STRIKE THREE: CALLING OUT COLLEGE OFFICIALS FOR SEXUAL ASSAULT ON CAMPUS

Comment

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I. MISSED CALLS: THE DISMAL RESPONSE OF SCHOOL OFFICIALS TO SEXUAL ASSAULT ON CAMPUS

"There is nothing we can do . . . . There is no one who can see you now . . . . Sorry. No resources are available."[1] These sentiments reflect Baylor University's anemic response to undergraduate women who suffered sexual assault at the hands of a member of their esteemed football team.[2] Between 2011 and 2014, thirty-one different Baylor University football players allegedly committed fifty-two acts of rape or sexual assault, several of which were gang-rape situations.[3] Since then, the university has come under intense scrutiny for its handling of the situation both for the lack of disclosure and its failure to promptly and adequately investigate and deal with the alleged victims and perpetrators.[4] School officials at Baylor reportedly knew of the events, but failed to act to prevent them—and at times, even interfered with the investigation.[5] Coaches allegedly went so far as to tell players there were a plethora of "white women" that "love football players" at Baylor.[6] Additionally, court documents allege that football staff members encouraged the use of sex to sell the program, allowed the use of alcohol and drugs at parties during recruiting visits, condoned trips to bars and strip clubs, and financially supported off-campus parties where gang rapes allegedly occurred.[7] Furthermore, text messages reveal how the coaches attempted to protect players from legal trouble.[8] In response, Baylor fired both head football coach Art Briles and university president Ken Starr.[9] Baylor remains under investigation by federal and National Collegiate Athletic Association officials.[10]

While this constitutes a very high-profile incident, it is not uncommon for women across college campuses to be the victims of sexual assault.[11]

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1. Paula Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (July 13, 2017), http://www.espn.com/espn/otl/story/_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims.
2. *Id.*
3. Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes by Football Players in 4 Years, 'Show 'em a Good Time' Culture*, DALL. MORNING NEWS (Jan. 27, 2017, 7:28 PM), http://www.dallasnews.com/news/baylor/2017/01/27/new-baylor-lawsuit-describes-show-em-good-time-culture-cites-52-rapes-football-players-4-years.
4. Matthew Watkins, *Feds Investigating Baylor University for Handling of Sexual Assault*, TEX. TRIB. (Oct. 19, 2016, 5:00 PM), https://www.texastribune.org/2016/10/19/federal-agency-investigating-baylor-university-han/.
5. *Id.*
6. Mervosh, *supra* note 3.
7. *Id.*
8. Paula Lavigne & Mark Schlabach, *Art Briles, Baylor Assistants Kept Players' Misbehavior under Wraps*, *Legal Documents Reveal*, ESPN (Feb. 3, 2017), http://www.espn.com/college-football/story/_/id/18609288/art-briles-baylor-bears-assistants-buried-player-misbehavior-documents-say.
9. Watkins, *supra* note 4.
10. *Id.*
11. Kelly Wallace, *23% of Women Report Sexual Assault in College, Study Finds*, CNN (Sept. 23, 2015, 8:43 AM), http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/.

Unfortunately, these types of responses from school officials are not uncommon.[12] A school official at the University of Richmond told student CC Carreras, a sexual assault victim, "I thought it was reasonable for him to penetrate you for a few more minutes if he was going to finish," even though she claims she never consented to the act with the student-athlete.[13] While the University of Richmond denies this claim, another student came forward with a similar accusation regarding a botched handling of a sexual assault incident.[14] In addition, claims of sexual assault by athletes are rampant, including incidents at the University of North Carolina,[15] Vanderbilt University,[16] Stanford University,[17] the University of Missouri, Florida State University, and the University of Notre Dame.[18] In nearly all of these incidents, the accused held the much higher status of student-athlete within the school's hierarchy than did the traditional-student victim.[19] The reaction of these schools failed to assuage the concerns of the victims and failed to meet federal standards at times.[20] It is understandable why schools may want to salvage the reputation of their athletes in order to keep their talents present on the athletic roster—athletic programs are a major source of pride and revenue for schools.[21] Unfortunately, this effort seems to conflict with school officials' ability to properly, ethically, and fairly manage their respective schools and administer school policies, state law, and federal law.[22]

Women suffer at the hands of student-athletes who are sponsored by the school.[23] This Comment proposes a solution to rape culture on campus by holding those who are most directly in charge of campuses—the officials and

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12. Elise Vandersteen Bailey, *U Campus Group Demands Better Response to Sexual Assault*, DAILY UTAH CHRON. (Dec. 19, 2016), http://dailyutahchronicle.com/2016/12/19/u-campus-group-demands-better-response-sexual-assault/.

13. CC Carreras, *There's a Brock Turner in All O(UR) Lives*, HUFFINGTON POST (Sept. 6, 2016, 10:11 AM), http://www.huffingtonpost.com/entry/theres-a-brock-turner-in-all-our-lives_us_57ceca16e4b0b9c5b73a3c65. Ms. Carreras reports that her rapist participated in athletics at the university. *Id.*

14. Denis Slattery, *University of Richmond Students Protest Amid Reports of Campus Rape and the School's Abysmal Response*, N.Y. DAILY NEWS (Sept. 10, 2016, 6:02 PM), http://www.nydailynews.com/news/national/u-richmond-students-protest-campus-response-rape-article-1.2786923. There is nothing to suggest that the second rapist participated in athletics or any activity at the university. *Id.*

15. Daniel Marans, *UNC Student Accuses College of Protecting Football Player Who Allegedly Raped Her*, HUFFINGTON POST (Sept. 13, 2016, 4:18 PM), http://www.huffingtonpost.com/entry/unc-sexual-assault-accusation_us_57d83eeee4b09d7a6880018c.

16. JESSICA LUTHER, UNSPORTSMANLIKE CONDUCT: COLLEGE FOOTBALL AND THE POLITICS OF RAPE 123–26 (2016).

17. Joe Drape & Marc Tracy, *A Majority Agreed She Was Raped by a Stanford Football Player. That Wasn't Enough*, N.Y. TIMES (Dec. 29, 2016), https://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html?mcubz=1.

18. LUTHER, *supra* note 16, at 87–105.

19. *See supra* notes 13–17 and accompanying text (explaining similar situations among victims at multiple universities).

20. *See* LUTHER, *supra* note 16, at 87–105, 123–26; *see also* Drape & Tracy, *supra* note 17; Marans, *supra* note 15.

21. LUTHER, *supra* note 16, at 26–27.

22. *Id.* at 83–105.

23. *See infra* Section I.A (discussing the rampant sexual assault caused by student-athletes).

administrators—personally liable for the injuries suffered by female students on campuses. This Comment first discusses the current fabric of laws relating to sexual violence on college campuses, including Title IX, state law tort claims, and 42 U.S.C. § 1983.[24] Next, this Comment suggests possible solutions to the shortcomings in the current laws.[25] Ultimately, this Comment recommends a solution for attorneys and victims seeking justice and judges seeking to change the judicial response to sexual assault.[26]

A. Unnecessary Roughness: Rampant Sexual Assault on College Campuses and Its Relationship to Athletics

Sexual assault is any sexual conduct occurring without the consent of the recipient.[27] This includes acts such as rape, attempted rape, sodomy, and fondling.[28] These types of incidents are becoming increasingly common on college campuses across the country with as much as 23% of women reporting being sexually assaulted while in college.[29] These events have stimulated a debate on a new phenomenon known as rape culture—"an environment in which rape is prevalent and in which sexual violence against women is normalized and excused in the media and popular culture."[30] Athletic participation fosters the type of masculine aggression trademark of the sexually-aggressive culture.[31] In fact, "[a] startling 54 percent of . . . student-athletes admitted to committing at least one 'sexually coercive' act in their lifetime[] . . . ."[32] Coaches often delve deep into the personal lives of student-athletes during recruitment, which reveals a wealth of information beyond what is required for normal acceptance into the university.[33] Given the actions of coaches, athletic directors, and school officials bringing athletes to campus and student-athletes' propensity for sexual violence, schools must do more to adequately protect their students.

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24. *See infra* Part II (addressing the law regarding sexual assault on campus).
25. *See infra* Part II (proposing remedies to the current law).
26. *See infra* Part III (recommending a judicial solution).
27. *Sexual Assault*, U.S. DEP'T JUST., https://www.justice.gov/ovw/sexual-assault (last visited Oct. 15, 2017).
28. *Id.*
29. Wallace, *supra* note 11.
30. Women's Center, *Rape Culture*, MARSHALL U., http://www.marshall.edu/wcenter/sexual-assault/rape-culture/ (last visited Oct. 15, 2017).
31. Dave Zirin, *How Jock Culture Supports Rape Culture, from Maryville to Steubenville*, THE NATION (Oct. 25, 2013), https://www.thenation.com/article/how-jock-culture-supports-rape-culture-maryville-steubenville/.
32. Ed Cara, *Half of Male College Athletes Admit History of 'Sexually Coercive' Behavior Such as Sexual Assault, Rape*, MED. DAILY (June 2, 2016, 8:59 PM), http://www.medicaldaily.com/college-athletes-sexual-assault-rape-myths-388585.
33. *See generally* Jamie Newburg, *The Nick Saban Plan Has Many Followers*, ESPN (Apr. 21, 2011), http://www.espn.com/college-sports/recruiting/football/news/story?id=6403943.

