



Muted deterrence: The enhanced attribution of tort liability to US higher education institutions for student safety

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A key challenge facing modern universities is ensuring student safety. This task inevitably involves deterring risky behavior. The existing law on campus safety, however, inadequately addresses this challenge. This essay argues that an overemphasis on tort litigation fails to (i) adequately deter risky individual and institutional behaviors; (ii) provide incentives to higher education institutions to create safe campuses; and (iii) provide higher education institutions with the resources, know-how, and overall capacity to improve campus safety. Recognising the limitations of adversarial tort litigation in the student safety context, this essay, proposes a more collaborative, less adversarial, regulatory framework for making US campuses safer learning environments.

Introduction

The traditional romanticised vision of a university is one where young students study, socialise, and live in a bucolic or sophisticated urban setting. University brochures, websites, and other advertisements, aimed at enticing aspiring students, contribute to this tranquil image. Yet recent events in the United States, such as the Virginia Tech shooting and the Penn State sexual assault cover-up, serve as a sobering reminder for universities, courts, regulators, and the public concerning an important truth: colleges can be very dangerous places.² The threats to student safety are numerous and include: sexual assaults, theft, hazing, gun violence and other dreadful crimes. Drug and alcohol abuse, suicide, poor mental health and athletic injury are additional safety threats today's students confront. These diverse threats reveal a key challenge facing modern universities — promoting student safety and deterring risky behaviour. In the current environment, US colleges and universities face greater scrutiny from the public, courts, and particularly federal regulators with regard to their student safety role. The Obama Administration has taken a proactive role in investigating universities for violations under federal regulations, especially targeting sexual violence

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² See C Hauser and O O'Connor, 'Virginia Tech Shooting Leaves 33 Dead', *New York Times*, 16 April 2007 at <<http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>>; L Alvarez and R Bown, 'Students Death Turns Spotlight on Hazing', *New York Times*, 30 November 2011, at <<http://www.nytimes.com/2011/12/01/us/florida-am-university-students-death-turns-spotlight-on-hazing.html>>; B Wolverton, 'Penn State's Culture of Reverence Led to "Total Disregard" for Children's Safety', *Chronicle of Higher Education*, 12 July 2012, at <<http://chronicle.com/article/Penn-States-Culture-of/132853>>.

under Title IX of the Education Amendments of 1972 (Title IX).³ Seizing the bully pulpit, it has drawn attention to student safety threats, such as sexual assaults and gun violence.⁴ And, particularly in the area of sexual assault, the Obama Administration has begun to provide specific guidance in the form of best practices that higher education institutions can implement to make their campuses safer. Overall, this is a positive development. The current state of the law on campus safety, however, remains inadequate.

Campus safety is primarily addressed by tort negligence standards at the state level through litigation. Litigation, however, may lead to inconsistent results, which, in turn, may create variations in safety standards across jurisdictions.⁵ There is also no comprehensive federal campus safety law. Instead, federal law with regard to campus safety is ‘scattered’ across different legislative measures that are enforced by multiple agencies such as the US Department of Education and the Department of Justice.⁶ This scattered federal approach, compounded by state and local regulations, complicates attempts to improve campus safety. Consequently, there is a need for better interpretive guidance to address the confusion colleges and universities face concerning what constitutes compliance among a matrix of intersecting regulations with different goals.

In response to this new enhanced level of scrutiny, universities are attempting, often with insufficient guidance from courts and regulators, to address multiple safety concerns while, at the same time, limiting their liability exposure and reputational damage. Under the present framework, state courts and federal agencies influence campus safety primarily through litigation, safety-related disclosures by higher education institutions, and fines

3 See discussion below at Pt IC1a.

4 See J Calmes, ‘Obama Seeks to Raise Awareness of Rape on Campus’, *New York Times*, 22 January 2014, at <http://www.nytimes.com/2014/01/23/us/politics/obama-to-create-task-force-on-campus-sexual-assaults.html?_r=0> (‘President Obama renewed pressure on colleges and universities to prevent and police sexual assaults on their campuses, creating a task force of senior administration officials to coordinate federal enforcement efforts’); L Sander, ‘Obama Promises Governmentwide Scrutiny of Campus Rape’, *Chronicle of Higher Education*, 23 January 2014, at: <<http://chronicle.com/article/Obama-Promises-Governmentwide/144147/>>; A Bidwell, *Feds Launch Title IX Investigation at USC*, USA Today, 25 July 2013, available at <<http://www.usnews.com/news/newsgram/articles/2013/07/25/feds-launch-title-ix-investigation-at-usc>> (discussing the Department of Education’s intention to investigate USC under Title IX for the university’s handling of several rape cases); J Hick, ‘Obama Marks Newtown anniversary with call for action on gun control’, *Washington Post*, 14 December 2013, at <<http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/14/obama-marks-newtown-anniversary-with-call-for-action-on-gun-control/>>.

5 See generally M Saks, ‘Do We Really Know Anything about the Behavior of the Tort Litigation System And Why Not’, 140 *UPA L Rev* 1147 (1992) (highlighting the paucity of empirical data regarding various aspects of tort litigation that are relevant to inform policymakers regarding reform); K N Hylton, ‘Information, Litigation and Common Law Evolution’ 8 *Amer Law & Econ Rev* 33 (2006) (discussing various theories of litigation).

6 P Lake, ‘What the New Campus-Safety Center Can Accomplish’, *The Chronicle of Higher Education*, 15 July 2013, at: <<http://chronicle.com/article/What-the-New-Campus-Safety/140321>>; See also P Lake, *The Rights and Responsibilities of the Modern University: The Rise of the Facilitator University* 2nd ed, Cap Press, 2013, p 5 (‘Paradoxically, at a time of great need, the law of higher education relating to the allocation of rights and responsibilities remains complex and confusing’).

rather than more collaborative and capacity-building approaches such as increased facilitation, grants, technical assistance, and other forms of guidance. The current litigation-disclosure-and-penalty focused approach to campus safety, irrespective of good intentions, is inadequate and in need of revision.

Tort law has multiple purposes including, among others, compensation and deterrence. Although the focus of this article is on deterrence-based university and legal responses, other goals such as compensation remain critically important to addressing fairness considerations.⁷ In theory, tort law (ie, private law) plays an important role alongside regulation (ie, public law) in reducing risky behaviours from both individuals and institutions.⁸ For several decades, law and economics scholars have made the claim that tort liability deters risky behaviours despite the paucity of empirical support for this position.⁹ Recent scholarship from behavioural economists and other scholars questions the deterrent value of tort liability.¹⁰ Generally, this research finds that tort liability has a marginal impact on deterrence.¹¹ Assuming the validity of these findings, this article explores a pragmatic question: What type of legal and regulatory framework will lead to more effective university responses to promote safer college campuses?

Tort litigation undoubtedly promotes compensation for various safety-related student harms in the higher education context, but it fails to (i) adequately deter risky individual and institutional behaviours; (ii) provide incentives to higher education institutions to create safe campuses; and (iii) provide higher education institutions with the resources, know-how, and

7 W P Keeton, D Dobbs, R Keeton & D Owen, *Prosser and Keeton on the Law of Torts*, 5th ed 1984, §1, 5–6 (expressing the central function of tort law to be compensation for those injured by unreasonable conduct); See also O W Holmes, Jr, *The Common Law*, 1881, Dover Publications, 1991, pp 105–13; R A Posner, *A Theory of Negligence* 1 *J Legal Stud* 29 at 32 (1972).

