

1. DO WE HAVE TO...ADDRESS SEXUAL MISCONDUCT ON OUR CAMPUSES?

By: Brett A. Sokolow, JD

Every few years, someone confronts me with this question. It is a question that is always borne of frustration. We try to help a victim. We try to support an accused student, and treat him with fairness and respect. We try to bring humanity to our processes. And, all we wind up doing is making everyone angry at us, while staring down the barrel of a lawsuit. We throw our hands up in the air, and ask a perennial question—why us? Why *should* colleges be trying to address crimes? That is not our business. And, we'll never be as good at it as everyone demands that we be—from the victim to her assailant to the local police to the prosecutor to the parents to the local rape crisis center to our counselors to the lawyers to watchdog groups. We're damned if we do and damned if we don't. So, we do. And then this week, I received a call from a university president with that question. But, do we have to?

The answer is a not-so-simple yes. The answer requires us to examine the practical intersection of two theories of legal liability—the federal Title IX anti-discrimination statute, and state negligence law, specifically premises liability that applies a form of landlord-tenant law to colleges and universities.

Title IX

Under Title IX, colleges can be liable in monetary damages to the victim of sexual misconduct if the following conditions occur:

- 1) The misconduct is so severe, pervasive and patently offensive that it could be said to deprive the victim of educational access or opportunities; and
- 2) The college has control over the perpetrator; and
- 3) The college has control over the context of the misconduct; and
- 4) Officials of the college have actual notice of the sexual misconduct; and
- 5) The institutional response to the sexual misconduct is one of deliberate indifference because...
 - a. The institution fails to act, or
 - b. The institution response fails to provide a prompt and equitable remedy; or
 - c. The institutional response is clearly unreasonable in light of the known circumstances.

The Tort of Negligence

A tort is a civil wrongdoing. Negligence is a tort that can be used to hold an institution liable when it owes a duty, breaches that duty, is the cause of harm to those to whom the duty is owed, and measurable damages result. Colleges, when acting as landlords and businesses, owe duties to those who are on campus property to warn and/or protect them from known, reasonably foreseeable dangers. What is or is not foreseeable is of significant debate to the courts. While foreseeability may be more nuanced than I cast it

here, I see two main types of foreseeability analysis by courts: the narrow foreseeability view and the broad foreseeability view. In the broad foreseeability view, almost anything is foreseeable on a college campus. Could a college know that a woman could be raped on its campus? Of course. And how do we know that? The college has security measures in place. The administrators must know it is a dangerous place.

The narrow foreseeability view asks a much more limited question—is the precise harm that took place a harm that the college knew specifically would happen. Almost always, that answer is no. The two foreseeability extremes are well-demonstrated by a pair of bookend cases. In the narrow foreseeability corner, we have Murrell v. Mt. St. Clare College. In the broad foreseeability corner, we have Stanton v. the University of Maine. These cases are contemporaries, and eerily similar. In both, a female was sexually assaulted in a campus residence hall. The main difference is that in Murrell, the victim was a student. In Stanton, the victim was a minor, living on campus during a summer camp. I don't believe that this distinction influenced the outcome of the cases, so it is immaterial for our discussion here. In Stanton, the court asked the broad question—was it reasonably foreseeable to the University of Southern Maine that a female residing in the residence halls could be sexually assaulted? Yes, of course. That is why security was provided, educational programs were offered, and campus policies addressed sexual violence. The University's motion for summary judgment was denied, and the case settled soon thereafter.

In many respects, this case is identical to the reasoning in the grandfather of campus premises liability cases, Mullins v. Pine Manor. With the notable exception of New Hampshire, most of New England follows a fairly broad foreseeability interpretation. In Murrell, a female student was assaulted in a residence hall at her college in Iowa. Iowa is known for its miserly approach to negligence cases, and Murrell was no exception. The court asked this question—did the College of Mt. St. Clare have knowledge that Alison Murrell would be sexual assaulted, in her residence hall, by the young man who did it, in the way he did it, at the time he did it? Put that way, there is almost no likelihood the college would have had that knowledge, and in fact, the court found that it did not. Murrell's negligence action failed.

