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Toward a Civilized System of Justice: Reconceptualizing the Response to Sexual Violence in Higher Education

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TOWARD A CIVILIZED SYSTEM OF JUSTICE: RE-CONCEPTUALIZING THE RESPONSE TO SEXUAL VIOLENCE IN HIGHER EDUCATION

Hannah Brenner[†] & Kathleen Darcy^{††}

The reporting, investigation, and prevention of sexual violence in settings that are closed off from the greater community and subject to their own laws, rules, norms and biases present special challenges for survivors of sexual violence. This essay builds on our existing scholarship that explores the pervasive problem and exceedingly high incidence of sexual violence perpetrated against women in closed institutional systems like prison, the military, and immigration detention centers. Survivors in these contexts are routinely denied access to justice internally and from the external criminal justice system; they also face major limitations (imposed by both federal law and Supreme Court jurisprudence) surrounding their ability to pursue civil litigation against the institutions for harms they endure. There are important lessons to be learned from comparing these closed systems as relates to the operationalization of sexual violence that is perpetrated within. To this end, this work significantly broadens the conversation and considers whether institutions of higher education—in which sexual violence also occurs at high rates—should be similarly contextualized.

INTRODUCTION.....	128
I. SEXUAL VIOLENCE IN HIGHER EDUCATION.....	134
II. DEFINING THE CLOSED SYSTEM	139
III. COMPARISONS AMONG THREE SYSTEMS: EMERGENCE OF A QUASI-CLOSED SYSTEM.....	141
A. Prison, Military and Higher Education	144
B. Caveats and Differences	153

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CONCLUSION: FUTURE STEPS 155

INTRODUCTION

Over the past several years we have studied sexual violence¹ perpetrated in a specific subsection of American society: prisons. This research, funded by a grant from the National Science Foundation, offers a nuanced understanding of the special issues surrounding the reporting of sexual violence in a unique setting that is separate from the general community.² Survivors in the general community face obstacles when reporting rape, including a loss of privacy, assumptions and blame based on their behavior and what they were wearing, attacks on their character, and the perspective that “victims should demonstrate a set of behaviors consistent with someone who has really suffered the trauma of assault.”³ Although the challenges faced by women who are raped while incarcerated are similar to and influenced by those faced by survivors in the community, it is also true that they are strongly and uniquely shaped by the setting and its related norms, policies, and laws.

The prison setting, referred to in the literature both as a total institution,⁴ and closed institutional system,⁵ might be conceptualized akin to a set of Russian nesting dolls; the outer doll represents society generally and the smaller inner doll represents the closed prison setting. The two dolls, or systems, share characteristics and bear resemblance to one another; they relate to each other, but they also maintain

¹ The term “sexual violence” is an overarching term selected intentionally by the authors as encompassing a continuum of gender-based violence including but not limited to rape, sexual assault, and sexual harassment.

² Sheryl Kubiak, Deborah Bybee, Rebecca Campbell & Hannah Brenner, *Using an Ecological Framework to Examine Reporting of Abuse During Incarceration*, NAT'L SCI. FOUND., http://www.nsf.gov/awardsearch/showAward?AWD_ID=1429948 [https://perma.cc/F36S-KCN6].

³ See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U.L. REV. 467, 468–69 (2005).

⁴ Erving Goffman, *The Characteristics of Total Institutions*, in ORGANIZATION AND SOCIETY 312, 314–15 (1961). Goffman is widely known amongst sociologists as having defined the concept of the total institution. See Christie Davies, *Goffman's Concept of the Total Institution: Criticisms and Revisions* 12 HUM. STUD. 77, 77–78 (1989) (crediting Goffman with the term “total institution” and discussing reliance on the term by other scholars).

⁵ Davies, *supra* note 4, at 89. See also Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 97, 131 (2014) (discussing a reference to military and university systems as “closed-culture environments”).

their own very distinct shape and form. When a woman is raped, her entire experience is impacted—significantly—by the context in which she is situated. The relationship between the systems has also been described by social scientists using an ecological model, taking into account cultural, interpersonal, and individual factors as influencing incidence and reporting of sexual abuse.⁶ Prison, as a system within the broader community, is a quintessential closed system; it confers a unique identity to individuals, who become inmates, upon entrance. This prisoner identity carries with it certain stereotypes that inform widely-held myths about rape.⁷ Prison is governed by specially crafted policies and procedures that intersect with state and federal laws and standards to provide a complex framework governing the reporting, investigation, and civil and criminal litigation surrounding sexual victimization. There are often major distinctions between what occurs after a woman is raped in the community as opposed to a closed institutional system as relates to reporting, investigation, and accountability of those who perpetuate the violence.

Throughout our research on prisons, we wondered what other closed systems might be ripe for exploration. More specifically, we became interested in comparing institutions employing state actors that may be held liable for perpetrating, or for failing to adequately address, sexual abuse. As a result of this inquiry, we compared our prison-based research on sexual victimization and related lessons learned to the military and immigration detention centers,⁸ which ignited our curiosity about other systems. As we read media accounts of sexual abuse occurring in higher education settings across the nation,⁹ the stories of

⁶ See Sheryl Pimlott Kubiak, Hannah Brenner, Deborah Bybee, Rebecca Campbell & Gina Fedock, *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 17 TRAUMA, VIOLENCE, & ABUSE 3 (2016).

⁷ Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 526–27 (2016) [hereinafter *Bars to Justice*].

⁸ Hannah Brenner, Kathleen Darcy & Sheryl Kubiak, *Sexual Violence as Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of Detention & the Military*, forthcoming, 44 PEPP. L. REV. (forthcoming 2017) [hereinafter *Occupational Hazard*].

⁹ E.g., Laura Hilgers, Opinion, *What One Rape Cost Our Family*, N.Y. TIMES, June 24, 2016, at A27, <https://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html> [https://perma.cc/97QX-9FHL]; Stephanie Saul, *University Did Not Investigate Rape Accusations, Lawsuits Say*, N.Y. TIMES, April 21, 2016, at A20, <https://www.nytimes.com/2016/04/21/us/kansas-state>

institutional roadblocks, internal retaliation, and difficulty in accessing the justice system resonated with us. Ultimately, this led to consideration of whether institutions of higher education (i.e. colleges and universities) should be contextualized similarly to these other systems. Many of these settings are characterized by high occurrences of sexual abuse,¹⁰ low reporting rates,¹¹ and infrequent prosecutions

university-fraternity-rape-lawsuit.html [https://perma.cc/CVX8-V7LM]; Liam Stack, *Outrage Over Sentencing in Rape Case at Stanford*, N.Y. TIMES, June 7, 2016, at A15, <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html> [https://perma.cc/E5D2-EV3V].

¹⁰ See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xiii–xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [https://perma.cc/BEN2-7C89]; NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf [http://perma.cc/4KC-DJUN]. In the prison setting, the U.S. Department of Justice estimates that between 149,200 and 209,400 inmates are subject to sexual abuse annually. National Standard to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37190 (June 20, 2012). In the military setting, one national survey estimates that as many as 36.3% of women on active duty experienced sexual violence that included physical contact. MICHELE C. BLACK & MELISSA T. MERRICK, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, PREVALENCE OF INTIMATE PARTNER VIOLENCE, SEXUAL VIOLENCE, AND STALKING AMONG ACTIVE DUTY WOMEN AND WIVES OF ACTIVE DUTY MEN 27 (2013). Another study revealed that 4.3% of active duty women experienced some kind of unwanted sexual contact, which is approximately 8,500 women. DEPT OF DEFENSE, DOD SEXUAL ASSAULT PREVENTION AND RESPONSE FACT SHEET (2015), http://archive.defense.gov/home/features/2015/0415_sexual-assault/SAPR_Fact_Sheet_2015.pdf [https://perma.cc/GTZ9-JSV4].

¹¹ In prison, the Bureau of Justice Statistics found that “[a]dministrators of adult correctional facilities reported 8,763 allegations of sexual victimization in 2011.” BUREAU OF JUSTICE STATISTICS, PREA DATA COLLECTION ACTIVITIES, 2015, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/pdca15.pdf> [https://perma.cc/7P7H-9VW3]. However, self-reported data from inmates indicates that there may be “more than *twenty times more* staff sexual misconduct” than captured by the Bureau of Justice Statistics’ estimates. M. Dyan McGuire, *The Empirical and Legal Realities Surrounding Staff Perpetrated Sexual Abuse of Inmates*, 46 CRIM. L. BULL. 428, 436 (2010) (emphasis added). This phenomenon is similar in the general community, where “[36%] of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police [from] 1992-2000.” CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 1 (2002), <http://www.bjs.gov/content/pub/pdf/rsarp00.pdf> [https://perma.cc/3WWW-FT9D]. In the military, a large number of sexual assaults go unreported, although the number of reports has increased in the last decade. DEPT OF DEFENSE, DEPT OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2015, at 28 (2015), http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/M659-LW2N] [hereinafter DOD ANNUAL REPORT 2015]. Some reasons cited for victims’ non reporting as documented by the DoD include: “[t]hought it was not serious enough to report”; “[w]anted to forget about it and move on”; “[t]ook other

and punishment;¹² these are characteristics that other scholars, practitioners, and policymakers have noted. The point of departure, however, from those who have engaged in such comparison, is to explore the ways in which the similarities extend far beyond the statistics and into the structure of the settings themselves, as they often fail to consider the specific *context* in which the violence occurs and how it shapes all that follows. This context, however, is integral because it impacts the ability of survivors inside the systems to seek justice in ways that differ from those survivors on the outside. One important element each system shares, albeit to differing extents, is a separation from general societal norms, laws, and resources surrounding sexual violence. This “closed off,” insular nature often thwarts even the most forward thinking law and policy changes from being effectively implemented, if at all.

