The Civil Rights Approach to University Negligence Liability Arising Out of Student-on-Student Misconduct

Cori Smith*

ABSTRACT

The legal relationship between a university and its students continues to evolve. Prior to the 1960s, courts did not intrude into universities' monitoring and disciplining of student misconduct. However, after the 1960s, courts intervened more frequently to limit university discretion in monitoring and disciplining student misconduct, which allowed students to enjoy greater individual freedoms on campus.

The increased judicial interference in the university-student relationship necessarily diminished the university's unilateral authority to monitor and discipline students. This trend introduced a particularly difficult question: when can a student hold a university responsible for failing to protect that student from harm caused by another student? The framework courts apply in answering this question differs depending on if the injurious student-on-student misconduct qualifies as discriminatory.

When a student plaintiff is injured by non-discriminatory student-on-student misconduct, courts apply a traditional negligence framework to hold universities liable for failing to prevent the student plaintiff's injuries. However, when a student plaintiff's injury results from student-on-student discrimination, courts apply a deliberate indifference framework.

The traditional negligence framework disincentivizes student misconduct prevention programs, inadequately accounts for students' individual rights, and disincentivizes efficient settlements, whereas the deliberate indifference framework does not. A novel approach, termed the Civil Rights Approach, can help address these issues. The Civil Rights Approach integrates the framework of discrimination cases into the traditional negligence analysis for cases arising out of student-on-student misconduct. The Civil Rights Approach allows courts to address the unique attributes of the university-student relationship in cases arising out of nondiscriminatory student-on-student misconduct.

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2022.

Table of Contents

I. INTRODUCTION 245
II. BACKGROUND 247
A. The History of University Liability Arising Out of Student-on-Student Misconduct 248
1. *In Loco Parentis* 248
2. Increased Constitutional Protection for Students 249
3. The Bystander Era 250
B. The Current Approach to University Liability Arising Out of Non-Discriminatory Student-on-Student Misconduct 251
1. Duty 251
2. Breach 255
3. Causation 255
4. Injury 256
C. The Current Approach to University Liability Arising Out of Student-on-Student Discriminatory Misconduct 257
1. Actual Knowledge 257
2. Deliberate Indifference 259
3. Severe, Pervasive, and Objectively Offensive 260
4. Deprival of Access 261
III. ANALYSIS 262
A. Applying the Civil Rights Approach to University Liability in Negligence Cases Arising Out of Student-on-Student Misconduct 263
1. Duty 263
2. Breach 264
3. Causation 266
4. Injury 267
B. Advantages of the Civil Rights Approach 268
1. The Civil Rights Approach Incentivizes Universities to Prevent Student-on-Student Misconduct 268
2. The Civil Rights Approach Balances a Student's Rights of Privacy and Due Process with a University's Duties to Prevent Harm to Students 269
3. The Civil Rights Approach Implements Pretrial Burden-Shifting that Leads to Efficient Settlements 270
IV. RECOMMENDATION: THE CIVIL RIGHTS APPROACH 271
V. CONCLUSION 273

I. INTRODUCTION

American university[1] students face the risk of serious injury caused by their peers' misconduct.[2] Injurious student-on-student misconduct takes many forms, including hazing,[3] bullying,[4] mental health crises,[5] and discrimination.[6]

When a student's misconduct injures another student, the injured student may seek damages from the university for the university's failure to prevent the injurious student-on-student misconduct.[7] In such cases, courts apply a different framework to analyze university liability depending on the type of student misconduct that caused the plaintiff's injury.[8] Specifically, if the student plaintiff's injury arose out of hazing, bullying, or other non-discriminatory misconduct of another student, courts apply traditional negligence principles to analyze the university's liability.[9] However, if the student plaintiff's injury arose out of student-on-student discriminatory misconduct, courts apply a deliberate indifference framework to analyze university liability.[10]

The different frameworks for university liability arising out of student-on-student misconduct impose differing incentives and burdens on universities and the court system.[11] The application of traditional negligence principles disincentivizes university programs for student misconduct prevention,[12] inadequately accounts for students' individual

1. This Comment uses the term "university" to refer generally to all institutions of higher education as defined by the Higher Education Act. *See* 20 U.S.C. § 1001.

2. *See, e.g.*, Regents of Univ. of Cal. v. Superior Court (*Regents I*), 413 P.3d 656, 662 (Cal. 2018) (finding that the student plaintiff was stabbed in the chest and neck by a fellow student); Furek v. Univ. of Del., 594 A.2d 506, 510 (Del. 1991) (finding that the student plaintiff suffered first and second degree burns from lye-based cleaning solution poured over his head and neck during a fraternity hazing ritual).

3. *See, e.g.*, Tina Burnside & Eric Levenson, *LSU Fraternity Member Charged with Felony Hazing After Student with Alcohol Poisoning Put on Life Support*, CNN (Nov. 3, 2020, 5:57 PM), cnn.it/38tFXob; Chris Quintana, *4 Frat Deaths This Month, 2 This Week Alone. What's Going on With Fraternity Hazing?*, USA TODAY (Nov. 14, 2019, 6:37 PM), bit.ly/3q5E4E7.

4. *See, e.g.*, Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), nyti.ms/35uGILT.

5. *See, e.g.*, Emily Friedman, *Va. Tech Shooter Seung-Hui Cho's Mental Health Records Released*, ABC NEWS (Aug. 7, 2009, 2:12 PM), abcn.ws/3i0i8Y2.

6. *See, e.g.*, *AAU Releases 2019 Survey on Sexual Assault and Misconduct*, ASS'N OF AM. UNIV.'S (Oct. 15, 2019), bit.ly/3brJzsH.

7. *See infra* Sections II.B–C.

8. *See infra* Sections II.B–C.

9. *See infra* Section II.B.

10. *See infra* Section II.C.

11. *See* discussion *infra* Section III.A.

12. *See infra* Section III.B.1.

freedoms from university oversight,[13] and imposes pre-trial burdens that disincentivize efficient settlements.[14] On the other hand, the deliberate indifference analysis incentivizes university programs for student misconduct prevention,[15] adequately accounts for students' individual freedoms,[16] and imposes a pre-trial burden shifting mechanism that leads to efficient settlements.[17]

Therefore, traditional negligence frameworks applied to analyze university liability for injuries arising out of nondiscriminatory student-on-student misconduct create perverse burdens and incentives. Accordingly, some scholars have suggested new frameworks for analyzing university liability for failure to prevent student injury arising out of non-discriminatory student-on-student misconduct.[18] Commentators and judges alike, however, have yet to explore whether the framework for analyzing university liability for injuries resulting from student-on-student discrimination[19] could provide the framework for analyzing university liability for student injuries arising out of other types of student-on-student misconduct.[20] This Comment titles the aforementioned approach the Civil Rights Approach. The Civil Rights Approach incentivizes university efforts to prevent student-on-student misconduct,[21] balances students' rights of privacy and due process with

13. *See infra* Section III.B.2.
14. *See infra* Section III.B.3.
15. *See infra* Section III.B.1.
16. *See infra* Section III.B.2.
17. *See infra* Section III.B.3.
18. *See* Mark Fidanza, *Aging Out of in Loco Parentis: Towards Reclaiming Constitutional Rights for Adult Students in Public Schools*, 67 RUTGERS L. REV. 805, 806–07 (2015) (proposing the Reasonable Institution model, through which statutory reform should establish more clear expectations of universities in regard to students and courts should consistently apply a reasonableness standard in evaluating university decisions that balances the rights of adult university students with the university's need to protect students); Neil Jamerson, *Who Is the University? Birnbaum's Black Box and Tort Liability*, 39 J.C. & U.L. 347, 349–50 (2013) (proposing the Black Box model, which posits that universities should be held liable only for risks that were within the direct control of an agent of the university); Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U.L. 755, 760–61 (1997) (proposing the Facilitator Model, through which universities should be liable only for foreseeable conduct); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 519 (2003) (proposing the educational mission paradigm, through which universities should be liable for injuries resulting from risks that can be tied to programs that the university actively controls and markets as part of its mission).
19. *See infra* Section II.C.
20. *See infra* Section III.
21. *See infra* Section III.B.1.

universities' duties to prevent harm to students,[22] and implements pretrial burden-shifting that leads to efficient settlements.[23]

Part II of this Comment will discuss the history of cases against universities arising out of student-on-student misconduct.[24] Part II will then examine the current approach to university liability in negligence cases arising out of nondiscriminatory student-on-student misconduct.[25] Lastly, Part II will discuss the current approach to university liability cases arising out of discriminatory student-on-student misconduct.[26] Part III will explain the elements of—and advantages to—the Civil Rights Approach.[27]