B. The Ball Is in Their Court: Why Should Administrators and Officials Be Held Accountable?

From their position within schools and universities across the country, school officials and administrators are responsible for controlling the culture on campus and providing safety for their students.[34] They are responsible for investigating allegations and for properly treating victims.[35] In fact, they play a large role in the punishment of alleged perpetrators.[36] School officials also put into place measures to educate students of the dangers and consequences of sexual assault.[37] In the case of student-athletes, school officials are also responsible for maintaining eligibility, practice schedules, tutoring regimens, and workout sessions for student-athletes.[38] In most cases, they also specifically go through numerous, often extensive, actions to bring these students to campus for the designated purpose of playing on an athletic team.[39] For these reasons, the focus of this Comment will be on the role of school officials and administrators, including athletic coaches. These individuals must be held to a higher level of personal responsibility for protecting the safety of the students under their care. Officials and administrators not only are responsible for a plethora of student-athlete activities outside of the normal student-teacher relationship, they but also have a large impact on student-athlete selection of the university and enrollment at their school.[40] As such, personal liability should follow when these student-athletes commit violent crimes against other members of the school community.[41]

II. COVERING ALL BASES: EXISTING PROTECTIONS AGAINST SEXUAL ASSAULT ON CAMPUS

Today, there are three common claims made against schools and their officials after a sexual assault takes place on campus: (1) a violation of Title IX of the Education Act of 1972; (2) a state law tort claim; and (3) a violation of constitutional rights, actionable through 42 U.S.C. § 1983.[42] Yet, all of these claims protect different interests of victims, schools, and society, and

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34. *See generally* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
35. *See generally id.*
36. *See generally id.*
37. *See generally id.*
38. Pascale Elisabeth Eenkema van Dijk, *Student Athletes Balance Sports and Academics*, STAN. DAILY (Dec. 9, 2015), http://www.stanforddaily.com/2015/12/09/student-athletes-balance-sports-and-academics/.
39. *See generally* Newburg, *supra* note 33.
40. *See* Eenkema van Dijk, *supra* note 38.
41. *See infra* Section II.B (discussing Texas tort law claims).
42. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007); Doe v. Univ. of Tenn., 186 F. Supp. 788, at 798, 803, 809 (M.D. Tenn. 2016).

all have shortcomings that currently make them ineffective in protecting college students from the grave dangers of rape culture.[43] None provide a solid path to bringing the officials, administrators, or school personnel into court for their misconduct or negligence in managing their schools and universities, where students are at risk of becoming victims to particularly heinous crimes.[44] A new judicial interpretation, however, may provide relief for those affected victims.

A. Defensive Line: The Federal Government's Frontline—Title IX

Throughout the early 1960s and 1970s, "[a]s the women's civil rights movement gained momentum," gender bias and discrimination in education developed into a policy concern.[45] As women took more jobs in the workforce, at less pay, attention turned toward the quality of education received by women.[46] Several groups filed lawsuits against colleges, universities, and the federal government for restraining the growth of women in education.[47] In the summer of 1970, Edith Green chaired the Subcommittee on Higher Education of the Education and Labor Committee, which held hearings on the gender discrimination present in higher education.[48] Congresswoman Green tried unsuccessfully to add a bill regarding sex discrimination to the Education Amendments of 1971.[49]

Her efforts, however, were not in vain because, one year later, Senator Birch Bayh of Indiana introduced an amendment aimed to enable equality in education.[50] Senator Bayh explained that the purpose of the amendment was to fight "the continuation of corrosive and unjustified discrimination against women in the American educational system."[51] Senator Bayh illuminated the link between education and employment opportunities for women.[52] During the bill's congressional life, Senator Bayh reiterated that the purpose of the bill was not to create quotas but that an individual "be judged on merit, without regard to sex."[53] After months of smoothing out the details, a floor

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43. *See infra* Sections II.A–C (discussing the shortcomings of tort law regarding sexual assault on campus).

44. *Id.*

45. *Title IX: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, U.S. DEP'T JUST., https://www.justice.gov/crt/title-ix#II._Synopsis_of_Purpose_of_Title_IX,_Legislative_History,_and_Regulations (last visited Nov. 22, 2017) [hereinafter *Title IX: Synopsis of Purpose*].

46. *Id.*

47. *Id.*

48. *Edith Starrett Green*, U.S. HOUSE REPRESENTATIVES: HIST. ART & ARCHIVES, http://history.house.gov/People/Detail/14080 (last visited Oct.15, 2017); *Title IV: Synopsis of Purpose*, *supra* note 45.

49. *Title IV: Synopsis of Purpose*, *supra* note 45.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

amendment kept the bill from having quotas.[54] The resulting legislation became known as Title IX of the Education Act of 1972 (Title IX).[55] Congress intentionally derived Title IX from the language of Title VII of the Civil Rights Act of 1964 (Title VII).[56] Both of these statutes prohibit discrimination in activities that receive federal funds and assistance.[57] These similarities allow some case law from Title VII to be used in Title IX cases, including the use of Title VII as guidance for the evaluation of hostile environment claims.[58]

Since 1972, Congress has amended Title IX twice.[59] The first amendments, completed in 1974, directed the Department of Health, Education, and Welfare to create proposed regulations and ordered that those provisions apply to intercollegiate athletics.[60] Following, in 1988, Congress amended Title IX to apply the legislation to all aspects of federally funded institutional activities.[61]

The operative clause of Title IX 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."[62] The United States Supreme Court emphasized the two purposes for Title IX in *Cannon v. University of Chicago*: (1) limiting the use of federal resources for discriminatory purposes; and (2) providing individuals protection against such discriminatory practices.[63] Title IX provides equality for students,

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54. *Id.* Opponents of the bill claimed this would require specific ratios and quotas of male to female students, to which Senator Bayh responded, "[t]he thrust of the amendment is to do away with every quota." *Id.*

55. *See* 20 U.S.C. § 1681 (1986).

56. *See* 42 U.S.C. § 2000d (1964). Title VII "makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex" and is enforced by the Equal Employment Opportunity Commission. *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/statutes/index.cfm (last visited Oct. 15, 2017).

57. 20 U.S.C. § 1681; 42 U.S.C. § 2000d.

58. Rouse v. Duke Univ., 914 F. Supp. 2d 717, 723 (M.D.N.C. 2012). Hostile environment claims under Title VII "may include, but [are] not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work." *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Oct. 15, 2017). Title IX's protections pale in comparison to the protections of similar Title VII. *Title IV: Synopsis of Purpose*, *supra* note 45.

59. *Title IV: Synopsis of Purpose*, *supra* note 45.

60. *Id.*

61. *Title IX & Issues: History of Title IX: Title IX Legislative Chronology*, WOMEN'S SPORTS FOUND., https://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/history-of-title-ix/history-of-title-ix (last visited Nov. 22, 2017) [hereinafter *Title IX Legislative Chronology*]. The legislation's applicability to all aspects of the educational institutions' activities had previously been limited by *Grove City College v. Bell*, 465 U.S. 555 (1984). *Id.*

62. 20 U.S.C. § 1681.

63. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

regardless of gender, in sports; parenting and pregnancy-related issues; and science, technology, and math programs.[64]

Today, Title IX also applies to sexual harassment and sexual violence.[65] In 1997, Congress expanded Title IX to include sexual harassment and violence between students, after years of not claiming authority over cases of that nature.[66] In *Davis v. Monroe County Board of Education*, the Court held that an action for peer harassment was permissible when the harassment was severe and pervasive enough to bar the victim's access to an educational opportunity or benefit.[67] Title IX lays out a very specific method for schools to deal with sexual harassment and violence.[68] The Department of Education echoed that Title IX actions are required to deal with the pervasive problem of sexual violence, and therefore, to allow all students to feel safe and receive the full benefits of an education.[69]

To comply with Title IX, schools must have a designated Title IX Coordinator that addresses issues concerning gender discrimination.[70] Additionally, schools must investigate sexual violence claims immediately, conduct their own investigation using a preponderance of the evidence standard to decide guilt, and provide an appellate process for both parties.[71] Even student-on-student harassment that occurs off campus is subject to Title IX regulation, and the school must follow the same protocol for on-campus and off-campus complaints.[72] The school cannot discuss the prior sexual

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64. Office of Title IX, *Title IX: The Basics*, U. ARK. LITTLE ROCK, http://ualr.edu/titleix/titleix/title-ix-the-basics/ (last visited Nov. 22, 2017) [hereinafter *Title IX: The Basics*].

65. *Id.* Sexual harassment is defined as "any *unwelcome* conduct of a sexual nature." James R. Marsh, *What You Need to Know About Title IX*, TITLE IX ON CAMPUS, http://title9.us (last visited Nov. 22, 2017) (emphasis in original). "It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." Office for Civil Rights, *Dear Colleague Letter: Sexual Violence*, U.S. DEP'T EDUC. 3 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *Dear Colleague Letter*].

66. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 653 (1999). The Court previously chose not to hold the institution to be responsible for the acts of third-party students, but determined that, because the misconduct occurred during school hours and on school grounds, the misconduct took place under the operation of the institution. *Id.* at 646.