So the question becomes, should higher education be conceptualized as a closed system for purposes of responding to sexual victimization? We conclude that it does in fact bear sufficient resemblance to traditional closed systems, with certain important caveats. Specifically, membership and identity conferred by one’s presence in these systems may be difficult to shed and results in different implications for reporting and finding justice. Further, the internal structure of these closed systems is unique and distinct from the larger legal system in which they are situated. These systems also all share similar restrictions on the availability of civil legal remedies. However, due in large part to the differences, universities are typically not considered along with closed systems like prison and the military,¹³ but their

actions to handle the situation”; “were worried about retaliation by a supervisor or higher up”; “did not think anything would be done”; “did not want more people to know”; “felt partially to blame.” *Id.* The phenomenon occurs in higher education as well. Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL’Y & L. 1,1 (2015).

¹² Seidman & Vickers, *supra* note 3, at 472; Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 8 (2011). Further, in the fiscal year 2015, the military services received a total of 6,083 reports of sexual assault—4,584 of which were Unrestricted Reports—and had jurisdiction to take disciplinary action against 72% of the subjects. DOD ANNUAL REPORT 2015, *supra* note 11, at 7. “Overall, 1,437 subjects received action for a sexual assault offense. Actions for these subjects included court martial charge referrals (926 subjects), nonjudicial punishment proceedings (303 subjects), and discharges or adverse administrative actions (208 subjects).” *Id.* at 49.

¹³ Although some scholars have engaged in comparative scholarship, their analysis of universities together with closed systems often fails to pay attention to the structural and institutional characteristics that tie them together. See,

conceptualization as such should not be discounted in the crafting of solutions to the problem of sexual violence. To this end, we created a novel classification into which colleges and universities (and perhaps even other systems that have not yet been identified) more comfortably fit, which we call the *quasi-closed system*. The *quasi-closed system* includes attributes of both the broader open community as well as the closed institutional systems.¹⁴ While our expertise in studying closed systems is limited to this narrow context, we rely on the experience gained from researching the perpetuation of sexual abuse in prison¹⁵ in creating this classification. An overarching goal is to signal to our legal colleagues that consideration of context, a characteristic studied by sociology scholars,¹⁶ is essential in creating effective law and policy. This call for reform is situated within a growing body of scholarship that is beginning to recognize similarities among survivors' experiences in various systems.¹⁷

There exist significant limitations inherent in closed systems that make reporting and the resulting investigation (or lack thereof) difficult for survivors of sexual violence; as a result, creating alternative avenues through which these individuals may find justice is essential. Legally, this translates most obviously into an argument that civil causes of action be made available both in tandem with or in lieu of both the internal administrative grievance processes and the criminal justice system. It is difficult not to think of the massive erosion of options for survivors of gender-based

for example, Deborah Rhode, *Rape on Campus and in the Military: An Agenda for Reform*, 23 UCLA WOMEN'S L.J. 1 (2016), for an analysis limited to the statistical similarities and lack of cohesive policies between the systems.

¹⁴ There is precedent for creating such a classification in the sociology literature. See generally, Davies, *supra* note 4, at 86 ("It is useful to create an intermediate category between the 'open' and 'closed' institutions.").

¹⁵ We intentionally focus our discussion in this Essay on sexual violence perpetrated by men against women because this reflects the structure and focus of our research in other systems, and it is from this specific place that we can most accurately draw connections. This choice is not meant in any way to discount or downplay the abuse that occurs across lines of gender, sexual orientation, age, and race, all of which deserves further research and study by other scholars.

¹⁶ See, e.g., Davies, *supra* note 4, at 80 (analyzing institutions in terms of their broader contexts).

¹⁷ See, e.g., Rhode, *supra* note 13, at 8–11, 20–23 (comparing ineffective internal policies and procedures for addressing rape on college campuses and in the military); see also Banner, *supra* note 5, at 131 (discussing the similarity between military and university systems where the protection of individual interests may compete with those of the institution).

violence that resulted from the Court's decision in *United States v. Morrison*.¹⁸ In *Morrison*, the Court struck down the civil rights remedy that was an integral part of the Violence Against Women Act. After all, it was widely understood that "VAWA's civil rights provision was a pioneering attempt to provide legal redress at the national level for one of the most common and fundamental manifestations of gender inequality."¹⁹ Chief Justice Rehnquist's words in *Morrison* are nonetheless worth noting as he describes the response to the brutal sexual violence experienced by Christy Brzonkala at the hands of two collegiate peers at Virginia Tech.²⁰ He concludes that "[i]f the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison."²¹ We take seriously Rehnquist's conclusion though depart, as many scholars do, from his ideas surrounding the exact means by which to achieve that desired end.²² As a starting place, significant potential exists in breaking down the barriers that separate these various closed systems and in considering them in tandem with one another.

Part I of this Essay defines the problem of sexual violence in higher education and includes a brief overview of the complex web of laws, policies, and norms that impede survivors in this setting from finding justice. Part II provides a discussion of closed systems generally, situating higher education within such a regime in a slightly refined context. Part III considers specifically the characteristics of higher education against those of prison and the military, leading to the conceptualization of a *quasi-closed* system. Finally, the Conclusion emphasizes the importance of making civil causes of action readily available for survivors of sexual violence and offers directions for future research and advocacy. We urge policy makers, educational administrators, advocates, lawyers, and others to break down the conceptual silos that separate these (seemingly disparate) closed system sectors and to consider them in tandem toward an end of crafting better remedies to both prevent and reform the response to

¹⁸ 529 U.S. 598 (2000) (finding 42 U.S.C. § 13981 (1994) unconstitutional).

¹⁹ Sally F. Goldfarb, "No Civilized System of Justice": *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 509 (2000).

²⁰ See *Morrison*, 529 U.S. at 627.

²¹ *Id.*

²² See, e.g., Goldfarb, *supra* note 19 at 519–27 (criticizing the Supreme Court's decision to strike down the federal civil rights remedy and to reserve the mechanism to the states).

sexual violence.

I

SEXUAL VIOLENCE IN HIGHER EDUCATION

Statistics on the incidence and prevalence of sexual violence in institutions of higher education are revealing. Conservative estimates suggest that one in five women and one in sixteen men will experience sexual violence while they are in college.²³ A staggering 80% of sexual assault survivors on college campuses do not report what happened to law enforcement.²⁴ Further, in one study, 63% of men who admitted committing rape had committed more than one rape.²⁵

Sexual violence that is perpetrated on campus is addressed differently than that which occurs in the broader community.²⁶ To this end, there exists a complex web of federal laws and policies that guide the process. Title IX of the Education Amendments of 1972 is the primary federal law that prohibits sex discrimination in the programs and activities of federally funded colleges and universities.²⁷ Signed into law in 1972, it reads, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁸ The courts over time developed an expansive definition of “sex” to include sexual harassment, which is inclusive of sexual violence.²⁹ Survivors may take advantage of Title IX as a civil rights

²³ See NAT’L SEXUAL VIOLENCE RES. CTR., *supra* note 10; see also KREBS ET AL., *supra* note 10, at 5-1 to -6.

²⁴ See SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2003, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [perma.cc/W4BW-4TJF].

²⁵ David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002).

²⁶ Fewer college women are inclined to report sexual crimes than those who are not attending college: 80% and 67%, respectively. SINOZICH & LANGTON, *supra* note 24, at 9.

²⁷ 20 U.S.C. §§ 1681–88 (2012).

²⁸ *Id.* § 1681(a).

²⁹ See, e.g., *Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that student-on-student sexual harassment is a Title IX violation); *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (ruling that coach’s alleged harassment of female athletes could amount to a Title IX violation); *S.S. v. Alexander*, 177 P.3d 724 (Wash. Ct. App. 2008) (finding that the university may be liable under Title IX for peer-on-peer sexual assault).

cause of action.