Part IV will summarize the Civil Rights Approach and illustrate the advantages of applying this approach in evaluating university liability for failing to prevent student injuries arising out of nondiscriminatory student-on-student misconduct.[28]

II. BACKGROUND

Prior to the 1960s, universities were practically immune from court intervention in universities' monitoring and disciplining of student misconduct.[29] During the 1960s, a new era began where courts and legislatures were called upon to decide the contours of a university's legal obligations to its students.[30] Currently, courts apply traditional negligence theories to cases arising out of hazing, bullying, and other nondiscriminatory student misconduct,[31] but courts apply a separate framework—a framework which arose out of federal statutes of the Civil Rights Era—to cases involving discrimination.[32]

22. *See infra* Section III.B.2.
23. *See infra* Section III.B.3.
24. *See infra* Section II.A.
25. *See infra* Section II.B.
26. *See infra* Section II.C.l.
27. *See infra* Section III.
28. *See infra* Section IV.
29. *See* Britton White, *Student Rights: From in Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education*, 2007 BYU EDUC. & L.J. 321, 321–22 (2007).
30. *See* Bradshaw v. Rawlings, 612 F.2d 135, 138–39 (3d Cir. 1979) ("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. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students.").
31. *See infra* Section II.B.
32. *See infra* Section II.C.

A. The History of University Liability Arising Out of Student-on-Student Misconduct

Courts' classifications of a university's duties to its students have taken many forms throughout history.[33] Prior to the 1960s, courts refused to intervene in the university-student relationship by granting universities blanket immunity through the *in loco parentis* doctrine.[34] After the 1960s, however, courts more frequently intervened in the university-student relationship, increasing constitutional protections for students.[35]

1. *In Loco Parentis*

Until the 1960s, courts applied the *in loco parentis* doctrine to define a university's liability for its decisions and actions regarding its students.[36] The *in loco parentis* approach to university liability relied on the theory that a university stood in the place of a student's parents when making decisions about the education, welfare, and discipline of that student while that student resided on campus.[37] Historically, courts applied the *in loco parentis* approach as a doctrine to confer blanket immunity on universities, making student success in holding a university liable under any theory nearly impossible.[38]

The blanket immunity of *in loco parentis* derives from the tort doctrine of parental immunity.[39] Parental immunity prevents courts from holding parents liable in suits brought by their children for personal torts.[40] Courts justified parental immunity with the argument that "domestic peace and parental control would be disturbed by permitting an action for a personal tort."[41] Thus, during the era of *in loco parentis*, courts gave universities great latitude to discipline students.[42] While *in loco parentis*

33. *See* White, *supra* note 29.

34. *See infra* Section II.A.1.

35. *See, e.g.*, Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (holding that the university violated students' due process rights by expelling the students without notice or hearing); *see also infra* Section II.A.2.

36. *See* 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 (1999).

37. *See* Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) ("[W]e are unable to see why . . . [universities] may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.").

38. *See* People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186, 187 (1866) ("[A university has the power] to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father[.]").

39. *See id.*

40. *See* RESTATEMENT (SECOND) OF TORTS § 895G cmt. c (AM. L. INST. 1979).

41. *Id.*

42. *See Gott*, 161 S.W. at 207. ("[L]ike a father may direct his children, those in charge of [universities] are well within their rights and powers when they direct their students what to eat and where they may get it, where they may go, and what forms of

gave great latitude to universities to discipline students, thereby preventing further misconduct, the actions universities took to unilaterally discipline and remove students were met by increasingly successful constitutional challenges beginning in the 1960s.[43]

2. Increased Constitutional Protection for Students

The Civil Rights movement in the 1960s brought a wave of student activism to university campuses and a marked change in the way courts viewed a university's duties to its students.[44] The landmark case, *Dixon v. Alabama State Board of Education*,[45] marked the first time a court of appeals held that universities were required to provide students with notice and an opportunity to be heard before expulsion.[46] In *Dixon*, the court held that Alabama State University (ASU) could not expel students who participated in protests against racism without ASU first supplying students with "the rudiments of an adversary proceeding,"[47] namely, notice of the charges and an opportunity to be heard.[48]

Because the *Dixon* decision signaled that courts were willing to intervene in a university's decision about disciplining its students, *Dixon* necessarily opened the door to questions of the extent and contours of a university's duties to its students.[49] The *Dixon* court's decision eliminated blanket immunity for universities—which allowed universities to unilaterally discipline students under *in loco parentis*—and necessarily led to the beginning of a new body of case law defining a university's duties to its students.[50]

---

amusement are forbidden."); *see also* John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (holding that the university properly suspended the plaintiff for ringing cowbells and turning the lights out in a dormitory hallway.); Anthony v. Syracuse Univ., 224 A.D. 487, 489 (N.Y. App. Div. 1928) (holding the university's expulsion of the plaintiff was proper based solely on reports from her sorority sisters that she "was causing a lot of trouble in the house; and that they did not think her 'a typical Syracuse girl'").

43. *See infra* Section II.A.2.

44. *See* Lake, *supra* note 36, at 10.

45. *See* Dixon v. Ala. State Bd. of Ed., 294 F.2d 150, 159 (5th Cir. 1961).

46. *See id.*

47. *Id.*

48. *See id.* The Fifth Circuit stated:

> [T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present . . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf . . . . If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

Id.

49. *See* Lake, *supra* note 36, at 10.

50. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a university may not prevent a religious student group from using university facilities as any other

Dixon recognized that a university may not disregard a student's individual rights simply because the student voluntarily resided on the university's campus.[51] *Dixon* and subsequent decisions recognized a student's individual right to privacy[52] and due process.[53] Consequently, the courts limited a university's ability to monitor and remove students who engaged in misconduct, which left other students vulnerable to injuries caused by the misconduct of their peers.[54] The post-*Dixon* judicial limits on a university's disciplinary jurisdiction over its students thus begs the question: when can a university be liable for failing to prevent a student's misconduct that leads to the injury of another student? During the Bystander Era, courts answered this question by limiting university liability for injuries to a student plaintiff brought on by the misconduct of a third-party student.[55]

3. The Bystander Era

In the post-*Dixon* era, courts continued guaranteeing protection of students' individual rights from university intrusion to the logical end: limiting a university's ability to monitor students and granting students more individual rights on campus also meant that students—not their universities—were responsible for their misconduct injuring another student. As the court in *Bradshaw v. Rawlings*[56] stated, "the authoritarian role of today's college administrations has been notably diluted in recent

student group would); Univ. of S. Miss. Chapter of Miss. Civ. Liberties Union v. Univ. of S. Miss., 452 F.2d 564, 568 (5th Cir. 1971) (holding that a university cannot arbitrarily deny formal recognition of a student organization of civil rights activists); Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971) (holding that a university violated a student's Fourth Amendment rights against unreasonable search and seizures by conducting a search of a dormitory for criminal evidence); Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) (holding that a university expelling students for "misconduct" was inadequately vague notice).

51. *See Dixon*, 294 F.2d at 156 ("[I]t is necessary to consider the nature both of the private interest which has been impaired and the governmental power which has been exercised." (internal quotation marks omitted)).

52. *See, e.g.*, *Piazzola*, 442 F.2d at 289 (holding that a university violated a student's Fourth Amendment rights against unreasonable search and seizures by conducting a search of a dormitory for criminal evidence, which resulted in the student's criminal conviction).

53. *See, e.g.*, Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) (finding that a university has the right to ban students from eating off campus and expel the students that break the rule).

54. *See* Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979) (explaining that while colleges used to strictly regulate students under the theory of *in loco parentis*, colleges today face students who "vigorously claim the right to define and regulate their own lives . . . and have vindicated what may be called the interest in freedom of the individual will"; thus, "college administrators no longer control the broad arena of general morals").

55. *See infra* Section II.A.3.