67. *Id.*

68. *See generally Dear Colleague Letter*, *supra* note 65.

69. *Id.* The letter points to a study finding that one in five women are victims of sexual assault or attempted sexual assault while in college, calling this "a call to action for the nation." *Id.*

70. S. Daniel Carter, *How to Comply with the Dept. of Ed's Title IX Sexual Violence Guidance*, CAMPUS SAFETY MAG. (Apr. 19, 2011), http://www.campussafetymagazine.com/article/How-to-Comply-With-the-Dept-of-Ed-s-Title-IX-s-Sexual-Violence-Guidance/P3#. Examples of such gender discrimination include: sexual harassment, gender-based harassment, belittling based on sex, catcalls and whistles, inadequate facilities based on sex, adverse treatment of pregnant students, and sexual violence. *Title IX: Sex Discrimination*, U. ARIZ., http://www.titleix.arizona.edu/sex_discrimination (last visited Nov. 22, 2017).

71. Carter, *supra* note 70. Claims include reports made by students of incidents violating Title IX, including those related to rape, sexual assault, sexual coercion, and sexual battery. *Id.*

72. *Dear Colleague Letter*, *supra* note 65. Because the effects of off-campus sexual harassment are often felt in the educational setting, the school has a continuing duty to students even when the harassment occurs away from the actual school grounds. *Id.*

history of the complainant with anyone other than the accused during a hearing.[73] Additionally, if a school knows or has a reasonable suspicion of any kind of behavior that might constitute harassment, violence, or discrimination resulting in a "hostile educational environment," it is required to act to remove the threat, remedy the situation, and prevent further instances of such activity.[74] After an incident, the school must take measures to ensure the victim is able to continue the victim's education free of any further incidents protected under Title IX.[75] These measures can include appropriate changes to housing, schedules, jobs, and other extracurricular activities and will usually include a no-contact order against the accused.[76] Title IX prohibits any retaliation toward the complainant from staff, faculty, or other students.[77] Title IX also requires that schools report to the Office for Civil Rights.[78] These reports should include all sexual harassment grievances, along with sufficient documentation of the investigation of each grievance.[79]

1. Flag on the Play: Remedies and Enforcement of Title IX

Failure to comply with Title IX can result in severe penalties for the institution.[80] Title IX has a dual-enforcement scheme in which a complainant can sue in civil court and also file a complaint with the Office of Civil Rights.[81] A complaint with the Office of Civil Rights can result in punishment as extensive as a complete loss of federal funding.[82] There are also avenues for those seeking redress to sue universities and colleges not in compliance with Title IX in civil court.[83] The Court clarified that, when a school falls below the standard set forth in Title IX, members of the protected class receive a private right of action under Title IX.[84] Essentially, this gives

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73. Marsh, *supra* note 65.

74. *Title IX: The Basics*, *supra* note 64. The United States Department of Education looks to whether there is conduct that is sufficiently pervasive or severe enough "to deny or limit a student's ability to participate in or benefit from the school's program based on sex." Marsh, *supra* note 65.

75. *Title IX: The Basics*, *supra* note 64.

76. *Id.*

77. Marsh, *supra* note 65. Retaliation can include threats, intimidation, or discrimination against a reporting individual. *Id.*

78. *Dear Colleague Letter*, *supra* note 65.

79. *Id.*

80. *Title IX*, TYLER JUNIOR C., http://www.tjc.edu/TitleIX (last visited Oct. 15, 2017).

81. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52 (2013).

82. TYLER JUNIOR C., *supra* note 80. The Office of Civil Rights has never once used its power to terminate funds. Henrick, *supra* note 81. The threat alone of sacrificing the money is enough to keep voluntary compliance. *Id.*

83. TYLER JUNIOR C., *supra* note 80.

84. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979). The protected class can include *anyone* that has been subjected to gender-based discrimination or harassment, including men and boys. *Title IX Protections from Bullying & Harassment in School: FAQs for Students*, NAT'L WOMEN'S L. CTR., http://nwlc.org/resources/title-ix-protections-bullying-harassment-school-faqs-students/ (last visited Oct. 15, 2017).

all students at a university or college the right to sue to enforce the rights guaranteed by Title IX.[85] Although Title IX did not expressly state such a claim, the Court held in *Cannon v. University of Chicago* that such a claim was within the legislative intent, was consistent with the efficient enforcement of Title IX, and was not a matter generally resolved by the states.[86]

Originally, injunctive relief was the sole remedy granted under Title IX.[87] This changed in 1992, when the Court ruled in *Franklin v. Gwinnett County Public Schools* that Title IX provided for monetary damages.[88] The Court in *Franklin* heard a case involving a high school teacher and coach harassing a student for four years while other faculty and staff made no effort to aid the student, and in fact, discouraged her from pressing charges against the teacher.[89] The Court presumed that any remedy was permitted unless the statute explicitly precluded such a remedy.[90] The Court held that where liability had been created, but no remedy existed, a common law action could be enforced.[91] Because Title IX did not foreclose monetary damages as a remedy, and the victim had no other reasonable remedy, the Court determined that Title IX provided for such relief.[92] In a claim for damages against a college or university, four elements must be met: (1) the institution is receiving federal funds; (2) the harassment is so severe that it prevents the victim from taking advantage of the institution's resources; (3) an official has reasonable knowledge and fails to respond; and (4) the institution's response amounts to deliberate indifference.[93]

Since its implementation, Title IX has greatly increased athletic and academic opportunities for women, just as it was designed to do.[94] It has not, however, been effective as a means for dealing with sexual violence.[95] Even in civil cases, plaintiffs bear a heavy burden to prove two of the elements

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85. *See Cannon*, 441 U.S. at 709 (1979).

86. *See id.* at 700.

87. *Title IX Legislative Chronology*, *supra* note 61. Injunctive relief, in this case, takes the form of a court order to take actions to stop sexual assault from occurring. *Title IX: The Basics*, *supra* note 64.

88. *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992).

89. *Id.* at 63–64.

90. *Id.* at 66, 76.

91. *Id.*

92. *Id.* at 73–76.

93. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); *see also* Davis v. Monroe Cty. Bd. of Ed., 526 U.S. 629 (1999) (applying the four *Gebser* elements).

94. NAT'L COALITION FOR WOMEN & GIRLS IN EDUC.: *TITLE IX AND ATHLETICS: PROVEN BENEFITS, UNFOUNDED OBJECTIONS* 7 (2017), http://www.ncwge.org/TitleIX40/Athletics.pdf. Since the inception of Title IX, female participation in high school sports has increased six-fold and females holding college degrees has increased by 20%. U.S. DEP'T JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 3 (June 23, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [hereinafter EQUAL ACCESS TO EDUCATION].

95. *See* Deborah L. Brake, *Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds*, 22 MARQ. SPORTS L. REV. 395, 409 (2012) (stating "legal scholars have bemoaned the limits of Title IX in its approach to sexual harassment in education").

required of a hostile educational environment: an official with actual authority had *actual* knowledge and responded with *deliberate* indifference.[96] These burdens are much higher than those required of adults in the workplace, where Title VII applies.[97] Until recent years, plaintiffs have rarely been able to meet this burden and hold universities liable.[98]

The plaintiffs in a recent case before a federal district court in Tennessee met this burden.[99] Eight female students from the University of Tennessee claimed they each suffered sexual assault by members of athletic teams at the university.[100] The plaintiffs alleged that the university did not follow procedures related to the disciplinary process, allowed the accused athletes to remain on their respective teams, and used administrative procedures to favor the student-athletes.[101] Further, the plaintiffs contended that the university's own policies implemented a culture of sexual violence toward women, including encouraging parties with alcohol and sex as a recruiting tool, gifting the team with tickets to concerts of artists with lewd music, and adopting inappropriate songs for use at university athletic functions.[102] The allegations also set forth that the university athletic department knew of the incidents and became upset with the Title IX Coordinator for her efforts to investigate claims against athletes.[103]

The court concluded that the University of Tennessee was liable under Title IX under two theories: deliberate indifference to knowledge of prior sexual assaults by student-athletes, and official policies of the university that put students at risk for sexual assault.[104] In doing so, the court deviated from previous precedent, and instead followed a relatively new theory for liability stemming from official policies in the form of using women for recruiting and providing disrespectful music, which endangers female students.[105]

In the instance in which high-ranking officials promulgate a culture that supports sexual violence, their conduct met the criteria of indifference.[106] In *Simpson v. University of Colorado Boulder*, the Tenth Circuit Court of

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96. *See Gebser*, 524 U.S. at 274; *see also Davis*, 526 U.S. at 629 (addressing the plaintiff's difficult burden).

97. *See* Brake, *supra* note 95. Under Title VII, "[h]arassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." U.S. EQUAL EMP. OPPORTUNITY COMMISSION, *supra* note 58.

98. *Compare* Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325 (M.D. Ga. 2007) (holding that plaintiff did not establish a violation of Title IX because she lacked evidence of severity, pervasiveness, and knowledge of the university), *with* Doe v. Univ. of Tenn., 136 F. Supp. 3d 788 (M.D. Tenn. 2016) (finding a Title IX violation on two theories).