Guidance on how to best comply with the often vague statutory requirements was first promulgated sixteen years after the passage of Title IX vis-à-vis two Supreme Court cases: *Gebser v. Lago Vista*³⁰ and *Davis v. Monroe County Board of Education*.³¹ Although Title IX was interpreted to include an implied private cause of action for monetary damages, the Court in these cases established very high barriers that tend to thwart complainants' success in this regard. *Gebser* requires a school official to have notice of sexual misconduct and to have acted with "deliberate indifference" in order to trigger liability.³² *Davis* extended that holding to peer sexual harassment with the additional requirements that a school be in "substantial control" of both perpetrator and "the context in which the harassment occurs" as well as that the behavior be "severe, pervasive, and objectively offensive."³³ This duo of cases together form a minimum set of requirements a survivor must meet. In order to establish a violation of Title IX: the school must be in receipt of federal funds, the alleged discrimination must be based on sex (broadly interpreted to include sexual violence), the survivor must be deprived of her access to or receipt of educational programs/activities.³⁴

The Department of Education's Office of Civil Rights routinely proffers additional guidance on Title IX. In 2011 it released its now infamous *Dear Colleague Letter*.³⁵ This letter provides direction on how academic institutions can best facilitate reporting and investigation of campus sexual violence, as well as how they may engage in preventative measures. The 2011 letter offered guidance, for example, on how a school's investigation should proceed. Once a school

³⁰ 524 U.S. 274 (1998).

³¹ 526 U.S. 629 (1999).

³² *Gebser*, 524 U.S. at 277.

³³ *Davis*, 526 U.S. at 645-50.

³⁴ Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 ED. LAW REP. 1, 6-7 (2016).

³⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/AVD5-K5R6>] [hereinafter DEAR COLLEAGUE LETTER]. A subsequent letter released in 2015 emphasized how schools must appoint Title IX Coordinators in order to comply with federal law, and the letter explained their roles and responsibilities. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS (2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> [<https://perma.cc/92TT-PYA4>].

“knows or reasonably should know” of possible sexual violence that is perpetrated by one student against another, it must take “immediate” and “appropriate” action to investigate or otherwise determine what occurred, regardless of whether the incident occurred on campus.³⁶ The school’s response must be “prompt, thorough, and impartial.”³⁷ Care must also be taken to respect the confidentiality of a survivor, but this is not an absolute guarantee.³⁸

Legal scholars are divided on whether the *Dear Colleague Letter* actually provides effective guidance or leaves gaps in understanding exactly how to adequately implement Title IX.³⁹ A recent white paper penned by law professors and scholars expressed support for the use of Title IX to address sexual violence on college and university campuses. The document emphasizes the importance of the *Dear Colleague Letter*’s suggestion that schools utilize a preponderance of the evidence standard of proof in their Title IX hearings, contextualizing it alongside civil laws in other contexts (including prison).⁴⁰ Further, an impressive committee of legal experts and scholars convened by the American Law Institute are writing prolifically on the issue, presenting a voluminous collection of commentary and suggestions for how institutions might best comply with Title IX.⁴¹

³⁶ DEAR COLLEAGUE LETTER, *supra* note 35, at 3–5.

³⁷ *Id.* at 5.

³⁸ *Id.* at 5 n.15.

³⁹ Compare Nick Rammell, Note, *Title IX and the Dear Colleague Letter: An Ounce of Prevention Is Worth a Pound of Cure*, 2014 BYU EDUC. & L.J. 135, 148 (“[The Dear Colleague Letter] clarifies the role of universities in responding to allegations of discrimination based on sex and provides guidance . . . for universities to prevent, remedy, and correct the negative effects of such discrimination.”), with Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POLY. REV. 387, 394 (2015) (“The April 2011 Dear Colleague Letter generated significant compliance questions for campuses.”).

⁴⁰ KATHERINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/10/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf> [<https://perma.cc/QD3Q-WSU4>] [hereinafter *2016 White Paper*]. But not everyone agrees that the preponderance standard is appropriate. In lawsuits brought against the Department of Education, plaintiffs have argued that the Department of Education guidelines are unfair to alleged perpetrators in part because the burden of proof is so low, akin to that used in civil cases rather than the more stringent “beyond a reasonable doubt” standard relied on in criminal law. Tyler Kingkade, *Lawsuit Targets Education Department Over Guidance on College Sexual Assault Policies*, HUFFINGTON POST (Apr. 19, 2016 4:51PM), http://www.huffingtonpost.com/entry/sexual-assault-lawsuit-education-department_us_57165996e4b0018f9cbb2a55?section=women&https://perma.cc/Q9CV-C7A9].

⁴¹ *Project on Sexual and Gender-Based Misconduct on Campus: Procedural*

In May of 2014, in response to the high number of sexual assaults (and related consequences⁴²) in educational contexts, the United States Department of Education made an unprecedented move in identifying fifty-five higher education institutions that failed to comply with Title IX, thereby impeding the prevention and investigation of sexual violence.⁴³

The Clery Act⁴⁴ and the more recent Campus SaVE Act⁴⁵ are two further measures that govern campus sexual violence as companions of Title IX. Together, they provide students the right to ensure their school is effectively addressing sexual violence on campus. The Clery Act requires schools to publish an Annual Security Report every fall that documents the previous three years of campus crime statistics, and which must contain information on the school's policy regarding sexual violence incidents.⁴⁶ Importantly, students may file a complaint with the United States Department of Education alleging Clery Act violations; schools face fines up to \$35,000 per violation.⁴⁷ Embedded within the 2013 reauthorization of the Violence Against Women Act, the

Frameworks and Analysis, AM. LAW INST.
<https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/>
 [https://perma.cc/G579-XPPD] (seeking to provide guidelines for college and universities as they create processes and procedures for addressing sexual misconduct that occurs on campus).

⁴² For a detailed description of the educational harms and health consequences that result from sexual violence, see *2016 White Paper*, *supra* note 40.

⁴³ Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [https://perma.cc/9RX9-JAVQ]. The list as of January 2017 includes 304 open investigations of 223 campuses and, in our opinion, is likely to continue to grow. Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled.*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.7a0aa5d1b4e3 [https://perma.cc/75PJ-4EKG].

⁴⁴ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012).

⁴⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (2013) (codified at 20 U.S.C. § 1092(f)). See also *id.* § 101(2)(M), 127 Stat. at 66 (codified at 42 U.S.C. § 3796gg(b)(15)).

⁴⁶ § 1092(f).

⁴⁷ Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1214 (2014).

Campus SaVE Act further refines the Clery Act measures by expanding coverage to include a broader array of survivors of gender-based crimes, includes new reporting requirements for schools, and adds additional prevention requirements.⁴⁸ Other bills that further refine responses to sexual violence on campus are often introduced in Congress.⁴⁹

As the primary federal law that governs how educational institutions handle sexual violence allegations, Title IX is similar to the kind of federal oversight and instruction that governs prisons and military systems.⁵⁰ It specifically confers on college students a civil rights cause of action against their institution of higher education (assuming that the institution is in receipt of federal funds) if certain criteria are met.⁵¹ Institutions failing to comply risk losing federal funding,⁵² a risk that some have been willing to assume—similar to how some states have elected to lose federal funding rather than comply with the Prison Rape Elimination Act.⁵³ Title IX and the other federal laws focused on addressing sexual victimization all demand “zero tolerance,” but the failures inherent in this mandate are widely acknowledged and sexual violence continues to be perpetrated at high rates throughout many institutions.⁵⁴ Finding justice has proved elusive for survivors in all of these closed institutional contexts,⁵⁵

⁴⁸ § 304, 127 Stat. at 89.

⁴⁹ *E.g.*, Campus Accountability and Safety Act, S. 590, 114th Cong. (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015); Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015). These proposed laws, in part, address some of the concerns about the due process rights afforded to the accused. For a comprehensive review of bills before Congress, see Emily D. Safko, Note, *Are Campus Sex Tribunals Fair?*, 84 *FORDHAM L. REV.* 2289 (2016).

⁵⁰ As of 2003, prisons must comply with standards on sexual assault set forth by the Prison Rape Elimination Act. See Prison Rape Elimination Act of 2003 (PREA) 42 U.S.C. §§ 15601–09 (2012). Similarly, the Uniform Code of Military Justice governs reporting, investigating, and punishment related to sexual violence wholly within the military courts. See Uniform Code of Military Justice, 10 U.S.C. §§ 807–946 (2012).

⁵¹ *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); see 20 U.S.C. § 1681(a) (2012).

⁵² See 20 U.S.C. § 1682 (2012).

⁵³ *E.g.*, Irin Carmon, *Rick Perry Refuses to Comply with Anti-rape Law*, MSNBC (Apr. 4, 2014, 11:50 AM), <http://www.msnbc.com/msnbc/rick-perry-flouts-anti-rape-texas-prison-law> [<https://perma.cc/3TRK-44U2>].

⁵⁴ Francine Banner, *Institutional Sexual Assault and the Rights/Trust Dilemma*, 13 *CARDOZO PUB. L. POL'Y & ETHICS J.* 97, 107 (2014).

⁵⁵ *But see* *Neal v. Dep't of Corr.*, 583 N.W.2d 249 (Mich. Ct. App. 1998). “In 1996, Tracey Neal, and five other female prisoners filed a complaint on behalf of themselves and all similarly-situated female prisoners against the Michigan Department of Corrections (MDOC), its directors, and various wardens and deputies in the prison system. Plaintiffs filed suit in the circuit court

especially those in higher education.