8 See S Rose-Ackerman, 'Regulation and the Law of Torts' 81(2) *American Economic Review* (1991) at 54.

9 J C Moorhouse, A P Morriss and R Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion* 62 *Alb L Rev* 667 at 667–8 (1998) ('... in the works of mainstream scholars, deterrence has ... assumed the role of the primary rationale for tort liability'); See also S Shavell, *Economic Analysis of Accident Law*, Harvard University Press, 2007; W M Landes and R A Posner, *The Economic Structure of Tort Law*, Harvard University Press, 1987.

10 See J W Cardi, R D Penfield, and A Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study* 9 *Empirical Legal Stud* 567 at 568 (2011) (discussing how the theory that the threat of common-law tort liability is a deterrent of tortious conduct is a 'grossly under-tested assumption'); See generally J C P Goldberg, *Twentieth-Century Tort Theory* 91 *Geo LJ* 513 at 558 (2003) (discussing how the theory of economic deterrence has recently come under criticism).

11 Cardi *ibid.*, at 595–6; See also G T Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' 42 *UCLA L Rev* 377 at 443 (1994) (concluding that arguments asserting that tort law provides a strong form of deterrence are 'in error'); J A Siliciano, 'Corporate Behavior and the Social Efficiency of Tort Law' 85 *Mich L Rev* 1820 at 1864 (1987) (arguing that tort law does 'not necessarily' deter corporations, or individuals, and push them toward a 'socially efficient level of safety'); T A Brennan, 'Environmental Torts', 46 *Vand L Rev* 1 at 6 (1993) (describing how empirical evidence shows that environmental torts 'currently send a weak signal'); see generally P W Huber and R A Litan (Eds), *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, Brookings Institution Press, 1991.

overall capacity to improve campus safety. Recognising the limitations of adversarial tort litigation in the student safety context, this article, proposes a more collaborative, less adversarial, regulatory framework for making US campuses safer learning environments. This article is not intended to provide an extensive set of recommendations or best practices; instead, the aim is to provide a general framework to guide further research on legal questions related to campus safety. Part I discusses the evolution of US universities' legal obligations for student safety. Part II examines the limitations of tort litigation in deterring risky behaviours and promoting safety. Part III, borrowing insights from new governance and organisational theory, proposes a collaborative regulatory framework to better address modern campus safety challenges.

I Evolution of university safety obligations

A *In loco parentis* era

The legal obligations of colleges and universities for student safety have evolved over time. Early universities operated pursuant to the principle of *in loco parentis*, where universities were authorised to restrict student activity.¹² In essence, they maintained a paternal and custodial-type relationship with students. The Kentucky Supreme Court's decision in *Gott v Berea College* (1913) captures the essence of *in loco parentis*:

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules are . . . is a matter left solely to the discretion of the authorities . . . and, in the exercise of that discretion, the courts are not disposed to interfere . . .¹³

Courts during this era remained reluctant to interfere with the paternalistic relationship between universities and their students. In addition, doctrines of charitable and sovereign immunity further insulated universities from tort liability.¹⁴

B The bystander era

The 1960's ushered in an expansion of student rights and marked the end of *in loco parentis* at US colleges and universities. Student unrest during this

¹² Lake, above n 6, at 279–81:

Until the 1960s, the American university operated almost entirely free from legal scrutiny regarding issues of student safety and regulation. This freedom — also once given to certain other major social institutions of the industrial age — was the product of the combination of insulating legal doctrines. Colleges were considered legally immune from lawsuits by way of family, charitable, and/or governmental immunities.

¹³ *Gott v Berea Coll*, 161 SW 204, 206 (Ky 1913); See also *John B Stetson Univ v Hunt*, 102 So 637 (Fla 1924) (asserting that court had 'no more authority to interfere [with university's delegated power *in loco parentis*] than they have to control the domestic discipline of a father in his family').

¹⁴ Lake, above n 6, at 9–10; J Areen, *Higher Education and the Law, Cases and Materials*, 3rd ed, Cap Press, 2006; See generally *Dixon v Alabama State Bd Of Ed*, 294 F 2d 150 (5th Cir 1961).

period, particularly related to the civil rights and anti-war movements, prompted colleges to revisit their relationships with students.¹⁵ This period of legal insularity, known as the bystander era, coincided with the expansion of student constitutional rights and freedoms.¹⁶ During this turbulent period, courts began hearing more injury cases yet they were reluctant to find and impose duties on colleges and universities for student safety.¹⁷ Meanwhile, universities fought vigorously against legal responsibility for student conduct.¹⁸ The case of *Bradshaw v Rawlings* captured the prevailing sentiment in the post 1960s environment.¹⁹ The court held that the ‘the modern American college is not an insurer of the safety of its students’ and noted that ‘society considers the modern college student an adult, not a child of tender years’.²⁰ According to the court, a college’s regulation of student life on and off campus was quite limited.²¹ William Lake asserts that the legal insularity universities experienced during the bystander era stemmed from a perception that ‘new student constitutional rights and freedoms had created a caste of *uncontrollable* students (legally and socially) and some *insolvable* safety problems’.²² This rationale, that students were largely autonomous and uncontrollable, differed from earlier rationales for legal insularity, namely, the idea that universities were innately ‘family-like, charity-like, or government-like’.²³

C Modern duty era

Historically, courts gave colleges and universities greater deference compared to other legal actors in how to respond to danger and promote safety. But, eventually, by the 1980s, courts began to treat universities similar to other societal institutions such as corporations. In this modern context, courts view

15 Lake, above n 6.

16 See generally, F B Smith, ‘Campus Unrest: Illusion and Reality’, 11 *Wm & Mary L Rev* 619 (1970); See also I Wolfe, ‘Understanding ‘60s Radicals in the ‘90s University’ *Chronicle of Higher Education*, 14 August 1998, at <<https://chronicle.com/article/Understanding-60s-Radicals-in-98515/>>; B Lafayette Jr, ‘2 The Siege of the Freedom Riders’ *New York Times*, 19 May 2011, at <<http://www.nytimes.com/2011/05/20/opinion/20Lafayette.html>>; T Gonzalez, ‘Accidental advocate risked life to fight segregation’, *USA Today*, 26 May 2013, at <<http://www.usatoday.com/story/news/nation/2013/05/26/accidental-advocate-fought-segregation/2362391/>>; L Copeland, ‘Sit-ins reignited the civil rights movement 50 years ago’, *USA Today*, 1 February 2010, at <http://usatoday30.usatoday.com/news/nation/2010-02-01-sit-ins-civil-rights_N.htm?csp=N009>.

17 Lake, above 6, at 9–10.

18 Ibid.

19 612 F 2d 135 (3d Cir 1979).

20 Ibid at 138.

21 Ibid; see also *Baldwin v Zoradi*, 123 Cal App 3d 275 at 287 (Ct App 1981) (finding new student rights and freedoms removed university from responsibility and exposure to liability for car accident stemming from student alcohol consumption on campus); *Beach v Univ of Utah*, 726 P 2d 413 at 418 (Utah 1986) (finding that university had no duty to student in alcohol-related accident because ‘law and society’ had come to recognise their status as ‘adults’); *Rabel v Illinois Wesleyan Univ*, 514 NE 2d 552 at 559 (1987) (holding university, along with other universities, is not an insurer of safety and had no duty to student in hazing accident).