99. *See generally Doe*, 136 F. Supp. 3d 788.

100. *Id.* at 791.

101. *Id.* at 792–94.

102. *Id.*

103. *Id.* at 793–94.

104. *Id.* at 806.

105. *See id.*; *see also* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).

106. *Simpson*, 500 F.3d at 1184.

Appeals examined the actions of both the university and the head football coach in relation to a recruiting program for the football team.[107] The program aimed at showing prospects "a good time," but resulted in sexual violence on more than one occasion.[108] The policy put in place by the coach put the university at risk for liability as the university remained apathetic to the dangerousness of the situation, and the coach had knowledge of the propensity for sexual aggression and violence.[109] However, in *Simpson*, Title IX did not allow for a lawsuit against an individual administrator.[110] Currently, courts cannot hold coaches, teachers, administrators, and other officials personally accountable because Title IX applies *only* to federally-funded educational institutions.[111]

2. *Fifteen-Yard Penalty: Solutions to Title IX Deficiencies*

Although claimants have recently had some success holding universities accountable for instances of sexual assault on campus, holding university employees and officials liable under the same premise remains highly unlikely under Title IX.[112] Decades of deeply-rooted precedent require Title IX sexual harassment suits to be raised against the university as opposed to individuals.[113] Overturning this precedent is not a simple task, but it is even more unlikely in these scenarios because the legislative intent and stated purpose of the bill agree with the current decisions.[114]

One of the main remedies to a Title IX violation is revocation of federal funds, which is used as a tool to promote female equality at the institutional level.[115] As courts would be unlikely to find reasons supporting the application of Title IX to individual employees working for the member institutions, the legislature would have to create an exception in the cases of hostile environments based on sex—in effect, creating a new and separate form of liability. Because this is distinct from Title IX's original purpose, legislation is unlikely.[116] Therefore, finding an avenue to hold university

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107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*; Davis v. Monroe Cty. Sch. Bd. of Educ., 526 U.S. 629, 635–36, 1668 (1999).
111. *Simpson*, 500 F.3d at 1184.
112. *See id.* (noting that private damage actions are only available when recipients of federal funding had notice that they could be liable for certain conduct).
113. *See generally id.*; Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992); Cannon v. Univ. of Chi., 441 U.S. 677 (1979). "Title IX applies to institutions that receive federal financial assistance from ED, including state and local educational agencies. These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums." *Title IX and Sex Discrimination*, U.S. DEP'T EDUC. OFF. C.R. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [hereinafter *Title IV and Sex Discrimination*].
114. *Title IX and Sex Discrimination*, *supra* note 113.
115. TYLER JUNIOR C., *supra* note 80.
116. *Cannon*, 441 U.S. at 704.

administrators and officials personally liable in the face of rape culture through Title IX lacks feasibility.

B. The Secondary: State Tort Law Claim Protections

With the elimination of Title IX as a possible avenue for liability, the next option to finding liability for officials is a state law tort claim. A tort is an act or omission that causes injury or harm to another person amounting to a civil wrong for which a court will impose liability.[117] The primary aims of tort laws are to provide remedies for injured parties, impose liability for responsible parties, and prevent others from committing the same kinds of actions.[118] Torts fall into three categories: intentional, negligent, and strict liability.[119] Intentional torts require that the actor act with the purpose of producing a certain result or that the result is reasonably certain to occur as a result of the actor's actions.[120] The administrators in these situations are not performing an overt act aimed at causing a specific consequence, so intentional torts cannot apply.[121] Strict liability applies in situations in which an abnormally dangerous activity takes place.[122] No such abnormally dangerous activity takes place in these situations, so strict liability is inapplicable.[123]

Negligent torts, however, occur because of a fault in the exercise of reasonable care in all circumstances.[124] Because the students are harmed due to a lack of care for their safety on the part of the administrators, negligent torts are the most applicable and most plausible remedy.[125] Most courts recognize four elements to establish negligence: duty, breach, causation, and damage.[126] Conversely, Texas defines negligence as "the existence of a duty on the part of one person to protect another against injury, a breach of that duty, and an injury to the person to whom the duty is owed as a proximate result of the breach of duty."[127]

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117. Legal Info. Institute, *Tort*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/tort (last visited Nov. 22, 2017).

118. *Id.*

119. *Id.*

120. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2010).

121. *Id.*

122. *Id.* § 20. "Classic examples of 'abnormally dangerous' activity include blasting with explosives and pile driving." Keith B. Hall & Lauren E. Godshall, *Hydraulic Fracturing Litigation*, 57 ADVOCATE 1, 13–14 (2011).

123. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 (AM. LAW INST. 2010).

124. *Id.* § 3.

125. *Id.*

126. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1672 (2007).

127. Clay v. AIG Aerospace Ins. Servs., Inc., 488 S.W.3d 402, 408–09 (Tex. App.—Texarkana 2016, no pet.).

Duty constitutes the legal obligation that one person owes to another through balancing the protections necessary to one person against the freedoms of another person.[128] The duty element serves as a gatekeeper to tort liability, and the lack of a duty to act precludes liability in many situations.[129] The second element, breach, is a defendant's act or omission.[130] This element stems from the duty element and is implicated when the wrongdoer fails in performance of his duty.[131] The third, and final element in Texas, is the injury by proximate cause of the breach of the duty.[132] Proximate cause is, in essence, the connection between the breach of duty by the tortfeasor and the harm to the wrongdoer.[133] Courts across the United States hear many cases based on negligence related to school officials and injuries to students; the result of each case varies.[134] The biggest hurdle comes in the form of the duty owed by administrators to students; there are two main avenues to find duty: A common law duty and a special relationship.[135]

1. Man-to-Man Coverage: Basic Common Law Duty

Courts in other states have heard cases in which a student was subjected to sexual harassment and violence and subsequently pursued state tort claims against administrators of universities.[136] Generally, courts do not find a common law duty between schools and their students.[137] For example, in *Rouse v. Duke University*, a female student reported her rape at an off-campus party to Duke University officials.[138] Ms. Rouse claimed that Duke created a hostile educational environment, and also pursued claims against the Dean for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress for sending Ms. Rouse a letter indicating that she would not be able to return to Duke to continue her education following the rape.[139] These state law claims failed on the premise that the dean did not owe Ms. Rouse a duty of care in discharging her duty as an official of the

128. Owen, *supra* note 126, at 1675–76.

129. *Id.* at 1671. These areas include: harm to unborn children, harm that landowners may cause to uninvited guests, harm from not providing affirmative help to others in need, and harm to non-physical interests. *Id.* at 1675–76.

130. *Id.* at 1676.

131. *Id.*

132. *Clay*, 488 S.W.3d at 409–10.

133. Owen, *supra* note 126, at 1681.

134. *See supra* Section II.A (discussing the history of Title IX); *see also infra* Section II.B.1 (discussing the common law duty as it pertains to Title IX).

135. *See infra* Sections II.B.1–2 (discussing common law duty and special relationship).

136. *See generally* Rouse v. Duke Univ., 914 F. Supp. 2d 717 (M.D.N.C. 2012).

137. McFadyen v. Duke Univ., 786 F. Supp. 2d 887, 998 (M.D.N.C. 2011).

138. *Rouse*, 914 F. Supp. 2d at 720. A federal court in this case considered the state law claims put forth by the plaintiff. *Id.*

139. *Id.* at 727–28. The letter sent was part of Duke's policy that students who transfer to another institution are no longer eligible to re-enroll at Duke. *Id.* at 720.

university.[140] Very few courts today allow a claim of duty between a university and its students, given the autonomy of the college student and subsequent demise of the *in loco parentis*, or "in the place of the parent" doctrine.[141] In the absence of a common law duty, as is the case here, a special relationship must be found to satisfy the duty element.[142]

2. Zone Coverage: Special Situation Theories

A special relationship describes a formally recognized association between two people that creates a legal duty when one would otherwise not exist.[143] "The necessary special relationship may be one that has been recognized as a matter of law, . . . or it may arise from the factual circumstances of a particular case."[144] These types of relationships give an individual a duty to control the acts of a third party in certain specific situations: (1) parent and child; (2) master and servant; (3) possessor of land and a licensee; and (4) an individual in charge of a person with dangerous tendencies.[145] To establish a legal duty, students, as plaintiffs, could assert that a special relationship exists between themselves and the defendant administrator, or a third party and the defendant in the case of a third-party criminal actor.[146] Courts are reluctant to find a special relationship between universities and their students, but make exceptions when the university undertook to protect potential victims from such crimes.[147]

In *Mullins v. Pine Manor College*, a female freshman student at an all-girls college was sexually assaulted on campus.[148] The Massachusetts Supreme Judicial Court looked to two theories to find a duty on the part of the university and its vice president of operations for the safety of the students: one based on existing values and customs in society, and the other

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140. *Id.* at 727. The court additionally held that the hostile environment claims based on Duke's action through the agents' statements and actions taken for academic and disciplinary reasons also fail for lack of evidence. *See generally id.*

141. Theodore Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability, and the Student-College Relationship*, 65 IND. L.J. 471, 472 (1990). A line of cases in the 1960s rejected the *in loco parentis* doctrine based on the autonomy of college students, and colleges effectively dismantled this theory of liability. *Id.*

142. Owen, *supra* note 126, at 1677.

143. *See* Fred A. Simpson & Deborah J. Selden, *Texas Law on Special Relationships*, 35 HOUS. LAW. 10, 10 (1997).

