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Seeking Relief: The Range of Theories of Liability Under Which Survivors of Sexual Assault Bring Litigation Against Their Universities

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I. Introduction

Sexual assault[1] on college campuses has become an epidemic. It is widespread, harmful, and seemingly incurable in terms of both its causes and its effects. First, it is far-reaching. Studies suggest that between twenty and twenty percent of women at undergraduate institutions experience rape or sexual assault through physical force, violence or incapacitation.[2] Second, it is near impossible for survivors of sexual assault to ever attain relief or seek justice. Survivors rarely pursue criminal charges against their assailants and when they do, these often prove inadequate.[3] Specifically, survivors who are college students also have the option of pursuing disciplinary

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[1] Throughout this Comment, "sexual assault" will be used to encompass all types of sexual harassment, sexual violence, and rape.

[2] David Cantor, Bonnie Fisher, Susan Chibnall, Reanna Townsend, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N OF AM. U., 13-14 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

[3] Studies show that eighty percent of student rapes and sexual assaults were not reported to the police. U.S. Department of Justice, Special Report, *Rape and Sexual Assault Victimizations Among College-Age Females, 1995–2013*, 9, U.S. DEP'T OF JUST. (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. There can be many different reasons for why a survivor would not report her assault to the police including desire to not relive the trauma, fear that she will not be believed or fear of retaliation by the assailant. Further, "[o]f those student victims who do report, few will see the assailants held accountable. Law enforcement has a well-documented history of doubting allegations of sexual assault and failing to complete investigations." Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call to Victim's Attorneys*, 65 Drake L. REV. 293, 318-19 (2017). The inherent problem with sexual assault cases is that there is often very little evidence and many cases turn into he-said-she-saids. Additionally, as is often the case in the context of college students, alcohol is involved and this factor discredits much of any possible evidence. Then, "even in cases in which a prosecutor does move forward, most perpetrators will not serve time in prison." *Id*. Recently, in 2015, the judge in *People v. Turner*, in which a Stanford swimmer was convicted of raping an unconscious woman behind a dumpster, handed down a sentence of only six months jail time with three years probation. No. B1577162, 2016 WL 3442308, (Cal. Super. May 23, 2016). Turner, however, will likely on serve three months in prison. *See* Veronica Rocha, *Former Stanford Swimmer Likely to Serve Only Half of 6-month Sentence for Sexual Assault*, L.A. TIMES (Jun. 9, 2017), http://www.latimes.com/local/lanow/la-me-ln-brock-turner-jail-release-20160609-snap-story.html

actions against their attackers through their university.[4] Survivors, however, do not have much more success in educational discipline either.[5]

As a result, survivors are left without a plausible avenue of attaining relief against their universities. Therefore, many instead seek to hold the universities themselves accountable. Not only are survivors more successful against the universities, but also the perpetrators of sexual assault are not the only parties at fault; the universities themselves contribute to the culture under which these attacks run rampant and, in effect, permit these attacks to continue.[6] Additionally, universities are responsible for the harm that comes after the initial attack, what some scholars refer to as the "second rape," which includes how an administration responds to the victim's allegations.[7] This continued trauma has severe consequences on survivors. These effects can include health problems such as sexually transmitted diseases, anxiety, eating disorders, post-traumatic stress disorder, lowered academic achievement, increased risk to engage in binge drinking and drug use, and in some cases suicide.[8] Therefore, in recent years much of the litigation resulting from campus sexual assault has been in the civil arena against the universities themselves.[9] Many of these cases are pursued under Title IX.[10] Even under this theory of liability,

[4] Throughout this Comment, "university" will be used to describe all universities, colleges, and other four-year secondary education institutions.

[5] Students are rarely expelled for sexual assault. *See* Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—with U-Va. a Prime Example*, THE WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.237bcfc96a96.

[6] *See* Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 359 (2015) ("[T]he most effective way to stop campus sexual assault is to confront the reality of its perpetration, identify the cultural components that enable its normalization, and build the institutional capacity of schools to prevent and address it.").

[7] *See* Behre, *supra* note 3. Specifically this second rape occurs when "organizations and individuals engage in victim-blaming attitudes, behaviors, and practices." *Id*. at 325.

[8] *See* Lisa Fedina, Jennifer Lynne Holmes, and Bethany Backes, *How Prevalent Is Campus Sexual Assault in the United States?*, National Institute of Justice, 277 NIJ J. (2016), https://www.ncjrs.gov/pdffiles1/nij/249827.pdf.

[9] *See generally* Cody Nelson, *Why Colleges Can Punish Sexual Assault Better Than the Courts*, MPR NEWS (Dec. 21, 2016), https://www.mprnews.org/story/2016/12/21/why-colleges-can-punish-sexual-assault-better-than-the-courts.

[10] *See e.g.*, Doe v. Baylor Univ., 240 F. Supp.3d 646 (W.D. Tex. 2017); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007); Moore v. Regents of the Univ. of Cal., No. 15-cv-05779-RS, 2016 WL 4917103 (N.D. Cal. Sept. 15, 2016).

however, survivors must overcome many obstacles before they can succeed.[11] Therefore, in an attempt to optimize their chances of success, survivors have begun to pursue claims under alternative theories of liability including those grounded in both contract and tort law.

The pending class action litigation against Baylor University illustrates the range of theories of liability under which survivors are pursuing claims against an university in an attempt to attain relief. In *Doe v. Baylor University*, ten female university students who were sexually assaulted while enrolled as students at Baylor University from 2004–2016 brought a class action against the University, asserting claims for violation of Title IX, negligence, and breach of contract.[12] All ten plaintiffs asserted similar claims alleging that university officials dismissed them, discouraged them from pursuing further action against their assailants, failed to adequately investigate their assaults, failed to ensure that plaintiffs would not be subjected to continuing assault and harassment, and misinformed them of their rights.[13] As a result, the plaintiffs experienced varying degrees of mental health complications, which led to decreased academic performance, in some cases loss of scholarship funds and financial aid, and, for many, led to withdrawal from the University.[14] The court found that each plaintiff had plausibly alleged such facts that comported with these allegations and therefore denied Baylor's motion to dismiss.[15] The court also held that many of these claims did not violate the statute of limitations, finding that the claims did not accrue until the media shed light on the breadth of sexual assault on Baylor's campus in spring 2016.[16]

However, the court dismissed plaintiffs' claims of negligence and breach of contract.[17] It found that Texas courts have not found that a special relationship exists between a university and

[11] *See infra* Part II.
[12] 240 F. Supp. 3d 646 (W.D. Tex. 2017).
[13] *Id.* at 654–56.
[14] *Id.*
[15] *Id.* at 660–61.
[16] *Id.* at 663.
[17] *Id*. at 669.

its students.[18] Furthermore, the court noted that plaintiffs failed to identify a specific provision that would give rise to a claim of breach of contract.[19] This case is important because it is the largest Title IX case ever brought and a judge recently allowed it to continue.[20] Additionally the publicity this has generated is promising in that it may attract attention again to the problem and universities may self-impose improvements to their systems to avoid the same treatment as Baylor is currently receiving.[21]

This Comment will analyze the rise of sexual assault on college campuses and how the judicial system has failed to accord relief to the victims. Part II will begin by examining the jurisprudence thus far, including successful cases under Title IX liability and unsuccessful attempts as well. Part III will analyze cases brought under torts-based theory of liability including negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Part IV will assess cases brought under contract theories of liability including breach of contract and breach of the Consumer Protection Act. Part V will then determine which of these theories offers to best chance of success for victims and how these new trends will affect sexual assault jurisprudence overall. This Comment is strictly confined to the discussion of student-on-student sexual assault and rape that occurs in the context of university. This Comment will not address questions of potential criminal liability for those accused or criminal penalty for those convicted. Moreover, this