22 Lake, above n 6, at 9–10; additionally, see above n 12 and accompanying text.

23 Ibid at 9.

students more like consumers and tenants.²⁴ The following decision of the Florida Supreme Court reflects the evolving expectations of the university's role in promoting student safety:

It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care . . . We find this fundamental principle of tort law is equally applicable in this case. There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonable person would in like or similar circumstances.²⁵

Today, the historical sovereign and charitable immunities as well as the bystander approach that once shielded universities, have given way to an era of expanded tort duties.²⁶ Ironically, the imposition of duties on higher education institutions has not necessarily created the proper incentives for making campuses safer.²⁷ Universities, at times, appear most concerned with preserving their reputations and minimising their legal liability. Consequently, tactics to minimise legal exposure do not always coincide with eradicating safety risk.²⁸ For example, universities may limit their degree of engagement with students outside of the classroom for fear of creating a duty.²⁹ Ironically, some universities may take this approach even where they possess the expertise (eg, mental health counseling, etc) and ability to enhance student safety.³⁰ Today, the significant resources universities expend in a defensive posture — protecting their reputations, arguing that they owe no duty to

24 Lake, above n 6, *bid.*, at 281:

Courts began to treat universities like other institutions, particularly businesses. Many cases during the bystander era began to cast students in more commercial roles vis-à-vis the college — as consumer or tenant. In particular, the role of legal duty became prominent, and that role has only solidified since the mid 1980s.

25 *Nova Se Univ, Inc v Gross*, 758 So 2d 86 at 90 (Fla 2000), citing *Union Park Mem'l Chapel v Hutt*, 670 So 2d 64 at 66–7 (Fla 1996).

26 Lake, above n 6, at 12 ('From the mid 1980's or so to the present, courts have continued to use the concept of "duty" to organise analysis of student safety law. However, simultaneously, a shift in the legal use of "duty" has been under way in the courts, and the results courts reach are no longer strongly no-"duty" or no-liability oriented.'). See generally *Mullins v Pine Manor Coll*, 449 NE 2d 331 at 336 (1983) (finding that university did have a duty to protect resident students).

27 Lake, above n 6, at 282 (Avoid-legal-scrutiny strategies are 'dangerous, counterproductive, and inconsistent with the realities and missions of modern universities'); See also M H Baer, *Choosing Punishment*, 92 *BU L Rev* 577 at 632 (2012) (discussing how punishment can create a false sense of security, lead to deregulation, and 'trigger over-deterrence and risk aversion by regulated entities; this can fuel costly efforts to avoid and cover up mistakes, and perversely discourages "regulated entities" from monitoring and reporting wrongdoing to authorities').

28 *Ibid.*

29 E L Boyer, *College: The Undergraduate Experience in America*, The Carnegie Foundation for the Advancement of Teaching 5:

[A] *great separation*, sometimes to the point of isolation, exists between academic and social life on campus. Colleges like to speak of the campus as *community*, and yet what is being learned in most residence halls today has little connection to the classrooms; indeed it may undermine the educational purposes of the college. The idea that a college stands in for parents, *in loco parentis*, is today a faded memory. But on many campuses there is a great uncertainty about what should replace it.

30 Lake, above n 6, at 281–2.

students, and asserting that they used reasonable care under the circumstance — are somewhat misdirected and should be reallocated to more affirmative efforts that make students safer.³¹

1 Federal regulatory initiatives

Federal regulators, dissatisfied, in part, with tort law's ability to promote safe campuses, pursue a range of initiatives to promote safer campuses. Examples of these federal initiatives include among others, Title IX of the Education Amendments of 1972 and the Clery Act.

a Title IX

Although frequently associated with increasing athletic participation opportunities for female students, Title IX of the Education Amendments of 1972, is an US federal civil rights law that prohibits gender discrimination in any education program or activity receiving federal funding.³² The US Department of Education administers Title IX through its Office of Civil Rights. Under Title IX, an educational institution that receives federal funding may be held liable for damages stemming from sexual discrimination. In general, monetary damages will only be awarded for an institution's intentional conduct. Sexual harassment, which includes sexual assault, falls within the scope of Title IX. Both student-on-student as well as teacher-on-student sexual harassment and assaults are covered under the Act.³³ In cases of student-on-student sexual harassment, the institution is subject to monetary damages where it was 'deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority'.³⁴ In cases of teacher-on-student harassment, two minimal criteria must be met in order for an aggrieved party to recover sexual harassment damages under Title IX.³⁵ First, the party must show that a school official, with the ability to institute corrective measures, knew of the forbidden conduct.³⁶ Second, a showing must be made that despite having knowledge of the forbidden conduct, the educational establishment deliberately failed to respond in a proper manner.³⁷

In the wake of high profile incidents at US universities and US military service academies, the Obama Administration has taken a proactive role

31 Lake, above n 6.

32 20 USC §§ 1681–1688; 34 CFR §§ 106.1–106.71.

33 *Davis v Monroe County Bd Of Ed*, 526 US 629 (1999) (holding that school can be held responsible under Title IX in private damage actions for 'student on student harassment' when they act with deliberate indifference to harassment that is severe enough to prevent victims from enjoying educational opportunities).

34 *Ibid*; see also T Davis and K E Smith, 'Eradicating Student-Athlete Sexual Assault 1983 and Personal Liability Following *Fitzgerald v Barnstable*', 2009 *Mich St L Rev* 629 at 642–48 (2009) (discussing the standards for assessing Title IX student-on-student sexual harassment claims).

35 See generally *Gebser v Lago Vista Independent School Dist*, 524 US 274 (1998) (holding that two minimal criteria must be met in order for an aggrieved party to recover sexual harassment damages under Title IX in the case of 'teacher on student' harassment).

36 *Ibid*.

37 *Ibid*.

investigating universities for violations under Title IX.³⁸ Title IX has become an important tool for targeting sexual violence on US campuses.³⁹ In the spring of 2014, the Obama Administration published a list of 55 colleges and universities under investigation for Title IX violations.⁴⁰ These federal inquiries primarily stem from the alleged ineffective handling of sexual assault and sexual harassment complaints. Notably, this list includes some of the nation's most prestigious institutions such as Harvard University, Princeton University, Dartmouth College, Vanderbilt University, and others. The purpose behind the disclosed list was to raise public awareness and presumably provide incentives to schools to take meaningful steps to address sexual assaults in order to preserve their reputations.⁴¹

b The Clery Act

The Clery Act, signed into law in 1990, requires all colleges and universities that receive federal funding to notify campus constituents such as students, faculty, and employees when certain crimes come to the attention of the institution.⁴² Specifically, institutions covered under the Act must make 'timely reports to the campus community on crimes considered to be a threat to other students and employees . . . that are reported to campus security or local police agencies'.⁴³ The notification requirement extends to crimes occurring 'on campus, in or on non-campus buildings or property, and on public property'.⁴⁴ Congress passed the Act to address the growing threat that campus crime posed to student safety. They designed the Act 'to encourage [universities] to develop campus security policies and procedures', while leaving them adequate discretion to address the unique needs of their particular campuses.⁴⁵ At the time of the Clery Act's passage, Congress recognised that approximately 80% of crimes on campus involved a

38 See S Lipka, 'Revived Title IX Agreement with Tufts Signals Stricter Enforcement', *Chronicle of Higher Education*, 12 May 2014, at <<http://chronicle.com/article/article-content/146501/>>.