There are certain observable dynamics inherent in higher education institutions that mirror those that limit the effectiveness of anti-sexual violence strategies in the closed systems of prison and the military. We therefore seek to extrapolate lessons learned from these other closed systems in order to create a framework and carve out new pathways for effecting change within educational systems, ultimately advocating for the creation of new policies, practices, and procedures to address sexual violence. This novel idea, identifying the unique elements of a closed system that may be impeding progress, forms the basis for our work. The following section outlines the key definitive characteristics of closed institutional systems and specifically highlights the points of intersection with and departures from higher education. It also illuminates the ways in which these characteristics impact sexual violence that is perpetrated within, ultimately lending support for the creation of a new term of art, the *quasi-closed institutional system*.

II

DEFINING THE CLOSED SYSTEM

The reference to the closed system is based on the well-known definition of “total institution” initially discussed by social scientist Erving Goffman; his conception is widely regarded amongst scholars.⁵⁶ He uses the term “total institution” to refer to a place where people both live and work and are at the same time isolated from the larger community for a significant length of time; he contemplates places like prisons, military systems, and mental institutions.⁵⁷ According to Goffman, “all aspects of life are conducted in the same place and under the same single

specifically alleging eight causes of action based on the treatment of women prisoners in the prison system.” *Neal v. Dep’t of Corr.*, No. 253543, 2005 WL 326883, at *1 (Mich. Ct. App. Feb. 10, 2005) (footnote omitted). For a discussion of the case and its impacts, see Rachel Culley, “*The Judge Didn’t Sentence Me to Be Raped*”: Tracy Neal v. Michigan Department of Corrections: A 15-Year Battle Against the Sexual Abuse of Women Inmates in Michigan, 22 *WOMEN & CRIM. JUST.* 206 (2012). Despite the success in *Neal*, it is only one of a few successful cases, and it came at a cost that spanned fifteen years of litigation, and faced resistance the entire way. *See id.* Attempts to bring civil litigation against the military have been routinely struck down by non-military courts as lacking jurisdiction. *See* discussion *infra* notes 122–125 and accompanying text.

⁵⁶ *See* Davies, *supra* note 4, at 78–82 (1989) (discussing how various scholars have applied Goffman’s “total institution”).

⁵⁷ *See* Goffman, *supra* note 4, at 313–14.

authority” in total institutions.⁵⁸ Prisons reflect many characteristics of the total institution in a number of ways. Professor Ajunwa highlights Goffman’s work: “[D]aily activity is carried on in the immediate company of a large batch of others, . . . the day’s activities are tightly scheduled, . . . [and] the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.”⁵⁹ An overarching feature of this system is its limited interaction with other systems and with society as a whole.

As discussed later in this Essay, when violence occurs in a closed system, it is almost always intensified; inhabitants of the system have little access to external avenues of justice and the outside world has little knowledge of what goes on inside. The conception of total institutions today might be described as “formal and informal, small or large, voluntary or involuntary, with [t]he only idea common to all usages of the term . . . [being] that of some sort of establishment of relative permanence of a distinctly social sort.”⁶⁰ We utilize this conception as a starting point.

Prisons and the military are both easily defined as closed systems by scholars, and the inherent difficulties in having an unbiased, non-retaliatory system that prevents and addresses sexual abuse have been widely discussed in these two realms.⁶¹ Fitting this definition, at least in part, are also institutions of higher education. They have not traditionally been discussed in this context, yet we see similarities in their structure specifically related to the complex issue of sexual violence, including its perpetration, reporting, remedy, and

⁵⁸ *Id.*

⁵⁹ Ifeoma Ajunwa, “Bad Barrels”: An Organizational-Based Analysis of the Human Rights Abuses at Abu Ghraib Prison, 17 U. PA. J.L. & SOC. CHANGE 75, 82–83 (2014) (quoting ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 6 (1961)).

⁶⁰ Banner, *supra* note 54, at 107–08 (quoting Everett C. Hughes, *The Ecological Aspect of Institutions*, 1 AM. SOC. REV. 180, 180 (1936)). Banner attributes the ongoing problem of sexual victimization not to the individual culture of specific institutions but instead to “the result of a greater systemic imbalance of rights and trust that pervades a U.S. society as a whole.” *Id.* at 103.

⁶¹ Goffman’s descriptions of a total institution perfectly match prison conditions. For example, Goffman highlights that “[t]he central feature of total institutions . . . [is] a breakdown of the kinds of barriers ordinarily separating the [] three spheres of [sleep, play, and work].” Goffman, *supra* note 4, at 314. In both military and civilian prisons, prisoners—and in some cases the guards—all sleep, play, and work within the walls of the institution. See *Bars to Justice*, *supra* note 7, at 571 (discussing prison life); Brenner et al., *supra* note 8.

prevention. At the same time, we proceed cautiously in response to the recognition that there are indeed important differences that argue against their being considered along with the more traditional closed systems for fear of thwarting, rather than promoting, progress.

Other scholars also notice similarities between institutions of higher education and other closed systems and look to common elements inherent in these systems for guidance and illumination.⁶² Professor Francine Banner rejects the common approach that tends to define and address sexual violence specific to the space in which it occurs (i.e. “campus rape”), and instead, in part proposes that solutions take broader cultural ideals and norms into consideration, calling for the characterization of “institutional sexual assault.”⁶³ She writes, “Despite that sexual violence is a concern common across numerous and varied institutions, however, there has been little impetus toward a holistic approach to dealing with rape and sexual assault. Rather, the trend has been to address such crimes as horrific but isolated occurrences.”⁶⁴

We offer a slight departure from Banner’s discussion but still support a similar more “holistic” approach in an attempt to effect meaningful change.⁶⁵ We support her sweeping socio-cultural approach, though we interpret it a bit more narrowly. We promote the idea of looking across multiple institutions, but we instead use a lens that examines how the unique structure of an *individual* closed system may uncover similarities among institutions as one way to address the problem—a problem Banner correctly identifies as “elusive.”⁶⁶ We identify similarities and differences both within and outside of closed systems to argue for a middle ground in framing educational institutions as quasi-closed systems, which provides better guidance for crafting policy.

III

COMPARISONS AMONG THREE SYSTEMS: EMERGENCE OF A

⁶² See, e.g., Banner, *supra* note 54, at 100 (discussing the socio-legal framework of U.S. society as a common element).

⁶³ *Id.* at 104.

⁶⁴ *Id.* at 100.

⁶⁵ *Id.* at 100–01.

⁶⁶ *Id.*

QUASI-CLOSED SYSTEM

It is important to note as a starting place that none of these systems, nor the violence that occurs inside them, are identical, but that the institutional dynamics that ultimately dictate response and prevention strategies are deserving of comparison. Importantly, each of these systems, by virtue of their closed nature, are ripe for the perpetuation of sexual violence and make difficult the pursuit of justice. “Closed organizations, such as residential care facilities, children’s homes and prisons, are relatively isolated from the outside world, and as such, violations and violence are often contained and intensified.”⁶⁷ It is also true that sexual violence in each of these systems is perpetrated by different actors, but an overarching similarity is that they are dominated by a culture of sexual violence. Our NSF-funded research⁶⁸ focused exclusively on sexual violence committed by prison staff against inmates, and it is this perspective that informs the focus here but is not intended to minimize or deny the existence of inmate-on-inmate violence.⁶⁹ And in institutions of higher education, the majority of assaults occur between students, though faculty and staff can be both perpetrators and victims.⁷⁰ From our vantage point, we observe significant challenges (and failures) in implementing a reporting, investigation, and prevention scheme in these systems, all of which lack incentive to operate without bias because of their closed and insular context.

A unique characteristic across all three institutions is the relationship between victim and perpetrator. Importantly, some researchers have drawn connections between higher education and military institutions as having similarly “male dominated” cultures that impact the ways these institutions respond to and create preventative measures against sexual violence.⁷¹ We, along with others, have observed the same

⁶⁷ Sheryl Pimlott Kubiak et al., “I Came to Prison to Do My Time – Not to Get Raped”: Coping Within the Institutional Setting, 8 *STRESS, TRAUMA, & CRISIS* 157, 160 (2005).

⁶⁸ Kubiak et al., *supra* note 2.

⁶⁹ For further discussion of staff violence against inmates, see BARBARA OWEN ET AL., *GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN’S FACILITIES* 23–26 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225338.pdf> [<https://perma.cc/XRM9-A5YZ>]. See also McGuire, *supra* note 11, at 430–34 (describing the history of staff sexual abuse of inmates).

⁷⁰ See FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 17 (2000).