Why does a negligence action impact on whether a college must hear campus sexual misconduct? Because, clearly, one of the factors that would likely establish foreseeability for a college is knowing of the occurrence of previous sexual misconduct by the same perpetrator. One of the things that I advise my clients is that we cannot afford a second victim, both morally and legally. If there is a second perpetration of sexual violence on a college campus by someone we knew to have done it the first time, it is because we failed to protect the second victim adequately. (See Nero v. Kansas State University, but see Jane Doe v. Ohio State University).

So, let's put all this legal analysis to work. Laura, a student at your college, comes forward and reports to the Dean of Student Development a sexual assault by Mark, another of your students. Asked if she wants to make a formal complaint, Laura says no (and hopefully puts that in writing for you). At this point, she is functionally stopped

from suing under Title IX, because it will be hard for her to argue that the college was indifferent to her claim. The college's duty does not end with Laura's decision, though. The obligation is to investigate, and the investigation serves two purposes. It will help the college to determine whether it can respect Laura's decision, or whether it needs to pursue a complaint independent of her involvement. If the college decides it must pursue a complaint, it will be because it believes the incident represents a threat of present or future harm to members of the community. Depending on whether your college is located in a narrow or broad foreseeability jurisdiction (you should know this if you don't, as it may impact on your decisions), the facts of the incident may convince you that continued or future harm is foreseeable, and you will have to act. The only mechanism we have to protect our campuses is then to issue a complaint, and conduct a hearing.

Third-Party Arguments

It would seem that current Title IX analysis bars third-party claims, though that assertion is more educated conjecture than case-based, because of the dearth of that type of claim against colleges to date. Suppose that after assaulting Laura, Mark was left at large on campus because of inaction on the report by Laura and the college. He then assaulted Misty. While Misty now has a potential Jane Doe/Nero-type negligence claim, she does not really have a Title IX claim under the Gebser v. Lago Vista and Davis v. Monroe County line of cases decided by the Supreme Court. These claims for monetary damages do not hold colleges liable for sexual assault. As described above, liability is predicated upon actual notice to the college, and deliberate indifference by it. That actual notice seems to be specific to Misty's claim, not Laura's. She can't argue that the college's response to her claim was inadequate until she makes that claim, and gives the college a chance to respond. (Misty may have a claim under the Tiffany Williams v. University of Georgia and Simpson v. Colorado line of Title IX cases, depending on the circumstances).

The investigation under Title IX is the saving grace under negligence law. Suppose the college investigates Laura's report, and determines that the sexual assault was relatively minor. Mark groped her butt, after a conversation in which he thought Laura indicated that she was welcoming of such contact. The investigation shows that Mark's misunderstanding of the conversation was reasonable, and that he did not intend her harm. Based upon this information, the college has no reason to believe that Mark is a danger, or to believe that repeat perpetration is foreseeable. In fact, Mark seems so chastened by the investigation that the potential for a repeat offense seems even less likely because of the fear invoked by the investigation. Thus, if Mark later is accused by Misty of groping her butt, and she sues (having found out about Laura's incident), the college has a solid defense to the negligence allegation. While Mark did commit the act previously, the college specifically did not find that repeat perpetration was reasonably foreseeable.

Instead, suppose that the college has no information after investigating Laura's claim to indicate that Mark is harmless, and the offense is much more egregious than a groped butt. The college will have to act to warn and/or protect its community because the risk of repeat perpetration is significant, especially for sexual offenses of this level of egregiousness. Mark may need to be barred from the residence halls, or be suspended or

expelled, in order to protect the community from a known, foreseeable danger of continued perpetration.

Given this analysis, it should be clear that there is no way that colleges can satisfy duties owed under Title IX and negligence law by refusing to deal with campus sexual misconduct. The criminal justice system cannot be relied upon to satisfy these duties for colleges. Refusing to address a report of campus sexual misconduct is the surest path to an allegation of deliberate indifference.

2. THE REDEMPTIVE REVERSAL

I am a hanging judge, and I admit it. When it comes to sexual misconduct, if you have sexual intercourse with someone by force or without their consent, I usually think you should be expelled. At the very least, a long suspension is in order. I am not soft on these issues, I am tough. I don't think you can educate/rehabilitate a rapist. Or, more precisely, if a rapist can be educated, I don't think we ought to be doing it. And, I don't want to run the risk that our efforts may not take. That's more of a dice roll than I can justify. Granted, not all sexual misconduct is created equal, and some offenses are of lesser severity than others. Those do merit more leniency, and an educational approach.

