

**IT'S ON THE NCAA:  
A PLAYBOOK FOR ELIMINATING SEXUAL ASSAULT**

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## INTRODUCTION

Sexual violence on college campuses is an acute crisis. Most everyone agrees that sexual violence is a “serious and insidious problem that occurs with intolerable frequency on college campuses.”<sup>1</sup> There is broad agreement on certain fundamental precepts: campuses need to be safe learning environments free of sexual violence, due process rights of all involved must be protected, no one should be provided preferential treatment, and perpetrators should be punished. However, there is little agreement on how to achieve these goals. Universities devise their own specific procedures and processes to prevent sexual violence pursuant to a welter of laws, guidelines and regulations—whether from federal or state authorities or their own internal offices.<sup>2</sup> As a result, the complicated

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1. Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>.

2. Sex offense, sexual violence, sexual abuse, sexual coercion, sexual harassment, sexual misconduct, and sexual assault are used interchangeably in this Article, although the precise definitions vary depending on the relevant law. The different definitions and scope of conduct addressed within various laws exacerbate the confusion in this area but are not

problem of sexual violence on college campuses is not being effectively addressed.

The crisis is amplified with respect to college athletes. There are a number of reasons that athletes present a unique set of challenges, including the following:

- At some schools,<sup>3</sup> athletes receive special treatment by athletic departments and law enforcement when accused of sexual violence.<sup>4</sup>
- At other schools, athletes are targeted by accusers<sup>5</sup> and not provided basic fairness or due process rights.<sup>6</sup>
- Except in a few intercollegiate sports conferences with recently enacted rules, athletes are able to transfer to new schools to avoid Title IX investigations of sexual misconduct without the new school knowing that the athlete has been charged or even found guilty of sexual misconduct.<sup>7</sup>
- The glorification of athletes can encourage a sense of entitlement and power among certain athletes contributing to the incidence of sexual misconduct.<sup>8</sup>

There has been an explosion in the media of high profile incidents of sexual violence involving athletes. What we know is that at least between twenty and twenty-five percent of college women are victims of sexual violence.<sup>9</sup> Also, some studies suggest that athletes may engage in a greater number of incidents of sexual violence than the general student population.<sup>10</sup> We need better data, though, to document the extent to which athletes or particular subgroups of athletes may be overrepresented in campus sexual assaults. What is clear, as highlighted by the media and recent investigations and lawsuits, is that athletic departments are

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specifically addressed herein. Also, although this Article discusses conduct in the context of men assaulting women, the problem and recommendations also apply to women assaulting men and same-sex assaults.

3. The term “schools” as used herein includes the over 1100 colleges and universities that are members of the National Collegiate Athletic Association (NCAA).

4. *See infra* Marcotte, note 160.

5. This Article interchangeably uses the terms “accuser,” “victim,” and “complainant.”

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

7. *See infra* Part III.

8. *See infra* Abdul-Jabbar, note 138.

9. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at xiv (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf).

10. *See infra* Section II.A.

mishandling this issue at too many schools.<sup>11</sup> Here, too, while the problem is definite, its extent and character need more precise definitions. Regardless, we know right now that the problem is real—athletes engage in acts of sexual violence too frequently and athletic departments mishandle those situations too frequently.

The NCAA is in the perfect position to help resolve this crisis. It is the national governing body for intercollegiate sports,<sup>12</sup> with missions and goals that include focusing on the health, safety, and wellbeing of athletes;<sup>13</sup> promoting integrity and exemplary behavior of athletes;<sup>14</sup> and ensuring effective learning environments and fair competition.<sup>15</sup> Its eligibility rules, for example, prohibit athletes from participating in intercollegiate athletics if they fail to maintain specific grade point averages;<sup>16</sup> accept gifts or cash of any amount;<sup>17</sup> accept a promise of cash;<sup>18</sup> accept payment for signing an autograph;<sup>19</sup> accept gifts to their families;<sup>20</sup> sign a contract to play a professional sport;<sup>21</sup> enter into an agreement with a sports agent;<sup>22</sup> participate in sports wagering,<sup>23</sup> including fantasy sports;<sup>24</sup> or abuse drugs.<sup>25</sup> Importantly, the NCAA imposes sanctions on schools if they fail to comply with these rules.<sup>26</sup> Sanctions range from fines,<sup>27</sup> to reductions in the number of scholarships,<sup>28</sup> to suspension from post-season competition,<sup>29</sup> to vacating

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11. *See infra* Section II.B.1.

12. NCAA, 2016–17 NCAA DIVISION I MANUAL § 1.3.1 (2016).

13. *Id.* §§ 2.2, 2.2.3, 20.9.1.6.

14. *Id.* § 20.9.1.4.

15. *Id.* §§ 20.9.1.3, 20.9.1.7.

16. *Id.* § 14.2.13.1(c).

17. NCAA, *supra* note 12, § 16.1.1.2.

18. *Id.*

19. *Id.* § 12.5.2.1.

20. *Id.* § 12.3.1.3.

21. *Id.* § 12.1.2(c).

22. NCAA, *supra* note 12, § 12.3.1.

23. *Id.* § 10.3(d).

24. *Id.* § 10.2.1.

25. *Id.* § 31.2.3.

26. *Id.* § 3.2.5.1.

27. *See NCAA: 3-Year Probation, Scholarship Reduction, Postseason Ban Among UH Men's Basketball Sanctions*, KHON2 (Dec. 22, 2015, 8:48 PM), <http://khon2.com/2015/12/21/ncaa-3-year-probation-scholarship-reduction-postseason-ban-among-uh-mens-basketball-sanctions-3/>.

28. *Id.*

29. *Id.*; *see also NCAA Bans SMU from 2016 Postseason, Larry Brown for Nine Games*, ESPN (Sept. 30, 2015), [http://www.espn.com/dallas/mens-college-basketball/story/\\_/id/13769364/college-sports-bans-smu-mustangs-2016-postseason-suspends-larry-brown-30-percent-team-games](http://www.espn.com/dallas/mens-college-basketball/story/_/id/13769364/college-sports-bans-smu-mustangs-2016-postseason-suspends-larry-brown-30-percent-team-games).

past championship wins, and to the ultimate “death” penalty (i.e., disqualification from future competition).<sup>30</sup> Yet, the NCAA, while acknowledging that campus sexual violence is “abhorrent,”<sup>31</sup> relies only on guidelines and resolutions with no specific penalties for failures, either by athletes or schools, to address the problem.<sup>32</sup> Accordingly, this Article proposes that the NCAA enact rules that would have comparable consequences for violations as those that govern its other eligibility rules. Finally, this Article proposes that the NCAA collect data that will permit more detailed review of the incidence of sexual assault committed by college athletes and ensure that the NCAA’s rules are maximally effective, practical, fair and do not discriminatorily impact certain subgroups of athletes.