[18] *Baylor*, 240 F. Supp. 3d at 667 (citing Boyd v. Tex. Christian Univ., Inc., 8 S.W.3d 758, 760 (Tex. App.1999)).
[19] *Id*. at 668.
[20] *See* Sarah Mervosh, *Judge Allows Largest Title IX Lawsuit Against Baylor to Move Forward*, DALLAS NEWS (Mar. 7, 2017), https://www.dallasnews.com/news/baylor/2017/03/07/judge-allows-largest-baylor-title-ix-lawsuit-move-forward-opens-path-victims-join
[21] *See* Marc Tracy and Dan Barry, *The Rise, Then Shame, of Baylor Nation*, THE NEW YORK TIMES (Mar. 9, 2017) https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html ("[T]he allegations of sexual assault by Baylor football players have multiplied, causing incalculable damage to the university's reputation and leading to resignations and firings, including those of the president, the football coach and the athletic director. The crisis has left alumni apoplectic, students outraged, donors turning on one another, and the Board of Regents bracing for the next blow."); Tovia Smith, *How Campus Sexual Assault Came to Command New Attention,* KUOW.ORG (Aug. 12, 2014), https://perma.cc/9Z4T-MKWB.

Comment does not address private causes of action against the accused and in cases of alleged wrongful accusation, those instances where accused proceed against their accuser.

II. Title IX Liability

A. History of Title IX

As part of the United States Education Amendments, Congress adopted Title IX in 1972.[22] Its main proposition states, "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."[23] Title IX therefore applies to all universities that receive federal funding and are therefore subject to its requirements.[24] Title IX is enforceable at the administrative level under which the Office of Civil Rights can bring an action against a university for noncompliance.[25] The Department of Education can also enforce Title IX provisions by leveraging institutions' funding.[26] However, "the Department has never withdrawn funding from an institution for noncompliance."[27] The Supreme Court first found an implied private right of action for individuals to enforce the mandates of Title IX in 1979.[28] Later, the Court further held that monetary damages are available in the implied private action.[29]

Originally, the constraints of Title IX were not construed as an avenue for liability for sexual assault.[30] However, as Title IX jurisprudence expanded, this became a possible route for survivors

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[22] 20 U.S.C. § 1681 (2012).
[23] *Id*.
[24] *See* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 (1999); only three colleges or universities in the entire country do not receive federal funding. Joe Dryden, David Stader, & Jeanne L. Surface, *On Sexual Assault & The Law: Two Perspectives: Title IX Violations Arising from Title IX Investigations: The Snake Is Eating Its own Tail*, 53 IDAHO L. REV. 639, 668 (2017).
[25] Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 292 (1998).
[26] This is permissible under Congress' spending power. U.S. CONST. art. 1, § 8, cl.1.
[27] Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 79 (Winter 2017).
[28] Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).
[29] Franklin v. Gwinnett Cty. Pub. Schools, 503 U.S. 60 (1992).
[30] Title IX was originally adopted as way to combat discriminatory practices in educational employment. The History, Uses, and Abuses of Title IX, https://www.aaup.org/file/TitleIXreport.pdf.

to pursue. The Supreme Court first declared in 1986 that sexual harassment is a form of sex discrimination.[31] Not until 1992, did the Court recognize that sexual harassment fell under Title IX.[32] In *Davis v. Monroe County Board of Education*, the Court specifically addressed school liability in the context of sexual harassment.[33] It ultimately held that there is a private damages action under Title IX against a school where there has been student-on-student harassment only "where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit."[34] This holding became the standard for peer sexual assault cases against Title IX recipient schools.

B. Elements of a Title IX Claim

Actions against a university for violations of Title IX in the context of peer sexual assault generally fall into one of two types. The first is claims based on an official policy of discrimination.[35] This type of claim alleges that there exists a form of institutionalized discrimination in areas such as admissions, scholarship administration, or athletics.[36] The second is claims based on an institutions actual notice of and deliberate indifference to sexual harassment or assault.[37] This type of claim alleges that sexual harassment within a school "is a form of sex discrimination when the harassment is so severe, pervasive, and objectively offensive that it deprives the victim of educational opportunities or benefits provided by the school."[38]

[31] Meritor Sav. Bank, FSB v. Vinson, 447 U.S. 57 (1986).
[32] Franklin v. Gwinnett Cty. Pub. Schools, 503 U.S. 60 (1992).
[33] 526 US 629 (1999).
[34] *Id.*
[35] Doe v. Baylor Univ., 240 F. Supp. 3d 646, 657 (W. D. Tex. 2017).
[36] *Id*. at 658.
[37] *Id*. at 657.
[38] *Id*. at 658 (citing Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999)).

In recent years, much of the litigation has been of the type in the second category, in which the plaintiff is required to prove four elements.[39] The first is that the defendant must be a Title IX funding recipient.[40] The second element is that an "appropriate person" must have actual knowledge of the discrimination or harassment that the plaintiff has alleged occurred.[41] Case law has further elaborated that such an "appropriate person" is "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."[42] Therefore, "[a] recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action."[43] The third element is that the funding recipient is liable only if it acts with "deliberate indifference to known acts of harassment in its programs or activities."[44] Additionally, the institution's deliberate indifference must have a causal relationship to the harassment suffered.[45] This element seeks to constrain the scope of liability to circumstances in which the institution had control over the harasser and the situation in which the harassment took place.[46] Lastly, the fourth element is that the discrimination must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[47]

C. Success of Title IX Litigation

Many of the Title IX claims have been successful. Several claims brought against universities under theories of violation of Title IX allege that the universities exercise deliberate indifference

[39] *See, e.g.*, Weckhorst v. Kan. St. Univ., 241 F. Supp. 3d 1154, 1164 (D. Kan. 2017); Doe v. Baylor Univ., 240 F. Supp. 3d 646, 659 (W.D. Tex. 2017); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).
[40] *Weckhorst*, 241 F. Supp. 3d at 1164.
[41] *Baylor*, 240 F. Supp. 3d at 659.
[42] Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 290 (1998); Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 966 (N.D. Okla. 2016) (explaining "this requirement aims to ensure that schools are only held liable for official decision, rather than for their employees' independent actions.").
[43] Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644 (1999).
[44] *Id*. at 648.
[45] *Id*. at 645.
[46] *Id*. at 644 ("The language of Title IX itself . . . also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.").
[47] *Id*. at 633.

in how they responded to students' accusations of sexual assault.[48] Courts have held schools responsible for failing to inform survivors of their rights, failing to take allegations seriously, and not working with survivors to aid in the recovery process.[49]

Mainly these types of suits are effective because they raise the threat of a large monetary judgment. For example, in *Simpson v. University of Colorado Boulder*, the University ultimately paid $2.5 million to the plaintiff.[50] Yet, most petitioners do not simply want the money, but rather they seek some sense of recognition by the university of their culpability.[51] Instead, the real hope is that, even if it is only the threat of a large pay out, universities will begin to rethink their practices and adopt better procedures that will improve responses to sexual assaults.[52] Another part of the settlement in *Simpson* was that the school hired a Title IX analyst and fired University officials, including the President of the University and the football coach, responsible for encouraging the type of discriminatory policy the court found.[53] Similarly, in *Williams v. Board of Regents of University System of Georgia*, part of the settlement was that the University had to establish an Office for Violence Prevention on campus.[54] This is important because by weeding out those that

[48] *See, e.g.*, Ross v. Univ. of Tulsa, 180 F.Supp.3d 951, 965 (N.D. Okla. 2016); Facchetti v. Bridgewater Coll., 175 F.Supp.3d 627, 637–38 (W.D. Va. 2016); Doe v. Baylor Univ., 240 F.Supp.3d 646, 660 (W.D. Tex. 2016).
[49] *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (2007); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282 (2007).
[50] 500 F.3d 1170 (10th Cir. 2007); 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 (Fall 2011).
[51] *See* Behre, *supra* note 3, at 326 ("The survivors shared a goal of gaining validation from their communities, including an acknowledgment of the basic facts of the assault and the harm it caused them…Second, victims wanted vindication in the form of community denunciation of the crime, moving the stigma of shame from them to the perpetrator.").
[52] *See* Davis Next Friend LaShonda D. v. Monroe Ct.y Bd. Of Educ., 526 U.S. 629, 680-81 (1999) (Kennedy, J., dissenting) ("There are no damages caps on the judicially implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts.").
[53] Cantalupo, *supra* note 50.
[54] 477 F.3d 1282 (11th Cir. 2007).

have been compliant which such actions, it reflects an attempt to change the system and culture, not to just punish the individuals.

