternities were so common that many insurance carriers “completely abandoned the area.”<sup>211</sup> For those that did not, costs to customers surged: By the end of the decade, the premium for risky chapters was more than ten times the average five-dollar-per-member annual premium of the late 1970s.<sup>212</sup> Both “self-insuring” and specialist fraternity insurers arose out of this chaos.<sup>213</sup> While these fears have merit, they gloss over the core dynamics within fraternity insurance. With their business model so tied up in fraternity life, specialty insurers are not going anywhere.

Increased premiums due to litigation are unlikely to discourage national fraternity organizations from purchasing insurance. Removing insurance coverage for sexual assault will not reduce national organizations' eligibility as third-party defendants in sexual assault tort lawsuits (by making them judgment-proof). While insurance is typically the source of litigation funding, national organizations, with the cumulative value of national fraternities' dues

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208. *Id.* at 266.

209. *Id.*

210. *Id.*

211. *See* Kimzey, *supra* note 108, at 468.

212. *Id.* at 467-68.

213. *See id.* at 469, 473.

and their real property assets,<sup>214</sup> are likely capable of paying for litigation and settlements themselves. Therefore, the most prudent strategy will instead be to maintain insurance coverage for sexual assault, with the associated information-sharing benefits of being in that network, and invest in risk prevention. National organizations' demand for insurance coverage for sexual assault should therefore remain strong.

A related concern would be that insurers (either a self-insuring fraternity coalition or a third-party insurer) would simply delete the clause in the insurance contract covering third-party liability for sexual assault. If litigation and settlement costs surge, the logic goes, it would be financially sound to stop covering these costs. This is unlikely, however. Self-insurance systems, like the one run by James R. Favor & Co.,<sup>215</sup> have no reason to disband. And the few third-party insurers in the market enjoy oligopolistic domination.<sup>216</sup> Having structured their operations to cater to fraternities,<sup>217</sup> these insurers are unlikely to forsake their market share while demand for such coverage remains high. Nor is sexual assault coverage likely to be withdrawn. Fraternities in self-insurance systems will not choose to leave themselves vulnerable. Third-party insurers, for their part, are all too aware that specialty fraternity insurance exists in large part for coverage of injuries and litigation relating to hazing and sexual assault.<sup>218</sup> Refusing to provide coverage would likely cause fraternities to go elsewhere, wasting years of specialization. Instead, fraternity insurers would be far better off looking forward for the possibilities of further reducing risk and managing costs; a particular opportunity lies in data.

#### B. The Possibility of Broader Policy Reform

Besides holding national fraternity organizations accountable and generating economic damages for survivors, increased civil litigation also has the potential to contribute more broadly to sexual assault prevention. Incident reporting between chapters and national organizations produces data that would be of interest to both insurers and courts. Proper use of this data could make a significant contribution to sexual assault prevention, from tracking patterns and preventing risk to clarifying responsibility in litigation.

As increased litigation raises the pressure, insurers (both third-party and "self-insurance" schemes) will be well positioned to generate positive externalities

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214. Greek organizations own \$3 billion worth of real estate on college campuses in the United States. HECHINGER, *supra* note 16, at 6. National organizations together generate at least \$170 million in annual revenue. *Id.* at 31.

215. *See supra* text accompanying notes 115-18.

216. *See supra* note 108 and accompanying text.

217. *See supra* Part II.B.1.

218. *See supra* notes 108-12 and accompanying text.

through their unique institutional competencies in data harvesting and analysis. Based on fraternities' strict reporting procedures for sexual assault and other incidents,<sup>219</sup> the national organization should have data on each chapter's sexual assault rate, the circumstances of individual cases, and what disciplinary actions followed. But national offices are small,<sup>220</sup> and thus are not equipped to process this data. By contrast, insurers, whose feature and experience ratings are based on data analysis,<sup>221</sup> have the infrastructure to process and analyze reams of data. They also have a wider client base from which to harvest this data. By fully using the ability to gather, analyze, and distribute information about sexual assault, insurers can not only make it easier for national organizations to monitor and discipline their chapters, but also possibly contribute to broader assault prevention efforts.

As national organizations are increasingly held liable or settle—triggering an insurance payout—both the clients and the insurers will have strong incentives to create and contribute to such a data scheme. This data will improve fraternity insurers' price discrimination. The more information they have on their fraternity clients, the better insurers are able to calculate each fraternity's risk profile and adjust their premiums accordingly.<sup>222</sup> Fraternities, in turn, would presumably be motivated to cooperate to improve the fraternity's feature rating with the insurer (akin to how car insurance companies provide telematics devices or apps to track an individual's driving<sup>223</sup>). Any attempt, by either the national organization or a chapter, to suppress such information would be shortsighted: The filing of a lawsuit or claim against the insurance policy would trigger an investigation, ultimately unearthing the information anyway.

The above model has the potential to contribute to broader efforts to reduce campus sexual assault. At a minimum, thorough data collection and analysis could help fraternities better understand the risks within their organizations and work to protect against them. In particular, the data would more easily identify repeat offenders (individuals or chapters) and increase

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219. See *supra* notes 82-87 and accompanying text.