56. *See Bradshaw*, 612 F.2d at 138.

decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students."[57]

In *Bradshaw*, the court refused to hold the University liable for injuries to the student plaintiff that occurred as a result of a drunk-driving accident in which a visibly intoxicated student drove the plaintiff home from a school-sanctioned sophomore picnic.[58] Although a university faculty member had co-signed a check to pay for kegs, which were to be consumed by clearly under age sophomore students, the court held the university was not liable for the plaintiff's injury, instead placing the onus on the students.[59] Higher education law scholars Robert D. Bickel and Peter F. Lake dubbed the court's reasoning in *Bradshaw* the "bystander" approach because the court portrayed the students as agents of the injurious events and the university as an innocent witness.[60] Today, the national focus on university violence prevention efforts has spurred a shift away from the bystander reasoning and courts now readily find universities liable for failure to prevent student-on-student misconduct by applying traditional negligence theories from the non-educational context.[61]

B. The Current Approach to University Liability Arising Out of Non-Discriminatory Student-on-Student Misconduct

Since the late 1990s, the bystander approach has become increasingly rare in cases involving a university's liability for failing to prevent student-on-student misconduct.[62] The current approach to university negligence liability in cases arising out of nondiscriminatory student-on-student misconduct applies traditional negligence theories from the non-educational context.[63] Successful negligence claims require the plaintiff to prove four elements: duty, breach, causation, and injury.[64]

1. Duty

Unlike *in loco parentis* and the bystander approach,[65] the current approach to university negligence liability does not carve out a university-specific doctrine.[66] Instead, student plaintiffs must prove their university

57. *Id.* at 138.
58. *See id.* at 137.
59. *See id.* at 138.
60. *See* Bickel & Lake, *supra* note 18, at 780–81.
61. *See id.*; *infra* Section II.B.
62. *See* Lake, *supra* note 36, at 21.
63. *See* White, *supra* note 29, at 327.
64. *See* RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965).
65. *See supra* Section II.A.1.
66. *See* discussion *supra* Section II.A.1.

owes them a duty through the existing tort duties of special relationship,[67] assumed duty,[68] or premises liability.[69]

Historically, courts hesitated to find that a special relationship existed between a university and its students.[70] Some scholars, however, predict that the recent decision in *Regents of University of California v. Superior Court*[71] marks a change of course and that, in the future, courts will be more likely to find that a university-student special relationship exists.[72]

In *Regents*, the Supreme Court of California found that the University of California Los Angeles (UCLA) breached its duty, "to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting,"[73] by failing to prevent an attack on the student plaintiff by a third-party student who the University knew to be exhibiting signs of schizophrenia.[74] The court reasoned that the University's duty stemmed from the special relationship between the University and the students.[75] In determining whether a special relationship existed, the court used seven factors.[76]

---

67. *See, e.g.*, Regents of Univ. of Cal. v. Superior Court (*Regents I*), 413 P.3d 656, 667–68 (Cal. 2018).

68. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991).

69. *See, e.g.*, Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

70. *See* Freeman v. Busch, 349 F.3d 582, 587–88 (8th Cir. 2003) ("[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students." (citing Bradshaw v. Rawlings, 612 F.2d 135, 138–40 (3d Cir. 1979))); *see also Furek*, 594 A.2d at 519–20 ("[W]e acknowledge the apparent weight of decisional authority that there is no duty on the part of a college or university to control its students based *merely* on the university-student relationship . . . .").

71. *Regents I*, 413 P.3d at 667.

72. *See* Phil Catanzano, *The Supreme Judicial Court Steps into the Complicated World of Student Mental Health*, 2018 BOSTON BAR J. 14, 17–18 (2018); Corrigan, J., Year-in-Review Article, *The Regents of the University of California v. Superior Court*, 46 W. ST. L. REV. 265, 267 (2019); Ruth Jebe & Susan Park, *The Student-University Relationship and Access to Student Online Activity*, 19 CONN. PUB. INT. L.J. 45, 74 (2019); Mary-Christine Sungaila & Marco A. Pulido, *2018 In Review: Notable Civil Cases From the California Supreme Court*, ORANGE CNTY. LAW. (Jan. 2019) at 31, 32.

73. *Regents I*, 413 P.3d at 674.

74. *See id.*

75. *See id.* at 664.

76. *See id.* at 670. The seven factors listed by the court were:

1) the foreseeability of harm to the plaintiff,
2) the degree of certainty that the plaintiff suffered injury,
3) the closeness of the connection between the defendant's conduct and the injury suffered,
4) the moral blame attached to the defendant's conduct,
5) the policy of preventing future harm,
6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and

Regents left many questions unanswered about when the courts should hold that a university-student special relationship exists. The court in *Regents* limited its holding to the curricular setting,[77] but the court left open whether a special relationship could exist outside of the classroom[78] and whether a special relationship could impact a university's misconduct prevention efforts.[79]

The special relationship doctrine continues to be used sparingly by courts to hold that a university owes a student plaintiff a duty in negligence cases arising out of student-on-student misconduct.[80] Courts more frequently rely on the doctrines of assumed duty and premises liability to hold that a university had a duty to a student plaintiff in negligence cases arising out of student-on-student misconduct.[81]

The assumed duty doctrine is another framework through which some courts hold that universities owe a duty in negligence cases arising out of nondiscriminatory student-on-student misconduct.[82] According to Section 323 of the Restatement (Second) of Torts, when an individual undertakes to provide services to another person, the individual can be held liable for failing to provide services with reasonable care.[83] Therefore, when a university affirmatively takes measures to prevent harm to students caused by nondiscriminatory student-on-student misconduct, courts hold that the university assumed a duty to prevent that harm.[84] Examples of when courts may hold that a university assumed a duty to prevent harm to a student plaintiff include when the university communicates to students

---

7) the availability, cost, and prevalence of insurance for the risk involved.

Id.

77. *See id.* at 669 ("Education is at the core of a college's mission, and the classroom is the quintessential setting for curricular activities.").

78. *See id.* at 668 ("Colleges are in a special relationship with their enrolled students only in the context of school-sponsored activities over which the college has some measure of control.").

79. *See id.* at 673 ("[A]s the record in this case demonstrates, threat assessment and violence prevention protocols are already prevalent on university campuses. Recognizing that the university owes its students a duty of care under certain circumstances is unlikely to appreciably change this landscape.").

80. *See* Hindenach v. Olivet Coll., No. 340540, 2019 WL 1265074, at *3 (Mich. Ct. App. Mar. 19, 2019), *appeal denied*, 940 N.W.2d 76 (Mich. 2020).

81. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010); Vega v. Sacred Heart Univ., Inc., 836 F. Supp. 2d 58, 62 (D. Conn. 2011).

82. *See, e.g.*, *Furek*, 594 A.2d at 520; *Vega*, 836 F. Supp. 2d at 62.

83. *See* RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965) ("One who undertakes . . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care . . . . if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.").

84. *See id.*

about the dangers of a specific type of student misconduct—such as hazing[85]—or if the university publishes adjudication policies that include punishments for the student misconduct that caused a plaintiff's injury.[86]

Lastly, courts employ a premises liability framework to find that a university owes a duty to its students in negligence cases arising out of student-on-student misconduct.[87] Section 343 of the Restatement (Second) of Torts provides that a possessor of land is subject to strict liability for injuries to invitees if: (1) the possessor knows or should have known of the danger and should expect that the invitee will not realize the danger or fail to protect against it; and (2) the possessor fails to exercise reasonable care to protect the invitee against the danger.[88] Therefore, courts hold a university liable for harm to a student plaintiff arising out of nondiscriminatory student-on-student misconduct when the university knew or should have known that the misconduct would occur and that the plaintiff would fail to protect against that conduct, and the university fails to protect the student plaintiff from the harm.[89] The Restatement (Third) of Torts outlines a similar analysis for holding non-university landlords and business owners liable for the criminal acts of a third-party.[90]

Once a court holds that a university owes a student plaintiff a duty under the special relationship, assumed duty, or premises liability

85. *See, e.g.*, *Furek*, 594 A.2d at 520 ("[T]he University not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the University policy of discipline for hazing infractions. The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'" (quoting Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (1983))).

86. *See, e.g.*, *Vega*, 836 F. Supp. 2d at 62 (holding that the University assumed a duty to prevent the injuries to the student plaintiff during a sorority hazing ritual because the university made "affirmative avowals of its anti-harassment and anti-hazing policies.").

87. *See, e.g.*, Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010); *Vega*, 836 F. Supp. 2d at 62.

88. *See* RESTATEMENT (SECOND) OF TORTS § 343 (AM. L. INST. 1965) ("A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.").

89. *See Knoll*, 601 N.W.2d at 762–65 ("[T]he University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom."); *see also Vega*, 836 F. Supp. 2d at 62 (reasoning that the university had a duty to protect the student plaintiff from injuries in a hazing-related abduction because the plaintiff was the foreseeable victim of the misconduct of hazing on Sacred Heart University's property).