144. *Id.* (quoting Yuzefovsky v. St. John's Woods Apartment, 540 S.E.2d 134, 139 (Va. 2001)). "[Courts] have recognized that the necessary special relationships that may create a duty of care include those of common carrier and passenger, business proprietor and invitee, innkeeper and guest, and employer and employee." *Yuzefovsky*, 540 S.E.2d at 140.

145. RESTATEMENT (SECOND) OF TORTS §§ 316–19 (AM. LAW INST. 1965); *see also* Simpson & Selden, *supra* note 143, at 2.

146. Commonwealth v. Peterson, 749 S.E.2d 307, 311 (Va. 2013).

147. *See generally* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

148. *Mullins*, 449 N.E.2d at 333–34.

based on voluntary assumption of the duty.[149] Increased student autonomy leads most courts to hold that no duty exists between a school and its students; thus, ruling out a duty based on existing values and customs.[150] The court turned to the voluntary assumption of duty theory to find liability for the school in this case.[151] A duty is assumed voluntarily when one takes action to perform an act without being required to do so.[152] The court looked to the security measures already in place at the school, such as multiple fences, guards on patrol, and a security fee included in tuition to gauge the duty assumed by the school.[153] The fact that the school implemented protective services is not sufficient to impose a duty.[154] The court determined that either the failure to exercise care increased the risk, or the harm resulted from a student's reliance on the school's undertaking.[155] The court upheld judgments against both the school and the administrator involved.[156] According to the court, a student may rely on a school's ability to protect students when applying and considering colleges, thus easily fulfilling the reliance prong.[157] Therefore, colleges and their administrators, when they have undertaken safety and security measures to protect students, have a duty to actually protect them from the actions of a third party.[158]

In *Furek v. University of Delaware*, the Delaware Supreme Court held similarly to the Massachusetts Supreme Judicial Court in *Mullins*, finding a university's undertaking to protect students could result in liability upon breach of that duty.[159] A University of Delaware freshman suffered injuries as a result of a hazing incident connected to a Greek fraternal organization.[160] Fraternity members poured lye-based oven cleaner on Mr. Furek's back, resulting in permanent scarring and subsequent withdrawal from the university.[161] The Delaware Supreme Court noted that no authority placed a duty on a university to provide for its students' safety, but held that the duty of protection, once assumed by a university, could result in liability for the

149. *Id.* at 335–36.

150. *Id.* Prior to the 1960s, colleges and their employees had a recognized special relationship based on *in loco parentis* meaning in the place of the parent. Stamatakos, *supra* note 141. Following a line of cases rejecting this theory based on the autonomy of college students, however, this theory of liability was effectively dismantled in the college setting. *Id.*

151. *Mullins*, 449 N.E.2d at 336.

152. *See generally id.*

153. *Id.* at 333–34.

154. *Id.* at 336.

155. *Id.*

156. *Id.* at 333.

157. *Id.* at 336–37.

158. *Id.* at 337. The court based its foreseeability analysis on the security measures of the school and the testimony of an officer of the school, who testified he foresaw this type of danger. *Id.*

159. *See generally* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); *Mullins*, 449 N.E.2d at 331.

160. *See generally Furek*, 594 A.2d at 506.

161. *Id.* at 510.

breach of that duty.[162] This duty, however, extends only to third-party actions that are subject to the university's control and are reasonably foreseeable.[163]

3. *Forcing Three and Out: Solutions to State Tort Law Deficiencies*

Under current tort law, two separate avenues exist from which a student could seek to impose liability on a school administrator: through a common law duty or through a special relationship between the student and the school.[164] Both of these strategies, however, suffer from distinct deficiencies.[165] Since the 1960s, the common law doctrine does not recognize a duty of care between a college and its students.[166] Courts today do not impose liability on a university in a suit by its students unless there is some additional dimension, such as a special relationship or assumption of duty.[167] Finding liability under these two schemes is nearly impossible under existing judicial interpretation.[168]

Few courts have found a special relationship between a college and its students.[169] Even in situations deemed worthy of the heightened duty of a special relationship, public university officials receive qualified official immunity.[170] Official immunity stems from sovereign immunity that protects state entities from tort liability.[171] Public schools receive sovereign immunity through their status as political subdivisions of the state.[172] Official immunity is protection "from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed."[173] When the function is discretionary or requires a judgment call

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162. *Id.* at 520. The record showed that the university's actions in communicating dangers of and disciplining infractions of hazing had ultimately "constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'" *Id.* (quoting *Mullins*, 449 N.E.2d at 336).

163. *Id.* at 521.

164. *See* Rouse v. Duke Univ., 914 F. Supp. 2d 717 (M.D.N.C. 2012); *see also* Stamatakos, *supra* note 141, at 487.

165. *See supra* Sections II.B.1–2 (discussing the common law duty and special relationship theories).

166. Stamatakos, *supra* note 141, at 473–74.

167. *See id.* at 476.

168. *Id.* at 490.

169. *See generally, e.g.*, Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431 (2007).

170. *See* Alexander v. Univ. of N. Fla., 39 F.3d 287, 290 (11th Cir. 1994); Yanero v. Davis, 65 S.W.3d 510, 519 (Ky. 2001).

171. *Yanero*, 65 S.W.3d at 519–22. "The rationale for absolute immunity for the performance of legislative, judicial and prosecutorial functions is . . . to protect their offices against the deterrent effect of a threat of suit alleging improper motives where there has been no more than a mistake or a disagreement on the part of the complaining party with the decision made." *Id.* at 511.

172. *Id.* at 525.

173. *Id.* at 521 (citing Salyer v. Patrick, 874 F. 374 (6th Cir. 1989)). "[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Id.* at 522.

by the official as part of his or her official duty, the official will receive protection.[174] When the act is ministerial, or one that is required, failure to perform an act will not receive protection by way of official immunity.[175]

In the case of school officials, some state statutes provide an imminent harm exception to sovereign immunity, in which a school and its officials have a duty to act in order to prevent imminent harm.[176] Imminent harm exists "where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person [or member of an identifiable class of foreseeable persons] to imminent harm . . . ."[177] In *Ambrose v. Singe*, a superior court in Connecticut found that the elements for imminent harm existed when a bully acted violently toward another student multiple times before finally slashing the student with a sharp object.[178] In the case of sexual assault, imminent harm would rely on a sexual threat being present and known to the officials of the school.[179] Nevertheless, the imminent harm exception has not caught on in university settings.[180] In *Commonwealth v. Peterson*, a case stemming from the Virginia Tech shooting, the Virginia Supreme Court looked to the foreseeability factor in determining the applicability of the imminent harm exception to sovereign immunity.[181] Scenarios involving universities are less likely to be amenable to the imminent harm exception as foreseeability and the ability to identify a victim or class of victims becomes significantly more difficult with numerous students.[182] Additionally, this exception is harder to apply in sexual assault cases than in mere assault cases because of the personal nature of the act.[183]

Universities and their officials could potentially be held liable under state tort laws if Texas courts applied the special relationship and imminent harm theories.[184] The Massachusetts and Delaware courts in *Mullins* and *Furek*, respectively, provide model decisions applicable to rape culture cases in Texas by providing that duty can exist when school officials assume that

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174. *Id*.

175. *Id*.

176. *See* Prescott v. City of Meriden, 873 A.2d 175, 177 (Conn. 2005).

177. *Id.* (quoting Burns v. Bd. of Educ., 638 A.2d 1 (1994)).

178. *See* Ambrose v. Singe, No. 320896, 1997 WL 338561, at *4 (Conn. Super. Ct. June 10, 1997).

179. *Cf. id.* (holding that imminent harm existed because previous threats were made).

180. *See* Commonwealth v. Peterson, 749 S.E.2d 307, 311 (Va. 2013) (holding the Commonwealth did not have a duty to protect against third-party criminal acts). This lack of duty to protect remains especially true in the case of an assault by a third party because such acts can rarely be foreseen. *Id.*

181. *See generally id.* For the purposes of this case, the court assumed, without deciding, that a special relationship between the victim and the university existed at the time of the incident. *Id.*

182. *See generally id.*

183. *See id.*

184. *See* Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 284 n.1 (Tex. 1993) (acknowledging the existence of special relationships in Texas); *see also* Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (holding that knowledge of imminent harm can create a duty of care for invitees).

duty.[185] Given that federal law requires colleges to provide protections both before and after sexual assaults, schools have an incentive to create safe campuses.[186] Therefore, many colleges likely provide more protection than is mandated by law; in these instances, courts may find that they have undertaken a duty to protect students from third-party crimes. By arguing that coaches, athletic directors, and those involved in the recruitment process have assumed a duty by delving into the personal lives and backgrounds of players, a special relationship could be found.[187] Given the prevalence of rape culture on college campuses throughout the United States and Texas, it is foreseeable that such crimes may be committed against students at any institution.[188]

Therefore, the remaining debatable issue surrounding the use of state law tort claims is the ability of the school to control third-party actors.[189] Both *Mullins* and *Furek* rely heavily on the ability to control the actor.[190] In the particular case of student-athletes, universities and their officials exercise much greater control over the individuals responsible for these crimes.[191] By providing money for illicit drugs, alcohol, and trips to strip clubs and using sex as a recruiting tool, coaches exercise a significant level of control over the situations in which sexual assaults are likely to occur. In *Mullins*, the control factor was not at issue when the student lived on campus and when the school had a reasonable amount of control over the school grounds.[192] Student-athletes spend more time on campus, with their actions controlled by the school, than the average student.[193] They are likely living in student housing managed by the university as well.[194] It would be a reasonable extension of the *Mullins* case to find that the school had control over the third-party individual committing a sexual assault.[195] However, holding schools liable under this theory would require a departure from the widely accepted view that there is no duty owed by the school to the student.[196] It would require Texas courts to adopt theories from cases attenuated both in geography and in time.[197]

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185. *See* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

186. 20 U.S.C. § 1092(f) (1974); *see also Dear Colleague Letter*, *supra* note 65.