This Article is divided into four Parts. Part I provides a background on recent efforts to address sexual violence on college campuses focusing on students generally. Section I.A focuses on Title IX. Title IX, its regulations, and interpretations require schools to provide environments free from sexual violence that can diminish educational opportunities.<sup>33</sup> Title IX enforcement, whether by schools or the federal government, has been woefully ineffective and inconsistent in addressing campus sexual assault.<sup>34</sup> Section I.B discusses recent isolated state-level lawmaking that focuses mostly on standards for both determining whether the act in question was consensual and for disclosing on a student’s educational record findings of sexual violence engaged in by students. Section I.C summarizes both law enforcement’s important role in combating sexual violence on college campuses and the intersection of Title IX college campus investigations with the criminal justice system. There is a matrix of complications in the intersection of these two systems: different evidentiary burdens of proof; the timing and sequencing of investigations and hearings; the preservation and sharing of evidence; the admissibility of each institution’s findings in the other’s process; and state law

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30. See, e.g., Marlen Garcia & Steven Wieberg, *Two Vacated Final Four Runs Put on Stain Calipari’s Career*, USA TODAY (Aug. 24, 2009, 10:26 AM), [http://usatoday30.usatoday.com/sports/college/mensbasketball/2009-08-20-calipari\\_N.htm](http://usatoday30.usatoday.com/sports/college/mensbasketball/2009-08-20-calipari_N.htm).

31. *Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution*, NCAA (Aug. 8, 2014), <http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution>.

32. See *id.* Significantly, in August 2016, the NCAA Board of Governors recommended that a committee be formed to study whether rules are necessary. See *infra* Part III.

33. Dana Bolger, *Title IX: The Basics*, KNOW YOUR IX, <http://knowyourix.org/title-ix/title-ix-the-basics/> (last visited Jan. 27, 2017).

34. Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX’s Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 545 (2016).

differences with respect to consent, definitions of sexual acts, and confidentiality requirements.

Part II focuses on athletes. Section II.A discusses the research that suggests athletes, particularly in sports like Division I football and basketball, may be more likely than the general student population to engage in sexual violence. Section II.B highlights certain recent matters and litigation relating to athletes and sexual violence. Section II.B.1 focuses on cases alleging that schools have mishandled investigations involving athletes. Section II.B.2 focuses on cases brought by athletes against universities alleging that their rights of fairness and due process have been violated. Part III discusses the NCAA's current approach to sexual violence.

Finally, Part IV makes detailed proposals for new NCAA rules with sanctions. Most importantly, these rules dictate the circumstances and burdens of proof for when an athlete should be suspended from intercollegiate sports; restrictions on athletic departments from interfering in any manner in Title IX or criminal investigations of athletes accused of sexual misconduct; information that must be provided when an athlete transfers to a new school; and the creation of an NCAA Independent Office<sup>35</sup> to address this complicated problem.

In sum, this Article recommends a strong layer of rules that would apply specifically to athletes and athletic departments. It recognizes the additional burden that the rules may impose on athletes, athletic departments, and schools. However, more rules are essential because of the enormous inadequacies of the current system and the wrongdoings by too many athletic departments. The new rules are essential to tackle the crisis of sexual violence on campus.

## I. BACKGROUND: EFFORTS TO ADDRESS SEXUAL VIOLENCE ON COLLEGE CAMPUSES

Efforts to address sexual violence on college campuses come from various federal and state laws and regulations, as well as from school policies and procedures. They contribute different, conflicting—and sometimes confusing—standards, requirements, protections,

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35. The office would not be under the auspices of the NCAA. It would operate similar to Drug Free Sport, a privately held company that administers the NCAA's substance abuse program, including drug testing. *See Overview, DRUG FREE SPORT*, <http://www.drugfreesport.com/drug-free-sport-overview.asp> (last visited Jan. 27, 2017). It started with a contract from the NCAA. *See id.* Similarly, the Academic Clearinghouse was independent from the NCAA, although it was brought in-house and is now the NCAA Eligibility Center. *The NCAA Eligibility Center*, ATHNET, <http://www.athleticscholarships.net/ncaa-eligibility-center.htm> (last visited Jan. 27, 2017).

punishments, and rights.<sup>36</sup> The most important are the following:

- Federal Legislation<sup>37</sup>
  - Title IX: Schools must provide a safe learning environment free from sexual violence.<sup>38</sup>
- State Legislation
  - Certain states have enacted an array of requirements relating to campus sexual violence, including, particularly, standards regarding consent and disclosures of sexually violent acts.<sup>39</sup>
- Processes for Adjudication<sup>40</sup>
  - Schools: Pursuant to Title IX, schools must develop processes and procedures to keep their campuses safe and independently investigate and discipline students accused of sexual misconduct.<sup>41</sup>
  - Federal Government: The Department of Education’s Office of Civil Rights enacts guidelines and regulations regarding Title IX. It, along with the Department of Justice, enforces

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36. Alan M. Dershowitz referred to the resulting policy at Harvard Law School, for example, as “political correctness run amok.” Travis Andersen, *Harvard Law Professors Want University’s New Sexual Harassment Policy Changed*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/metro/2014/10/14/harvard-law-professors-want-university-new-sexual-harassment-policy-changed/HZ72eaMcLgRgoq4DL9ZBOO/story.html>.

37. The following are relevant applicable federal statutes: The Clery Act requires schools to report acts of sexual violence that occur on campus and requires certain procedures for disciplinary actions. *See* Student Right-To-Know and Campus Security (Clery) Act, Pub. L. No. 101-542, sec. 204, § 485, 104 Stat. 2381, 2385 (1990) (amended 2013). The Family Educational Rights and Privacy Act of 1974 (FERPA) limits the sharing of students’ education records to third parties (certain confidentiality rules specifically apply to disclosure of acts of sexual violence). *See* 20 U.S.C. § 1232g(b) (2012). The Violence Against Women Reauthorization Act of 2013 (VAWA), including within it the Campus Sexual Violence Elimination (Campus SaVE) Act, expands the types of misconduct that may be publicly reported. *See* 20 U.S.C. § 1092(f)(8)(A)(i) (Supp. II 2014); 42 U.S.C. § 13925(b)(2)(D)(i)(I)–(III). VAWA requires sexual assault prevention education to all incoming students and employees, strengthens penalties for repeat sex offenders, and creates a federal rape shield law. 42 U.S.C. §§ 14043c(b)(2), 14016.