39 See N Bernstein, On Campus, a Law Enforcement System to Itself, *New York Times*, 18 April 2013, at <<http://www.nytimes.com/2011/11/12/us/on-college-campuses-athletes-often-get-off-easy.html?pagewanted=all>> (discussing case where female student sued university for violating her Title IX rights by creating a 'hostile environment' and eventually was awarded \$850,000 per a court settlement).

40 See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, 1 May 2014, at <<http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i->>.

41 See *ibid*; E Gray, 'Sexual Assault on Campus', *Time*, 26 May 2014, pp 20, 27.

42 See Crime Awareness and Campus Security Act of 1990 (Title II of Public Law 101-542); 20 USC § 1092(f); see also J Palazzolo, 'Penn State Investigation Brings Clarity to the Clery Act', *Wall Street Journal*, 12 July 2012, at: <<http://blogs.wsj.com/law/2012/07/12/penn-state-scandal-brings-clarity-to-the-clery-act/>>; S Lipka, 'Education Dept Imposes Largest Fine Yet for Campus Crime-Reporting Violation', *The Chronicle of Higher Education*, 11 January 2008, at: <<http://chronicle.com/article/What-the-New-Campus-Safety/140321>> ('In the largest penalty ever imposed under the Clery Act, the U.S. Department of Education has fined Eastern Michigan University \$357,500 for failing to warn the campus of a student's murder. . .').

43 20 USC § 1092(f)(3).

44 20 USC § 1092(f)(1)(F).

45 See, eg, HR Rep No 101-518, at 9, reprinted in 1990 USCCAN at 3371.

perpetrator and victim who were students.⁴⁶ In light of this fact, the Act recognises that prompt notice of crimes committed by students is essential.

Although federal laws such as Title IX and the Clery Act are helpful tools, their effectiveness often depends on vigilant enforcement, closing regulatory loopholes, and lessening their degree of ambiguity. Regulators and the public must also gauge the effectiveness of such regulations in light of potential trade-offs with competing harms such as violations of privacy. Higher education institutions inevitably must straddle a delicate balance between campus safety, privacy, and the public good when complying with federal privacy laws such as the Family Educational Rights and Privacy Act of 1974 (FERPA)⁴⁷ and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)⁴⁸ as well as state and local privacy laws. Following the 2007 mass shootings at Virginia Tech University, the university's attorney asserted, albeit unsuccessfully, that the university could not share information regarding the shooter, Seung-Hui Cho, because doing so would violate privacy laws.⁴⁹ More recently, the University of Missouri's handling of an alleged 2011 sexual assault has similarly exposed the continuing challenges universities face when implementing multiple legal requirements with different goals.⁵⁰ These examples illustrate how balancing privacy while

46 20 USC § 1092(f).

47 Family Education Rights Privacy Act of 1974, 88 Stat 571, 20 USC § 1223g; American Association of State Colleges and Universities, *Balancing student privacy, campus security, and Public Safety: Issues for Campus Leaders*, 2008. FERPA prohibits the federal funding of educational institutions that have a practice or policy of releasing education records to unauthorised persons. Although FERPA promotes the nondisclosure of student records, there are exceptions that allow universities to disclose records to parents and other 'appropriate parties' in emergency situations. See 34 CFR § 99.36; J S Gearan, 'When Is It Ok to Tattle? The Need to Amend the Family Educational Rights and Privacy Act', 39 *Suffolk U L Rev* 1023 (2006). FERPA attempts to provide information sharing in support of intervention by various parties such as college officials and parents without compromising privacy. One can argue that strict interpretations of FERPA can be at odds with promoting safety on campus. See Areen, above n 14, at 269. FERPA only applies to student records and it permits the disclosure of information if legally mandated, with parental consent, or student consent if the student is 18 or older. In 2008, Congress amended FERPA to address disclosures in emergency situations to permit disclosures that promote student and public safety.

48 The Health Insurance Portability and Accountability Act of 1996, PL No 104-191, 110 Stat 1938 (1996). HIPAA (in addition to state law) governs the release of uniquely identifiable medical information on patients by health care providers. Medical information is defined as all information, either written or oral, obtained during a course of treatment. Therefore, a student telling a therapist about suicidal feelings would be considered medical information. See American Association of State Colleges and Universities at 4. HIPAA's definition of 'provider,' as explained in the Virginia Tech Review Panel report, includes 'doctors, nurses, therapists, counselors, social workers, and health organisations such as HMOs and insurance companies, among others.' *ibid*.

49 See Areen, above n 14, at 269 (discussing how the US Congress, influenced by the Virginia Tech shooting, amended the Clery Act to allow for timely disclosures related to active shooter events).

50 N DeSantis, 'U of Missouri President Seeks Inquiry Into Handling of Alleged Rape Case', *Chronicle of Higher Education*, 27 January 2014, at <<http://chronicle.com/blogs/ticker/u-of-missouri-president-seeks-investigation-into-flagships-handling-of-alleged-rape-2/71873>>; See also K Murphy, 'University of Missouri president wants a probe of rape claim response', *Chicago Tribune*, 29 January 2014, at <http://articles.chicagotribune.com/2014-01-29/news/sns-rt-us-usa-crime-missouri-20140129_1_missouri-president-sexual-assaults-university>.

concomitantly promoting safety presents a vexing challenge for universities, law enforcement authorities, and legislators.⁵¹ These challenges, however, are not insurmountable.

2 The rise of the corporate university

Another theme coinciding with the modern era is the emergence of a more contractual view of the relationship between universities and students. Increasingly, the public and lawmakers view higher education as a market, industry, and private good.⁵² As this market perspective gains traction, students are likely to be viewed more as an analog to customers similar to the commercial context. Many educational institutions sell educational services and products to students much in the same fashion as commercial businesses like Apple.⁵³ In carrying out their charitable pursuits, nonprofit educational institutions engage in a range of commercial activity that includes directly providing services to students or, pursuant to an arm's-length agreement, outsourcing the provision of services to a for-profit entity.⁵⁴ Therefore, it is often difficult to draw a bright line between nonprofit and for-profit commercial activity.⁵⁵ Analogising students to consumers in the commercial context has significant implications for law reform and how institutions serve students.⁵⁶ To an extent, safety is perhaps one element of the purchase price (ie, tuition) students pay for education services. The idea that market forces alone, in the form of consumer preferences, will adequately provide incentives for universities to make campuses safer is, however, unrealistic. All university and college students should receive some minimum level of safety that market forces cannot guarantee. Any discussion of market forces in the higher education context must account for various types of market failure.⁵⁷ Consequently, market failures illustrate why interventions by courts (ie, litigation) and regulators (ie, regulation) are necessary. Despite the similarities between US higher education institutions and for-profit businesses, there are distinctions worth acknowledging.

a Subsidisation

The key distinguishing feature between private businesses and higher education institutions is that, in the latter case, universities and colleges sell their product to students far below the costs of production.⁵⁸ In other words, mostly all students attending a US college or university, whether public or private, are subsidised in some form or another. Higher education institutions

51 See American Association of State Colleges and Universities, above n 47, at 16.

52 O Simmons, 'For-Profits and the Market Paradox', 39 *Wake Forest L Rev* 333 at 351 (2013).

53 J Colombo, 'Why Is Harvard Tax Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)', 35 *Ariz L Rev* 841 at 842-3 (1993).