Under President Obama's administration, changes were made to strengthen Title IX in an attempt to combat sexual assault on campuses as the recognition of the pervasiveness of this problem increased.[55] President Obama created a federal task force to protect students from sexual assault and the Office of Civil Rights (OCR) became more active and instituted investigations into several universities.[56] The White House also issued the "Not Alone" report, a forty-six-page document consisting of questions and answers issued by the OCR and the task force.[57] But the most important measure was the *Dear Colleague Letter* the OCR in the Department of Education released. The letter explicitly outlines that sexual harassment is a form of discrimination prohibited by Title IX and that schools have certain responsibilities in this regard.[58] These obligations include a prompt investigation;[59] a preponderance of evidence standard;[60] the obligation to take interim measures to protect the complainant as the investigation is in progress.[61] The *Dear Colleague Letter* acted as a catalyst for the reform movement. Following its release, the OCR also been more involved.[62] However, the lasting consequences have not all been beneficial.

[55] *See generally* Juliet Eilperin, *Biden and Obama Rewrite the Rulebook on College Sexual Assaults*, WASH. POST (Jul. 3, 2016), https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html?noredirect=on&utm_term=.839a15fb798a.

[56] Memorandum from the White House Office of the Press Secretary, Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a.

[57] NOT ALONE: The First Report of the White House Task Force to Protect Students, April 2014, https://www.justice.gov/ovw/page/file/905942/download

[58] Letter from U.S. Dept. of Edu., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[59] *Id*. at 9.

[60] *Id*. at 10–11.

[61] *Id*. at 15–16.

[62] The Chronicle of Higher Education currently reports that 355 investigations brought by the OCR of colleges for possibly mishandling reports of sexual violence remain open. *Title IX: Tracking Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUC., https://projects.chronicle.com/titleix/

Through increased litigation, the failures of this version of Title IX have been exposed.[63] Many blame the *Dear Colleague Letter* as emphasizing these flaws.[64] Most critics highlight the potential violations of due process rights of accused students including the preponderance of evidence standard, lack of a neutral and independent decision maker, too broad of a definition of sexual harassment, and prohibition on appeals.[65] There has been an influx of litigation brought against universities by students who were disciplined by the university for committing sexual assault.[66] These students argue that they have been discriminated against and that the processes used by universities in handling allegations of sexual assault are unfair.[67] Many blame universities for "overcorrecting" after being accused of being too dismissive of these allegations following the *Dear Colleague Letter*.[68] Recently, courts have found in favor of plaintiffs in these types of cases, signaling an acknowledgement of the deficiencies of this conception of Title IX.[69] However, these improvements have in some ways hindered the progress of survivors' ability to attain relief. Although they highlight the inherent deficiencies in the system, they also enforce stereotypes surrounding sexual assault that contribute to its pervasiveness, specifically those of not believing

[63] Harvard Law School professors released a manifesto expressing their concern with the disciplinary procedures at universities and the threat they posed to individuals' rights. Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX*, HARVARD LAW SCHOOL (Aug. 21, 2017), https://dash.harvard.edu/handle/1/33789434.

[64] Years before the *Dear Colleague Letter*, however, these same potential problems were contemplated by the dissent in *Davis*. 526 U.S. 629, 677–83 (1999). Justice Kennedy warned that allowing a private right of action in this context would lead to a flood of litigation. *Id*. Justice Kennedy further argued that this was essentially pointless because no matter how a school responded, litigation could ensue regardless. *Id*. He argued, "[o]ne student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process." *Id*. at 682.

[65] Bartholet, *supra* note 63.

[66] *See* T. Rees Shapiro, *Expelled for Sex Assault, Young Students Are Filing More Lawsuits to Clear Their Names*, THE WASH. POST (Apr. 28, 2017) https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html?utm_term=.27ec501ba5fa ("Since 2011, more than 150 lawsuits have been filed against colleges and universities involving claims of due-process violations during the course of Title IX investigations and proceedings related to sex-assault allegations.").

[67] *Id.*

[68] Buzuvis, *supra* note 27.

[69] *See, e.g.*, Doe v. Regents of Univ. of Cal. San Diego, No. 37-2015-00010549-CU-WM-CTL, 2015 WL 4394597 (Cal. Super. Ct. July 10, 2015); Doe v. Univ. of S. Cal., 200 Cal. Rptr. 3d 851, 877 (Ct. App. 2016); Doe v. Brandeis Univ., No. 15-11557-FDS, 2016 WL 1274533, at *4 (D. Mass. Mar. 31, 2016).

allegations and victim blaming.[70] Yet, there are real concerns about these procedures and it must be acknowledged that all people have rights and these allegations have very real and long-lasting effects on accused students as well as the victims.[71]

III. Contract Liability

As the probability of success under Title IX theory of liability has dwindled, survivors have sought other avenues through which to attain relief. Recently, these new theories of liability have been based in contract law. Students have brought claims against their universities for breach of express and implied contracts.[72] Some courts have found that the student handbook constitutes a binding contract between the university and students.[73] Other students have attempted to use their scholarship and athletic agreements with universities as a basis for contractual liability. For example, in *Ruegsegger v. Board. of Regents of Western New Mexico University*, the plaintiff who attended Western New Mexico University (WNMU) on an athletic scholarship brought suit against

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[70] SAVE OUR SONS, http://helpsaveoursons.com/ (last visited Apr. 20, 2018) (continuing to perpetuate the myth that allegations of rape are often false).

[71] This threat was realized and catapulted into the national attention in 2014 following the release of the controversial Rolling Stone article, *A Rape on Campus*. Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), http://web.archive.org/web/20141119200349/http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119. The article detailed a horrific tale of a female student at the University of Virginia who was gang raped by new members of a fraternity. *Id*. However, as this story was further investigated, numerous journalistic failures were realized which lead to a formal investigation by the Columbia School of Journalism. *See* Shelia Coronel, Steve Coll, and Derek Kravitz, *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405. The sources were never confirmed and many of the facts did not align. *Id*. As a result, the magazine withdrew the article and the fraternity (and many others implicated in the story) brought suits against the journalist and the magazine for defamation. *See* Camila Domonoske, *Fraternity Members' Defamation Case Against 'Rolling Stone' Can Proceed, Court Says*, NPR (Sept. 19, 2017), http://www.npr.org/sections/thetwo-way/2017/09/19/552090031/fraternity-members-defamation-case-against-rolling-stone-can-proceed-court-says; T. Rees Shapira and Emma Brown, *Rolling Stone Settles with Former UVa. Dean in Defamation Case*, THE WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/local/education/rolling-stone-settles-with-u-va-dean-in-defamation-case/2017/04/11/5a564532-1f02-11e7-be2a-3a1fb24d4671_story.html?utm_term=.9e26d1f365cd. This case highlights the very real consequences of false or not completely true allegations. Many of the members of the accused fraternity had threats issued against them and suffered from embarrassment as a result. *See generally* Austin Siegemund-Broka, *Rolling Stone Sued for $25M by Fraternity Implicated in Rape Story*, THE HOLLYWOOD REP. (Nov. 9, 2015) https://www.hollywoodreporter.com/thr-esq/rolling-stone-sued-25-million-838548.