187. *See supra* Section II.B.2 (addressing the special relationship theory).

188. *See* LUTHER, *supra* note 16, at 15–16.

189. *See Furek*, 594 A.2d at 519–23.

190. *See id.*; *Mullins*, 449 N.E.2d at 506.

191. Eenkema van Dijk, *supra* note 38.

192. *See Mullins*, 449 N.E.2d at 331.

193. *See* Eenkema van Dijk, *supra* note 38. In fact, some athletes need the permission of the head coach of their sport to live in off-campus housing. *Student Athletes: Housing*, LSUSPORTS.NET, http://www.lsusports.net/src/data/lsu/assets/docs/ad/policymanual/pdf/504A.pdf?DB_OEM_ID=5200 (last visited Oct. 15, 2017).

194. *See Student Athletes: Housing*, *supra* note 193.

195. *See Mullins*, 449 N.E.2d at 335–37.

196. *See* Peters, *supra* note 169.

197. *See* Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); *Mullins*, 449 N.E.2d at 331.

Even if rape culture cases could fall under the umbrella of assumption of the duty when universities take measures for student safety, it remains doubtful whether it will extend to university officials in Texas. Under Texas law, the state may be liable for torts committed by the state itself or by its agent.[198] A plaintiff, however, sacrifices the right to elect to pursue claims against the employee of the state when he or she elects to pursue action against the state entity.[199] A plaintiff could still potentially sue both the institution and the officials if the plaintiff sued the institution itself under federal law, while leaving the officials for the state tort law claims.[200]

Additionally, the plaintiff could still attempt to argue that the official, when dealing with rape culture incidents, is dealing with an imminent harm.[201] By making this argument, the plaintiff questions the discretionary nature of the act, instead imputing it to be a required, or ministerial, act.[202] The imminent harm exception has succeeded in school injury cases in the past but has not been applied to a college or a rape culture case.[203] There is no reason to not apply it to rape culture cases going forward as federal law requires action on the part of school administrators.[204]

C. Red Zone Defense: 42 U.S.C. § 1983

Passed in 1871 as an attempt to give a civil remedy to citizens against abuses occurring in the southern states during the Reconstruction Era, the Civil Rights Act of 1871 has since been interpreted to create a type of tort liability.[205] This section has not been a source of substantive rights, but provides a method for defending rights conferred elsewhere.[206] Under what became known as 42 U.S.C. § 1983:

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198. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). Suits against private universities may avoid this pitfall, as private university action does not always constitute state action, and this issue is before the Texas Supreme Court in 2017. Michael Barajas, *Private University Asks for Government Immunity in Lawsuit over Student Shot and Killed by Campus Cop*, SAN ANTONIO CURRENT (Dec. 9, 2016, 10:45 AM), http://www.sacurrent.com/the-daily/archives/2016/12/09/private-university-asks-for-government-immunity-in-lawsuit-over-student-shot-and-killed-by-campus-cop.

199. TEX. CIV. PRAC. & REM. CODE § 101.106(a).

200. Niall D. O'Murchadha, *Should My Lawsuit Be in State or Federal Court?*, SCHLAM STONE & DOLAN LLP (Dec. 13, 2014), http://www.schlamstone.com/client-qa-should-my-lawsuit-be-in-state-or-federal-court/.

201. *See* Ambrose v. Singe, No. 320896, 1997 WL 338561, at *2–4 (Conn. Super. Ct. June 10, 1997).

202. *See id.* at *4–5.

203. *See generally id.*

204. 42 U.S.C. § 1983 (1871).

205. *See* Randy Means, *History and Dynamics of Section 1983*, POLICE CHIEF MAG., http://www.policechiefmagazine.org/magazine/the-history-and-dynamics-of-section-1983/ (last visited Oct. 15, 2017).

206. Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[207]

For the first ninety years after its passage, the statute endured without notable use.[208] Following a United States Supreme Court decision in 1961, the statute found new life in *Monroe v. Pape*, when the Court held that violations of state law carried out under authority of the state violated § 1983.[209] Within the *Monroe* decision Justice Douglas articulated three purposes of § 1983: (1) to supersede certain state laws; (2) to provide a remedy when state law fails to do so; and (3) to provide a federal remedy when the state remedy is not available in practice.[210] The comprehensive language of § 1983 allows for a considerable breadth in scope.[211] Section 1983 is applicable in cases in which, as in *Monroe*, the rights come from an amendment that has been incorporated through the Fourteenth Amendment or directly from rights secured by the Fourteenth Amendment itself.[212]

1. *Coaching Error: Section 1983 Liability for Schools and School Officials*

In the cases of schools and school officials, courts explore the liability of the officials with respect to tort liability.[213] Courts explore officials' liability by using § 1983 in conjunction with the Equal Protection Clause of the Fourteenth Amendment[214] and the Substantive Due Process Clause of the Fourteenth Amendment.[215]

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207. 42 U.S.C. § 1983.

208. Means, *supra* note 205.

209. *See generally* Monroe v. Pape, 365 U.S. 167 (1961) (holding that a deprivation of Fourth Amendment rights by a state were given a private right of action under 42 U.S.C. § 1983).

210. *Id.* at 173–74.

211. 42 U.S.C. § 1983.

212. Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 5–6 (1974).

213. *See* KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 17–22 (1998), https://www.fjc.gov/sites/default/files/2012/Sect1983.pdf. Courts have found that public institutions organized and ran pursuant to state constitutions, laws, and regulations, and funded by the state are state actors. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 183 (1988).

214. *See* Williams v. Bd. of Regents, 477 F.3d 1282, 1300 (11th Cir. 2007).

215. *See* Doe v. Beaumont Indep. Sch. Dist., 8 F. Supp. 2d 596, 605–13 (E.D. Tex. 1998).

Cases concerning sexual harassment in schools have come before various courts under § 1983 and the Fourteenth Amendment. In *Doe v. Beaumont I.S.D.*, the District Court for the Eastern District of Texas heard a case in which elementary school students repeatedly faced sexual harassment at the hands of a fifth-grade teacher at the school.[216] The case contained actions against both the accused and the school along with its officials under § 1983 for deprivation of the rights of the students under the Fourteenth Amendment.[217] Liability under § 1983 can be attributed to a school official when it is shown that: (1) the official learned of instances plainly pointing to sexual abuse of that student; (2) the official demonstrated deliberate indifference by failing to take action to stop or prevent the abuse; and (3) the failure caused injury to the student.[218] In *Doe*, the plaintiffs were unable to show that the official had a reason to know of the danger and failed to act in a reasonable time.[219]

In a similar case, a New Jersey district court looked at liability for school officials in a student-on-student assault.[220] In *Lockhart v. Willingboro High School*, a seventeen-year-old special needs student claimed that another student had sexually assaulted her on school grounds during school hours.[221] The plaintiff, Ms. Lockhart, pursued § 1983 claims against the school, the school board, and several administrators.[222] The court held that the defendants did not violate Ms. Lockhart's due process rights under the Fourteenth Amendment because the Fourteenth Amendment "does not protect [students] from being sexually assaulted by another student at school. Substantive due process protects an individual's liberty interest in bodily integrity but in general does not impose a duty on the state to protect individuals from harm inflicted by private actors."[223]

2. *Down, but Not Out: Exceptions to Common Law Precedent*

The court carved out two exceptions to the generally held rule: the special relationship exception and the state-created danger exception.[224] The special relationship exception applies when the state enters into a special relationship with a person and fails to ensure the health and safety of the

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216. *See id.* at 602–04.

217. *Id.* at 604. Courts have held that students have a liberty interest in their bodily integrity and personal safety under the Due Process Clause of the Fourteenth Amendment. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 (5th Cir. 1994) (en banc). Those rights are violated when a school employee commits sexual harassment. *Id.*

218. *Doe*, 8 F. Supp. 2d at 611.

219. *Id.* at 613.

220. *See* Lockhart v. Willingboro High Sch., 170 F. Supp. 3d 722 (D.N.J. 2015).

221. *See id.*

222. *Id.* at 722.

223. *Id.* at 731.