⁷¹ Sarah Jane Brubaker, *Sexual Assault Prevalence, Reporting and Policies:*

phenomenon in prisons.⁷² Contributing to this culture of sexual violence is the prevalence of extreme power imbalances.⁷³ Settings that promote and facilitate male aggression are also known to be more prone to perpetuation of sexual violence.⁷⁴

The proceeding section illuminates the ways in which features of these three systems—prisons, military, and higher education—intersect with one another. Specifically, we identify similarities in the tensions that arise from loyalty to the system and of the system to its members, and from internal biases (often perpetuated by widely held myths about rape) thwarting fair investigation and training. In exploring these similarities we suggest that the central ways in which higher education is situated similarly to prison and the military, despite the caveats that might argue otherwise, are compelling enough to justify its inclusion in a novel category,

Comparing College and University Campuses and Military Service Academies, 22 SECURITY J. 56, 56 (2009) (“Specific influences on sexual assault incidents and reporting are identified in both settings, including male-dominated cultures as well as specific policies and practices around sexual assault prevention and response.”); see also Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAV. 267, 271 (2010) (“The structure of the military as a male-dominated institution, where men assume greater leadership roles, creates a power differential between men and women. Mazur (2007) states that the different assumptions about women in leadership is the ‘single greatest impediment to solving issues of sexual misconduct within the military.’”) (quoting Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL’Y 977, 993 (2007)). One prospective study found that college men who had more adversarial beliefs concerning heterosexual relationships were more likely to report sexual perpetration over a seven-month period. Catherine Loh et al., *A Prospective Analysis of Sexual Assault Perpetration: Risk Factors Related to Perpetrator Characteristics*, 20 J. INTERPERSONAL VIOLENCE 1325, 1341 (2005).

⁷² E.g., SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 285 (1976).

⁷³ The exploitation of power related to sexual violence is not unique to the military. “People in various positions of power, such as supervisors and employers in workplace, professors in academia, prison and jail guards in correctional facilities, often abuse their authority to coerce sexual acts on individuals in subordinate positions.” Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J.L. GENDER & SOC’Y 341, 347 (2014).

⁷⁴ In the education context: “As indicated, these studies suggest linkages between such cultural attitudes and the actual occurrence of campus peer sexual violence. Multiple studies have shown that perpetrators share characteristics such as macho attitudes, high levels of anger towards women, the need to dominate women, hyper-masculinity” Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 212 (2011). For discussion in the military, see Buchhandler-Raphael, *supra* note 73, at 347–52.

the *quasi-closed* system.⁷⁵

A. Prison, Military, and Higher Education

There are a number of defining, shared characteristics of the military, prisons, and colleges/universities that, when taken together, form the basis for our call for a unified approach to addressing sexual violence. The significant number of these overlapping features offers the strongest evidence toward conceptualizing higher education as a *quasi-closed institutional system*.

As a starting place, in almost no setting other than higher education is there such a shared responsibility both to perpetrator and survivor and to the system itself. Professor Banner discusses the potential conflict that arises from this dual duty, conceptualizing it as a “rights/trust” dilemma.⁷⁶ This can be seen when institutions place personal interests over those of the collective system and when institutions hide bad behavior, taking advantage of the trust members place in the institution.⁷⁷ An alleged perpetrator expects preservation of his due process rights; an individual who reports a sexual assault expects a fair, rigorous investigation and outcome that is favorable to her grievance. And the institution must satisfy the demands of numerous constituencies including parents, its members, alumni, etc.

In institutions of higher education, alleged perpetrators criticize campus rules and policies as lacking necessary “procedural protections” and also allege violations of due process that stem from the Title IX office acting “as investigator, prosecutor, judge, and jury.”⁷⁸ One investigation of sexual violence among students concluded that campus processes sometimes resemble “kangaroo courts’ with the deck stacked in favor of the alleged perpetrator, and that a survivor of campus peer sexual violence needs independent representation because she cannot rely on her school to protect her rights.”⁷⁹ Other outcomes or procedures in an investigation are troubling for the survivor. If she reports to

⁷⁵ The term “quasi-closed system” is original to these authors.

⁷⁶ Banner, *supra* note 54, at 101.

⁷⁷ *See id.* at 102.

⁷⁸ Rhode, *supra* note 13, at 9.

⁷⁹ Cantalupo, *supra* note 74, at 208 (citing Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010 12:00 PM), <https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [perma.cc/W9NT-4TA7] (describing how a victim felt that her university handled her case as a “kangaroo trial with a kangaroo sanction”).

the school, it may be that, despite law and policy mandates, the school (a) does nothing; (b) talks to the alleged perpetrator and does nothing to protect her from potential retaliation; (c) conducts an investigation in an untimely or biased manner; or (d) determines sexual violence did occur and yet takes no (or minimal) disciplinary action.⁸⁰ The dual duty owed to both parties presents inherent conflicts in investigation, and perpetuates a cycle whereby perpetrators do not fear reprisal and survivors do not report.

At a system-wide level, prisons do not experience tensions about dual loyalty to perpetrator and survivor in the same way as the other two systems do.⁸¹ However, all three institutions internally investigate sexual violence while having a vested interest in communicating to the broader outside community low levels of sexual violence. In higher education, the institution has an interest in protecting its reputation and thus is dis-incentivized to take reports seriously, to fairly adjudicate reports, and to report the true numbers of incidences of sexual abuse. The culture of not reporting sexual violence on college campuses leads to the creation of a false sense of safety and security in those places where the numbers are low.⁸² Further, Professor Deborah Rhode illuminates the complex impact of this loyalty on a survivor in highlighting an excerpt from an Onion article that portrays a rape survivor talking to reporters: “I get to go into a room filled with a committee of middle-aged men whose primary concern is upholding the college’s reputation and recount in explicit detail the circumstances of my rape at the hands of another student—I can’t wait.”⁸³ The same complex tensions exist in prisons, which face mandates to annually report

⁸⁰ For further discussion, see *id.* at 214–15.

⁸¹ A shocking number of prison administrators and the public at large even see sexual abuse as part of the punishment inherent in prison. *Bars to Justice*, *supra* note 7, at 542. “Much of the public at large also accepts the notion that whatever happens to these inmates in prison is deserved. In one survey, half of those questioned stated that ‘society accepts prison rape as “part of the price criminals pay for wrongdoing.”’” *Id.* at 542 (citing Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates*, BOS. GLOBE, May 17, 1994, at 22); see also Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 581–88 (2006) (discussing prison rape as punishment).

⁸² See Cantalupo, *supra* note 74, at 219–20.

⁸³ Rhode, *supra* note 13, at 8–9 (quoting *College Rape Victim Pretty Thrilled She Gets to Recount Assault to Faculty*, ONION (May 27, 2014), <http://www.theonion.com/article/college-rape-victim-pretty-thrilled-she-gets-to-re-36129> [<https://perma.cc/CTA9-YA8C>]).

sexual abuse statistics,⁸⁴ and thus are dis-incentivized to sustain as true allegations of abuse, and as a result may be ripe for informal barriers such as retaliation.⁸⁵ Similarly, the military faces this dilemma, as they are required to report incidences of sexual violence annually;⁸⁶ survivors often face retaliation as a mechanism to deter reporting.⁸⁷

The issue of loyalty is difficult to discount, as each institution is inherently self-interested. Despite best efforts, this is hard to overcome in all three systems, and it impacts the ability of the system to train internal actors to fairly investigate reports of abuse, especially when the outcome could harm the institution as a whole. This is not to suggest that all who investigate carry explicit biases, but it is likely that subtle internal biases or pressures exist against those who report abuse and are seen as attacking the system that thwart the impartial adjudication upon which our legal system is premised.

Loyalty also operates at the level of the survivor. An important similarity that institutions of higher education and the military both share is voluntary membership, which contributes to the tensions related to loyalty and reporting. Unlike prisons, inhabitants both voluntarily choose to be a part of these systems, thereby choosing identification as a member of that system and internalizing and accepting its authority over matters that occur within the system.⁸⁸ Often,

⁸⁴ “The Prison Rape Elimination Act of 2003 (PREA; Public Law 108-79) requires the Bureau of Justice Statistics (BJS) to carry out a comprehensive statistical review and analysis of the incidence and effects of prison rape for each calendar year.” *Prison Rape Elimination Act (Sexual Victimization in Correctional Facilities)*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=20> [<https://perma.cc/XQ84-NJ52>].

⁸⁵ “Retaliation, for the purposes of this report, is any act by a corrections officer, corrections employee, or official aimed at an inmate in order to punish her for having reported abuse or in order to keep her from reporting abuse.” *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, HUM. RTS. WATCH (1998), <http://www.hrw.org/legacy/reports98/women/> [<https://perma.cc/8RKJ-CZQ4>] [hereinafter *Nowhere to Hide*].

⁸⁶ “To help address the crime of sexual assault within the Military, the Department of Defense and the military Services conduct comprehensive sexual assault assessments and issue reports.” *Reports*, DEP’T DEF: SEXUAL ASSAULT PREVENTION & RESPONSE OFF., <http://www.sapr.mil/index.php/reports/sapro-reports/annual-reports-archive> [<https://perma.cc/C6SU-6TR2>].

⁸⁷ See HUMAN RIGHTS WATCH, *EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY* (2015), <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military> [<https://perma.cc/EVD3-CXF4>] [hereinafter *EMBATTLED*].