[72] *See, e.g.*, Doe v. Amherst Coll., 238 F. Supp.3d 195 (D. Mass. 2017); Stanton v. Univ. of Maine Sys., 773 A.2d 1045 (ME 2001); Shank v. Carleton Coll., 232 F.Supp.3d 1100 (D. Minn. 2017).

[73] *Amherst*, 238 F. Supp.3d at 215.

the University after two WNMU football players raped her.[74] The action included claims for violation of Title IX, intentional infliction of emotional distress, breach of contract and breach of the implied covenant of good faith and fair dealing.[75] Although the court agreed that plaintiff's athletic scholarship agreement constituted an enforceable contract,[76] the court also found that it did not oblige the University to follow the University's polices and procedures, including those as applied to sexual harassment and sexual assault.[77] Only the plaintiff was bound to comply.[78]

Sexual assault survivors' parents have themselves attempted to bring lawsuits against universities as parties to a contract with the universities. In *Stanton v. University of Maine*, the parents of a high school student who attended the University during an accelerated summer program and participated in their soccer program alleged that she was raped in the dorms.[79] The parents alleged that they entered into an agreement with the University in which the University "agreed, for consideration, to provide room and board for their daughter . . . and that pursuant to that agreement the University expressly or impliedly was obligated to provide a safe and secure environment and to take all reasonable steps for the protection and safety of the minor student."[80] However, the court disagreed and found that no such contract existed and even if one had, there were no particular terms the parties had assented to in such a contract.[81]

Overall, breach of implied or express contract claims have been unsuccessful. The main issue has been establishing a valid contract.[82] "Regardless of the assurances and promises about safety and services communicated in marketing materials, courts have repeatedly held that except where

[74] 141 N.M. 306 (2006).
[75] *Id*.
[76] *Id*. at 310.
[77] *Id*. at 311.
[78] *Id*.
[79] 773 A.2d 1045 (ME 2001).
[80] *Id*. at 1051.
[81] *Id*.
[82] *See, e.g.*, *Stanton*, 773 A.2d; Shank v. Carleton Coll., 232 F.Supp.3d 1100 (D. Minn. 2017).

the parties explicitly contract, marketing and promotional materials do not form the basis of a valid enforceable contract—either express or implied—to provide a safe or secure campus."[83] Therefore, survivors have looked to other areas of contract law to seek relief. Recently, in a line of cases in Kansas, plaintiffs have alleged that universities violated the state's Consumer Protection Act.[84]

In these cases, plaintiffs argue that the University falsely marketed their school, and specifically dormitories, as safe.[85] Therefore, petitioners were falsely misled and seek a refund.[86] This argument was first asserted in *Tackett v. University of Kansas*.[87] Here, the plaintiffs were parents of the victim of sexual assault who brought a class action against the University of Kansas for violation of the Kansas Consumer Protection Act (KCPA).[88] The court dismissed the action, and found that the parent-plaintiffs did not have statutory standing to sue because they were not parties to the contract since the students themselves had signed.[89] Therefore, the parents did not meet the definition of consumers as provided in the KCPA.[90] Additionally, the court found the student-plaintiffs also lacked standing to seek declaratory or injunctive relief because they did not allege that they were in danger of a present or future danger and thus were not "aggrieved consumer[s]."[91]

[83] Eric A. Hoffman, *Taking a Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save Their Students?*, 29 GA. STATE UNIV. L. REV. 539, 556 (Winter 2013).
[84] *See, e.g.*, Tackett v. Univ. of Kan., No. 2016-CV-103, 2017 WL 3190353 (Kan. Ct. App. May 8, 2017); Weckhorst v. Kan. St. Univ., 241 F. Supp.3d 1154 (D. Kan. 2017); KS Stat § 50-623 (2012).
[85] *Tackett*, 2017 WL 3190353; *Weckhorst*, 241 F. Supp.3d at 1175.
[86] *Id*.
[87] *Tackett*, 2017 WL 3190353.
[88] *Id*.
[89] *Id*.
[90] *Id*. at *1.
[91] *Id*. at *2.

Other cases were brought under the same theory of liability but the individual survivors themselves brought them.[92] For example, a student-plaintiff alleged that Kansas State University (KSU) misrepresented fraternities as safe and that it "made these representations when it knew or had reason to know (1) of many incidents of sexual assault at its fraternities, (2) that it would refuse to investigate such assaults, and (3) that the statements it made were misleading."[93] Plaintiff pointed to promotional materials about the University's Greek Community describing Greek life as "a safe and fun way to maximize the college experience."[94] Under the KCPA, a party must state with particularity the circumstances constituting fraud, including time, place, and contents of the false misrepresentation and the identity of the party making it.[95] Plaintiff failed to meet this requirement.[96] Additionally, under the KCPA, a plaintiff must allege that she is an "aggrieved consumer" meaning that she suffered some injury as a result of the violation, thus incorporating a statutory causation element.[97] Plaintiff here did not allege that she relied on KSU's representation.[98] Thus, the court dismissed the plaintiff's claim under the KCPA.[99]

Even though neither attempt has thus far been successful under the KCPA claims, this new theory of liability may have opened up a new avenue of sexual assault based civil litigation.[100] Moreover, these two cases have shown future plaintiffs what mistakes not to make in their own complaints. For example, when alleging fraud, plaintiff must state with utmost particularity the

[92] Weckhorst v. Kan. St. Univ., 241 F. Supp.3d 1154 (D. Kan. 2017). Plaintiff also asserted claims under Title IX and negligence. *Id*. at 1164, 1178.
[93] *Id*. at 1175.
[94] *Id*. at 1159.
[95] *Id*. at 1176.
[96] *Id*. at 1177.
[97] *Id*. at 1177–78.
[98] *Weckhorst*, 241 F. Supp.3d at 1177-78.
[99] *Id*. at 1178.
[100] *See* Dan Marolies and Laura Ziegler, *Lawsuit Against KU Over Sexual Assault Takes Novel Legal Approach*, KCUR 89.3 (Mar. 14, 2016), http://kcur.org/post/lawsuit-against-ku-over-sexual-assault-takes-novel-legal-approach#stream/0.

exact statements made, when they were made, and who made them.[101] Additionally, plaintiffs must demonstrate that they are an "aggrieved consumer" under the statute.[102] These new types of claims are important because they once again demonstrate that plaintiffs are desperate to find some way to attain relief and that the other avenues available to them have been continually unsuccessful.

IV. Tort Liability

Many plaintiffs asserting claims for violations of Title IX also assert tort-based claims, including negligence, premises liability, and infliction of emotional distress.[103] In order to establish negligence, the plaintiff must prove: (1) there is a duty owed to plaintiff by the defendant; (2) that the defendant breached the duty; (3) that the breach proximately caused the plaintiff's alleged injury; and (4) that the plaintiff was in fact injured.[104]

A. Problems of Establishing Duty

In the context of sexual assault, most negligence claims fail the first prong because plaintiffs are unable to establish a duty. Generally, a duty does not arise to protect individuals from the conduct of another or prevent intentional criminal acts of a third party.[105] However, one exception to this principle is that a duty arises when there is a special relationship between the parties.[106] For example, a special relationship exists between parent and child, teacher and student,

[101] *Weckhorst*, 241 F. Supp.3d at 1177.
[102] *Id*.
[103] *See, e.g.*, Ross v. Univ. of Tulsa, 180 F.Supp.3d 951 (N.D. OK 2016); Facchetti v. Bridgewater Coll., 175 F.Supp.3d 627 (W.D. Va. 2016); Doe v. Emerson Coll., 153 F. Supp. 3d 506 (D. Mass. 2015); Doe v. Baylor Univ., 240 F. Supp. 3d 646 (W.D. Tex. 2017).
[104] 57A AM. JUR. 2D *Negligence* §71 (2018).
[105] RESTATEMENT (SECOND) OF TORTS § 215 (AM. LAW INST.1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the action and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relationship exists between the actor and the other which gives the other a right to protection.").
[106] *Id*.