90. *See* RESTATEMENT (THIRD) OF TORTS § 40 (AM. L. INST. 2012).

doctrines, it will then assess whether the university breached its duty to the student plaintiff.[91]

2. Breach

To assess whether the university breached its duty to a student plaintiff, courts analyze whether the university's failure to act to prevent the plaintiff's injury was unreasonable under the circumstances.[92] In other words, courts apply a nonfeasance analysis.[93] Examples of unreasonable failures to act include: (1) failing to communicate between professional teams responsible for monitoring students of concern;[94] (2) failing to enforce policies against hazing;[95] and (3) failing to take action against known student-on-student misconduct.[96] Once a court holds that the university owed a duty to the student plaintiff and the university breached that duty, the court must then consider whether the university's breach of duty caused the plaintiff's injury.[97]

3. Causation

In order to hold the university liable for negligence arising out of nondiscriminatory student-on-student misconduct, courts must find that the university's breach of duty proximately caused the plaintiff's injury.[98] Proximate causation exists when a court identifies the plaintiff's injury as a foreseeable result of the defendant's conduct.[99] Therefore, in order for a

91. *See infra* Section II.B.2.

92. *See, e.g.*, Regents of Univ. of Cal. v. Superior Court (*Regents II*), 240 Cal. Rptr. 3d 675, 693 (Cal. Ct. App. 2018); Furek v. Univ. of Del., 594 A.2d 506, 523 (Del. 1991); *Vega*, 836 F. Supp. 2d at 62; *Knoll*, 601 N.W.2d at 765.

93. *See Nonfeasance*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The failure to act when a duty to act exists.").

94. *See Regents II*, 240 Cal. Rptr. 3d at 694 (holding the university breached its special relationship duty by failing to protect the student plaintiff, reasoning that there was an "unreasonable failure of communication and lack of coordination among the various professional teams responsible for responding to situations of the type presented by Thompson").

95. *See Furek*, 594 A.2d at 523 (finding that the university breached its assumed duty when the university failed to take reasonable measures to prevent hazing); *see also Vega*, 836 F. Supp. 2d at 62 (finding that the university failed to enforce anti-hazing policies to prevent the harm to the plaintiff).

96. *See Knoll*, 601 N.W.2d at 765 (finding that the university failed to "take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom"). *See also Vega*, 836 F. Supp. 2d at 62 (finding that the university failed to correct the unsafe condition of on-campus hazing and, therefore, failing to prevent the plaintiff's injuries).

97. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (AM. L. INST. 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

98. *See id.*

99. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

court to hold a university liable for negligence arising out of student-on-student misconduct, the court must find that the student's injury was a foreseeable result of the university's failure to prevent the student misconduct that resulted in the plaintiff's injury.[100] Examples of situations in which courts have held that a university proximately caused a student plaintiff's injury are: (1) a student plaintiff was stabbed by a fellow student and the university knew the assailant suffered from auditory hallucinations;[101] and (2) a university was aware of past hazing on campus and publicly admonished the behavior, but students continued to receive hazing injuries.[102] Further, in order for a court to hold a university liable for negligently causing the student plaintiff's injury, the court must hold that the student plaintiff's injury was legally cognizable.[103]

4. Injury

To satisfy the final element of the traditional negligence approach, the court must find that student plaintiff suffered a legally cognizable injury, which can be physical or emotional.[104] Restatement (Third) of Torts defines physical harm to include bodily harm, which includes "physical injury, illness, disease, impairment of bodily function, and death."[105] Additionally, the Restatement (Third) of Torts defines emotional harm as "impairment or injury to a person's emotional tranquility."[106]

While duty, breach, causation, and injury are the four traditional negligence elements courts apply to university liability cases arising out of nondiscriminatory student-on-student misconduct,[107] courts apply a different analysis to university liability cases arising from student-on-student discriminatory harassment. [108]

100. *See* Regents of Univ. of Cal. v. Superior Court (*Regents II*), 240 Cal. Rptr. 3d 675, 693 (Cal. Ct. App. 2018) (explaining that the university's failure to prevent the attack despite "a rational inference that the university should have foreseen Thompson posed a threat" demonstrated that the university proximately caused the student's injuries).

101. *See id.*

102. *See* Furek v. Univ. of Del., 594 A.2d 506, 521–22 (Del. 1991); *see also* Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

103. *See infra* Section II.B.4.

104. *See* Regents of Univ. of Cal. v. Superior Court (*Regents I*), 413 P.3d 656, 662 (Cal. 2018) (finding that the student plaintiff was stabbed in the chest and neck); *see also Furek*, 594 A.2d at 510 (finding that the student plaintiff suffered first and second degree burns from lye-based cleaning solution poured over his head and neck during a fraternity hazing ritual); *see also* Vega v. Sacred Heart Univ., Inc., 836 F. Supp. 2d 58, 60 (D. Conn. 2011) (finding that the student plaintiff suffered injuries to her ankle, knees, and spine, as well as emotional distress from getting kidnapped and physically abused by members of her sorority).

105. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 4 (Am. L. Inst. 2010).

106. *Id.* at § 45.

107. *See supra* Section II.A.

108. *See infra* Section II.C.

C. The Current Approach to University Liability Arising Out of Student-on-Student Discriminatory Misconduct

Title IX of the Education Amendments of 1972[109] (Title IX) is modeled after the language of Title VI of the Civil Rights Act of 1964 (Title VI).[110] The language of both titles is identical, except Title IX replaced the "race, color, and national origin" language of Title VI with "sex."[111] Title IX prohibits sex discrimination in all educational programs that receive federal funding, whereas Title VI prohibits racial discrimination in all programs receiving federal funding, including, but not limited to, educational programs.[112] Given the similarities between Title IX and Title VI, the Supreme Court reasoned in *Cannon v. University of Chicago*[113] that because an established right to private remedy existed under Title VI, Congress intended to establish the same right to private remedy under Title IX.[114]

In order to hold a university liable for violations of either Title IX or Tile VI arising out of discriminatory student-on-student misconduct, a student plaintiff must prove that: (1) the university had actual knowledge of the misconduct;[115] (2) the university was deliberately indifferent to the misconduct;[116] (3) the misconduct was severe, pervasive, and patently offensive;[117] and (4) the misconduct was so severe, pervasive, and patently offensive that it deprived the plaintiff of access to the university's educational program.[118]

1. Actual Knowledge

For a court to hold a university liable for a violation of either Title IX or Title VI arising out of discriminatory student-on-student misconduct, the plaintiff must prove that the university had actual knowledge of the

109. *See* 20 U.S.C. § 1681.

110. *Compare* 20 U.S.C. § 1681 ("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 . . . ."), *with* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

111. *See supra* note 110.

112. *See id.*

113. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 695–96 (1979).

114. *See id.*

115. *See infra* Section II.C.1.

116. *See infra* Section II.C.2.

117. *See infra* Section II.C.3.

118. *See infra* Section II.C.4.

misconduct.[119] As the Supreme Court explained in *Davis Next Friend LaShonda D. v. Monroe County Board of Education*,[120] actual knowledge was required because Congress enacted Title IX and Title VI through the Spending Clause of the Constitution:

> [P]rivate damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." In interpreting language in spending legislation, we thus "insis[t] that Congress speak with a clear voice," recognizing that "[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it."[121]

Actual knowledge in the context of a university's liability for violations of Title IX or Title VI arising out of discriminatory student-on-student misconduct requires that a university employee with the authority to take corrective measures received notice that the misconduct has either occurred in the past or is likely to occur in the future.[122] The plaintiff's injury must occur *after* the university had actual knowledge of the misconduct in order for the plaintiff's Title IX or Title VI claim to be actionable.[123] University presidents[124] and athletic directors, for example, have the authority to take corrective measures when a university athlete is accused of discriminatory misconduct.[125] Campus security officers, however, do not possess the authority to take corrective action.[126] Adequate notice that the misconduct occurred or likely occurred includes reports of the accused engaging in similar misconduct on a prior occasion,[127] prior formal complaints made by the student plaintiff about the accused,[128] and reports of a group or team to which the accused belongs

119. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294–95 (11th Cir. 2007); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 259 (6th Cir. 2000).

120. *See Davis,* 526 U.S. at 640.

121. *Id.* at 640 (quoting Pennhurst State Sch. and Hosp. v. Halderman*,* 451 U.S. 1, 17 (1981)).

122. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 276 (1998); Ross v. Univ. of Tulsa, 859 F.3d 1280, 1284, 1286 (10th Cir. 2017); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294–95 (11th Cir. 2007); Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006).

123. *See* Doe v. Univ. of Ky., 959 F.3d 246, 251 (6th Cir. 2020).

124. *See Williams*, 477 F.3d at 1294–95; *Oden*, 440 F.3d at 1089.

125. *See Williams*, 477 F.3d at 1294–95.

126. *See* Ross v. Univ. of Tulsa, 859 F.3d 1280, 1284, 1286 (10th Cir. 2017).