38. Bolger, *supra* note 33.

39. *See, e.g.*, N.Y. EDUC. LAW §§ 6439–6449 (McKinney 2016); *Campus Sexual Assault*, ST. CAL. OFF. ATT’Y GEN., <https://oag.ca.gov/campus-sexual-assault> (last visited Jan. 27, 2017); Steve Treagus, *California Mandates Campus Sexual Assault Reporting to Police*, CAMPUS CLARITY: BLOG (Oct. 27, 2014), <https://home.campusclarity.com/california-mandates-campus-sexual-assault-reporting-to-police-2/>.

40. Students can also bring civil litigation in state or federal court alleging that their rights have been ignored by schools or that they have been wronged by the opposite party. They can seek monetary damages or injunctive orders that certain action be required.

41. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL 1 (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf>.

Title IX.<sup>42</sup>

- The Criminal Justice System: State criminal laws apply to sexual misconduct. The existence and timing of a criminal investigation have direct implications on a school's investigation, and vice versa.<sup>43</sup>

At bottom, these laws and processes provide an ineffective solution to the central dilemma facing universities: how to protect the student body and the complainant, appropriately investigate the accused, and punish students found responsible for engaging in acts of sexual violence.

### A. Title IX

Title IX is a twenty-seven word legislation that says nothing about sexual violence. Enacted as part of the Education Amendments of 1972, it provides that “[n]o 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.”<sup>44</sup>

Educational institutions must comply with Title IX if they receive federal funding from the Department of Education.<sup>45</sup> The sanction for failing to comply with Title IX is a loss of funding.<sup>46</sup> However, in the over forty years that Title IX has been enforced, no school has ever lost federal funding as a result of a failure to abide by Title IX and its regulations.<sup>47</sup>

The Office of Civil Rights (OCR) in the Department of Education is responsible for administering Title IX.<sup>48</sup> OCR in its *2001 Guidance* made clear that discrimination on the basis of sex includes sexual

42. *Title IX and Sex Discrimination*, U.S. DEP'T EDUC. OFF. FOR C.R., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last modified Apr. 29, 2015).

43. See Robin Hattersley Gray, *How to Investigate Campus Sexual Assaults*, CAMPUS SAFETY, <http://www.campussafetymagazine.com/article/Sexual-Assault-Investigation-Basics> (last visited Jan. 27, 2017).

44. 20 U.S.C. § 1681(a) (2012).

45. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

46. *Id.*

47. *What Is Title IX?*, MYRA SADKER FOUND., <http://www.sadker.org/TitleIX.html> (last visited Jan. 27, 2017).

48. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2-4 (2001) [hereinafter OCR, GUIDANCE], <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.



harassment.<sup>49</sup> OCR's definition of sexual harassment is "unwelcome conduct of a sexual nature" that is serious enough to impact the complainant's access to educational opportunities by creating a hostile environment.<sup>50</sup> Once a school is aware of harassment, it has a general obligation under Title IX to stop the behavior, prevent its recurrence, and remedy its effects.<sup>51</sup> It does this by disciplining the accused or taking other measures designed to eliminate the hostile environment.<sup>52</sup>

Until relatively recently, campus sexual harassment did not receive near the attention that it required despite OCR's various guidelines and recommendations. It was not until 2011 that OCR issued more substantive and specific requirements.<sup>53</sup> That year, OCR issued a nineteen page "significant guidance document," both in response to increasing public concern about the prevalence of campus assaults and in an attempt to be more transparent and helpful.<sup>54</sup> This guidance in the form of the so-called "Dear Colleague Letter"<sup>55</sup> (DCL) attempted to create more uniformity and clarity about the rights of all parties and provide a safe learning environment.<sup>56</sup>

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49. *Id.* at 2.

50. *Id.* Sexual violence is defined as

physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Sexual Violence 1–2 (Apr. 4, 2011) [hereinafter OCR, DCL], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

51. OCR, GUIDANCE, *supra* note 48, at 3–4.

52. *Id.* at 12.

53. OCR, DCL, *supra* note 50, at 1. While an important way in which the OCR provides guidance is through its publicly available "Dear Colleague Letters," significant insight also can be gained from the consent decrees that OCR enters into with schools charged with violating Title IX.

54. *Id.* at 1 n.1.

55. Some argue that the DCL should carry no weight because it is not legislation and the traditional rule-making requirements of notice and comment were not followed. *See* Hans Bader, *No, OCR's April 4, 2011 Dear Colleague Letter Is Not Entitled to Deference*, LIBERTY UNYIELDING (Sept. 30, 2015), <http://libertyunyielding.com/2015/09/30/no-ocrs-april-4-2011-dear-colleague-letter-not-entitled-deference/>. Bader, a former attorney for OCR, argues that a DCL is not entitled to a *Chevron* or *Skidmore* deference. *Id.* He contrasts the OCR's DCL to OCR's Policy Interpretation on Intercollegiate Athletics, which has been deferred to by the courts, because such interpretation was specifically delegated to the OCR by Congress and the policy was issued after the OCR solicited and received more than seven hundred comments. *Id.*

56. The OCR also issued a forty-six page document in April 2014 comprised of questions and answers in an attempt to add clarification to the DCL. *See* OFFICE FOR CIVIL RIGHTS, U.S.

The 2011 DCL, and subsequent OCR materials,<sup>57</sup> for the first time comprehensively attempted to impose the following explicit obligations, *inter alia*, on schools to comply with Title IX:

- Take immediate and appropriate action to investigate or otherwise determine what occurred once it knows or reasonably should know of possible sexual violence.<sup>58</sup>
- Take prompt and effective steps to end any reported sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation.<sup>59</sup>
- Take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation.<sup>60</sup>
- Provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence.<sup>61</sup>
- Require an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights.<sup>62</sup>

Since issuing the DCL in 2011, OCR has opened over three hundred

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DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1–2 (2014) [hereinafter OCR, Q&A], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

57. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 15 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>; OCR, Q&A, *supra* note 56, at 1–2.

58. OCR, DCL, *supra* note 50, at 4.

59. *Id.*

60. OCR, Q&A, *supra* note 56, at 3.

61. OCR, DCL, *supra* note 50, at 8. As stated in the DCL, elements of a grievance procedure that are critical for compliance with Title IX include

- [n]otice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- [a]pplication of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- [a]dequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- [d]esignated and reasonably prompt time frames for the major stages of the complaint process;
- [n]otice to parties of the outcome of the complaint; and
- [a]n assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

*Id.* at 9.

62. *Id.* at 11–12. The OCR strongly discourages schools from allowing parties to personally question or cross-examine each other during the hearing. *Id.* at 12.

investigations of colleges and universities that receive federal funding (small and large, public and private) for possible violations of Title IX involving reported sexual harassment.<sup>63</sup> This unprecedented number of investigations has resulted in some schools entering into lengthy settlement agreements that change their processes.<sup>64</sup> Still, the vast majority of the investigations are on-going.<sup>65</sup>

The DCL and university policies revised to comply with the DCL's guidelines have prompted the following significant criticism that they are unfair.