and landlord and tenant.[107] In some states, courts have found that there exists a special relationship between universities and students by nature of this dynamic.[108]

Yet, multiple courts have held that there is no such special relationship.[109] For example in *Ross v. University of Tulsa*, a female student alleged that a member of the University's basketball team raped her.[110] The alleged assailant here had a history of prior sexual assault including previous allegations of raping a student at College of Southern Idaho, where he previously attended, and two other rape accusations at the University of Tulsa.[111] The plaintiff argued that the University had a special relationship to the assailant and thus was liable under a theory of negligence.[112] Oklahoma recognizes a duty to protect from a third party's actions if three factors are met.[113] A plaintiff would have to prove that: (1) the university exercised control over the assailant; (2) that the university had actual or constructive knowledge of the risks he posed; and (3) that the plaintiff's rape was foreseeable.[114] The court ultimately found that no such duty existed.[115] First, even though the university exercised some disciplinary control over the assailant it is not to the same level as other scenarios in which there is a duty, such as mental institution or other custodian scenario.[116] Second, the university did not know nor should it have known of past incidents of sexual harassment and assault committed by the assailant.[117] Lastly, because the

[107] RESTATEMENT (THIRD) OF TORTS § 40 (AM. LAW INST. 2016).
[108] *See* Mullins v. Pine Manor Coll., 389 Mass. 47, 54 (1983) ("Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students . . . it is quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students."). The court grounded this finding of duty in social customs and values. *Id*. at 51. Perhaps, then, one explanation as to why many other courts have not held the same is because these values and customs have changed over time.
[109] *See* Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951 (N.D. Okla. 2016); Tanja H. v. Regents of Univ. of Cal., 228 Cal.App.3d 434 (1991).
[110] 180 F. Supp. 3d at 959.
[111] *Id*. at 957-59.
[112] *Id*. at 974.
[113] *Id*. at 975.
[114] *Id*.
[115] *Id*. at 977.
[116] *Ross*, 180 F.Supp.3d at 975.
[117] *Id*. at 976 –77.

University was unaware of the assailant's past: "T[ulsa] U[niversity] lacked sufficient information . . . to give rise to a foreseeable 'zone of risk' that extended to Ross's rape."[118]

Ross is an example of the growing reconceptualization by the court of the relationship between a university and its students.[119] No longer do courts follow the *in loco parentis*—in place of parent—doctrine.[120] In recent decades the courts have instead declared that a university is not responsible for the safety of its students and that the dynamic between the administration and students has changed.[121]

However, some courts have found a duty when classifying the student-university relationship in a different way. These could include "custodian-charge" duty, "business-invitee", "landlord-tenant", or "protector-protectorate."[122] For example in *Nero v. Kansas State University*, the court found that the University owed the student a duty of reasonable care based on its landlord-tenant relationship with both the victim and alleged assailant.[123] Other courts have found a similar duty exists yet the duty is not always violated depending on the facts.[124] In *Nero*, the assault took

[118] *Id*. at 977.
[119] *See, e.g.*, Nero v. Kan. St. Univ., 253 Kan. 567 (1993) ("A university is not an insurer of the safety of its students nor does it police student morality.").
[120] *See id*. at 580 ("The in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."); Johnson v. State, 77 Wash. App. 934, 939 (1995) ("College attendance is not mandatory. College students are adults and generally are not in the protective custody of their parents. The policy reasons underlying the applicability of the doctrine do not exist for college students."); Hoffman, *supra* note 83, at 553; *see generally* Peter F. Lake, *The Rise of Duty and the Fall of in Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 3–8 (1999).
[121] Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) ("[T]he modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades."); *see also* Tanja H. v. Regents of Univ. of Cal., 228 Cal. App. 3d 434 (1991).
[122] Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 974 (N.D. Okla. 2016).
[123] 253 Kan. 467, 583 (1993) ("KSU is a landlord furnishing housing to its students in competition with private landlords. It owes a duty of reasonable care to its tenants."). In general, a landlord has no duty to protect an invitee from a third party's criminal act unless the act is reasonably foreseeable. *Id*. at 584. Given the circumstances of the past incident of sexual assault, the court found that a jury could reasonably find that the current attack was foreseeable. *Id*.
[124] *E.g.*, Doe v. Emerson Coll., 153 F.Supp.3d 506 (D. Mass. 2015) (holding that the University owed a special duty to students housed in on-campus housing but that that duty did not extend to protect students while off campus); Facchetti v Bridgewater Coll., 175 F.Supp.3d 627 (W.D. Va. 2016); Johnson v. State, 77 Wash. App. 934 (1995)

place in a co-ed dormitory and therefore the duty was implicated. However, if the assault takes places off-campus then this duty is not violated and there is no available avenue for relief.[125] Similarly, plaintiffs have also attempted to use premises liability as a route to attain relief against the university.[126]

Other courts found that a duty existed by classifying students as business invitees.[127] Yet this liability extends only to what is "reasonably foreseeable and under the university's control."[128] This further narrows the scope of when a court will find a duty.[129] Courts have differed over whether they find that the assault was foreseeable or not.[130] However, it seems contrary to the reality of sexual assault to find that this is not foreseeable. Additionally, courts are at times hypocritical in terms of this analysis. Sometimes courts says that sexual assault is not foreseeable,[131] yet other times courts admit that sexual assault is inevitable.[132] Further, in determining foreseeability, and similar to the actual notice standard in Title IX claims, courts continue to focus on specifics, instead of the general problem.[133] Nowadays, it is an unfortunate reality that sexual assault is foreseeable for any female student attending university. In essence,

(holding that university owed student duty of reasonable care by virtue of her status as an invitee; however, also holding that plaintiff failed to establish breach of that duty).

[125] *See Emerson*, 153 F. Supp. 3d at 515 ("Emerson owed a special duty to Doe as a student housed in a facility on its campus" but that "duty did not extend so far as to require Emerson to protect her when she voluntarily left the campus and attended a party that was not affiliated in any way with Emerson.").

[126] *See, e.g.*, Tanja H. v. Regents of Univ. of Cal., 228 Cal. App. 3d (1991); *Facchetti*, 175 F. Supp. 3d.

[127] *See, e.g.*, Vega v. Sacred Heart Univ., 836 F. Supp. 2d 58 (D. Conn. 2011); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001); *see also* Hoffman, *supra* note 83, at 558, n.120.

[128] Nero v. Kan. St. Univ., 253 Kan. 567, 780 (1993).

[129] *See* Weckhorst v. Kan. St. Univ., 241 F. Supp. 3d 1154 (D. Kan. 2017) (finding that the university did not have substantial control over context of alleged sexual assault of student).

[130] *Compare* Mullins v. Pine Manor Coll., 389 Mass. 47, 51 (1983) (describing sexual assault as "self-evident"), *with Facchetti*, 175 F. Supp. 3d at 644 (finding lack of foreseeability when there had been no prior allegations of sexual assault against specific perpetrator).

[131] *Mullins*, 389 Mass. at 51.

[132] *See Tanja H.*, 228 Cal.App.3d at 438 ("As campuses . . . have become microcosms of society . . . unfortunately, sexually degrading conduct or violence in general and violence against women in particular are all too common within society at large.").