54 J Colombo, 'Research Paper No 06-02: In Search of Private Benefit', *Ill Pub L & Legal Res Series*, 6 March 2006, at 25-6.

55 See Colombo, above, n 53, at 848-49 (discussing the lack of uniformity in determining tax exemption based solely upon the degree of commercial activity).

56 D Taylor, 'Science, Enlightenment, and Intellectual Tensions in Higher Education', in *What is College For?: The Public Purpose of Higher Education* E C Lagemann and H Lewis (Eds), Teachers College Press, New York, 2012, pp 46, 57-8.

57 Simmons, above n 52, at 351.

58 See M McPherson, M Schapiro, and G Winston, *The Economic Analogy*, Discussion Paper No 37, 1996, pp 2-13.

use non-tuition resources, for example, gifts, endowment funds, and government funds, to subsidise their educational programs.⁵⁹ This approach is completely inconsistent with the private business experience where the goal is to maximise profit by charging a price that is higher than the costs of production.

b Unique university-student relationship

A student's relationship with their college or university carries different expectations than a casual consumer in an isolated commercial transaction. The university-student relationship, although containing contractual elements, is more longstanding, ongoing, and personal. In a sense, students and universities enter into a relational contract where there are expectations that the counterparty will operate in good faith and in a manner consistent with maintaining a long-term amicable relationship.⁶⁰ Students do not resemble corporate employees, who are key players in corporate compliance initiatives.⁶¹ In contrast to the university-student context, corporations can use economic incentives such as compensation systems to align employee behaviour with corporate safety objectives.⁶² Generally, colleges and universities do not exercise such control over their students, who are nonetheless, crucial stakeholders in campus safety.⁶³ Unfortunately for colleges and universities, psychological research indicates that young college students are an extremely challenging demographic, who are more likely to engage in risky behaviours that ultimately generate more safety-related incidents.⁶⁴

c Sense of altruism and public mission

The public at-large associates nonprofit higher educational institutions with a sense of altruism that is absent from the image of for-profit business firms.⁶⁵ This perception, in part, explains the favourable treatment courts and

⁵⁹ McPherson, Schapiro, and Winston, above n 58.

⁶⁰ See C J Goetz and R E Scott, 'Principles of Relational Contracts', 67 *Va L Rev* 1089 at 1089 (1991) (discussing relational contracts and why they 'do not easily fit the presuppositions of classical legal analysis'); see also G Baker et al, 'Relational Contracts and the Theory of the Firm', 117 *QJ Econ* 39 at 39 (2002) (discussing the role of relational contracts in efficient ownership patterns).

⁶¹ See O S Simmons, 'The Corporate Immune System: Governance From the Inside Out' 2013 *U ILL L Rev* 1331, 1145 (describing how compliance is integral to the daily operations of large companies, involving the decisions made by various firm employees, throughout the course of a fiscal year).

⁶² *Ibid*, at 1147 ('Remuneration provides the requisite tangible incentives that do not depend on the impossible task of verifying whether someone has truly internalized the firm's corporate values.')

⁶³ See discussion below Pt IIB.

⁶⁴ *Ibid*.

⁶⁵ Baer, above n 27, at 627 ('the general public has evinced a growing need to hold corporate managers accountable for the harms they have caused, and the accountability they seek differs from the sanitized account of cost internalization that law and economic scholars supply'); See D C Langevoort, 'The SEC and the Madoff Scandal: Three Narratives in Search of a Story', 2009 *Mich St L Rev* 899 at 902 (asserting the public has a growing distrust of large, powerful organisations); C Hurt, 'Of Breaches of the Peace, Home Invasions, and Securities Fraud', 44 *Am Crim L Rev* 1365 at 1368 (2007) (describing how a distrust of corporations may grow from the public's need to protect 'our most treasured possessions').

regulators have historically given to colleges and universities. Examples of favourable treatment include charitable immunity and tax-exempt status.⁶⁶ To an extent, a university's nonprofit status may serve as a crude heuristic for quality in the higher education context.⁶⁷ One can even argue that the nonprofit organisational form limits managerial incentives to exploit students and makes managers less sensitive to profit maximisation.⁶⁸ Instead, a university's nonprofit status, in theory, should make higher education managers more responsive to quality concerns such as campus safety. In light of the above distinctions, the analogy between universities and businesses, although helpful for analysis, should not be exaggerated.

In response to heightened scrutiny from courts and regulatory initiatives, colleges and universities, similar to corporations, are developing more elaborate policies, procedures, internal controls, and compliance programs to respond to student safety threats and curtail their own liability exposure.⁶⁹ Yet the mere presence of compliance initiatives is not a sufficient condition for safe campuses.⁷⁰ Although helpful, universities, regulators, and courts must avoid the temptation of being lulled into a false sense of security concerning the efficacy of compliance programs. Federal regulators and universities can learn from the successes and *failures* of compliance initiatives in the corporate context.

66 See Colombo, above n 53, at 864–5; See also Simmons, above n 52, at 348:

The tax-exempt status of traditional higher education institutions is often justified because the institutions produce a service or product valued by a segment of society that is undersupplied by the private market and undersupported by the government.

67 H Hansmann, 'The Evolving Economic Structure of Higher Education', 79 *U Chi L Rev* 159 at 170 (2012); See also Simmons, above n 52, at 349.

68 Hansmann, *ibid*, at 164: '[P]ersonal pride and satisfaction from providing high-quality services are important incentives for nonprofit managers.'

69 See eg, H Burns, 'Students respond to Obama's sexual assault task force', *USA Today*, 6 February 2014, at <<http://www.usatodayeducate.com/staging/index.php/pulse/students-res-pond-to-obamas-sexual-assault-task-force>> acknowledging since Obama has created the task force, colleges and universities across the USA are reevaluating their procedures and policies for sexual assault cases); See also S Snyder, 'Penn State to install security cameras at its main campus', *Philadelphia Inquirer*, 30 November 2013, at <http://articles.philly.com/2013-11-30/news/44599030_1_security-cameras-surveillance-cameras-residence-halls>; L Sieben, 'Education Dept Issues New Guidance for Sexual-Assault Investigations', *Chronicle of Higher Education*, 4 April 2011, at <<http://chronicle.com/article/Education-Dept-Issues-New/127004/>>.