### *1. Standard of Proof*

The DCL mandates the lowest standard of proof be applied in university Title IX proceedings: preponderance of the evidence standard.<sup>66</sup> This standard requires a “wisp” more than a fifty percent likelihood that the accused has engaged in the alleged conduct.<sup>67</sup> Critics argue that schools should have autonomy to choose which evidentiary standard to use in disciplinary proceedings.<sup>68</sup> Some experts believe a higher standard of evidence should be utilized because a finding of guilt can have significant financial and reputational consequences for the

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63. *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> (last visited Jan. 27, 2017).

64. Robin Wilson, *As Federal Investigations of Sex Assault Get Tougher, Some Ask if that's Progress*, CHRON. HIGHER EDUC. (Oct. 8, 2015), [www.chronicle.com/article/As-Federal-Investigations-of/233698?cid=T9NEWS](http://www.chronicle.com/article/As-Federal-Investigations-of/233698?cid=T9NEWS).

65. See *Title IX: Tracking Sexual Assault Investigations*, *supra* note 63.

66. OCR, DCL, *supra* note 50, at 10–11.

67. See *Lapsley v. Columbia University-College of Physicians & Surgeons*, 999 F. Supp. 506, 523 (S.D.N.Y. 1998), where the court held the plaintiff did not meet her burden of proof because she “presented but a fleeting wisp of smoke that is easily dissipated by [defendant’s] proof.” See also Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1065 (1988).

68. *Standard of Evidence Survey: Colleges and Universities Respond to OCR's New Mandate*, FIRE (Oct. 28, 2011), <https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/>. Before the DCL, many schools (including Harvard) employed a “clear and convincing evidence” standard for formal disciplinary sanctions. See Madeline Conway & Steven S. Lee, *Federal Recommendations May Be in Tension with Harvard's Handling of Sexual Assault*, HARV. CRIMSON (Apr. 30, 2014), <http://www.thecrimson.com/article/2014/4/30/federal-guidelines-sexual-assault/>. See *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (stating clear and convincing means the evidence is highly and substantially more likely to be true than untrue; the factfinder has an abiding conviction that the truth of the allegation is “highly probable”). It is the standard used in most civil proceedings. Criminal convictions require the highest standard: beyond a reasonable doubt. The evidence must be so convincing that there is no logical explanation other than that the accused committed the crime. See, e.g., *In re Winship*, 397 U.S. 358, 362–63 (1970) (citing *Davis v. United States*, 160 U.S. 469, 484, 488, 493 (1895)).

accused.<sup>69</sup>

## 2. Evidence

The DCL established evidentiary rules that some argue favor the complainant. Critics note that, for example, while the DCL does not prevent schools from prohibiting cross-examination, it discourages cross-examination of the complainant.<sup>70</sup>

## 3. Impartiality of the Proceedings

The DCL notes that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.”<sup>71</sup> Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed. Critics suggest that a Title IX policy that consolidates investigatory, prosecutorial, fact-finding, and appellate functions in the same office (considered a Title IX office) is structurally partial and unfair; they argue that even if this conflict of interest is disclosed, it remains inequitable.<sup>72</sup>

## 4. Structure of the Hearing

The DCL is silent as to the structure of a disciplinary hearing. Some universities have a single hearing officer, while other universities have established hearing panels.<sup>73</sup> Some universities permit students to sit on the panels.<sup>74</sup> Also, there is no requirement that a panel be unanimous in

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69. Samuel R. Bagenstos, *What Went Wrong with Title IX?*, WASH. MONTHLY, <http://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/> (last visited Jan. 27, 2017).

70. Stephane Jasmin Kirven, *A Rush to Judgment and a Denial of Due Process*, J. CRIM. JUST. & LEGAL ISSUES, July 2015, at 13. There is no independent constitutional right to cross-examine witnesses or parties in campus disciplinary proceedings, though the right is sometimes protected by state education codes, contracts, or regulations. Courts have sometimes found cross-examination to be a due process right to test credibility of the accuser. *See, e.g.,* *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (quoting *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972)).

71. OCR, DCL, *supra* note 50, at 12.

72. Bagenstos, *supra* note 69.

73. *See, e.g.,* *Section 5. Student Conduct System: 2016–2017 Student Guide*, B.C., <http://www.bc.edu/publications/studentguide/judicial.html%23appeals> (last updated Nov. 28, 2016) (detailing different types of procedures, including those in front of panels and single hearing officers); *see also Student Disciplinary Process*, BOWDOIN, <https://www.bowdoin.edu/studentaffairs/student-handbook/college-policies/student-disciplinary-process.shtml> (last visited Jan. 27, 2017) (outlining process for determining whether disciplinary proceedings are in front of a panel or administrative staff officer).

74. *See Student Disciplinary Process*, *supra* note 73 (defining judicial board as consisting of student and faculty members).

finding responsibility.<sup>75</sup> Some experts argue there should be a unanimous decision by a panel with no students in order to better protect the rights of the accused.<sup>76</sup>

#### 5. *Conflict Between Criminal Investigations and University Proceedings*

Under the DCL, schools can grant prosecutorial requests to defer investigations and adjudicatory proceedings in order to permit law enforcement to go first.<sup>77</sup> Such deference, however, must not interfere with a school's obligation to immediately ensure a safe environment free from sexual assault.<sup>78</sup> If the school goes first, there can be resulting complications for the accused. For example, the Fifth Amendment right against self-incrimination is not available to a student in a school proceeding, and what is said in that proceeding conceivably may be introduced in criminal court.<sup>79</sup>

#### 6. *Representation During Title IX Proceedings*

The DCL does not require schools to permit parties to have lawyers present at any stage of the proceedings, mandating that only if a school chooses to allow the parties to have their lawyers participate in the proceedings it must do so equally for both parties.<sup>80</sup> And, there is no explicit obligation or given guidance in the DCL regarding whether the university may pay for a lawyer for the accused.<sup>81</sup>

#### 7. *Disclosure*

The DCL does not provide detailed guidance about what a school can or cannot disclose when a student has been charged with sexual assault or has withdrawn from an institution prior to any findings of

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75. *Id.*

76. See K.C. Johnson, *Why Colleges Don't Have Fair Hearings on Sexual Assault*, MINDING CAMPUS (Aug. 8, 2016), <http://www.mindingthecampus.org/2016/08/why-colleges-dont-have-fair-hearings-on-sexual-assault/>.