⁸⁸ “Additionally, and importantly, as Nancy Chi Cantalupo has characterized, in addition to the more nurturing parental role, the university

a survivor will have made a conscious choice to attend a particular university, and as a result will feel a loyalty to that university and an accompanying unease at reporting abuse within the system. “As individuals move up through the hierarchy of their organization and therefore have greater potential to effect change, the greater the pressures they experience to incorporate the dominant cultures’ values.”⁸⁹ The same phenomenon is at work with those in the military. The choice to enter the military is a serious one, as it implies a willingness to be bound completely by a set of rules, norms, and laws under the Uniform Code of Military Justice (UCMJ).⁹⁰

The community is therefore tight-knit, and members’ loyalty to that community is extreme. If sexual violence occurs by another member of the system, the survivor may be faced with a difficult choice whether to file a report internally because of the consequences that may impact that system and/or one of its members. The military and institutions of higher education share the tensions inherent in this dual loyalty, tensions that do not cross over with prisons in the same way.

Loyalty also powerfully operates in all three systems vis-à-vis retaliation against survivors, where pushback from other system members may undercut the seriousness of sexual violence claims. Survivors in the military and higher education both describe loyalty as a significant factor that in fact thwarts their ability to get justice within the system.⁹¹ In the military, if one does report, she is often told to “deal with it,” which reflects the fact that she is challenging the cohesion and loyalty to the system.⁹² As detailed by the plaintiffs in three recent class action lawsuits (*Cioca v. Rumsfeld*, *Klay v. Panetta*, and *Hoffman v. Panetta*), retaliation is a powerful force inhibiting access to internal justice. “Of forty-four

and the military each assume a ‘state like’ role in members’ lives. Both offer structures that supplement, and often supplant, civilian processes, including law enforcement.” Banner, *supra* note 54, at 130.

⁸⁹ Elizabeth Parsons & Vincenza Priola, *Agents for Change and Changed Agents: The Micro-politics of Change and Feminism in the Academy*, 20 GENDER, WORK & ORG. 580, 583 (2013); *see also* Banner, *supra* note 54, at 109 (discussing institutional “culture”).

⁹⁰ Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2012); *see supra* note 50.

⁹¹ *See* Banner, *supra* note 54, at 131.

⁹² First Amended Complaint at 6, *Klay v. Panetta*, 924 F. Supp. 2d 369 (D.D.C. 2014) (No. 12-0350). “As victims of military sexual assaults speak out, the Pentagon worries that the ‘unit cohesion’ will be threatened.” Banner, *supra* note 54, at 131.

named plaintiffs in the lawsuits, nearly half suffered retaliation for reporting their claims, ranging from confinement to quarters to criminal charges to other than honorable discharges.”⁹³ Human Rights Watch dedicated an entire report to the retaliation experienced by those who report sexual abuse in prison.⁹⁴ As between individual and system, the system often wins out. The difficulty in choosing whether to report is further informed by evidence of retaliation and derision from other system members as illustrated powerfully by the experiences of survivors who reported in the past.⁹⁵

Ultimately, lessons can be learned by comparing the similar dynamics of loyalty in the military, prison, and higher education, in terms of how a survivor’s claims of sexual assault may not be reported, may be retaliated against, or may not find internal justice. If system members feel a strong connection to the system, there is likely to be a significant amount of pushback against someone who questions the system’s ability to protect them from harm. This strong loyalty in both the military and higher education may prevent those who receive the report or who are charged with investigation from believing the survivor, it might inform their duty, or provide incentive to protect the reputation of the institution, or it may interfere with their belief that a crime of this nature could occur in their beloved system. The informal barriers of retaliation reinforce the self-interest of the institution in having low numbers of sexual abuses to report nationally. Further, other similarly informal barriers may be at play to impede a survivor from finding justice in these systems.

Within these institutions, survivors lack control over reporting and investigations to varying degrees. In prison, a survivor has very little control over how the process unfolds once she initiates a formal report; from that point, an investigation is triggered and she must comply with internal policies and demands of system actors. The military has its own unique set of laws governing reports and investigation, but federal law and policy ultimately govern both universities and prisons. All systems are strongly shaped by their communities, their populations, and their members, including the members’ common and widely-held rape

⁹³ Banner, *supra* note 54, at 134–35.

⁹⁴ *Nowhere to Hide*, *supra* note 85.

⁹⁵ See EMBATTLED, *supra* note 87.

myths.⁹⁶ Each institution may have its own mechanism by which to interpret compliance and has in place its own policies (and biases or norms that influence *implementation* of policies) that make a survivor's experience unpredictable and different across institutions.

Illustrative of the power inherent in comparing systems is a recent change related to confidentiality of the reporting process in higher education that somewhat mirrors that of the military. There are a myriad of reasons that survivors of sexual violence may not want to report what has happened to them, and forcing compliance with institutional requirements once a report is made has the potential to undercut the survivors' autonomy. Over the past years, the military implemented a unique process that allows a survivor of sexual violence to file either a "restricted" or "unrestricted" report; the former affords access to services like counseling and medical care, but allows the individual to remain anonymous and does not result in any further official action, while the latter allows for these same options and also triggers an official investigation.⁹⁷ In higher education, a comparable system now exists that has the potential to be more respectful of a survivor's right to remain anonymous while still retaining access to important services like counseling. "This system is similar to the restricted and unrestricted reporting system used in the military for many years with significant success."⁹⁸ Recently, the Office of Civil Rights clarified this issue for colleges and universities in its publication, *Questions and Answers on Title IX and Sexual Violence*, explaining how under certain circumstances, survivors may choose to report to campus "mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality" without initiating a formal report/investigation.⁹⁹

⁹⁶ For a comprehensive discussion of rape myths in the prison system, see *Bars to Justice*, *supra* note 7, at 529–33.

⁹⁷ DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, at 17 (2013), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [<https://perma.cc/R4WN-4H67>] [hereinafter *DoD Annual Report FY12 (2013)*].

⁹⁸ Nancy Chi Cantalupo, Assistant Professor of Law, Barry Univ. Dwayne O. Andreas Sch. of Law, Address: The Civil Rights Approach to Campus Sexual Violence (Oct. 3, 2015), in 28 REGENT U. L. REV. 185, 192–93 (2016).

⁹⁹ U.S. DEP'T OF EDUC.: OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 22–24,

The internal nature of investigations in these closed settings makes it unlikely that that an allegation of sexual violence will be sustained, since members of that system, who necessarily carry some amount of bias and loyalty to the system, are in charge of the process.¹⁰⁰ Importantly, in all of these contexts, the perpetrator is a protected member of the system. While the survivor is also a member of the system, the very fact that she made an allegation against another member—and therefore against the system—diminishes her status; the priority often shifts to protecting the alleged perpetrator.

However, reaching out to law enforcement to file a report about a sexual assault in higher education is not subject to the same kinds of limitations faced by those in prison and the military. While the risks of derision and retaliation exist, members of higher education institutions are not wholly grounded in that system and therefore have a greater number of options. That said, one of the reasons we are compelled to classify higher education institutions as *quasi-closed systems* is because they all require forced interaction with perpetrators—in campus buildings, residence halls, and classrooms. Further, we recognize that potentially losing access to one's education and severing ties with the institution to which one has an established loyalty is patently unfair and complicates notions of free choice.

In addition to the systemic issues inherent in reporting and investigation, powerful rape myths are likely to permeate the process. Rape myths are “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.”¹⁰¹ We have previously explored how these myths operate in prison to bar survivors from obtaining fair investigations of their allegations,¹⁰² and we believe that similar myths operate in military and educational systems, a more formal exploration of which is the subject of a future project. Some scholars

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>
[<https://perma.cc/7HLT-58SE>].

¹⁰⁰ See discussion *supra* note 11 and accompanying text on low reporting and prosecution rates.

¹⁰¹ Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 217 (1980).

¹⁰² *Bars to Justice*, *supra* note 7, at 563; see also Diana L. Payne, Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 J. RES. PERSONALITY 27, 59–68 (1999) (discussing six studies conducted to explore the structure underlying rape myths and to develop the *Illinois Rape Myth Acceptance Scale*).

note how the military laws encompass some of these rape myths by taking into account the “character and military service of the accused,” “the extent of harm caused,” “possible improper motives,” “reluctance of the accused to testify,” and “availability and admissibility of evidence.”¹⁰³ These requirements can operate to discredit a report when, for example, the perpetrator has an honorable reputation or the survivor doesn’t suffer a tangible physical injury. Interestingly, educational systems are the primary setting in which scholars have tested for rape myth acceptance, and find that “in the university system . . . students who are victimized face deeply institutionalized ‘rape scripts,’ ‘prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists’ that influence their sensemaking of sexual violence.”¹⁰⁴ Survivors who report in all three settings are routinely met with the response from those in positions of power that “no one will believe” them.¹⁰⁵ Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape survivors from ever reporting.¹⁰⁶

Myths requiring a “stranger rapist”¹⁰⁷ are irrelevant and inapplicable in all of these systems because their members all interact and know each other well. Much to the contrary of this widely-held myth, in each of these three settings the perpetrator is almost always known to the survivor. “For both college students and nonstudents, the offender was known to the victim in about 80% of rape and sexual assault victimizations.”¹⁰⁸

Further complicating the reporting of sexual violence is that the known perpetrators tend to be characterized as having upstanding, honorable or positive reputations given their respective places or statuses within the system. Or,

¹⁰³ Turchik & Wilson, *supra* note 71, at 272 (citing JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES II-25 (2008), <http://www.jag.navy.mil/documents/mcm2008.pdf> [<https://perma.cc/HE73-2V44>]; see also Kristen Houser, *Analysis and Implications of the Omission of Offenders in the DoD Care for Victims of Sexual Assault Task Force Report*, 13 VIOLENCE AGAINST WOMEN 961, 965 (2007) (noting the normalization of rape myths in the military environment).