224. *Id.* at 731–33.

individual with whom it has a special relationship.[225] Courts have been reluctant to rely on this exception as it applies to students and schools; the *Lockhart* court agreed, declining to hold that Ms. Lockhart's participation in the school environment required the state to maintain a special relationship.[226] The second exception, the state-created danger exception, applies when the state's own action creates danger that ultimately causes the plaintiff's injury.[227] In order for a plaintiff to exercise the state-created danger exception, the plaintiff must show: (1) "the harm caused was foreseeable and fairly direct;" (2) the state acted in disregard or with great indifference for the safety and care of the plaintiff; (3) there was a relationship between the two entities; and (4) the plaintiff's injury would not have occurred but for the state's use of authority to create an opportunity for the injury to occur.[228] In the *Lockhart* case, the court declined to hold that lack of supervision amounted to a state-created danger.[229]

Based on the *Lockhart* court's discussion, there remains an avenue for liability under § 1983 when the state has created a danger or a special relationship does exist.[230] In order to prove a state-created danger, the plaintiff must be able to fulfill the elements set forth in *Lockhart*. For cases originating in Mississippi, Louisiana, and Texas, there remains a problem: the Fifth Circuit has consistently declined "to recognize [the] 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented."[231] The Fifth Circuit, in some of its opinions, established the elements of a state-created danger theory, but it has ultimately chosen not to use the theory in its decisions yet.[232] In recent cases, district courts have analyzed the elements of the state-created danger theory of liability when it involves school districts and injuries to their students; however, the district courts within the Fifth Circuit have still decided not to adopt the state-created danger theory.[233]

If the Fifth Circuit adopted the state-created danger theory, to succeed, a plaintiff would have to show: "(1) [t]he [s]tate created or increased the danger to the plaintiff, a known victim; and (2) the [s]tate was deliberately indifferent to that danger."[234] Under existing United States Supreme Court

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225. D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1369 (3d Cir. 1992) (citing Cornelius v. Town of Highland Lake, 880 F.2d 348, 352 (11th Cir. 1989)).

226. *Id.* at 1372; *Lockhart*, 170 F. Supp. 3d. at 732–33.

227. Morrow v. Balaski, 719 F.3d 160, 166–67 (3d Cir. 2013).

228. *Lockhart*, 170 F. Supp. 3d. at 732.

229. *Id.* at 732–34.

230. *See id.*

231. Beltran v. City of El Paso, 367 F.3d 299, 307 (5th Cir. 2004).

232. Scanlan v. Texas A&M Univ., 343 F.3d 533, 537–38 (5th Cir. 2003). The Fifth Circuit stated, "[a]lthough we have not recognized the theory, we have stated the elements that such a cause of action would require." Doe v. Covington Cty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (en banc).

233. *See* Pierce v. Hearne Indep. Sch. Dist., No. W:13-CV-00334, 2014 WL 11308099, at *30 (W.D. Tex. June 19, 2014).

234. *Id.* at *24.

decisions, if the state had no direct hand in creating the danger but merely took no action when circumstances ordered a more active role, it cannot be held liable.[235] The state can only be held liable under the state-created danger theory if it created an environment of immediate danger to a specifically known victim.[236] The theory does not extend to foreseeable victims because "increasing the risk of harm to unidentified and unidentifiable members of the public . . . [is] not sufficiently willful and targeted toward specific harm to remove the case to the domain of constitutional law."[237] For a claim against an administrator to prevail, the plaintiff must prove that the danger within the school created a specific risk of danger to that particular plaintiff.[238] The foreseeable victim requirement has previously doomed cases before the Fifth Circuit involving incidents related to school injuries.[239] The lack of a foreseeable victim creates special difficulties relating to rape culture, in which there are thousands of possible victims and a single specifically known victim.[240]

While the foreseeable victim standard does create difficulties, it does not entirely foreclose the ability of a plaintiff to successfully allege a § 1983 cause of action in a campus sexual assault case.[241] In a case before the Eleventh Circuit Court of Appeals, *Williams v. Board of Regents*, Tiffany Williams pursued actions against the school, school officials, and athletic officials under both Title IX and § 1983 after being raped by members of the University of Georgia's men's basketball team.[242] In her claims, Ms. Williams criticized the University of Georgia and its officials for admitting and recruiting Mr. Cole, who had prior issues with sexual misconduct at a previous institution.[243] Ms. Williams attempted to use the violation of Title IX to implement a § 1983 violation, which the court ultimately rejected for failure to state a claim.[244] Ms. Williams also asserted a claim under the Equal Protection Clause, but the court held that Ms. Williams failed to meet her burden.[245] Because of qualified immunity, Ms. Williams needed to prove that, at the time of the assault, the defendants had adequate warning that the

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235. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

236. *Pierce*, 2014 WL 11308099, at *24. The known-victim requirement is a way for the court to establish foreseeability of the incident in question. *Id.*

237. *Id.* at *24–25 (quoting Saenz v. Heldenfels Bros., 183 F.3d 389, 392 (5th Cir. 1999)).

238. *See* Moore v. Dallas Indep. Sch. Dist., 370 F. App'x 455, 458 (5th Cir. 2010) (holding that a plaintiff alleging an increased risk of danger to a large class of school personnel that included her was not enough to satisfy the state-created danger theory).

239. *See id.* at 458; *Pierce*, 2014 WL 11308099, at *24.

240. Wallace, *supra* note 11.

241. *See generally* Williams v. Bd. of Regents, 477 F.3d 1282 (11th Cir. 2007).

242. *See id.* at 1288.

243. *Id.* at 1299–1300.

244. *Id.* at 1300.

245. *Id.* at 1301. The Equal Protection Clause of the Fourteenth Amendment confers a federal constitutional right to be free from sexual discrimination. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

sexual assault committed against Williams was unconstitutional.[246] To do so, "the defendant must show that he acted within the scope of discretionary authority when performing the challenged conduct."[247] Once met, the burden would then shift to the plaintiff to show that the defendant's conduct clearly violated the law.[248]

3. Fumble Recovery: Solutions to Section 1983 Shortcomings

Rape culture on college campuses is a pervasive and unique problem.[249] Under § 1983, Due Process Clause deprivations have been foreclosed by the decision in *Lockhart* because the Due Process Clause does "not impose a duty on the state to protect individuals from harm inflicted by private actors."[250] Even if it did, the use of the Due Process Clause under § 1983 must be coupled with the use of the state-created danger theory in order to overcome qualified immunity.[251] The Fifth Circuit's current repudiation of the state-created danger theory, coupled with the high barrier placed upon plaintiffs by the known victim requirement, weakens the state-created danger theory as a solution.[252] Without any state-created danger theory in the Fifth Circuit, the Equal Protection Clause coupled with § 1983 is relatively useless as it applies to imposing liability against a university.

The Equal Protection Clause, through § 1983, provides more viability.[253] The Eleventh Circuit's decision in *Williams* provides a platform for which civil liability could be found for school officials and administrators.[254] The Eleventh Circuit provided in *Williams* that in order to use qualified immunity, the official must prove that he acted with discretionary authority when performing the act.[255] Then, the Equal Protection Clause coupled with § 1983 requires a plaintiff to prove that school officials possessed reasonable knowledge that a sexual assault the plaintiff suffered comprised a constitutional violation.[256] The Eleventh Circuit held that the reckless behavior of the officials and coaches in *Williams*

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246. *Williams*, 477 F.3d at 1300.

247. *Id.* (quoting Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988)).

248. *Id.*

249. Wallace, *supra* note 11.

250. Lockhart v. Willingboro High Sch., 170 F. Supp. 3d 722, 731 (D.N.J. Mar. 31, 2015). In the case of private universities, such as Baylor, there are additional arguments to be made to prove state action. Leigh J. Jahnig, Note and Comment *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NW. U.L. REV. 249, 255–56 (2015). There are several ways to argue that their actions are attributable to the state: Performing a public function, acting under color of state law and abiding to state regulation and control. *Id.*

251. *See generally Williams*, 477 F.3d at 1282.

252. *See supra* Section II.C.2 (addressing the state-created danger theory). *See generally* Scanlan v. Tex. A&M Univ., 343 F.3d 533, 537–38 (5th Cir. 2003).

253. *See generally Williams*, 477 F.3d at 1282.

254. *See generally id.*

255. *Id.* at 1300.

256. *Id.*

did not amount to a constitutional violation.[257] Given the prevalence and atrocious nature of rape culture on college campuses and its relationship to college athletics, the Fifth Circuit should put all coaches and school administrators on notice that sexual assault on college campuses constitutes a constitutional violation.[258] While there is no case law suggesting that recruiting, admitting, or allowing for the maintenance of a sexual assault perpetrator amounts to a violation of constitutional rights, the extremely reckless behavior of coaches in recruiting and providing scholarships to athletes calls for a change in the law to protect students.[259]

III. Leveling the Playing Field

Women in education have progressed substantially since the early 1970s when the federal government first took on gender discrimination in education.[260] Even with new laws regarding sexual assault, there remains an increasingly heavy burden on the progress of women in education.[261] If school officials were held to a higher standard when admitting students with a propensity for sexual violence, this burden could be lifted. While the law has not been favorable to victims attempting to pursue claims against school officials, there remains a possibility for change.[262] Plaintiffs have two separate arguments for change: state tort law claims and § 1983 claims.[263] Both could yield positive results, and courts have sufficient reasons to change prior rulings to find in the favor of sexual assault victims.[264] Title IX is not a viable claim because it applies *only* to federally funded institutions and not the administrators, but it does communicate to the court the importance of eradicating sexual assault on campus.