127. *See Williams*, 477 F.3d at 1295.

128. *See Oden*, 440 F.3d at 1089.

engaging in similar conduct in the past.[129] Once a court finds that a university had actual knowledge of past or likely future discriminatory misconduct, the court will then consider whether the university acted with deliberate indifference in response to the discriminatory misconduct.[130]

2. Deliberate Indifference

Courts apply the deliberate indifference standard when evaluating a university's liability stemming from Title IX and Title VI.[131] Deliberate indifference differs from traditional negligence standards, such as failure to protect, in a very important respect: deliberate indifference is a theory of feasance, not nonfeasance.[132] Unlike negligent failure to protect, which focuses on the university's inaction, deliberate indifference is an active decision on the part of the university to respond inadequately, either through inaction or through clearly unreasonable remedial actions.[133]

Proof that the university failed to follow either federal regulations or the university's own policies is not, in and of itself, enough to establish that it acted with deliberate indifference.[134] Rather, the court must determine if the university's actions were clearly unreasonable.[135] A university is deliberately indifferent if its actions cause the misconduct that injured the plaintiff or make students vulnerable to the misconduct that injured the plaintiff and the university had control over the misconduct.[136]

---

129. *See Ross*, 859 F.3d at 1284, 1286.

130. *See infra* Section II.C.2.

131. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

132. *See id.* at 644 ("Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action . . . . If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.").

133. *See id.* (holding that a school's failure to respond to reports of student-on-student sexual harassment for five months presented an issue of fact as to whether the school was deliberately indifferent).

134. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

135. *See id.*

136. *See, e.g.*, McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009) (finding the university was deliberately indifferent for deferring to criminal proceedings and failing to independently investigate a student's complaints of sexual misconduct); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294 (11th Cir. 2007) (finding that the university was deliberately indifferent when it admitted a transfer student that the university knew had violated the sexual misconduct at another university and for failing to hold a disciplinary hearing in response to new reports of sexual misconduct by the same student until eight months after the reports); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1172 (10th Cir. 2007) (finding that the university was deliberately indifferent by failing to supervise football recruits who assaulted a female student when many school officials, including the football coach, knew the program had a reputation of pervasive sexual harassment and assault).

Deliberate indifference does not need to stem from actual notice to a university that violations occurred in a specific university-sponsored program or activity.[137] A court will find that a university was deliberately indifferent if the university was notified of a trend of discriminatory misconduct and the university unreasonably failed to act—or acted unreasonably to prevent—further discriminatory misconduct.[138] Even if the court finds that a university was deliberately indifferent to misconduct of which it had actual knowledge, a court must also find that the misconduct was severe, pervasive, and objectively offensive in order to hold that the university violated Title IX or Title VI.[139]

3. Severe, Pervasive, and Objectively Offensive

The 2020 United States Department of Education's Office of Civil Right's Final Rule on Title IX imposes the standard that the injury must be severe, pervasive and objectively offensive.[140] The specific language of severe, pervasive, and objectively offensive, however, originated from a common law doctrine articulated by the Supreme Court in 1999 in *Davis*.[141] In *Davis*, the Court explained that "sufficiently severe" conduct includes student-on-student harassment.[142] Following a finding of severe, pervasive, and objectively offensive misconduct,[143] a court must also find

137. *See* Feminist Majority Found. v. Hurley, 911 F.3d 674, 679 (4th Cir. 2018) (finding that a university's choice to hold two listening circles and send university police to some student events was a deliberately indifferent response to reports of over seven hundred harassing and threatening messages from all over campus using an anonymous app targeting members of an activist organization).

138. *See* Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1113 (9th Cir. 2020) ("[I]t may be easier to establish a causal link between a school's policy of deliberate indifference and the plaintiff's harassment when the heightened risk of harassment exists in a specific program. But we will not foreclose the possibility that a plaintiff could adequately allege causation even when a school's policy of deliberate indifference extends to sexual misconduct occurring across campus."); Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 967 (9th Cir. 2010) ("[W]here the official policy is one of deliberate indifference to a known overall risk of sexual harassment, notice of a particular harassment situation and an opportunity to cure it are not predicates for liability.").

139. *See infra* Section II.B.3.

140. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.30 (2020).

141. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999).

142. *See id.* at 633.

143. Courts analyzing alleged misconduct under the severe, pervasive, and objectively offensive standard have found a variety of actions satisfy this standard. *See, e.g.*, Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1298 (11th Cir. 2007) (holding that an orchestrated assault involving three student assailants and two consecutive assaults in one night was severe, pervasive, and patently offensive); Feminist Majority Found. v. Hurley, 911 F.3d 674, 690 (4th Cir. 2018) (holding that over seven hundred threatening messages targeting a student activist group was severe, pervasive, and patently offensive); Cavalier v. Cath. Univ. of Am., 306 F. Supp. 3d 9, 16 (D.D.C. 2018) (holding that rape involving forcible penetration was severe, pervasive, and patently offensive);

that the conduct deprived the plaintiff of access to the university's educational program.[144]

4. Deprival of Access

Deprival of access occurs when the discriminatory misconduct that caused the plaintiff's injury "so undermines and detracts from the victim['s] educational experience, that the victim [is] effectively denied equal access to an institution's resources and opportunities."[145] Therefore, a student plaintiff must prove that the university's deliberate indifference materially deprived the plaintiff of access to university-provided educational opportunities.[146] Importantly, the plaintiff must show deprival of access to the defendant's educational opportunities, not any other institution's educational opportunities, which effectively requires that the plaintiff be enrolled in classes at the defendant university or otherwise taking advantage of the defendant's curriculum.[147]

All in all, courts' current approaches to university liability for student plaintiffs' injuries caused by student-on-student misconduct diverge depending on the nature of the injurious misconduct. If a plaintiff's injury was caused by nondiscriminatory student-on-student misconduct, the court will analyze the university's liability applying traditional negligence principles.[148] On the other hand, if a plaintiff's injury was caused by

McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 482 (S.D.N.Y. 2009) (holding that rape involving forcible penetration was severe, pervasive and patently offensive); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1172 (10th Cir. 2007) (holding that rape involving forcible penetration was severe, pervasive, and patently offensive).

144. *See infra* Section II.B.4.

145. *Davis*, 526 U.S. at 631.

146. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1105 (10th Cir. 2019) (finding that a plaintiff avoiding educational programs out of an objectively reasonable fear of encountering the plaintiff's attacker was evidence of the student plaintiff's deprival of access to educational opportunities); *Williams*, 477 F.3d at 1298 (finding that the student plaintiff's decision to withdraw from the university as a result of emotional trauma and continued fear constituted a deprival of access to the university's education opportunities); *Feminist Majority Found.*, 911 F.3d at 682 (finding that the student plaintiffs' objectively reasonable consistent fear stemming from numerous anonymous threats hindering the plaintiffs' freedom of movement on campus sufficiently deprived the plaintiffs of educational opportunities); *McGrath*, 672 F. Supp. 2d at 485 (finding that a student plaintiff's suicide following an incident of multiple sexual assaults in one night constituted deprival of access to the university's educational opportunities).

147. *See* Doe v. Brown Univ., 896 F.3d 127, 133 (1st Cir. 2018) (holding that Doe's Title IX claim must fail because Doe was not enrolled at the defendant university and, despite the alleged incident happening on defendant university's campus, Doe could not prove deprival of access to educational opportunities at the defendant university).

148. *See supra* Section II.A.

discriminatory student-on-student misconduct, the court will apply a deliberate indifference framework.[149]

III. ANALYSIS

Universities currently face a conundrum regarding liability for student injuries arising out of nondiscriminatory student-on-student misconduct. Courts require universities to give students more individual freedom on campus in the post-*Dixon* era,[150] yet courts more frequently hold universities liable[151] for failing to prevent injuries resulting from student-on-student misconduct.[152] In other words, courts are simultaneously limiting universities' ability to monitor and discipline student misconduct, while increasing universities' liability for failing to prevent the injuries resulting from that misconduct.[153]

The Third Circuit foresaw the conundrum presented by the current approach to university negligence liability arising out of nondiscriminatory student-on-student misconduct. In *Bradshaw v. Rawlings*,[154] the Third Circuit famously declared that, "the modern American college is not an insurer of the safety of its students."[155] As the court in *Bradshaw* explained, universities are no longer granted the wide discretion and control over student conduct that marked the era of *in loco parentis*.[156] Instead, universities must give students the freedom to exercise their individual rights on campus.[157] It follows, the court reasoned, that as courts lessened university discretion and control over student conduct, universities should have less liability for student injuries caused by student-on-student misconduct.[158]

---

149. *See supra* Section II.B.