70 These measures, however, pale in comparison to compliance programs in the corporate context. For example, corporations under state common law have an obligation to establish a compliance program. See *In re Caremark Int'l Inc Derivative Litig*, 698 A 2d 959 (Del Ch 1996); *Stone ex rel AmSouth Bancorporation v Ritter*, 911 A 2d 362 (Del 2006); but see K D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance', 81 *Wash ULQ* 487 (2003). In addition, under the Federal Sentencing Guidelines for Organisations, one of the factors that mitigate punishment is 'the existence off an effective compliance and ethics program'. P J Desio, 'Introduction to Organisational Sentencing and the U.S. Sentencing Commission', 39 *Wake Forest L Rev* 559 at 560 (2004) ('In order to have an effective program as defined by the Guidelines, an organisation must demonstrate that it exercised due diligence in fulfilling the requirements and also promoted in other ways 'an organisational culture that encourages ethical conduct and a commitment to compliance with the law.');

Simmons, above n 61, at 1141. Generally speaking 'the monitoring model of corporate governance — emphasizing procedures, internal controls, compliance, and risk management — has become the favored policy response to contemporary scandals and economic turmoil.' *ibid* at 1145.

II Limitations of tort liability as a means to promote student safety

In order to arrive at a more effective framework for ensuring campus safety, it is instructive to recognise a few of the well-documented shortcomings of tort liability in promoting campus safety.

A The nature of litigation

The nature of litigation reveals the serious weaknesses of tort litigation as an effective deterrent of risky behaviour and guarantor of student safety. Tort litigation in a plaintiff-driven system operates in an ex post adversarial manner; it provides ex-post payments to injured parties and may not generate beneficial systemic changes that promote safety.⁷¹ Courts, unlike agencies and university professionals, often lack the requisite expertise and capacity to fashion remedies that promote campus safety in an ex ante manner. Generally speaking, judges and juries are not compliance or risk management experts and may lack competence ‘concerning technical issues of health and safety’.⁷² Furthermore, they may not have a proficient understanding of the operational aspects of higher education institutions. Court and jury decisions are prone to outsider and hindsight bias. An overemphasis on litigation may crowd out forward-looking internal organisational responses to student safety. Although tort litigation, in theory, promotes future deterrence by increasing the costs of ignoring safety risks, a closer examination reveals backward looking ‘adversarial tournaments’ that divert crucial resources away from regulatory innovations and improvements to organisational policies and procedures.⁷³ Litigation inspired adversarial tournaments, similar to regulatory fines, are often a popular short-term response to a crisis. They often serve a satisfying compensatory, retributive, and punitive function rather than being an effective long-term deterrent.⁷⁴

B Misplaced incentives for individuals and organisations

Promoting safety at colleges and universities inevitably depends upon the decisions of individual students and organisations. The misplaced incentives guiding individual and university decision-making illustrate the need to adjust expectations concerning the efficacy of tort litigation in addressing campus safety.

1 Individual behaviour

In light of the significant body of research on the question of deterrence, there is reason to remain skeptical whether young college students, a risk-taking demographic, and other university constituents will curb their risky

71 Rose-Ackerman, above n 8, at 54–5; see generally Shavell, above n 9.

72 Ibid; see also P W Huber, *Liability: The Legal Revolution and Its Consequences*, Basic Books, 1990, p 5; K W Viscusi, ‘Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation’, 2 *Yale J on Reg* 53 at 81 (1985).

73 Baer, above n 27, at 628–9.

74 Ibid.

behaviours due to the threat of tort liability alone.⁷⁵ Social scientists have highlighted an assortment of behavioural biases and tendencies that impact individual decision-making.⁷⁶ The degree of bounded rationality is particularly acute where the decision-makers are young college students. A significant body of research finds that tort liability has a negligible, if any, impact on individual deterrence.⁷⁷ For example, individuals discount the prospect of liability, where the risk of detection is low.⁷⁸ Jonathan Cardi posits that even if:

people might be influenced by [the] threat of tort liability were they aware of the law's mandates, evidence shows that people are typically ignorant of the law — and even if aware of law's content, people commonly discount the chance of being held liable.⁷⁹

Some studies actually find that non-legal sanctions imposed by peers and family members may have a stronger impact than legal sanctions.⁸⁰

2 University behaviour

Compared to student behaviours, university responses to tort liability, in theory, are more likely to be rational. Notwithstanding, studies also show limited deterrence for organisational actors.⁸¹ Liability insurance, for example, may reduce the deterrent impact of tort litigation on organisations.⁸² And even if colleges and universities respond to tort litigation, the ensuing organisational response may not address the underlying safety concerns. Colleges and universities may take actions that prevent reputational damage and mitigate the prospect of legal liability in the short or medium term.⁸³ This narrow, shorter term, crisis-mode, and reactionary focus may not be in the best long-term interests of students, society, and even universities.⁸⁴ For example, a university may implement 'cosmetic' compliance procedures to satisfy outside regulators.⁸⁵ They may also adopt policies of disengagement from student populations outside the classroom, and surrounding communities, for

⁷⁵ See above n 4 and accompanying text.

⁷⁶ See D C Langevoort, 'Organised Illusions', 146 *UPA L Rev* 101 (1998) at 102 (see n 3 citing behavioural literature on individual decision making).

⁷⁷ See above n 4 and accompanying text.

⁷⁸ See M H Baer, 'Temporal Inconsistency and the Regulation of Corporate Misconduct', 1 *VaJ Crim L* 2 at 8–11 (2013) ('Rational criminals refrain from wrongdoing when their net costs outweigh their net benefits. The criminal's net cost is portrayed as a function of two variables: the sanction that ensues in response to a given act, and the probability that the state will impose it.'). See also, generally, G Becker, 'Crime and Punishment: An Economic Approach', 76 *J Pol Econ* 169 (1968); A M Polinsky and S Shavell, 'The Economic Theory of Public Enforcement of Law', 38 *J Econ Lit* 45 at 49 (1998).

⁷⁹ Cardi et al, above n 10, at 570.

⁸⁰ See generally, D Bishop, 'Legal and Extra-legal Barriers to Delinquency: A Panel Analysis', 22 *Criminology* 403 (1984), H Jacob, 'Deterrent Effects of Formal and Informal Sanctions', 2 *Law and Policy* 61 (1980).

⁸¹ W H Rodgers, Jr, 'Negligence Reconsidered: The Role of Rationality in Tort Theory', 54 *S Cal L Rev* 1 at 16–23 (1980) (conceding that tort might deter corporations, but arguing that it does not deter individuals in part because individuals do not always act rationally); Siliciano, above n 11 and accompanying text.

⁸² Cardi et al, above n 10, at 595.

⁸³ See above n 26 and accompanying text.

⁸⁴ *Ibid.*

⁸⁵ See Krawiec, above n 70.

fear that their actions will give rise to additional duties, legal exposure, or reputational damage. Such responses could undermine efforts to promote student safety.⁸⁶

III A collaborative framework to address campus safety concerns

The current adversarial, litigation and penalty focused, approach to campus safety is inadequate. A more collaborative approach is needed. New governance and organisational theories offer guidance for designing more effective regulatory systems fulfilling collaborative goals.⁸⁷

Tort litigation and regulation play important complementary roles in addressing safety threats. Notwithstanding, properly formulated ex ante regulation enjoys distinct advantages over tort law.⁸⁸ Susan Rose-Ackermann discusses the potential advantages of regulation:

Statutory regulation, unlike tort law, uses agency officials to decide individual cases instead of judges and juries; resolves some generic issues in rulemakings not linked to individual cases; uses nonjudicialized procedures to evaluate technocratic information; affects behavior ex ante without waiting for harm to occur, and minimizes the inconsistent and unequal coverage arising from individual adjudication. In short, the differences involve who decides, at what time, with what information, under what procedures, and with what scope.⁸⁹

According to Rose-Ackermann:

[p]rivately initiated lawsuits, brought either under tort principles or under regulatory statutes, should be quite limited and targeted on augmenting regulatory enforcement and responding to unusual situations that would be poorly resolved by broad-based regulations.⁹⁰

In other words, tort litigation, as a tool among several, should govern the extreme, non-routine, and unusual cases.⁹¹ Although regulation, when compared to an overreliance on tort litigation, may be the preferred route to promote student safety, it will fail unless it embraces the benefits of collaboration and less-adversarial-non-litigious approaches to student safety. An overly punitive penalty-driven regulatory regime shares common weaknesses with tort litigation.⁹²

⁸⁶ Krawiec, above n 70.