[133] *See Facchetti*, 175 F. Supp. 3d at 644 ("The five assaults, none of which are alleged to have been perpetrated by Vest, simply do not create the same level of foreseeability of harm.").

there should be an automatic presumption of foreseeability.[134] Some courts have also found that these crimes are foreseeable given the safety precautions universities have instituted to ward against them.[135]

B. Problems Establishing Breach and Causation

Yet establishing duty is only half the battle. For the most part, even if a duty is found to have existed as a matter of law, plaintiffs still need to adequately prove the other four elements of a negligence claim.[136] A student plaintiff must also then prove that the university breached the duty and that this breach proximately caused the plaintiff's injuries.[137] In establishing both breach and causation, there is often the problem of proving that a specific act done by the university or university officials directly contributed to the harm the victim suffered. It is difficult in these situations to pin point actions that could have been taken by the school to avoid the harm from taking place.[138] For example in *Tanja H. v. Regents of University of California*, a student brought an action alleging premises liability, a form of a negligence claim.[139] While at a party in a residence hall one night, the plaintiff was forced into a stairwell and was forcibly raped by another student.[140] The court recognized the duty of the University as akin to that of an innkeeper by virtue of the university's role as "operator of a dormitory used as living quarters by students."[141] In part, plaintiff argues that because there was a shattered light in the stairwell where she was assaulted,

[134] *See e.g.*, *Mullins*, 389 Mass. at 51 ("The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident.").
[135] Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (M.E. 2001); this acknowledgement can also serve as another argument for establishment of a duty—that the universities voluntarily assumed such a duty. *Mullins*, 389 Mass. at 50-53; RESTATEMENT (SECOND) OF TORTS § 323 (1965).
[136] 57A AM. JUR. 2D *Negligence* §71 (2018).
[137] *Id*.
[138] *See, e.g.*, *Facchetti*, 175 F. Supp. 3d at 644 ("It is unclear how Facchetti could plausibly establish causation here, particularly where she invited Vest to her room and invited him to stay while she slept.").
[139] 228 Cal. App. 3d 434, 439-40 (1991).
[140] *Id*. at 436.
[141] *Id*. at 438.

the university, as landlord, is liable.[142] The court dismissed this argument finding that "there was no meaningful causal connection here between failing to more quickly fix a shattered light bulb and the sexual assault."[143] Ultimately the court dismissed plaintiff's claim for failure to state a claim.[144] As a result of holdings like these, plaintiffs have generally been unsuccessful when asserting tort-based claims against universities.[145]

V. Viability and Efficacy of Title IX, Contract, and Tort-Based Theories of Liability

A. Problems with the "Actual Knowledge" Standard in Title IX

The standard to prove a violation of Title IX, particularly the "actual knowledge" prong, may be too high and act as a systematic bar of relief to victims. One reason why this standard is unworkable is because it is unclear and there is still great variation among district courts about how to meet this standard. Some circuits have followed a less stringent standard and instead of requiring actual knowledge of the specific parties, have found evidence of similar types of harassment occurring in the past to be sufficient.[146] Second, this standard is problematic because it is so high.[147] It places too great a burden on the plaintiff to put forth evidence that is most likely impossible to show. Additionally, this standard appears to be excessively high because in cases brought by the OCR, instead of private actions, courts use a constructive knowledge standard.[148]

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[142] *Id*. at 439.
[143] *Id*.
[144] *Id*. at 441.
[145] *But see* Mullins v. Pine Manor Coll., 389 Mass. 47, 58 (1983) (finding expert witness testimony that "deficiencies of the college's security system were a substantial cause of the attack" to be sufficient to establish causation.).
[146] Facchetti v. Bridgewater Coll., 175 F. Supp. 3d 627, 640 (W.D. Va. 2016) (citing Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007) and Mathis v. Wayne City, Bd. of Educ., 782 F. Supp. 2d 542, 549 (M.D. Tenn. 2011)).
[147] Doe v. Baylor Uni., 240 F. Supp. 3d 646, 659 (W.D. Tex. 2017) (quoting Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 290 (1998) ("For a school to be said to have 'actual knowledge' of harassment, an 'appropriate person—an official of the recipient entity with authority to take correction action' must have both actual knowledge of the harassment and an 'opportunity to rectify any violation.'")
[148] *Gebser* announced two different standards and in 2001, OCR guidance indicated that they would use a lesser standard. 524 U.S. 274, 290-91 (1998). *See also* Understanding How and Why Title IX Regulates Campus Sexual Violence, United Educators, Problems and Protection for Education, 3, https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf

The biggest problem with the actual knowledge standard is that it incentivizes schools to remain aloof.[149] As long as universities can plausibly claim deniability, they will escape liability because the actual knowledge element will not be met. Therefore, the standard results in an unfair burden on victims and provides yet another impenetrable hurdle in their path to relief.

As a whole, it is difficult to satisfy the elements of a Title IX claim. The court in *Davis* stated that this was done purposefully to preserve the flexibility with which schools are afforded in determining how to discipline their students.[150] The "deliberately indifferent" standard can only be met by a clear showing of a response that is clearly unreasonable.[151] This standard is not met by failure to follow past or best practices.[152] Even if a school does not follow its own policies, this does not automatically satisfy the deliberate indifference standard.[153] The court purposely made this standard higher than the reasonableness standard.[154] However, even the Supreme Court itself has suggested that the standard may be burdensomely too high.[155] Many survivors are unable to succeed under this theory of liability because even though some plaintiffs have been successful, this is usually when there are egregious facts.[156] Yet, studies reveal sexual assault is very common

[149] *See* Cantalupo, *supra* note 47, at 220 ("[T]he peer sexual violence problem will persist until schools make sure that they have knowledge about what is actually occurring among their students, and schools will not acquire that knowledge until the law requires them to do so, or at least until the law does not encourage them to do the opposite.").
[150] Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).
[151] *Id*.
[152] Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 969 (N.D. Okla. 2016).
[153] *Id*.; Facchetti v. Bridgewater Coll., 175 F.Supp.3d 627, 637 (W.D. Va. 2016).
[154] *Davis*, 526 U.S. at 649; this standard requires "a showing of a response that was more deficient than merely 'negligent, lazy or careless." Moore v. Regents of the Univ. of Cal., No. 15-cv-05779, 2016 WL 4917103 (Sept. 15, 2016 N.D. Cal.) (citing Lopez v. Regents of Univ. of California, 5 F. Supp. 3d 1106, 112 (N.D. Cal. 2013)).
[155] *See* Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 304 (1998) (Stevens, J., dissenting) ("Presumably, few Title IX Plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard."); *see also* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007) ("We do not think that the notice standards established for sexual-harassment claims in *Gebser* and *Davis* necessarily apply in this circumstances.").
[156] *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1179-81 (10th Cir. 2007) (alleging that as part of the University's football program, recruits were encouraged to rape female students); Williams v. Bd. of Regents of Univ. Sys. Of Ga., 477 F.3d 1282, 1288 (11th Cir. 2007) (alleging that two members of the school's basketball team gang raped a female student in the dorm).

and occurs more frequently than just these in these extreme cases. Hence, Title IX may not be the best to address the reality and frequency of sexual assault on university campuses.

B. Tort-based Theories of Liability Present an Area of Hope for Survivors—or false hope?

Tort-based theories of liability may offer real promise to survivors as a possible way to achieve relief against universities. Because most sexual assaults take place on campus in university housing and most take place between peers, there is an increased probability that the university thus owes a duty to the student-victims.[157] On its face, there seems to be ample support for success,[158] yet in reality this is not the case. Some scholars suggest that courts are hesitant to hold universities accountable and that much of this sentiment is a byproduct of old-school thinking of how to view sexual assault and its core causes.[159]

One benefit to tort-based theories of liabilities is that it acknowledges the role the university has in creating and condoning the environment that gives way to sexual assault. The inherent elements of a tort claim, including duty, breach, causation, and damages, specifically highlight the connection between a university's actions and the harm caused to the victim. Whereas, Title IX mostly handles the school's conduct after an incident of sexual assault is reported and does not address the conditions creating the environment that leads to sexual assault. [160] In order for there

[157] A 2014 study conducted by the Department of Education found that eighty-two percent of sexual assaults occurred in dormitories. Campus Safety and Security Data Analysis, U.S. Dep't of Educ. (2014), https://perma.cc/HTW7-AN5Z.