150. *See supra* Section II.A.2

151. *See Large Loss Report 2019*, UNITED EDUCATORS (Jan. 2019), https://bit.ly/3iUJ2D2.

152. *See supra* Section II.A.2.

153. *Compare supra* Section II.A.1., *with supra* Section II.A.2.

154. 612 F.2d 135 (3d Cir. 1979).

155. *Id.* at 138.

156. *See, e.g.*, Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) (finding that a university standing *in loco parentis* has the right to ban students from eating off campus and expel the students that break the rule and eat in local restaurants); *see also supra* Section II.A.1.

157. *Bradshaw*, 612 F.2d at 139–40 ("[C]ampus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited.").

158. *See id.*

Unlike the current approach to negligence arising out of nondiscriminatory student-on-student misconduct,[159] the current approach to university liability for student-on student discrimination[160] more adequately and consistently focuses courts' analyses on the university's ability to know of and control student misconduct.[161] In order to reconcile the conundrum faced by courts applying the current approach to university negligence liability arising out of nondiscriminatory student-on-student misconduct, courts should apply the Civil Rights Approach.[162]

A. Applying the Civil Rights Approach to University Liability in Negligence Cases Arising Out of Student-on-Student Misconduct

At first glance, the frameworks courts apply in negligence and discrimination cases arising out of student-on-student misconduct seem to differ greatly because the origins of each framework are different. The framework for analyzing violations of Title IX and Title VI arises out of statutory interpretation.[163] On the other hand, the framework for negligence liability arises out of common law personal injury doctrine.[164] However, the elements of the Title IX and Title VI analyses closely resemble the common law negligence elements of duty, breach, causation, and injury.[165] The Civil Rights Approach uses the Title IX and Title VI framework to facilitate a negligence analysis for nondiscriminatory student-on-student misconduct that more accurately reflects the university-student relationship.[166]

1. Duty

Under the Civil Rights Approach, a court analyzes whether the university has a duty to the student plaintiff by considering whether the university had actual knowledge of the misconduct that caused the student

159. *See supra* Section II.B.

160. *See supra* Section II.C.

161. *Compare* Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294 (11th Cir. 2007) (holding that the university was deliberately indifferent when it admitted a transfer student that the university knew had violated the sexual misconduct policy at another university and for failing to hold a disciplinary hearing in response to new reports of sexual misconduct by the same student until eight months after the reports), *with* Regents of Univ. of Cal. v. Superior Court (*Regents II*), 240 Cal. Rptr. 3d 675, 693 (Cal. Ct. App. 2018) (holding the university was negligent because the university breached its special relationship duty by failing to protect the student plaintiff because there was an "unreasonable failure of communication and lack of coordination among the various professional teams responsible for responding to situations of the type presented by Thompson").

162. *See infra* Section III.A.

163. *See, e.g.*, Davis. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 630 (1999).

164. *See supra* Section II.B.

165. *See infra* Sections III.A.1–3, III.A.4.

166. *See infra* Sections III.A.1–3.

plaintiff's injury.[167] The Civil Rights Approach does not create a new standard by which courts should find that a university has a duty to its students. Instead, the Civil Rights Approach introduces a threshold question to the existing analyses of special relationship,[168] assumed duty,[169] and premises liability.[170] The threshold question is: did the university have actual knowledge of the misconduct that caused the plaintiff's injury?

Actual knowledge of the misconduct does not require the university to be on notice that the specific student who caused the plaintiff's injury posed a threat specifically to the plaintiff.[171] Rather, actual knowledge of misconduct requires that the plaintiff prove the university knew or should have known that the plaintiff's injury would occur if the university did not effectively address the misconduct.[172] Actual knowledge for violations of Title IX or Title VI requires that a university employee with the authority to take corrective measures has received notice that the conduct that caused the plaintiff's injury has either occurred in the past or is likely to occur in the future.[173]

By introducing the threshold question as to the university's actual knowledge, the Civil Rights Approach allows courts to analyze duty in a way that better reflects the nature of the university-student relationship. The actual knowledge inquiry requires courts to analyze whether the university's reporting and supervision structures were used in a way that constitutes adequate notice to the university.[174] Once the court finds that the university had actual knowledge and holds that the university had a duty to the student plaintiff, the court will then analyze if the university breached its duty.[175]

2. Breach

Under the Civil Rights Approach, a court examines if a university breached its duty by analyzing whether the university was deliberately indifferent to the nondiscriminatory misconduct of which the university had actual knowledge.[176] A university is deliberately indifferent if the

167. *See supra* Section II.B.

168. *See, e.g.*, Regents of Univ. of Cal. (*Regents I*) v. Superior Court, 413 P.3d 656, 667–68 (Cal. 2018).

169. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991).

170. *See, e.g.*, Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

171. *See supra* Section II.C.1.

172. *See* cases cited *supra* note 122.

173. *See* cases cited *supra* note 122.

174. *See supra* Section II.C.1.

175. *See supra* Section II.B.1.

176. *See supra* Section II.C.2.

university's actions caused the misconduct that injured the plaintiff or made students vulnerable to such injuries and the university had control over the conduct that caused the injury.[177] As in the cases arising out of discriminatory student-on-student misconduct,[178] in the cases arising out of nondiscriminatory student-on-student misconduct, universities cannot avoid breach simply by taking some action to prevent student-on-student misconduct.[179] The action must be a reasonable remedial action to prevent harm from misconduct—of which the university has actual knowledge—from reoccurring.[180]

Analyzing whether a university breached its duty to students by assessing the university's deliberate indifference ensures that courts consider the efficacy of a university's risk-prevention efforts, instead of simply pointing to risk-prevention as an indicator of assumed duty[181] or special relationship.[182]

Deliberate indifference introduces the major difference between the current approach to negligence liability arising out of nondiscriminatory student-on-student misconduct[183] and the Civil Rights Approach. Like the current approach to university liability for discriminatory student-on-student misconduct,[184] the Civil Rights Approach is a doctrine of feasance instead of nonfeasance.[185] In other words, under the Civil Rights Approach, the university breaches its duty by affirmatively acting, not failing to act.[186] The university breaches its duty by acting with deliberate indifference to the misconduct that caused the plaintiff's injury, instead of passively failing to prevent the plaintiff's injury.[187]

A feasance approach better aligns with the university-student relationship because "the modern American college is not an insurer of the

177. *See supra* Section II.C.2.

178. *See supra* Section II.C.2.

179. *See, e.g.*, Vega v. Sacred Heart Univ., Inc., 836 F. Supp. 2d 58, 62 (D. Conn. 2011) (holding the university breached its assumed duty to the student plaintiff by failing to enforce anti-hazing policies to prevent the harm to the plaintiff).

180. *See supra* Section II.B.2.

181. *See, e.g.*, *supra* note 89 and accompanying text; *See also Vega*, 836 F. Supp. 2d at 62 (holding that the University assumed a duty to prevent the injuries to the student plaintiff during a sorority hazing ritual because the university made "affirmative avowals of its anti-harassment and anti-hazing policies").

182. *See* Regents of Univ. of Cal. v. Superior Court (*Regents II*), 240 Cal. Rptr. 3d 675, 693 (Cal. Ct. App. 2018) (holding the university breached its special relationship duty by failing to protect the student plaintiff, reasoning that there was an "unreasonable failure of communication and lack of coordination among the various professional teams responsible for responding to situations of the type presented by Thompson").

183. *See supra* Section II.B.

184. *See supra* Section II.C.2.

185. *See Nonfeasance*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The failure to act when a duty to act exists.").

186. *See supra* Section II.C.2.

187. *See supra* Section II.C.2.

safety of its students."[188] Therefore, the university is generally not required to insulate university students from all possible danger caused by third parties.[189] Instead, the Civil Rights Approach requires courts to find that the university actively breached its duty to the plaintiff by *acting* in a way that made the student plaintiff vulnerable to an injury at the hands of other students, where the university had control over the misconduct of the other students.[190] Once the court holds that the university breached its duty, the court will then analyze if the university's breach caused the plaintiff's injury.[191]

3. Causation

Arguably, both approaches to liability for universities arising out of nondiscriminatory student-on-student misconduct[192] and student-on-student discrimination[193] consider legal causation in determining liability.[194] Courts applying Title IX and Title VI, however, consider causation as part of a deliberate indifference analysis.[195]

Under the Civil Rights Approach, a court analyzes whether a university's breach of its duty caused a student's injury by examining whether the student's injury was a foreseeable result of the university's deliberate indifference.[196] A university is deliberately indifferent if its actions caused the misconduct that injured the plaintiff or made students vulnerable to the misconduct and the university had control over the conduct that caused the injury.[197] Therefore, courts applying the Civil Rights Approach to analyze whether the student's injury was a foreseeable result of the university's negligence will ask: (1) whether the university had control over the conduct that caused the plaintiff's injury; and (2)

188. Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979).

189. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (AM. L. INST. 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

190. *See* Freeman v. Busch, 349 F.3d 582, 587–88 (8th Cir. 2003) (citing Bradshaw v. Rawlings, 612 F.2d 135, 138–40 (3d Cir. 1979).

191. *See supra* Section II.C.2.

192. *See supra* Section II.B.3.

193. *See supra* Section II.C.2.

194. *Compare* Regents of Univ. of Cal. v. Superior Court (*Regents II*), 240 Cal. Rptr. 3d 675, 693 (Cal. Ct. App. 2018) (holding that the university's failure to prevent the attack despite "a rational inference that the university should have foreseen Thompson posed a threat" demonstrated that the university proximately caused the student's injuries), *with* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633, 645, 649 (1999) ("[D]eliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.").

195. *See supra* Section II.C.2.

196. *See supra* Section II.C.2.

197. *See, e.g.*, cases cited *supra* note 136.

whether the university directly caused the injury or made students vulnerable to injuries of the type sustained by the plaintiff.[198]

The Civil Rights Approach focuses courts' causation analyses on a university's control over the misconduct that caused the injury.[199] Accordingly, the Civil Rights Approach allows courts to hold universities accountable for injuries the university had the resources and authority to prevent.[200] Therefore, the Civil Rights Approach also protects the constitutional rights of third-party students by examining if the university had the authority to monitor and discipline the student misconduct at issue.[201] In order for a court to hold the university liable, the court must hold that the injury, which the university's breach caused, is legally cognizable.[202]

4. Injury

In order for a university to be liable for a student injury caused by either nondiscriminatory or discriminatory student-on-student misconduct, the court must find that the student plaintiff had a legally cognizable injury.[203] In evaluating violations of Title IX and Title VI, however, courts specifically consider whether the discriminatory misconduct at issue denied the student plaintiff access to educational opportunities.[204] Under the traditional negligence framework, courts make no such university-specific analyses in evaluating if the plaintiff's injury is legally cognizable.[205]

Under the Civil Rights Approach, courts analyzing whether the injury is legally cognizable will evaluate whether the injury deprived the plaintiff of access to the university's educational opportunities.[206] Deprival of access occurs when the misconduct that caused the plaintiff's injury "so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."[207] Deprival of access is indicative of the causal link between the university's actions and the plaintiff's injury because the plaintiff's inability to partake in the university's program suggests that the university did not take appropriate remedial action in response to the

198. *See* case cited *supra* note 132.
199. *See* case cited *supra* note 132.
200. *See supra* Section II.C.2.
201. *See supra* Section II.A.2.
202. *See infra* Section III.A.4.
203. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 4 (Am. L. Inst. 2010).
204. *See supra* Section II.C.4.
205. *See supra* Section II.B.4.
206. *See supra* Section II.C.4.
207. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999).

injurious student-on-student misconduct.[208] Therefore, the deprival of access analysis focuses the court's findings on the university's role in the plaintiff's injury and adequately separates the agency of the student engaged in the injurious misconduct from the analysis of university liability for failing to prevent such misconduct.[209]

The Civil Rights Approach applies the deliberate indifference framework to the elements of duty, breach, causation, and injury in negligence cases arising out of nondiscriminatory student-on-student misconduct, which provides many advantages.[210]

B. Advantages of the Civil Rights Approach

The Civil Rights Approach to university negligence liability arising out of nondiscriminatory student-on-student misconduct[211] provides many advantages when compared to the current approach to such cases.[212] Namely, the Civil Rights Approach: (1) incentivizes university efforts to prevent student-on-student misconduct;[213] (2) balances a student's right of privacy and due process with a university's duties to prevent harm to its students;[214] and (3) implements pretrial burden-shifting that leads to efficient settlements.[215]

1. The Civil Rights Approach Incentivizes Universities to Prevent Student-on-Student Misconduct

The framework for analyzing university liability for student-on-student discrimination[216] already evaluates the effectiveness of a university's attempts to prevent student-on-student misconduct through the deliberate indifference analysis.[217] The current approach to university negligence liability resulting from nondiscriminatory injuries, however, disincentivizes prevention efforts by treating university prevention efforts primarily as a signal that the university assumed a duty to prevent all injurious misconduct.[218] Arguably, the traditional negligence framework

208. *See Davis*, 526 U.S. at 631 (1999) ("[T]hat the discrimination must occur 'under any education program or activity' suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect . . . .")

209. *See supra* Section II.C.4.

210. *See infra* Section III.B.

211. *See supra* Section III.A.

212. *See supra* Section II.B.

213. *See infra* Section III.B.1.

214. *See infra* Section III.B.2.

215. *See infra* Section III.B.3.

216. *See supra* Section II.C.

217. *See supra* Section II.C.2.

218. *See, e.g.*, *supra* note 85 and accompanying text.

treats a university's student misconduct prevention efforts as evidence of an assumed duty to eradicate all student misconduct.[219]

The current approach to negligence liability for universities arising out of nondiscriminatory student-on-student misconduct overlooks the fact that student misconduct prevention efforts are intertwined with the "dramatic reapportionment of responsibilities and social interests"[220] between students and universities that took place during the civil rights era.[221] During the civil rights era, courts necessarily limited the university's control over student conduct in order to grant students more individual freedoms from university intrusion.[222] Therefore, a university's student misconduct prevention programs should be analyzed not as an assertion of absolute control over student conduct, but as an attempt to equip students to refrain from and prevent student-on-student misconduct.[223]

The Civil Rights Approach, like the current approach to violations of Title IX and Title VI,[224] analyzes the quality of a university's student misconduct prevention efforts in determining causation.[225] Applying the Civil Rights Approach, courts examine efficacy of the university's prevention efforts because the effective implementation of such programs would mitigate a finding of deliberate indifference.[226]

2. The Civil Rights Approach Balances a Student's Rights of Privacy and Due Process with a University's Duties to Prevent Harm to Students

Increased judicial intervention following the *in loco parentis* era[227] continually granted students protection from university intrusion on their individual rights.[228] The current application of the traditional negligence framework, however, does not adequately account for the university's duty to respect students' individual rights.[229]

A university breaches its duty under the traditional negligence framework when it fails to take reasonable action to prevent the student plaintiff's injury.[230] Accordingly, the court engages in an ex-post analysis

219. *See, e.g.*, *supra* note 85 and accompanying text.
220. Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979).
221. *See id.*
222. *See supra* Section II.A.2.
223. *See, e.g.*, case cited *supra* note 132.
224. *See supra* Section II.B.1.
225. *See supra* Section III.A.3.
226. *See supra* Section III.A.3.
227. *See supra* Section II.A.1.
228. *See supra* Section II.A.2.
229. *See supra* Section II.A.2.
230. *See supra* Section II.B.2.

of actions the university failed to take to monitor and discipline the students responsible for the plaintiff's injury.[231] Yet, universities are often prohibited from monitoring and disciplining students without cause because such surveillance interferes with students' rights of privacy and due process.[232] The Civil Rights Approach addresses this issue by focusing judicial analysis of breach and causation on the efficacy of the university's affirmative response to a known risk.[233] The Civil Rights approach introduces the questions of actual knowledge[234] and deliberate indifference[235] into the duty[236] and breach[237] analysis, respectively.[238]

Actual knowledge requires that the university knew of the risk to the plaintiff before the plaintiff's injury.[239] Accordingly, the Civil Rights Approach allows courts to consider whether the university had cause to monitor and discipline the students responsible for the plaintiff's injury.[240] Further, deliberate indifference is a standard of feasance, which focuses the court's analysis on the efficacy of the actions the university took in response to its actual knowledge of the risk.[241] Therefore, instead of analyzing all of the possible actions the university could have taken to mitigate the risk to the plaintiff, a court utilizing the Civil Rights Approach focuses on the efficacy of the actions the university did take.[242]

3. The Civil Rights Approach Implements Pretrial Burden-Shifting that Leads to Efficient Settlements

The Civil Rights Approach shifts the pre-trial burden of production between the student plaintiff and the defendant university. Under the Civil Rights Approach, plaintiffs are required to meet a higher standard of proof to survive a motion to dismiss for failure to state a claim ("12(b)(6) motion") under Federal Rule of Civil Procedure 12(b)(6).[243] However, discovery is broader in scope against a university after the plaintiff survives a 12(b)(6) motion.[244]