¹⁰⁴ Banner, *supra* note 54, at 148.

¹⁰⁵ *Bars to Justice*, *supra* note 7, at 556 (discussing the prison system); see discussion *supra* notes 85–87 for the military context.

¹⁰⁶ Cantalupo, *supra* note 74, at 213 (citing FISHER ET AL., *supra* note 70, at 24).

¹⁰⁷ Cantalupo, *supra* note 74, at 220.

¹⁰⁸ SINOZICH & LANGTON, *supra* note 24, at 1.

they may have exclusive statuses that the institution seeks to protect—for example, athletes, higher ranked military officers, and correctional officers. Myths that women deserve to be raped are present across all three systems. These myths presume a survivor deserved or was asking for the abuse based on what she was wearing, whether she consumed alcohol, how she was acting and what she was doing, or her past sexual conduct. In both the military and higher education, survivors are often blamed for rape when they drink¹⁰⁹ or dress “provocatively.”¹¹⁰ In prison, sometimes it is simply their status or identity as an inmate that fosters a perception that they “deserved” abuse regardless of any specific actions or behaviors.¹¹¹

Taking into account the complex tensions surrounding loyalty at the institution level, survivor level, and investigation level across these institutions suggests that similar barriers may be at play in clouding our understanding of the dynamics of sexual abuse in these settings. Further, issues of retaliation, interaction with internal and external reporting, and rape myths all play a part, to differing extents, across these contexts. However, the takeaway from our discussion is that while there are similarities among institutions of higher education, prisons, and military, there are also important differences that are worth noting. Ultimately, we conclude that the similarities are not strong enough to characterize institutions of higher education as full-fledged closed systems, but this should also not necessarily discount their characterization altogether. The preceding discussion, taken together with the differences and caveats discussed below, help illuminate why higher education institutions should be conceptualized by legal scholars and others as “quasi-closed,” and as a related matter, what this means for a survivor’s access to alternative, external legal remedies.

¹⁰⁹ See Krebs, *supra* note 23, at 6-5 (noting the need for prevention programs to stress that women should not blame themselves for their sexual assault, even if the victim used substances prior to her sexual assault).

¹¹⁰ For a comprehensive discussion of the role that “provocative” behavior and dress plays in sexual harassment cases, see Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL’Y 125, 127-37 (2007).

¹¹¹ Half of those questioned in one survey stated that “society accepts prison rape as ‘part of the price criminals pay for wrongdoing.’” Charles M. Sennott, *supra* note 81; see also Sigler, *supra* note 81, at 563 (discussing indications that rape is viewed as a “feature of the criminal punishment”).

B. Caveats and Differences

One of the universal characteristics of closed systems according to Goffman is that individuals eat, sleep, and work in the system.¹¹² For military members and prisoners, this is true almost all of the time. The experiences of those in higher education, however, differ slightly from those in the military and prison because, relying on Goffman's definition, higher education members' lives are only immersed in the system *part* of the time. Many, but not all, college students reside in dormitories or other housing on or near campus. Though the authority of the university does not control their entire life it does indeed have far-reaching impact; this should not preclude classification entirely as a closed-system, but instead argues for the designation as a *quasi-closed system*.

One scholar argues that despite the prevalence of sexual violence and other common characteristics—like shared housing, the excessive use of alcohol, and socialization—the differences between higher education and traditional closed systems like the military are significant enough so as to reject comparisons in conceptualizing solutions.¹¹³ “These settings are strikingly different, however, when considering the problem of sexual assault.”¹¹⁴ We push back against this separation and the call for different legal treatment of sexual assault among institutions. In fact, this different legal treatment may actually deny survivors justice; we observe and predict positive effects from comparing systems to craft solutions.¹¹⁵

Most profoundly, differences surrounding the identity of the inhabitants separate educational institutions from prisons and the military. In prisons, uniquely, a member's presence is compulsory as a consequence of her disruption of social rules and laws. Upon entrance to prison, an individual is inherently perceived as “deviant”¹¹⁶ and she loses all other components of her identity besides that of inmate. These labels have a powerful detrimental impact if sexual violence is perpetrated, undercutting the credibility of survivors and perpetuating the belief that inmates perhaps deserved the

¹¹² Goffman, *supra* note 4, at 314.

¹¹³ Buchhandler-Raphael, *supra* note 73, at 347.

¹¹⁴ *Id.*

¹¹⁵ As but one poignant illustration of the argument in favor of comparing closed systems to craft solutions, colleges and universities have moved toward a dual reporting scheme similar to that found in the military. See Cantalupo, *supra* note 98, at 192–93.

¹¹⁶ Bars to Justice, *supra* note 7, at 530.

abuse as a component of the punishment for the crimes that got them there in the first place.¹¹⁷ The identity of a military member is also impacted upon entrance to that system. In that context, she is given a label that defines her rank and inherently shapes her identity, separating her from her military peers, and to some extent from those in the broader community. This phenomenon, however, is significantly less pervasive in institutions of higher education, where a student does not automatically lose her outside identity upon admission and is not subject only to the narrow rules, norms, and policies of the institution. Further, the “college student” identity that is conferred on her carries certain benefits and is easily shed.

The internal structures of educational institutions are also distinct from prisons and the military. There exists an extreme power imbalance in prisons between inmates and staff, and, in response to this imbalance, stringent rules and laws have been promulgated in almost every state, barring any sort of sexual activity between staff and inmate.¹¹⁸ When sexual violence does occur, the reporting, investigation, and punishment all take place within the prison itself by state actors, and the process remains almost entirely separate from the outside.¹¹⁹ Although police must be informed if the behavior constitutes a crime, the duty to initiate this involvement falls to prison officials.¹²⁰ The survivor must report, participate in investigation, and observe (administrative) punishment of her perpetrator from within the system she resides, and she has very limited access to resources outside the prison.¹²¹

¹¹⁷ Sennott, *supra* note 81.

¹¹⁸ “The reason why the federal government and almost every state have laws banning even ostensibly voluntary sexual contact between inmates and prison staff is that prisoners are deemed legally incapable of giving voluntary consent to sexual contact with their ‘keepers.’” McGuire, *supra* note 11, at 431.

¹¹⁹ See, e.g., MICH. DEPT OF CORR., POLICY DIRECTIVE NO. 03.03.140, PRISON RAPE ELIMINATION ACT (PREA) AND PROHIBITED SEXUAL CONDUCT INVOLVING PRISONERS (2017), https://www.michigan.gov/documents/corrections/03_03_140_559703_7.pdf [https://perma.cc/GK5H-BJRV].

¹²⁰ *Id.*

¹²¹ Although great strides have been made with the implementation of the Prison Rape Elimination Act, which attempts to address the ability of an inmate to report to a resource externally, prison policies may nonetheless restrict an inmate from directly calling the police: logistically, as but one example, they may have to go through prison officials to reach the telephone. See NAT’L PREA RES. CTR., THIRD-PARTY REPORTING UNDER THE PREA STANDARDS: A FACT SHEET FOR CORRECTIONS OFFICIALS, NATIONAL PREA RESOURCE CENTER (2014), <https://www.prearesourcecenter.org/sites/default/files/library/third->

This inherent power imbalance is also present in the military system, which is by design a hierarchical institution; scholars have examined sexual violence in prisons as compared to the military,¹²² and we recently engaged in this discussion ourselves.¹²³ The military is uniquely governed by its own complex system of laws and policies under the UCMJ that operate independent of oversight and guidance from the outside civil and criminal systems.¹²⁴ Because the UCMJ exclusively governs the crime of sexual violence, survivors have limited access to outside remedies; courts have continually struck down attempts to bring claims in Article III courts for sexual violence under the Feres “incident to service” standard.¹²⁵ Institutions of higher education, however, while not without some power imbalances (between professor and student, for example) and institution-specific policies, are not inherently characterized by the same sort of definitive structure as prisons and the military, and the power that does exist is manifested in different ways.

CONCLUSION: FUTURE STEPS

The civil legal system offers important opportunities for survivors of sexual violence to seek redress for the harms they suffer from the institutions in which they are situated, either in tandem with or in lieu of criminal, internal procedural, or civil rights causes of action.¹²⁶ This conceptualization requires a shift in consciousness surrounding sexual violence beyond simply situating rape as a crime best dealt with exclusively by the criminal law. Professor Swan explains, “Rape is most often thought of as a

partyreportingfactsheet.pdf [https://perma.cc/B7SR-RBML] (discussing reporting obligations that apply to third-parties, including prison officials). Agencies, however, “must provide inmates with access to at least one [outside] reporting option,” such as a police department, under 28 C.F.R. § 115.51, .151, .251, .351(b) (2016). *Id.* at 3 n.7.