220. See HECHINGER, *supra* note 16, at 112-13.

221. Feature rating involves evaluating the fraternity for riskiness at the time the policy is secured. See *supra* text accompanying note 121. Experience rating is the process of adjusting insurance rates on the policy as the insurer continues to evaluate the riskiness of the policy holder. See *supra* text accompanying note 122.

222. See *supra* text accompanying notes 126-30.

223. See Ben-Shahar & Logue, *supra* note 119, at 236-37 (describing “pay as you drive,” or “telematics” technology, where a data recorder is installed in the car to monitor patterns of usage in exchange for a premium discount); Barbara Marquand, *Your Smartphone Can Tell How Well You're Driving*, FORBES (Jan. 29, 2016, 5:13 PM EST), <https://perma.cc/T56C-XWEX>.

accountability for disciplining members. Studies suggesting that the majority of rapists are repeat offenders are consistent with recent cases where the accused has been previously accused or disciplined.<sup>224</sup> Rigorous tracking of this data would help national fraternities discipline and monitor chapters who tend to protect offending members despite the harm they inflict. A more ambitious goal would be for fraternity insurers to share overall data trends with government agencies and nongovernmental organizations to aid in campus sexual assault prevention. This sharing should not implicate privacy concerns, as insurers would only pass on information about incident rates and losses paid, not the details of specific claimants.<sup>225</sup> While legislation would likely be necessary to encourage insurers to surrender this proprietary information, such a large dataset would be an immense asset to any entity studying campus sexual assault trends.

Courts are also interested in whether certain fraternities are aware of patterns of sexual assault within their ranks.<sup>226</sup> As rigorous data tracking would support the foreseeability element of the duty analysis discussed in Part III.B above, that would seem to incentivize fraternities not to cooperate with insurers. But there's every reason to think the incentives will in fact cut the other way. If, in an era of big data, a fraternity can prove that they do not have a history of prior sexual assaults and that policies are being closely followed, submitting

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224. See *supra* note 185 and accompanying text; see also, e.g., *Kollaritsch Order*, *supra* note 152, at 5, 2016 WL 10733962, at \*2 (discussing how the alleged perpetrator assaulted plaintiff Kollaritsch, was disciplined for that assault, and then subsequently assaulted plaintiff Gross); Stephanie Saul, *When Campus Rapists Are Repeat Offenders*, N.Y. TIMES (Jan. 24, 2017), <https://perma.cc/83DM-CDTG> (describing a rape allegedly committed at Kansas State University by a man who had been the subject of a sexual assault claim the year prior).

225. Insurers regularly share information on insurance premiums collected and losses paid with insurance rating bureaus. Ben-Shahar & Logue, *supra* note 119, at 206 & n.18 (citing KENNETH S. ABRAHAM, *INSURANCE LAW & REGULATION* 34-36 (5th ed. 2010)). For example, insurers that offer property-casualty policies submit records of insurance premiums collected and losses paid to the Insurance Services Office (ISO), a rating bureau. The ISO processes this information to help insurers set accurate prices and mitigate losses. *Id.* at 206 n.18. Another example is the nearly forty years of information sharing between the National Association of Bar Related Insurance Companies (NABRICO) and the American Bar Association, which have teamed up to collect information on legal malpractice claims. Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1444 & n.155 (2013) (citing AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER* (1989); AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *PROFILE OF LEGAL MALPRACTICE CLAIMS 2008-2011* (2012); and NABRICO, <https://perma.cc/2ULW-ZTPT> (archived May 2, 2020)). The level of detail disclosed and the mission of understanding broader trends would be the same with a government reporting program, suggesting privacy would not be a problem.

226. See, e.g., *supra* note 191 and accompanying text.



that data will help a fraternity argue that it exercised the appropriate degree of care. As this data is more frequently used, other fraternities will feel the pressure to reduce their own assault-risk ratings rather than risk looking suspicious for not providing that data. In this way, the effects of litigation should extend beyond the individual cases brought.

### **Conclusion**

As campus sexual assault prevention strategies evolve, advocates and advisers should push civil litigation for fraternity-related assaults as a way to open up an avenue of remuneration for survivors through a comparatively gentle process. Our contemporary understanding of the fraternity command structure, enforced by the incentives and mandates of insurance, provides the necessary degree of control on which to base a claim for negligent supervision by the national organization. Survivors can therefore look to the civil justice system to obtain much-needed economic damages for both the assault and its aftereffects.

This Note addresses only a portion of the campus sexual assault problem and potential litigation, but a part that has been underemphasized in recent discourse and could bring significant changes to the landscape with greater attention. Naming national fraternity organizations in litigation increases the options for sexual assault prevention. If more survivors feel they have viable options for redress (due to the increased availability and visibility of civil litigation), they may be more inclined to report their assaults. Moreover, the pressure of increased civil litigation—and the insurers' response—could further encourage self-regulation within fraternities. In holding all parties to their appropriate level of responsibility, the next generation will hopefully be having a very different conversation.