Currently, many cases applying traditional negligence theories will survive a 12(b)(6) motion based only on proof that the university knew

231. *See supra* Section II.B.2.
232. *See supra* Section II.A.2.
233. *See supra* Section II.A.2.
234. *See supra* Section II.C.1.
235. *See supra* Section II.C.2.
236. *See supra* Section II.B.1.
237. *See supra* Section II.B.2.
238. *See supra* Sections III.A.1–2.
239. *See* cases cited *supra* note 122.
240. *See supra* Section III.A.1., III.A.2.
241. *See supra* Section II.C.2.
242. *See supra* Section III.A.2.
243. *See* FED. R. CIV. P. 12(b)(6).
244. *See supra* Section II.A.3.

that misconduct occurred and caused the plaintiff's injury.[245] On the other hand, the Civil Rights Approach would require plaintiffs to assert a plausible claim that the university knew of the misconduct and failed to take reasonable measures to prevent it from injuring the plaintiff.[246] Once a plaintiff survives a 12(b)(6) motion, the scope of discovery widens to all evidence related to the efficacy of the university's misconduct prevention efforts under the deliberate indifference analysis.[247]

Accordingly, the burdens of production under the Civil Rights Approach increase for the university as the settlement value of the case increases.[248] Therefore, the shifting burden of production would ensure more efficient use of judicial resources.[249] The Civil Rights Approach will filter cases in which the university's response to the notice is adequate enough to defeat a plausible claim of breach as a matter of law.[250] At the same time, the Civil Rights Approach will expand judicial review of university response to student misconduct, allowing a more thorough proximate cause analysis.[251]

IV. RECOMMENDATION: THE CIVIL RIGHTS APPROACH

In summary, the Civil Rights Approach to negligence liability for universities arising out of nondiscriminatory student-on-student misconduct addresses the shortcomings of the current approach by applying the existing framework that courts use to analyze university liability for violations of Title IX and Title VI.[252] The Civil Rights

245. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 515 (Del. 1991) ("[I]n view of the evidence suggesting that the University was aware of the 'dangerous propensities of the fraternities as they related to hazing,' and the fraternity's location on University property, it could not be said, as a matter of law, that no duty was owed to Furek.").

246. *See supra* Section III.A.3.

247. *See* Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1112 (9th Cir. 2020) ("A school need not have had actual knowledge of a specific instance of sexual misconduct or responded with deliberate indifference to that misconduct before damages liability may attach . . . . Thus, a pre-assault claim should survive a motion to dismiss if the plaintiff plausibly alleges that (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment . . . .").

248. *See supra* Section III.A.3.

249. *See supra* Section III.A.3.

250. *See supra* Section III.A.3.

251. *Compare* Furek v. Univ. of Del., 594 A.2d 506, 515 (Del. 1991) ("[I]n view of the evidence suggesting that the University was aware of the 'dangerous propensities of the fraternities as they related to hazing,' and the fraternity's location on University property, it could not be said, as a matter of law, that no duty was owed to Furek."), *with* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644, 649 (1999) (holding that a school's failure to respond to reports of student-on-student sexual harassment for five months presents an issue of fact as to whether the school was deliberately indifferent).

252. *See supra* Section III.A.

Approach does not create a new legal concept. Rather, the Civil Rights Approach uses the existing framework for assessing violations of Title IX and Tile VI to analyze duty, breach, causation, and injury in a negligence suit arising out of nondiscriminatory student-on-student misconduct.[253]

In order to hold a university liable for negligence under the Civil Rights Approach, a court will first address the threshold question of whether the university had actual knowledge of the misconduct that caused the plaintiff's injury.[254] Actual knowledge of misconduct requires that the plaintiff prove the university knew or should have known that the plaintiff's injury would occur because an employee with authority to take corrective measures was notified that the misconduct had occurred in the past or is likely to occur in the future.[255] The actual knowledge threshold question considers the uniqueness of the university-student relationship by allowing courts to incorporate an analysis of whether the university's reporting and supervision structures were utilized in such a way that put the university on notice of the risk to the plaintiff.[256]

Following the threshold inquiry, a court will evaluate duty under the existing tort doctrines of special relationship,[257] assumed duty,[258] or premises liability.[259] In order to hold a university breached its duty under the Civil Rights Approach, a court will evaluate whether the university was deliberately indifferent in response to actual knowledge of misconduct.[260] A university is deliberately indifferent if: (1) the university's actions caused the misconduct that injured the plaintiff; or (2) the university's actions made students vulnerable to such injuries and the university had control over the conduct that caused the injury.[261] By incorporating deliberate indifference into the breach analysis, the Civil Rights Approach allows courts to consider a university's feasance instead of nonfeasance.[262] The feasance analysis better aligns with the university-student relationship because "the modern American college is not an

253. *See supra* Section III.A.

254. *See supra* Section III.A.1.

255. *See* cases cited *supra* note 122.

256. *See supra* Section III.A.1.

257. *See, e.g.*, Regents of Univ. of Cal. (*Regents I*) v. Superior Court, 413 P.3d 656, 667–68 (Cal. 2018).

258. *See, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991).

259. *See, e.g.*, Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 762–65 (Neb. 1999), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907 (Neb. 2010).

260. *See supra* Section III.A.2.

261. *See, e.g.*, McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294 (11th Cir. 2007); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1172 (10th Cir. 2007).

262. *See Nonfeasance*, BLACK'S LAW DICTIONARY, (11th ed. 2019) ("The failure to act when a duty to act exists.").

insurer of the safety of its students."[263] Therefore, the university is not required to generally insulate its students from all possible danger caused by third parties.[264] Instead, courts must find that the university specifically had a duty to the plaintiff and the university failed to meet that duty by acting in a way that directly harmed the plaintiff or left the plaintiff vulnerable to harmful student misconduct over which the university had control.[265]

In order to analyze whether a university's breach of duty caused the plaintiff's injury under the Civil Rights Approach, a court will analyze whether the plaintiff's injury was a foreseeable result of the university's deliberate indifference to the misconduct of which the university had actual knowledge.[266] Courts applying the Civil Rights Approach to analyze whether the university's negligence caused the student's injury arising out of student-on-student misconduct will ask: (1) if the university had control over the conduct that caused the plaintiff's injury; and (2) whether the university directly caused the injury or made students vulnerable to injuries arising out of student-on-student misconduct.[267] Analyzing deliberate indifference as part of breach and causation allows courts to consider the university's ability to control the misconduct of the third-party student in deciding whether the university breached its duty.[268]

Lastly, in order to hold a university liable for negligence arising out of nondiscriminatory student-on-student misconduct under the Civil Rights Approach, a court will find that the student plaintiff's injury was legally cognizable.[269] In evaluating whether a student plaintiff's injury was legally cognizable, a court will consider if the injury resulted in a deprival of the student plaintiff's access to education.[270]

V. CONCLUSION

Since the end of *in loco parentis* blanket immunity for universities,[271] courts have attempted to define a university's duties to prevent harm

263. Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979).

264. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (Am. L. Inst. 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

265. *See* Furek v. Univ. of Del., 594 A.2d 506, 519–20 (Del. 1991) ("[W]e acknowledge the apparent weight of decisional authority that there is no duty on the part of a college or university to control its students based *merely* on the university-student relationship . . . .").

266. *See supra* Section III.A.3.

267. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–45, 649 (1999).

268. *See id.*

269. *See supra* Section III.A.3.

270. *See supra* Section III.A.3.

271. *See supra* Section II.A.1.

caused by student-on-student misconduct.[272] The resulting case law sets out divergent approaches depending on if the student-on-student misconduct was discriminatory or not.[273] The traditional negligence framework[274] disincentivizes university misconduct prevention programs,[275] inadequately accounts for student's individual rights,[276] and disincentivizes efficient settlements,[277] whereas the deliberate indifference framework[278] does not.[279] By introducing the concepts of actual knowledge, deliberate indifference, severity, and deprival of access into a court's analysis of duty, breach, causation, and injury,[280] the Civil Rights Approach addresses the shortcomings of the traditional negligence approach applied to the university-student relationship.[281]

272. *See supra* Section II.A.
273. *See supra* Sections II.B–C.
274. *See supra* Section II.B.
275. *See supra* Section III.B.1.
276. *See supra* Section III.B.2.
277. *See supra* Section III.B.3.
278. *See supra* Section II.C.
279. *See supra* Section III.B.
280. *See supra* Section III.A.
281. *See supra* Section III.B.