¹²² Aprana Krishnaswamy Patrie, *No Place in the Military: The Judiciary’s Failure to Compensate Victims of Military Sexual Assault and a Suggested Path Forward Using Lessons from the Prison Context*, Note, 8 J. NAT’L SECURITY L. & POL’Y 119, 140–50 (2015).

¹²³ *Occupational Hazard*, *supra* note 8.

¹²⁴ Uniform Code of Military Justice, 10 U.S.C. §§ 807–946 (2012).

¹²⁵ *Feres v. United States*, 340 U.S. 135, 144 (1950). For a thorough discussion of the limitations imposed by the Feres doctrine, see *Occupational Hazard*, *supra* note 8.

¹²⁶ Our prison-based research focused on the impact of financial awards for the women class members of the case, *Neal v. Dep’t of Corr.*, 583 N.W. 2d 249 (Mich. Ct. App. 1998). See Sheryl Kubiak et al., *Do Sexually Victimized Female Prisoners Perceive Justice in Litigation Process and Outcomes?*, 23 PSYCHOL. PUB. POL. & L. 39, 39 (2017).

quintessential criminal wrong, as a violent crime that deviant, pathological strangers-in-bushes perpetuate, and thus one that is rightly punished through the full punitive weight of the state.¹²⁷ These ideas are internalized not just by society generally but by survivors themselves, suggesting that changing perceptions of what is even actionable—and how to do it—is a logical and necessary starting place.¹²⁸

This phenomenon gets at the core of our discussion: certain inherent aspects of closed systems, and even systems that are *quasi-closed*, impede the pursuit of justice. Each of the systems discussed is characterized by specific, albeit different, limitations on members' ability to hold accountable their respective institutions. In our earlier work, we devoted significant attention to the challenges faced by survivors in pursuing civil or tort causes of action in the prison and military contexts.¹²⁹ Due in large part to the insular nature and the lack of external oversight in closed systems, civil remedies are essential to protect the rights of those who live and work in closed systems.¹³⁰ One might surmise that members of a university may have better access to civil remedies than do prisoners (due to the stringent requirements of the PLRA in attempting to curb 'frivolous' lawsuits) and military members (who are required to utilize their own system of laws, the UMCJ, for complaints¹³¹), but in fact they also face significant limitations that narrow the avenues of justice.¹³² The *quasi-closed* status of higher education institutions facilitates the imposition of comparable limitations and complications that dictate the availability of legal options available to survivors of sexual violence.

¹²⁷ Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 KAN. L. REV. 963, 968–69 (2016).

¹²⁸ See Kubiak et al., *supra* note 6, at 3–6 (noting how victims may internalize certain rape myths).

¹²⁹ *Occupational Hazard*, *supra* note 8; see also NIC/WLC Project on Addressing Prison Rape, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody*, PREA RES. CTR. (Aug. 2009), <http://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawsfinal2009update.pdf> [<https://perma.cc/7TKL-LWQ9>].

¹³⁰ See discussion *supra* note 55; see also Amy Laderburg, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 353–58 (1998) (discussing why class action suits have been a successful and necessary remedy for women prisoners).

¹³¹ The District Court for the District of Columbia held that the UCMJ preempted a civil remedy in Article III courts. *Klay v. Panetta*, 924 F. Supp. 2d 8, 12 (D.D.C. 2013).

¹³² See discussion *supra* Part III.A.

As discussed earlier, existing federal law and Supreme Court jurisprudence make difficult the pursuit of civil rights causes of action under Title IX resulting in a messy and incohesive collection of legal options. There are many ways that Congress (and the courts) could respond that would open up these avenues of justice in important ways for survivors.¹³³ As one scholar notes, “[t]he limits of doctrinal reform suggest that the time has come for Congress to renew its commitment to gender equality and student safety.”¹³⁴ Congressional action could in fact eliminate the standard of deliberate indifference created by the courts, and further clarify the reach of Title IX.

The limitations of Title IX and the criminal law have created cause for exploration of other legal options. Indeed, sexual violence is also a tortious wrong, and “acknowledging that campus sexual assault is a tort, capable of redress in the private law system, also offers important conceptual insights for the campus sexual assault debate.”¹³⁵ To be sure, tort law is informative “about community standards, safety, [and] vindication” and also provides a public context that allows those who are harmed to tell their stories.¹³⁶ Despite its potential benefits, the option of utilizing tort law by survivors of sexual violence is often overlooked and underutilized in favor of exclusive reliance on Title IX.¹³⁷

Professor Tom Lininger discusses the trend in the broader community of survivors of sexual abuse using tort law to find justice.¹³⁸ He writes, “Rape survivors find that civil proceedings offer a number of advantages, including greater control, a wider range of remedies, and procedural

¹³³ This potential congressional action is the subject of a subsequent article.

¹³⁴ Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 132 (2010).

¹³⁵ Swan, *supra* note 127, at 965.

¹³⁶ JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 4 (2016).

¹³⁷ See Swan, *supra* note 127, at 968–70 (“Despite its increasing presence in criminal and antidiscrimination law, tort has been largely absent from the campus sexual assault conversation.”).

¹³⁸ See Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1567–73 (2008) (noting an increase in the number of lawsuits seeking damages for sexual assault since the 1970s). Though Lininger argues that there is a growing trend, other scholars continue to emphasize how tort law is underutilized by victims. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms & Constituencies*, 59 SMU L. REV. 55, 68–75 (2006) (discussing the “significant procedural, practical, and doctrinal advantages” that civil suits offer victims).

rules that are less favorable to defendants.”¹³⁹ For survivors of sexual violence in closed systems, however, sometimes tort law might be the only option, albeit with its own set of challenges, because of the shortcomings and failures of civil rights law and the criminal justice system.

Tort law in particular serves a myriad of ends, including deterrence and compensation for harm suffered and its potential to offer a mechanism to address and change wrongful practices.¹⁴⁰ It also can satisfy procedural justice by providing “a public forum within which plaintiffs and defendants can tell their stories.”¹⁴¹ Sometimes, a survivor needs to have her voice heard and experience validated. In explaining the utility of an approach beyond the criminal law, Professor Swan’s perspective is illustrative: “Title IX suffers from a similar new-kid-on-the-block syndrome, and has had difficulty establishing itself as a legitimate avenue of redress.”¹⁴² She suggests there is great potential that comes from coupling Title IX with the law of torts, offering varied and innovative ways to solve even those harms that have traditionally been addressed by the criminal justice system.

Scholars continue to suggest other kinds of reforms to address the widespread incidences of sexual violence in each of these systems individually,¹⁴³ but we go a step further in our conceptualization. We suggest that acknowledging the similarities among these systems and viewing them together offers a novel approach that encourages and advises widespread legal change. Specifically, this analysis leads to the suggestion that in developing response protocols, prevention measures, and legal strategies to address sexual violence in institutions of higher education, law and policy makers should very carefully consider the special *quasi-closed* characteristics of this system. We urge the exploration of tort law as a valuable and under-utilized tool of

¹³⁹ Lininger, *supra* note 138, at 1567 (arguing for changes in impeachment rules to make the simultaneous filing of civil and criminal causes of action for rape less complicated); *see also* Bublick, *supra* note 138, at 68–75 (pointing out the procedural difficulties that victims face in pursuing a criminal case).

¹⁴⁰ MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY* 15 (2010).

¹⁴¹ ROBBENNOLT, *supra* note 136, at 4.

¹⁴² Swan, *supra* note 127, at 971.

¹⁴³ *E.g.*, Karen Oehme, Nat Stern & Annelise Mennicke, *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 338, 357–71 (2015) (suggesting an increase in the number of female officers on campuses).

redress for survivors¹⁴⁴ and see potential in future congressional action that might help break down the silos among institutions and streamline legal actions for survivors of sexual violence in such settings.¹⁴⁵

It is not the intention of this Essay to advocate for specific reforms, as this is something we will take up later and hope we inspire others to do. Instead, we seek to highlight the spaces in which such work might occur against the backdrop of Chief Justice Rehnquist's aspirational words about what ought to be the norm within a civilized system of justice. We contemplate in the preceding paragraphs some of the multitude of ways that this special *quasi-closed* designation might make an impact, but ultimately see this as a beginning, not end, of an important conceptual shift toward more effectively addressing the national problem of sexual violence on college campuses and within other closed institutional settings.

¹⁴⁴ See Swan, *supra* note 127, at 967 (noting that tort is generally not a utilized remedy for campus sexual assault).

¹⁴⁵ While we acknowledge the failure of VAWA's civil rights remedy after the *Morrison* decision, there are other mechanisms by which solutions might be derived. See *supra* pp. 28–29.