⁸⁷ Simmons, above n 61, at 1151 (noting that theoretical perspectives including transaction cost economics, organisational theory, and stakeholder theories of corporate governance all recognise the importance of internal governance mechanisms).

⁸⁸ Rose-Ackerman, above n 8, at 54.

⁸⁹ Ibid.

⁹⁰ Ibid, at 58.

⁹¹ Ibid.

⁹² Baer, above n 27, at 578 ('Even worse, by overemphasizing punishment, we may undermine and crowd out the non-punitive, regulatory alternatives that are more adept at averting disastrous outcomes in the first place').

A new governance

1 General principles

A new governance approach to university and college safety requires collaboration among key stakeholders: courts, regulators, universities, and students. It must also provide greater flexibility and adaptability in the face of complex safety problems. Although there are multiple definitions for new governance strategies in the legal literature, these definitions reflect common conceptual threads: collaboration wherein stakeholders work together to create and implement reforms; experimentation with local program design, including the ability to evaluate and test such programs; government regulators acting as facilitators rather than centralised rulemakers; a preference for incrementalism and the utilisation of flexible legal principles rather than rigid prescriptive rules; and decentralising, bottom-up, and inside-out regulation strategies that promote active participation by affected groups within the governance structure.⁹³ These new governance principles could be particularly helpful in the campus safety arena that requires concrete ground-level steps.

Admittedly, even where collaborative new governance strategies may be optimal, their practical implementation in the campus safety arena may prove difficult. For example, rigid top-down prescriptive regulation may be more appropriate where a public regulator is incapable of providing meaningful oversight due to resource constraints or complexity.⁹⁴ Such prescriptive rules may help ‘conserve regulatory resources’ and assist in ‘keeping essential systems functioning’.⁹⁵ Timing can also determine the efficacy of various regulation types. When implementing new regulations, particularly a novel regulatory regime, regulators tasked with imposing the new rules often face an adversarial climate and institutional resistance.⁹⁶ In the short-term, command-and-control regulation and punitive tactics may be more efficient and effective addressing resistance and disobedience from higher education institutions.⁹⁷ But, as a regulatory regime is established, collaborative new governance strategies become more effective and face less resistance from institutions over time.⁹⁸ Moreover, participation by affected groups in both the crafting and implementation of the reforms may legitimise such measures. At this stage, new governance strategies become optimal.⁹⁹ On balance, collaborative new governance strategies may provide better long-term

93 Simmons, above n 61, at 1153; W A Bach, ‘Governance, Accountability, and the New Poverty Agenda’, 2010 *Wis L Rev* 239 at 256; C Ford, ‘New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation’, 2010 *Wis L Rev* 441 at 445 (describing ‘regulation based on an iterative process between private-party experience and a regulator that serves variously as clearinghouse, catalyst, monitor, prod, and coordinator.’).

94 Ford, *ibid*, at 479–83.

95 *Ibid* at 482.

96 See Simmons, above n 61, at 1154.

97 Compare E Rubin, ‘The Regulatizing Process and the Boundaries of New Public Governance’, 2010 *Wis L Rev* 535 at 553–4, with Baer, above n 27, at 627 (asserting that punitive measures, in general, are not effective corporate governance tools).

98 See Simmons, above n 61, at 1154.

99 Rubin, above n 97, at 554.

responses to complexities in the university safety context.¹⁰⁰

2 Amnesty

A new governance approach to university and college safety should embody an implicit or explicit bargain struck among the stakeholders whereby universities agree to create an array of safety mechanisms in exchange for some degree of amnesty or non-intervention by courts and regulators. Corporations already experience a similar approach under state corporate law and the Federal Sentencing Guidelines.¹⁰¹ Notwithstanding, regulators, when setting the conditions under which amnesty is granted in the higher education safety context, must recognise unique features of the higher education sector.¹⁰²

3 Subsidiarity

New governance approaches to campus safety require fidelity to the principle of subsidiarity. The principle of subsidiarity maintains that actors, who are closest to an issue, have the best prospects for resolving that issue.¹⁰³ A significant level of engagement by university officials and personnel with safety-related matters is essential. Universities and their agents are often in the best position to bring about safety changes. For instance, universities bring key resources and expertise to safety-related issues through mental health professionals, campus police forces, resident advisors, and campus infirmaries. In this sense, an overreliance on external parties, such as courts and even regulators, for safety management may be problematic because, despite having the willingness to improve campus safety, these external parties may lack the capacity and expertise to be effective.¹⁰⁴ Some commentators argue that new governance is nothing more than deregulation in disguise. They argue that the principle of subsidiarity is naïve because internal actors are often a part of the problem, that is, they lack sufficient independence or a willingness to comply with externally generated regulatory

¹⁰⁰ Ford, above n 93, at 482.

¹⁰¹ See above n 70 and accompanying text related to the Federal Sentencing Guidelines for Organisations.

¹⁰² See discussion above Pt I2b. College students can be harmed in multiple ways: economically; physically, either to their person or to their personal property; and in intangible ways such as privacy invasions, civil rights violations, and reputational damage.

¹⁰³ See generally O E Williamson, 'The Vertical Integration of Production: Market Failure Considerations', 61 *Am Econ Rev* 112 (1971) (analysing the benefits of internalisation versus external procurement), O E Williamson, 'Strategy Research: Governance and Competence Perspectives', 20 *Strategic Mgmt J* 1087 at 1099 (1999); See also O Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', 89 *Minn L Rev* 342 at 382 (2003):

As a guiding principle of social organisation, subsidiarity maintains that all governmental tasks are best carried out at the level closest to those affected by them. Central authorities should leave the widest scope possible for local discretion to fill in the details of broadly defined policies. Those closest to the problem possess the best information leading toward a potential solution. Therefore, the specific elaboration and application of common standards needs local knowledge to reach the desired objectives. Local entities are consequently understood to be more properly situated to manage functions by which they are affected than a dominant central organisation [or regulator].