[158] *See infra* Part IV.

[159] *See* Andrea Curio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 58 (Winter 2017) ("Both *Facchetti* and *Tanja H*. illustrate judicial reluctance to hold institutions accountable and an unwillingness to view the problem as one of institutional failure rather than one of individual bad actors.").

[160] This possibility also exists under Title IX theory of liability but the facts are more difficult to prove. A university can be held liable for a violation of Title IX when it exhibits deliberate indifference either before an attack that makes a student more vulnerable to the attack itself or after an attack that causes a student to endure additional harassment. Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 965 (N.D. Okla. 2016). A plaintiff would have to show "that the school has 'actual knowledge of a substantial risk of abuse to students based on prior complaints by other students.'" *Id*.; *but see* Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1296 (11th Cir. 2007); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1181-85 (10th Cir. 2007).

to be a preventative effect, other theories of liability are better suited in providing relief for victims.[161] Tort-based theories of liability may also be better in achieving more than just monetary relief, such as deterring sluggish behavior and incentivizing compliance protocols.

Therefore, it is not only the increased likelihood of success for plaintiffs who pursue claims under tort law, but also this causal link that is implicated that make these types of claims promising. This link is important to the greater fight against sexual assault and can shine a much-needed light on the realities of the situation and its causes. A few bad individuals do not cause the epidemic of sexual assault, rather this is an institutional failure that has been allowed to perpetuate for too long. Recognition and admission of guilt is the real goal because no amount of money will truly grant relief to survivors.

Emily Doe, the survivor from the Brock Turner case from Stanford University, wrote a statement she read to the court, detailing the lasting effects that her rape will have on her for the rest of life.[162] She wrote:

> I tried to push it out of my mind, but it was so heavy I didn't talk, I didn't eat, I didn't sleep, I didn't interact with anyone. After work, I would drive to a secluded place to scream. I didn't talk, I didn't eat, I didn't sleep, I didn't interact with anyone, and I became isolated from the ones I loved most . . . . My independence, natural joy, gentleness, and steady lifestyle I had been enjoying became distorted beyond recognition. I became closed off, angry, self deprecating, tired, irritable, empty . . . . You cannot give me back the life I had before that night either . . . . He is a lifetime sex registrant. That doesn't expire. Just like what he did to me doesn't expire, doesn't just go away after a set number of years. *It stays with me, it's part of my identity, it has forever changed the way I carry myself, the way I live the rest of my life.*[163]

[161] *See* Curio, *supra* note 159, at 41-42. (suggesting that the location of assaults matters and that since the majority of assaults occur in dorms, such litigation could highlight failures of universities to ensure safety of student housing and could also lead to an increase in educational efforts, including educating students on reality of sexual assault in college so that they can be more aware and act accordingly).
[162] Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED (Jun. 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.hva7WjjON#.ukeAeLLpm.
[163] *Id*. (emphasis added).

From these sentiments, it is clear that to some degree the relief many survivors seek cannot be obtained in a court. However, this statement also illustrates the devastating harm that these assaults cause and should raise the pressing need to find some sort of solution. This is a solution in which the courts can and should have an active role.

C. Possible New Sources of Duty

By looking at sexual assault jurisprudence as a whole, perhaps there is a possibility to combine past holdings to find a new way to support a finding of duty. For example, if the assault takes place on campus, the landlord-tenant relationship can be implicated or if the school has specifically taken measures to prevent sexual assaults, plaintiffs could possibly argue that the university has assumed the duty. An increased recognition of this duty could lead to more success for plaintiffs and also more concrete safety measures that universities can employ. Specifically, for tort-negligence claims grounded in the landlord-tenant relationship, perhaps now schools will have to institute increased security measures on dorms.[164] This would be great progress because it could provide a more plausible avenue of relief for survivors and hopefully actually deter more assaults from happening in the future.

Another way to establish duty could be to show that the university has created the risk of harm. Although a somewhat circular argument, a plaintiff may be able to combine with Title IX principals and show that through its deliberate indifference to claims of sexual assault, universities have materially contributed to the danger posed to students, particularly females, by sexual assault. When universities continue to inadequately respond to claims of sexual assault, the inadequate responses create a culture of complicity. As a result, more attacks are likely to occur because the

[164] *See* Curio, *supra* note 159, at 34 ("negligence claims based upon IHEs' failure to engage in meaningful dorm-based risk reduction efforts may focus attention on institutional failures that need to be addressed and consequently may result in self-regulatory reform.").

attackers are unlikely to fear repercussions. Under tort law, an actor owes the duty of reasonable care when that actor creates the risk of harm.[165] Therefore, universities would have a duty to protect students from this harm.

A duty may also be imposed on college athletes. One possible avenue is if college athletes start to receive monetary compensation as some proponents are currently campaigning for.[166] This could provide another possible theory of liability under which survivors of sexual assault could pursue claims against the university if their assailants are athletes because now the university would be implicated through its new relationship with the student-athlete as employer-employee. Student-athletes overwhelmingly commit sexual assaults and while of course they are not the only perpetrators, they also appear to be the group that universities go to the fiercest lengths to protect and thus there is the most discrimination towards victims in these situations.[167] Examples include *Doe v. Baylor University*,[168] *Simpson v. University of Colorado Boulder* (where sexual assault was deemed a part of the university's football recruitment process),[169] and the recent Florida State University settlement in which the plaintiff accused the quarterback of the football team and the Heisman winner of raping her.[170] This is not a viable option, however, until athletes get this

[165] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. LAW INST. 2010)
[166] *See, e.g.*, Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS AND WORLD REPORT, Jan.6, 2014, https://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid.
[167] *See* Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 117-18 (Winter 2017) ("Some of the most egregious stories of institutional failure and the re-victimization of complainants involve reports of sexual assault by male athletes, particularly elite male athletes who are highly valued members of big-time university athletic programs. . . . Research has long found a connection between male intercollegiate athletic participation—particularly among elite athletes and in certain sports such as football—and involvement in sexual violence when compared to men in the general student body. The reasons for this correlation are unclear, but it may have something to do with the privileged treatment elite male athletes take for granted in an athletic culture that allows them to act out with impunity. University protection of accused athletes was such a frequent theme in OCR's enforcement experience that the 2011 DCL includes a specific directive to not allow athletic departments to internally handle allegations of sexual assault brought against athletes. And yet, a government report issued three years later found that twenty percent of the institutions surveyed were still permitting their athletic departments to internally investigate alleged sexual misconduct by athletes, notwithstanding OCR's instruction to the contrary.").
[168] 240 F. Supp. 3d 646, 657 (W. D. TX 2017).
[169] 500 F.3d 1170 (2007).
[170] Kinsman v. Fla. St. Univ. Bd. of Trustees, No. 16 FJVR 3-7, 2016 WL 1105439 (N.D. Fla. Jan. 25, 2016).

employee status. Yet, some scholars have suggested that the NCAA may also need to become involved in this fight.[171]