77. See OCR, DCL, *supra* note 50, at 10. A reason to grant deference is that law enforcement has subpoena power to gather evidence. Teresa Watanabe, *College Administrators Learning to Be Sexual Misconduct Detectives*, L.A. TIMES (May 14, 2014, 6:39 PM), <http://www.latimes.com/local/education/la-me-sexual-assault-20140515-story.html>.

78. See OCR, DCL, *supra* note 50, at 10. New York law requires a university to defer its investigation for a specified time period if law enforcements request such. N.Y. EDUC. LAW § 6444(5)(c)(iv) (McKinney 2016).

79. Bagenstos, *supra* note 69.

80. See OCR, DCL, *supra* note 50, at 12.

81. See *generally id.* (lacking any discussion of university's capability to pay for a lawyer for the accused).

disciplinary action.<sup>82</sup> However, it provides that the school may disclose the final results on the student's record "if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies."<sup>83</sup>

### 8. Reporting Obligations

Discussions between a student and professional or pastoral counselor who provides mental health assistance are absolutely privileged. The counselor should, however, report the "nature, date, time, and general location of the incident" to the Title IX coordinator, while maintaining confidentiality of the identity of the complainant.<sup>84</sup> However, communications with an employee who has the duty to report incidents of sexual violence or other student misconduct, or who a student could reasonably believe has this authority or duty ("responsible employees"), triggers a school's Title IX obligations.<sup>85</sup> Responsible employees, including coaches and other staff in the athletic department, are obligated to report the incident and all details to the university's Title IX office.<sup>86</sup> These employees cannot ensure confidentiality of the complainant.<sup>87</sup>

### B. State Legislation

A number of states have recently enacted legislation that impose requirements relating to campus sexual violence.<sup>88</sup> And, many states have

82. See generally *id.* (lacking guidance on school's disclosure limitations when student withdraws from institution).

83. See *id.* at 14. FERPA requires that schools safeguard the private educational records of students. See 20 U.S.C. § 1232g (2012). Schools are permitted under certain circumstances to disclose disciplinary action taken against students for forcible sex offenses. *Id.* § 1232g(b)(6). It does not address circumstances where students have been merely charged but not yet found responsible. Under FERPA regulations, forcible sex offenses are considered crimes of violence. 34 C.F.R. § 99 app. A (2016). Forcible sex offenses are defined as "[a]ny sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent." *Id.* Rape, sodomy, sexual assault with an object, and forcible fondling are forcible sex offenses. *Id.* Non-forcible sex offenses are incest and statutory rape (e.g., sex with a minor). *Id.*

84. OCR, Q&A, *supra* note 56, at 22–24. Privileged or confidential sources may have state law reporting requirements also. *Id.* at 4.

85. John Gaal & Laura Harshbarger, *Responsible Employees and Title IX*, JD SUPRA (May 13, 2014), <http://www.jdsupra.com/legalnews/responsible-employees-and-title-ix-77800/>.

86. *Id.*

87. *Id.*

88. See Kati Lebioda, *State Policy Proposal to Combat Campus Sexual Assault*, POL'Y MATTERS (Am. Ass'n of State Colls. & Univs.), Dec. 2015, at 4, <https://www.aascu.org/policy/publications/policy-matters/campussexualassault.pdf>.

considered, but not passed, legislation.<sup>89</sup> In general, the laws focus on narrow areas such as affirmative consent definitions<sup>90</sup> and disclosures of sexual violence on a student's educational records.<sup>91</sup> Idaho is unique in that it has a long-standing detailed law that relates specifically to violence and athletes.<sup>92</sup> The following more significant laws illustrate the lack of uniformity at the state level.<sup>93</sup>

### 1. California

In 2014, California enacted what is commonly referred to as the "Yes Means Yes" bill.<sup>94</sup> Under this standard, students must get "affirmative, conscious, and voluntary agreement to engage in sexual activity."<sup>95</sup> California also requires comprehensive prevention and outreach programs for every incoming student.<sup>96</sup> In 2015, California enacted another law that requires every college to enter into a written agreement and cooperate with local law enforcement (called a memorandum of understanding).<sup>97</sup>

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89. *Id.* at 4–15.

90. States that have enacted affirmative consent requirements include California, Illinois, and New York. *Id.* at 5 tbl.1 (first citing S. 967, 2013–14 Leg., Reg. Sess. (Cal. 2014) (enacted); then citing H. 0821, 99th Gen. Assemb., 2015–16 Reg. Sess. (Ill. 2015) (enacted); and then citing S. 5965, 238th Gen. Assemb., 2015 Reg. Sess. (N.Y. 2015) (enacted)). Boards of Higher Education enacting affirmative consent requirements include Maine, Massachusetts, and Minnesota. *Id.*

91. States either proposing or enacting policies regarding transcript notations include California, Louisiana, New York, and Virginia. *Id.* at 7 tbl.2 (first citing Assemb. 968, 2015–16 Leg., Reg. Sess. (Cal. 2015); then citing S. 255, 2015 Leg., Reg. Sess. (La. 2015) (enacted); then citing S. 5965, 238th Gen. Assemb., 2015 Reg. Sess. (N.Y. 2015) (enacted); and then citing S. 1193, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (enacted)). New York's bill passed and was signed by Governor Cuomo; California's bill was vetoed by its governor. Lebioda, *supra* note 88, at 7 tbl.2.

92. *See infra* Section I.B.4.

93. Some states have begun to focus on developing responsiveness to sexual assaults on college campuses. Minnesota and Connecticut, for example, now require schools to host anonymous websites intended to promote reporting. Other states, including Colorado, Illinois, New York, and California, have focused on raising awareness and education (e.g., requiring students or administrators to undergo sexual assault training). *See* Kim Soffen, *How One State Is Giving More Power to Students in Reporting Sexual Assaults on Campus—Anonymously*, WASH. POST (Aug. 2, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/02/how-one-state-is-giving-more-power-to-students-in-reporting-sexual-assaults-on-campus-anonymously/>.

94. CAL. EDUC. CODE § 67386 (West 2016).

95. *Id.* § 67386(a)(1).

96. *Id.* § 67386(e).

97. *Id.* § 67381(b).

## 2. *New York*

New York's 2015 "Enough is Enough" law is perhaps the broadest and "the most aggressive policy in the nation to fight against sexual assault on college campuses."<sup>98</sup> The law requires all colleges in New York to adopt a uniform definition of affirmative consent.<sup>99</sup> "Enough is Enough" also requires all colleges in New York<sup>100</sup> to adopt or implement a Students' Bill of Rights<sup>101</sup> that enumerates a list of procedural requirements relating to disciplinary procedures.<sup>102</sup> Among other requirements, the institution's process may run concurrently with a criminal justice investigation and proceeding, although if law enforcement requests, a school must give it an initial ten-day exclusive

98. *Enough is Enough: Combating Sexual Assault on College Campuses*, N.Y. ST., <https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses> (last visited Jan. 27, 2017).