A. *Plaintiff's Power Play*

While there are many obstacles in pursuing claims against a school official, there are certain methods to accomplish these claims. In order to pursue claims in Texas state courts against a school employee, the plaintiff must elect to pursue only those claims and not pursue any state tort claims

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257. *Id.* at 1301.
258. *See* Wallace, *supra* note 11.
259. *See generally Williams*, 477 F.3d at 1282.
260. Equal Access to Education, *supra* note 94.
261. *See* Anna Herod, *Reports of Sexual Assault Rise this Year at Texas State University*, Austin American-Statesman (Oct. 13, 2016, 4:22 PM), http://www.mystatesman.com/news/state--regional/reports-sexual-assault-rise-this-year-texas-state-university/wVUiVtpOBBwt8FuI8KSwvK/.
262. *See, e.g.*, *Williams*, 477 F.3d at 1282.
263. *See infra* text accompanying notes 265–68 (discussing procedural methods of pursuing both state and federal claims).
264. *See id.*

against the school.[265] By electing to pursue the official in state court while challenging the school under federal claims, the plaintiff could successfully collect from both.[266] The plaintiff must argue that the school and its officials have voluntarily undertaken to protect students from harm while on campus.[267] Given the existing negative publicity that results from high-profile public scandals at colleges,[268] it is likely that schools have undertaken measures to ensure the safety of their students while they are on campus.[269] The actions of coaches, athletic directors, and other school employees in recruiting and performing in-depth checks on players provides evidence that they have considered the athlete's background relevant to their participation in sports at the school.[270] The plaintiff must also argue that the prevalence of rape culture and sexual assault on campus is such that it creates a foreseeable risk of injury to students on campus.[271] Evidence exists and provides information on both the prevalence and highly publicized nature of sexual assault.[272] Plaintiffs must then prove that the school and its officials had substantial control over the third party's actions.[273] Student-athletes present a special case in which the school's officials have substantially more contact with, and control over, them than the average student.[274] Coaches hold student-athletes to different standards athletically, academically, and personally than the majority of other students at a university.[275] Furthermore, student-athletes spend a great deal more time with campus officials than a normal college student.[276]

Moreover, any school official who serves in an official capacity would potentially have immunity as well.[277] By arguing that sexual assault carries the status of imminent harm, the victim is able to question whether the official had any choice but to act. This particular argument may be met harshly because of the particular long-standing victim standard and the lack of case law applying this to college students.[278] This theory would be a worthy argument to make as the particular circumstances surrounding sexual assault

265. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011).
266. *See id.*; O'Murchadha, *supra* note 200.
267. *See supra* text accompanying notes 228–31 (discussing the duty element of tort law).
268. *See* Watkins, *supra* note 4.
269. *See* Lockhart v. Willingboro High Sch., 170 F. Supp. 3d 722, 732–33 (D.N.J. 2015) (discussing the state-created danger theory).
270. *See* Newburg, *supra* note 33.
271. *See Lockhart*, 170 F. Supp. 3d at 732.
272. LUTHER, *supra* note 16, at 2.
273. *See Lockhart*, 170 F. Supp. 3d at 732.
274. *See* Eenkema van Dijk, *supra* note 38.
275. *Id.*
276. *Id.*
277. *See supra* Section II.B.3 (addressing the immunity of school officials).
278. *See generally* Williams v. Bd. of Regents, 477 F.3d 1282 (11th Cir. 2007).

on campus have changed so drastically and are deserving of new law for public policy reasons.[279]

By coupling the state law tort claims with a federal cause of action, plaintiffs could pursue claims under § 1983 coupled with the Equal Protection Clause of the Fourteenth Amendment in federal court.[280] The plaintiff should claim that sexual discrimination took place because of the actions of a school official.[281] The burden for the plaintiff to overcome qualified immunity is high.[282] To disprove a claim of qualified immunity, the victim must demonstrate that the assault suffered constitutes a constitutional violation.[283] Evidence suggests that sexual assault torments the victims to the point that their ability to participate in the college experience diminishes significantly.[284] All school officials are constructively aware of their duty to protect students from harm, especially from sexual assault.[285] Arguments such as these will allow courts to make a new decision on the viability of these claims given the current social situation.[286]

B. Home-Field Advantage

When considering these claims, courts must take into account the circumstances and public policy concerns motivating the litigation. Former President Barack Obama and Congress instituted initiatives to help end this problem, and individual colleges and students have taken part as well.[287] Courts must fulfill their part in preventing sexual assault on campus by holding those closely involved liable in ways they have not been in the past.

Texas courts must recognize that college officials and their relationship with student-athletes is special and deserves recognition in a different light. Coaches and officials put incredible amounts of effort into selecting players to participate in athletic programs within their school.[288] School officials are aware of the risk to students from sexual assault.[289] Athletes spend much more of their time under the attention and control of coaches and school

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279. *See supra* Section I.A (discussing the prevalence of rape culture at universities).
280. *See* O'Murchadha, *supra* note 200.
281. *See* Prescott v. City of Meriden, 873 A.2d 175, 176 (Conn. 2015).
282. *Williams*, 477 F.3d at 1301.
283. Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).
284. *See* Tyler Kingkade, *Being a Sexual Assault Survivor in College Often Comes with Huge Bills*, HUFFINGTON POST (Jan. 13, 2016, 4:12 PM), http://www.huffingtonpost.com/entry/cost-of-sexual-assault-in-college_us_5695c0e7e4b09dbb4bad3f4c.
285. *Dear Colleague Letter*, *supra* note 65.
286. *See supra* Section III.A (discussing arguments an on-campus rape victim may assert).
287. *See VAWA Reauthorization*, CLERY CTR., https://clerycenter.org/policy-resources/vawa/ (last visited Oct. 15, 2017); *see also* Madison Park, *Stanford Bans Hard Alcohol at Campus Parties*, CNN (Aug. 23, 2016, 6:59 AM), http://www.cnn.com/2016/08/23/us/stanford-hard-alcohol-ban/ (addressing the problems associated with alcohol and rape culture).
288. *See* Newburg, *supra* note 33.
289. *Dear Colleague Letter*, *supra* note 65.

officials than the average student.[290] Even in the case of immunity, courts should recognize that there is imminent harm involved in the particular instance of rape culture on campus because of its unique position in society today.[291] Immunity should not shield coaches and administrators when students are endangered by their actions.

Similarly, federal courts and appellate courts also need to take into consideration the public policy and societal issues surrounding rape culture on campus.[292] Coaches and administrators are in a distinct position to control the individuals on campus, particularly in regard to the athletes the schools see fit to bring to their institutions.[293] Reflecting that reality, courts need to recognize an avenue to hold these individuals and schools to a higher standard. Such an avenue exists in the form of a § 1983 claim coupled with the Equal Protection Clause.[294] It is not a stretch of the law to hold that school officials and coaches know that sexual assaults could occur on their campuses.[295] Nor is it a stretch of the law to hold that officials and coaches know that a sexual assault could be perpetrated by someone they recruited, coach, and mentor on a daily basis.[296] It is definitely not a stretch of the law to hold that officials and coaches also know that such a sexual assault deprived another student of her constitutional right.[297] While it is true that no current case law establishes liability for recruiting, selecting, or admitting students that perpetrate violent crime, that does not eliminate the need for such case law to promote social justice.[298]

IV. CONCLUSION

Rape culture and sexual assault on campus has become a national epidemic in desperate need of a more viable solution.[299] Too often, girls like CC Carreras and those at Baylor University suffer assaults that demean their educational experience at the hands of the school's own touted athletes.[300] Finding a solution to hold campus officials and administrators liable for the

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290. Eenkema van Dijk, *supra* note 38.

291. *See supra* Part I (discussing the rise of rape culture in today's society).

292. *See supra* Part I (discussing the ramifications of rape culture).

293. *See* Newburg, *supra* note 33.

294. *See supra* text accompanying notes 280–85 (describing how plaintiffs should bring § 1983 and Equal Protection claims against school officials).

295. *See supra* Part I (detailing on-campus rape accusations by female students against student-athletes at multiple universities).

296. *Id.* (same).

297. *See supra* text accompanying notes 70–79 (explaining school administrators' burden to reasonably investigate on-campus rape claims under Title IX).

298. *See supra* Part II (explaining the lack of legal remedies for victims of sexual assault).

299. *See supra* Part I (detailing on-campus rape accusations by female students against student-athletes at multiple universities).

300. *Id.*; *see also* Cara, *supra* note 32 (stating that 54% of student-athletes surveyed admitted they committed at least one sexually coercive act in their lifetime).

actions of student-athletes on campus is paramount to remedying rape culture. Given the existing state of law, the best means of accompanying this solution is through a state tort claim or a § 1983 claim, provided that the plaintiff supplies the proper arguments and the court approves the arguments.[301] Such a solution would place liability on those who have the utmost ability to change the direction of life on campus—the faculty and administrators—and would provide a much more meaningful educational experience for females like CC and others across the country.

301. *See supra* Part II (explaining Texas tort claims and § 1983 claims).