But, I don't sanction anyone. That's not my job. I do, however, provide advice to my clients on what are appropriate sanctions, and I provide conduct trainings on sanctioning principles. And, I find that my toughness is occasionally out of step with my clients. I have learned to step back, and not allow my personal sanctioning proclivities to impose my judgment on those I advise. That doesn't make it any less frustrating when I get a call from a college president, and he has just accepted a review of a conduct decision from an administrative hearing. A male student fondled and groped a drunken woman at a party. The administrative hearing resulted in moving the accused student to another residence hall, away from the victim, and in probation. The president conveyed to me that the probation was serious, because it carried social restrictions, one of which would be to deprive this varsity athlete of his ability to play baseball for the college that season. And, he was the college's star baseball player. He sought review because of the harshness of this penalty. When the president laid out this fact pattern, I fully expected his next words to be "Now that I have the review, I don't feel that the administrator imposed sanctions sufficiently proportionate to the level of violation." Imagine my shock when instead he said "I tend to agree that this sanction is too harsh for the conduct." I am glad I was sitting down. I made efforts to understand and respect a value system at odds with my own. We debated, I tried my best to inform his judgment, and left him to make the call that he needed to make.

I first noticed this tendency toward leniency in the colleges I serve that are Catholic, though it is by no means confined to them, or even to religiously-affiliated institutions. What I noticed was that Catholic universities occasionally engage in what I call the Redemptive Reversal, which takes a review of sexual misconduct and either reverses the finding of responsibility, or reduces the severity of the sanction. While a secular college might more often suspend or expel as the standard sanction for such a complaint, faith-

based institutions, especially Catholic colleges, rightfully allow the tenets of their faith to permeate their conduct decisions. This is not a criticism. If your conduct process is not infused with and informed by the tenets of your faith, what is the point of being a faith-based institution? Catholic colleges--as a crude but in my experience accurate generalization--tend to be less harsh and more focused on redemptive attempts to "teach a lesson, but not permanently destroy someone's future." Some would say they are soft on sanctions, and I think that softness is motivated by values and beliefs that reflect the institutional mission.

It is the same type of belief that has led to public perceptions that the priesthood was slow (or failed) to condemn priests who abused parishioners. They had faith that those who transgressed would learn the error of their ways. They were let down by this ardent investment in the inherent goodness of humanity. People are good, but there are rotten apples amongst us. The Redemptive Reversal also has a cognate in initial hearings, though in my experience it is more prevalent in reviews (appeals). How do we tell who the rotten apples are? It a fundamental tension between articles of faith and the expectations of the law. The problem for any college that practices the Redemptive Reversal or any similar form of leniency is that this softness can fly in the face of Title IX's requirements.

When I teach about sanctions, I teach a principled approach. There are three core legal principles that sanctions MUST satisfy, and it is perhaps because of my consciousness of these that my own sanctioning proclivities are as strict as they are. When we find someone to have committed sexual misconduct, Title IX requires that we remedy this misconduct as discrimination. To do that, colleges are legally expected to:

1. Ensure that the discriminatory conduct does not continue;
2. Provide sanctions that are reasonably calculated to prevent the reoccurrence of the discriminatory conduct;
3. Remedy the effects of the discrimination on the victim, to the extent practical and possible.

If you are guided by these three principles, it should be clear that when the conduct is sufficiently severe, the only way that you are going to be able to meet the criteria of the first two, above, is to separate the offender from the community, for some period of time. This is why suspension and expulsion are the standards. They meet the legal requirements, and tying into the discussion in the first half of this article, they help you to meet the duty of negligence liability, by protecting your students from reasonably foreseeable harm.

Risk Management Tip of the Week

- 1) Many of us need to recognize that remedying the effects of the discrimination, number three on the list above, is not normally within the sanction purview of our conduct processes. Regardless, it is a legal requirement upon us, and we need to find a way to ensure that remedial and restorative efforts are made on behalf of

the victim by those who have the power and authority to implement such measures.

- 2) There is a common practice of suspension that is often defined by the amount of time until the victim graduates. This makes sense as a sanction in light of the first criteria above, but it may not make sense in terms of the second. Once you re-admit the offender, he may do it to someone else, regardless of whether the original victim has moved on. I am not suggesting this is an inappropriate sanction, but that it should be used with consideration of criterion 2 in mind.

All information offered is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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