99. *Id.*

100. Affirmative consent bills have been proposed in numerous states, including but not limited to Hawaii, Michigan, Minnesota, and New Jersey. *E.g.*, H. 451, 28th Leg., 2015 Reg. Sess. (Haw. 2015) (requiring the University of Hawaii to establish and enforce an affirmative consent standard as a condition of receiving state funding); H. 4903, 98th Leg., 2015–16 Reg. Sess. (Mich. 2015) (adding affirmative consent instruction to the curriculum of sex education); H. 1689, 89th Leg., 2015–16 Reg. Sess. (Minn. 2015) (requiring sexual assault and sexual harassment policies to contain the affirmative consent standard); Assemb. 2271, 217th Leg., 2016–17 Reg. Sess. (N.J. 2016) (adding affirmative consent instruction to the curriculum of sex education). *See also* Lebioda, *supra* note 88, at 4 tbl.1.

101. N.Y. EDUC. LAW § 6443 (McKinney 2016). The Students' Bill of Rights ensures that a reporting student has a right to the following:

1. Make a report to local law enforcement and/or state police;
2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously;
3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution;
4. Participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard;
5. Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available;
6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations;
7. Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident;
8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution;
9. Access to at least one level of appeal of a determination;
10. Be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process; and
11. Exercise civil rights and practice of religion without interference by the investigative, criminal justice, or judicial or conduct process of the institution.

*Id.*

102. *Id.* § 6444(5)(c)(iv).



period to gather evidence.<sup>103</sup> Accused students have the right to a presumption that they are “not responsible,” until a finding of responsibility is made pursuant to the institution’s procedures in compliance with the law.<sup>104</sup>

The law requires that when a school proceeding finds a student responsible for sexual assault, the school must make a notation on the student’s transcript that the student was sanctioned after a finding of responsibility for a code of conduct violation.<sup>105</sup> If the student withdraws while facing code of conduct charges, a notation indicating “withdrew with conduct charges pending” must be included on the transcript.<sup>106</sup> An appeal process would allow students to petition to have the notation cleared one year after the conclusion of a suspension.<sup>107</sup>

There are many other provisions of the New York law. These include a statewide amnesty policy to ensure that students who report incidents of sexual assault are granted immunity for certain campus policy violations, including drug and alcohol use.<sup>108</sup> The law also imposes training and reporting requirements.<sup>109</sup>

### 3. North Dakota

In April 2015, North Dakota joined North Carolina and Arkansas as the third state to allow students facing suspension or expulsion the right to be represented by an attorney or non-attorney advocate during disciplinary proceedings involving matters other than academic misconduct, and to allow these advocates to fully participate in the proceedings.<sup>110</sup> Additionally, an early version of the law created a private right of action: a student who is suspended for more than ten days or expelled due to a violation of the disciplinary or conduct rules of that institution “may seek a review of the institution’s decision in the district court for the jurisdiction in which the institution is located.”<sup>111</sup> Possible

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103. *Id.*

104. *Id.* § 6444(5)(c)(ii).

105. EDUC. § 6444(6).

106. *Id.*

107. *Id.* According to 20 U.S.C. § 1232g and 34 C.F.R. § 99.34, as long as the disclosure is for purposes related to the student’s enrollment or transfer and the parent or student is notified of the transfer, receives a copy of the record that was disclosed, and has the opportunity to challenge its content at a hearing, university officials may receive information relating to charges or findings of sexual assault. 20 U.S.C. § 1232g(b)(1)(B) (2012); 34 C.F.R. § 99.34(a)(1)(ii)(2)–(3) (2016).

108. EDUC. § 6442.

109. *Id.*

110. N.D. Cent. Code § 15-10-56(2) (Repl. vol. 2015).

111. S. 2150, 64th Leg. Assemb., Reg. Sess. (N.D. 2015).

damages included a de novo rehearing by the institution and “monetary damages in an amount not less than the cost of tuition and fees paid by the student or on the student’s behalf, to the institution, for the semester during which the alleged violation occurred.”<sup>112</sup> Significantly, the final version of the law did not include these rights.

#### 4. Idaho

Idaho appears to be the only state with legislation applicable to campus athlete misconduct. In 1995, seven athletes attending two different Idaho State universities were accused of rape and assault.<sup>113</sup> Soon after their arrests, the legislature passed the following student-athlete code of conduct<sup>114</sup>:

1. Each public college and university shall have a written policy governing the conduct of student athletes. At a minimum, those policies shall include:
  - a. A disclosure statement completed and signed by the student athlete prior to participation in any intercollegiate athletic endeavor, which shall include a description of (1) all prior criminal convictions, (2) all prior juvenile dispositions wherein the student was found to have committed an act that would constitute a misdemeanor or felony if committed by an adult, and (3) all pending criminal charges, including juvenile proceedings alleging any act which would constitute a misdemeanor or felony if committed by an adult.
  - b. This statement will be kept in the office of the athletic director. Failure to accurately disclose all incidents may result in immediate suspension from the team.
2. Institutions shall not knowingly recruit any person as a player for an intercollegiate athletic team who has been convicted of a felony or, in the case of a juvenile, who has been found to have committed an act which would constitute a felony if committed by an adult. Exemptions to this restriction shall be granted only by the President of the college or university upon recommendation of the athletic director and faculty athletics representative. Such decisions shall be reported in writing to the Executive Director of the State Board of Education at the time the exception is granted.

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112. *Id.* Monetary damages would have included any scholarship funding lost as a result of the discipline, reasonable court costs, and attorney’s fees. *Id.*

113. Sam Donnellon, *Crime Doesn’t Play Idaho’s Code of Conduct Closes College Doors to Athletes Convicted of Felonies: Is This the Way to Go? Is Idaho’s Code the Way to Go?*, PHILA. DAILY NEWS, Feb. 22, 1996, at 74, reprinted in ACCESS WORLD NEWS, <http://infoweb.newsbank.com/resources/doc/nb/news/0EB2A2F8F9CCE991?p=AWNB> (last visited Jan. 27, 2017).

114. *Id.*

3. A student athlete convicted of a felony after enrollment, including a plea of nolo contendere on a felony charge, shall be removed from the team and shall not be allowed to participate again in intercollegiate athletics at any Idaho public college or university. Further, an institution may cancel any athletic financial aid received by a student who is convicted of a felony while the student is receiving athletic financial aid subject to NCAA regulations and the institution's applicable student judicial procedure. Nothing herein shall be construed to limit an institution from exercising disciplinary actions or from implementing student athletic policies or rules that go beyond the minimum requirements stated herein.<sup>115</sup>

Thus, there have been well-intended efforts in some states to fill in the gaps of federal legislation and regulations. For the most part, states have narrowly focused on standards for consent by the accuser or disclosure requirements of the accused's sexual misconduct.<sup>116</sup> Whether and how new federal legislation or more robust OCR requirements might eliminate the need for individual state involvement should be the subject of future federal-level analysis.