¹⁰⁴ Simmons, above n 61, at 1153.

requirements.¹⁰⁵ This perspective, however, is overstated and ignores an important underpinning of new governance approaches, that is, a pragmatic acknowledgement by regulators of their own shortcomings such as limited expertise and resources.¹⁰⁶ Instead, regulators, in the higher education context, could primarily serve as facilitators, who collaborate with or deputise higher education institutions and their agents to address safety on an ongoing basis. Effectively managing campus safety ultimately depends upon ground-level concerns: organisational commitment to effective implementation, accounting for predictable flaws, learning from experience, and ongoing adjustments.¹⁰⁷ Even with effective implementation, however, breakdowns will inevitably occur.¹⁰⁸

B Organisational theory

1 Adaptation

In response to a new wave of federal regulation and litigation, many colleges and universities are experiencing a common type of organisational adaptation, the adoption of elaborate compliance and risk management programs.¹⁰⁹ Organisational theorists such as Oliver Williamson tout the advantages of internal governance mechanisms over external governance responses.¹¹⁰ For example, internal actors have superior access to information and can leverage internal control mechanisms (eg, compensation structures), as well as ongoing internal relationships.¹¹¹ Internal actors can gather information more efficiently, accurately, and at a lower cost, allowing them to conduct more precise ex ante and ex post safety evaluations.¹¹² Leveraging an organisation's internal advantages and expertise figures prominently into the organisational adaptation discussion.¹¹³ Compliance programs have been a fixture of corporate governance for nearly two decades.¹¹⁴ Accordingly, some of the challenges corporations experience in their pursuit of compliance and risk management initiatives may be relevant to the higher education environment. Even elaborate compliance and risk management programs can create a false sense of security if there is an insufficient nexus to an underlying problem or risk-related issue.¹¹⁵ Universities, like corporations, should avoid 'procedures for procedures sake' that do not necessarily make universities safer and reduce risk of injury.¹¹⁶ Higher education institutions and regulators need to ensure that safety measures are scientifically-based, data driven, and tailored to address specific risks at the campus level. Consequently, a one-size-fits-all box

105 Simmons, above n 61, at 1155–57.

106 Ibid.

107 Ibid.

108 Ibid at 1170.

109 Burns, above n 69.

110 Williamson, above n 103.

111 Simmons, above n 61.

112 Ibid.

113 Ibid.

114 Ibid at 1141–42; O Simmons, 'Innkeepers: A Unifying Theory of the In-House Counsel Role', 41 *Seton Hall L Rev* 77 at 103 (2011) ('*Caremark* clearly made legal compliance a traditional corporate law issue').

115 Simmons, above n 61, at 1166–68.

116 Ibid.

ticking approach is not optimal. Perhaps, the most important feature of any safety-related program is the creation of a steady and reliable information flow to equip responsible parties to make informed decisions.¹¹⁷

General systems theory, a branch of organisational theory characterised by a loose analogy between social and biological systems, provides an instructive view of university responses to litigation and regulation.¹¹⁸ Presented with external threats in the form of litigation, regulation, and sanctions, a university, like other organisations, will respond to minimise the stress from the external threat and to restore its internal equilibrium.¹¹⁹ This response often involves short-term resistance that, over time, yields to adaptation.¹²⁰ Over the medium- and long-term, the normal organisation will respond by developing internal mechanisms that minimise the impact of stress to the organisations operations and value.¹²¹ This internalisation and threat response may take different forms: (i) a self-referencing response (ie, autopoietic) where the organisation creates an internal substructure that conforms to and perpetuates existing organisational structures; or (ii) a response that accounts for outside influences (ie, institutional isomorphism) where the firm develops internal structures that resemble an external force.¹²² In the latter case, internal change may reflect a mandate from regulators, pattern itself on the actual threat, or mimic structures from those reputable firms who have won regulatory approval.¹²³ These adaptations to threats, in theory, benefit both universities and their regulators. Admittedly, the efficacy of these adaptations may vary. For example, simply co-opting procedures that another highly-regarded university uses will not guaranty student safety. At worst, it could mask serious risks and create a false sense of security among various stakeholders.

2 The complexity of human nature

Institutional initiatives targeting campus safety must recognise the complexity of human nature. In other words, these initiatives should account for different behavioural tendencies that people exhibit such as opportunism, temporal consistency, and temporal inconsistency.¹²⁴ For example, many compliance initiatives are designed with temporally consistent individuals in mind, that is,

117 Simmons, above n 61, at 1144–45.

118 Rubin, above n 97, at 551–2; see also D C Langevoort, ‘Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis’, 2012 *Wis L Rev* 495 at 515 (2012):

Where a loyalty to the corporate mission comes to color the [employee’s] thinking, it becomes easy to start thinking of regulators and the courts as rivals-anachronistic, inexpert policy-makers who mindlessly burden entrepreneurial innovation. Once this kind of cynicism and disdain takes root, there is little to restrain the [employee’s] encouragement of legal risk-taking except for their sense of probability of detection and magnitude of possible sanction — which, as we have seen, can diminish for extended periods of time.

119 See Simmons, above n 61, at 1152.

120 Ibid.

121 Rubin, above n 97, at 552.

122 Ibid; see also C Goldspink and R Kay, ‘Organisations as Self-Organising and Sustaining Systems: A Complex and Autopoietic Systems Perspective’, 32 *Int’l J Gen Sys* 459 (2003).

123 Rubin, above n 97, at 552.

124 See generally Baer, above n 78, at 114–17.

people who follow through consistently on established goals.¹²⁵ These initiatives place a heavy emphasis on training and education as a prevention tool.¹²⁶ Training and education, however, will not deter the opportunistic individual or the person with temporally inconsistent behaviour, that is, someone who desires to do the right thing, but simply cannot follow through to reach their goal.¹²⁷ Accordingly, universities may need to use a diverse array of mechanisms to bind human behaviour in a manner consistent with maintaining safe campus learning environments.¹²⁸

Conclusion

The Obama Administration has signaled the need for greater federal regulatory intervention into the campus safety arena. The administration has also begun identifying specific measures higher education institutions can adopt to make their campuses safer. These tactics reflect a positive trend and a departure from the inadequate status quo, that is, an overreliance on adversarial litigation and a fragmented federal approach. Moreover, there is a need to clarify the confusion concerning what constitutes compliance with a matrix of intersecting regulations that have different goals. The above discussion highlights how a more collaborative approach to campus safety may improve the status quo. Rather than squandering vast resources in adversarial litigation and reputational preservation, a collaborative approach should provide for effective facilitation, technical assistance, grants, and other forms of guidance to help universities improve their internal safety-related processes. Regulators and courts should, similar to the corporate context, provide amnesty-related incentives such as safe harbours for higher education institutions that proactively manage safety through internal processes. Having said that, blindly co-opting a corporate approach to compliance should be approached with vigilance. This article, however, is only the beginning of a discussion that further research will continue to develop regarding the optimal design of campus safety reforms.

¹²⁵ Baer, above n 78.

¹²⁶ Ibid.

¹²⁷ Ibid. (Asserting that because corporations are full of temporally inconsistent individuals, they should embrace targeted enforcement regimes that 'reduce the short-term costs of investing in corporate compliance and simultaneously delay or eliminate the short-term benefits of breaking the law').

¹²⁸ C Peterkin, 'Campus Threat-Assessment Teams Get New Guidance From Mental-Health Groups', *The Chronicle of Higher Education*, 23 January 2014, at: <<http://chronicle.com/article/Campus-Safety-Teams-Get-New/135534/>>:

Teams that assess risks and respond to disturbing behavior or threats have become increasingly common on campuses.' These teams must navigate complex legal and mental-health issues 'without much precedent or guidance to draw on.