D. Assessment of Contract-Based Theories of Liability

Lastly, contract-based theories of liability are currently not a viable avenue through which survivors can realistically attain relief. Unfortunately, courts continue to remain reluctant to find that valid contracts exist and that contracts impose relevant obligations on universities.[172] However, if courts reconsidered the relationship of universities and their students, perhaps this would change. The judiciary needs a modernized understanding of college life and one that casts the relationship in the light of a business transaction. This characterization is in line with many of the courts' decisions to no longer recognize universities as *in loco parentis*.[173] Nowadays students do not just go to their local university. The admissions process is a lengthy and expensive right of passage high school seniors around the nation embark upon. Students now apply to an average of between five and eight schools.[174] Admission rates have declined and it is more difficult than ever before to get into the elite universities.[175] Therefore, when students are ultimately making the decision of which university to attend after this grueling process and when parents are deciding which institution to make their multi thousand-dollar investment in, it is a big decision that should not be taken lightly. Yet, courts are then reluctant to hold universities liable for their end of the bargain. It seems a bit hypocritical to both deny the personal relationship inherent in the college context and also deny the business one as well. Therefore, courts should give some type of

[171] *See* Jayma M. Meyer, *It's on the NCAA: A Playbook for Eliminated Sexual Assault*, 67 SYRACUSE L. REV. 357 (2017).
[172] *See infra* Part III.
[173] *See infra* Part IV.
[174] *See* Dan Edmons, *How Many College Applications Are Too Many?*, FORBES (Nov. 20, 2015) https://www.forbes.com/sites/noodleeducation/2015/11/20/how-many-colleges-should-you-apply-to/#4b60aa7049ef.
[175] *Id.*

protection considering magnitude of the decision to go to college and the significant financial investment that is often linked to that decision.

In forming a more realistic conception of university life, courts should also be more open to the idea of whether parents have standing because parents are also often injured in these types of contexts. Many parents of students are the parties footing the very high bill of higher education. If a university is going to permit, and, in some ways condone, sexual assault against their children this impacts the ability of the students to enjoy all benefits of the university. In some cases, the student drops out.[176] The parents then do not obtain the full extent of their financial investments. In this way, claims that embrace this part of the relationship, like the KCPA cases, could have great potential.

Survivors can also use Title IX itself to overcome the problem they encounter in establishing a valid contract. Some Justices have compared Title IX to a contract.[177] By accepting the federal funds, the universities are promising to oblige by the requirements of the statute. This perspective could form the basis for a valid breach of contract claim that would allow for a hybrid between the two theories of liability. If so, perhaps this could get survivors over that initial hurdle of establishing the existence of a valid contract and allow their claims to proceed under a lesser standard than that of a typical Title IX claim.

E. Problems Posed by Proposed Amendments to Title IX[178]

[176] *See e.g.*, Doe v. Baylor Univ., 240 F.Supp.3d 646 (W.D. Tex. 2017); Williams v. Bd. of Regents of Univ. Sys. Of Ga., 477 F.3d 1282, 1289 (11th Cir. 2007).

[177] Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 286 (1998) ("Conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."); *see also* Davis Next Friend LaShonda D. v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 655 (1999) (reasoning that "legislation enacted pursuant to the spending power is much in the nature of a contract") (Kennedy, J., dissenting) (quoting Pennhurst St. School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[178] Note that as of this writing, these amendments were still only proposals.

On September 22, 2017, Secretary of Education, Betsy DeVos, announced plans to alter Title IX and, specifically, to withdraw some of the changes made under the Obama Administration.[179] In addition, the department withdrew the *Dear Colleague Letter* and issued an interim Q&A guidance for schools on how to investigate and adjudicate allegations of sexual assault.[180] This new Q&A rescinds the previously suggested timeline and gives universities more flexibility in choosing a standard of evidence used in investigations.[181] The proposed changes will also allow for mediation, which was previously prohibited under Obama-era policy.[182] Democrats have criticized these changes for setting back the progress that has been made for survivors of campus sexual assault. Senator Patty Murray argued that this "could send sexual assault survivors 'back into the shadows.'"[183] However, critics on both sides had long been wary of the standard of proof element of the Obama era policies, particularly those of fairness and due process, and see this as further protection for accused students.[184] Rights of the accused must be taken into consideration especially when so much is at stake for them as well, including their future education and reputation.[185]

Although there has not yet been a completely workable policy, these new recommendations have their weaknesses as well. One concern is that these new procedures harm victims because in some ways, they reinforce cultural stereotypes and myths surrounding sexual assault that have

[179] *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, DEPARTMENT OF EDUCATION, Sept. 22, 2017, https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.
[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, THE ATLANTIC (Sep. 22, 2017), https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/
[184] *See generally* Stephanie Saul and Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, THE NEW YORK TIMES (Sep. 22, 2017), https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.
[185] *See infra* note 67.

disadvantaged progress for years. With a lower standard of proof, even less cases will reach the desired resolution. Others suggest that this higher standard of proof will incentivize universities to not discipline the accused.[186] Inherent in the problem is the automatic lack of proof. When looking at the reality of situations, most assaults are conducted by an acquaintance of the victim and alcohol is usually involved.[187] Already, these factors contribute to "bad" evidence. Removing the time restriction to complete investigations seems to only be less burdensome of the school and not aimed at helping students. But with responsibility comes burden. Schools have a responsibility to their students to properly investigate allegations and they must shoulder it. Lastly, by allowing mediation, this indicates that sexual assault is like any other dispute between students. Yet, sexual assault is not. It is a degrading and harmful crime that should be treated as such. Also, this can be problematic in terms of forcing the student to relive the trauma and many times, survivors are pressured to participate in mediation,[188] reinforcing the dismissiveness they already feel. Most importantly, policies must not play into the myth that most accusers are lying. Survivors need to be believed and more importantly, they must not be blamed.

VI. Conclusion

Each of these different theories of liability has its strengths and weaknesses. They each offer the hope of possibility and yet the reality of inadequacies. However, a study of all three of these different avenues exposes neither one is the solution. While litigation may bring some type of relief to the survivor and may threaten a university into action, judicial response will never

[186] Brake, *supra* note 167, at 132. There already exists to some extent an incentive for universities to not discipline accused students because in some way this admits that there exists a problem of sexual assault on their campuses. Universities will want to protect their reputations and in cases of accused student-athletes protect their profitable athletic programs.

[187] Studies show that in eighty-percent of rape and sexual assault accusations, the victim knew the offender. U.S. Department of Justice, Special Report, *Rape and Sexual Assault Victimizations Among College-Age Females*, 1995-2013, December 2014, https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

[188] *See* Saul and Taylor, *supra* note 184.

wholly address the root of the problem. In the end, societal change is needed to bring any real change. It is not just universities that permit a culture in which sexual assault is acceptable, but rather our nation as a whole. A quick look at pop culture and media indicates a tolerance of objectification of women and violence towards women.[189] It is not just fictional characters either that are permitted to act this way but our society permits that behavior in athletes, actors, and even our President.[190] In order to combat the problem of sexual violence on college campuses the nation as a whole must take a step back and reevaluate conceptions of gender. Yet, until this goal can be achieved, the judiciary should equally take responsibility for its role in the process and begin to rethink its conceptualization of the problem, seeking to do what it can to attempt to give victims of sexual assault the relief they so deserve.

[189] Social media platforms such as Barstool and Total Frat Move perpetuate the college culture that encourages equalization and objectification of girls and women. *See generally* BARSTOOL SPORTS, https://www.barstoolsports.com/ (last visited Apr. 20, 2018); TOTAL FRAT MOVE, https://totalfratmove.com/ (last visited April 20, 2018).

[190] *See e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER, Oct. 23, 2017, https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories; John Wagner, *All of the Women Who Have Accused Trump of Sexual Harassment Are Lying, the White House Says*, THE WASHINGTON POST, Oct. 27, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/10/27/all-of-the-women-who-have-accused-trump-of-sexual-harassment-are-lying-the-white-house-says/?utm_term=.568488c2e971; Nancy Armour, *NFL Draft Shows Teams Still Don't Care About Domestic Abuse*, USA TODAY, May 1, 2017, https://www.usatoday.com/story/sports/columnist/nancy-armour/2017/05/01/nfl-draft-domestic-violence-joe-mixon/101176656/