### C. Law Enforcement

Naturally, law enforcement continues to have jurisdiction over any criminal conduct on campuses. The relationship between the criminal justice system and state laws, on one hand, and Title IX school grievance procedures, on the other hand, has proven to be a thorny issue because the objectives of schools and law enforcement differ.<sup>117</sup> A sexually-assaulted student has the option of reporting the alleged crime to the school, to the police, or to both, and then each organization has an independent obligation to conduct an investigation.<sup>118</sup> Schools are required to immediately protect their respective campuses and provide a

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115. IDAHO STATE BD. OF EDUC., GOVERNING POLICIES AND PROCEDURES § 3(T)(1)–(3) (2016), [https://boardofed.idaho.gov/policies/documents/policies/iii/iiit\\_student\\_athletes\\_0616.pdf](https://boardofed.idaho.gov/policies/documents/policies/iii/iiit_student_athletes_0616.pdf).

116. See, e.g., David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y. & L. 227 (Aug. 2015) (discussing a current fifty state survey of sexual assault prevention and legislation).

117. See *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <http://knowyourix.org/why-schools-handle-sexual-violence-reports/> (last visited Jan. 27, 2017).

118. See, e.g., OCR, Q&A, *supra* note 56, at 1; OCR, DCL, *supra* note 50, at 16 n.41. The DCL recommends that local law enforcement agencies and universities within their jurisdiction attempt to coordinate and clarify these efforts through memorandum of understanding that define the cooperation between schools and law enforcement. OCR, DCL, *supra* note 50, at 10. Memorandums of understanding have proven to be useful, but they do not and cannot solve all the issues that come with having different entities with different purposes investigate the same incident.

safe learning environment.<sup>119</sup> Law enforcement must apprehend a person who, based on probable cause, committed a crime.<sup>120</sup> Then, if sufficient proof exists, law enforcement investigators will turn the case over to the district attorney's office so that the accused can be appropriately prosecuted and punished.<sup>121</sup>

Given the potential influence of criminal investigations and universities' general lack of experience in conducting these kinds of investigations, some experts argue that the criminal justice system should play the primary, or even sole role in investigating and adjudicating sexual assault.<sup>122</sup> Other experts argue that complainants may be less likely to report assaults if they know the police will be involved.<sup>123</sup> Plus, law enforcement may not sufficiently protect, at least immediately, complainants or campuses. This is unlike a typical Title IX office, which may immediately forbid the accused from having contact with the accuser,<sup>124</sup> require that the accused move dormitories,<sup>125</sup> or take other steps to protect the accuser.

Complications with the jurisdiction of campus Title IX offices and the criminal justice system over investigations and adjudication of acts of sexual misconduct include the following:

- Many law enforcement and district attorney offices have experts specifically trained in investigating and adjudicating sexual misconduct and in assessing credibility of parties and witnesses.<sup>126</sup> Generally, campus Title IX offices and their personnel are relatively inexperienced and not as well trained.<sup>127</sup>
- The criminal justice system can subpoena evidence, while campus Title IX offices have no such powers and must rely on the willingness of parties, witnesses, and others for

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119. See, e.g., OCR, Q&A, *supra* note 56, at 27.

120. See *infra* note 381 and accompanying text.

121. *Id.*

122. See, e.g., Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html).

123. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 23 (2000); see also Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/>.

124. Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 163(c)(1) (2015).

125. *Id.*

126. See, e.g., Katie Reilly, *Dedicated New York State Police Unit to Tackle Campus Sex Assault*, REUTERS (Aug. 26, 2015, 7:43 AM), <http://www.reuters.com/article/us-usa-new-york-sexualassault-idUSKCN0QV18120150826>.

127. See, e.g., OCR, DCL, *supra* note 50, at 1.

cooperation.<sup>128</sup>

- Statements and confessions made in the context of a campus Title IX investigation (even if no lawyer is present or *Miranda* rights have not been given) may possibly be used in a criminal proceeding.<sup>129</sup>
- The burdens of proof differ. A “preponderance of the evidence” standard is used in the campus Title IX investigation,<sup>130</sup> while a “beyond a reasonable doubt” standard applies in a criminal proceeding,<sup>131</sup> meaning there is a lesser standard applied in a Title IX investigation. However, it is possible that if the Title IX adjudication occurs first, its results may be introduced in the criminal investigation.<sup>132</sup>
- Campus Title IX adjudications have fact-finders that are employed by the respective school, while judges and juries are independent.<sup>133</sup>

Certain proposed federal legislation would require that law enforcement always play the primary investigative role, because on balance, it is better equipped than colleges to administer a fair and effective process.<sup>134</sup> And as noted above, a few states, such as New York,

128. “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI. However, campus authorities lack the legal authority to subpoena witnesses or documents. Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE U. L. REV. 117, 126 (2016).

129. See Jake New, *Making Title IX Work*, INSIDE HIGHER ED (July 6, 2015), <https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective>.

130. OCR, Q&A, *supra* note 56, at 13.

131. *In re Winship*, 397 U.S. 358, 362 (1970) (citing *Miles v. United States*, 103 U.S. 304, 312 (1881)).

132. See New, *supra* note 129.

133. OCR, Q&A, *supra* note 56, at 25.

134. Numerous bills have been introduced over the past few years at the federal level in order to confront more effectively the problem of campus sexual assault, including the Campus Accountability and Safety Act (CASA) and the Safe Campus Act. CASA is a comprehensive bill designed to increase the incentives for universities to investigate and accurately report violent sexual crimes that occur on campus. See generally *Campus Accountability and Safety Act*, S. 590, 114th Cong. (2015). The bill requires, inter alia, the following: (1) new resources and support services for student survivors, such as the designation of Confidential Advisors; (2) minimum training standards for on-campus personnel; (3) the adoption of memorandum of understanding between universities and local law enforcement agencies to clearly delineate responsibilities; (4) a stiffening of penalties for noncompliance with both the Clery Act (up to \$150,000 for a violation) and Title IX (up to one percent of the university’s operating budget); (5) more transparency relating to sexual assault on campus, including the publication of biennial survey data, the number of assaults reported, disciplinary proceedings undertaken, students found responsible, and what sanctions

have enacted legislation that specifically requires schools, if requested, to defer to law enforcement for a short specified period.<sup>135</sup>

## II. ATHLETES AND SEXUAL ASSAULT: THE EXTENT OF THE PROBLEM

We do not definitively know the prevalence of campus sexual assaults engaged in by athletes or particular groups of athletes. While studies that have attempted to quantify the problem encounter difficulty in obtaining accurate numbers due to the nature of the problem, certain studies have documented either a greater incidence of male student-athletes committing sexual violence than the general male student population or a greater number of reported sexual violence by male student athletes in comparison to their non-athlete male counterparts.<sup>136</sup> Also, certain research posits the reasons why athletes in power performance sports like football may be more likely to commit acts of sexual violence.<sup>137</sup> And, we know from media reports, Title IX settlements, and lawsuits that investigations and adjudications of athletes accused of sexual assault have been mishandled by universities and law enforcement too many times.<sup>138</sup>

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were imposed; and (6) written notice of whether the university will proceed with a disciplinary process regarding an allegation of sexual misconduct within twenty-four hours of such a decision. *Id.* §§ 2(1)(B)(ii), 2(1)(C)(K)(i)(VI), 2(5)(19)(B), 9(f), 125(b)(1), 125(b)(5)(A), 125(b)(8). CASA also requires uniform campus-wide processes for student disciplinary proceedings relating to claims of sexual violence. *Id.* § 125(b)(6). The Safe Campus Act, proposed in the House of Representatives in July 2015 would prohibit schools from punishing a student accused of sexual assault or imposing interim measures *unless* the reporting victim also reports the complaint to the police. Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 163(b)(1) (2015). The school would be prevented from initiating or carrying out a disciplinary proceeding with respect to the allegation, while the law enforcement agency is conducting its investigation, unless the institution determines a sanction is reasonable to promote campus safety. *Id.* § 163(c)(1). Among other particular requirements, this bill provides that each party to the proceeding must have the opportunity to be represented by an attorney or other advocate. *Id.* § 164(a)(4).

135. N.Y. EDUC. LAW § 6444(5)(c)(iv) (McKinney 2016).

136. See Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. SPORT & SOC. ISSUES, 126, 132, 134–35 (1995) [hereinafter Crosset et al., *Male Student-Athletes Reported for Sexual Assault*].

137. See Kate Wheeling, *Are Student Athletes More Likely to Commit Sexual Assault?*, PAC. STANDARD (May 31, 2016), <https://psmag.com/are-student-athletes-more-likely-to-commit-sexual-assault-bae021620b84#.ky801tdi3>.

138. Kareem Abdul-Jabbar, *Kareem Abdul-Jabbar: Colleges Need to Stop Protecting Sexual Predators*, TIME (Jan. 30, 2015), <http://time.com/3689368/campus-sexual-assault-athletes-yes-means-yes/>. Prominent individuals also have brought attention to the problem of sexual assault. For example, Kareem Abdul-Jabbar gives college administrators an “F-minus” when it comes to thoroughly investigating claims of sexual violence and educating students. *Id.* He states, “Their negligence is the result not of ignorance but of greed: protecting their brand so they can lure more unsuspecting students, grants, and alumni donations.” *Id.*

A. *Studies and Commentary Discuss the Problems relating to Athletes and Sexual Assault*

Certain studies, commentators and even former athletes suggest that athletes may be more likely than their peers to commit sexual assault. Kareem Abdul-Jabbar stated, “As a former college athlete, I’m especially aware of the culture of entitlement that some athletes feel as they strut around campus with the belief that they can do no wrong. This ridiculous notion certainly has contributed to the alarming statistics concerning athletes and rape.”<sup>139</sup> Studies have found the following<sup>140</sup>:

- While male student-athletes comprise 3.3% of the total male [college] population, they represent 19% of the perpetrators reported<sup>141</sup> and 35% of domestic violence perpetrators reported.<sup>142</sup>
- “Between 1983 and 1986 . . . a U.S. college athlete was reported for sexual assault on an average of once every eighteen days.”<sup>143</sup>
- 54% of intercollegiate and intramural athletes admit to coercing a partner into sex.<sup>144</sup>

Researchers suggest a variety of reasons that athletes may commit sexual assault more frequently than their peers. Todd Crosset—in a 1999

139. *Id.* See also Amy Ellis Nutt, *A Shocking Number of College Men Surveyed Admit Coercing a Partner into Sex*, WASH. POST (June 5, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/06/03/more-than-half-of-college-athletes-surveyed-at-one-university-admit-coercing-a-partner-into-sex/> (“[T]he attitudes toward women and acceptance of the rape myth [explains] the difference between athletes and non-athletes . . .”).

140. See summaries compiled at the National Coalition Against Violent Athletes (NCAVA), a website founded by Kathy Redmond-Brown. Ms. Redmond-Brown was raped her freshman year at University of Nebraska by a football player and subsequently filed a Title IX lawsuit that was settled for \$50,000 from the University of Nebraska and an undisclosed amount from the player who went on to play professionally. Harvey Araton, *Coming Home, Healed*, N.Y. TIMES (Dec. 1, 2012), <http://www.nytimes.com/2012/12/02/sports/ncaafootball/kathy-redmonds-journey-of-reconciliation-with-the-university-of-nebraska.html>.

141. Crosset et al., *Male Student-Athletes Reported for Sexual Assault*, *supra* note 136, at 132.

142. Crosset et al., *Male Student-Athletes and Violence Against Women: A Survey of Campus Judicial Affairs Offices*, 2 VIOLENCE AGAINST WOMEN 163, 171 (1996). Additionally, as of 2011, roughly eight percent of college football scholarship players have criminal records. John Taylor, *Report: Eight Percent of Scholarship Players Have Criminal Records*, NBC SPORTS (Mar. 2, 2011, 10:59 AM), <http://collegefootballtalk.nbcsports.com/2011/03/02/report-eight-percent-of-scholarship-players-have-criminal-records/>.

143. MICHAEL A. MESSNER & DONALD F. SABO, *SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY* 50–51 (1994).

144. Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN, May 30, 2016, at 9, SAGE, File No. 10.1177/1077801216651339.

review of male athletes' violence against women—points to six possible factors, no one of which is directly causal:

- “There is a strong association between drinking and sport. . . . Athletes drink, get drunk, and drink to get drunk at a higher rate than non-athletes.”<sup>145</sup> Drinking plays a prominent role in some men’s “premeditated strategy to coerce women into unwanted sex or to be violent.”<sup>146</sup>
- Impaired reasoning or impulse control caused by head injury plays a role in instances of sexual violence.<sup>147</sup>
- Training athletes to be violent in sport affects behavior off the field of play.<sup>148</sup> Training athletes to be physically dominant coupled with socialization that disrespects women may contribute to hostility and violence against women and support rape attitudes.<sup>149</sup>
- Research on male athletic teams and fraternities yield similar results. “[P]eer support of abuse and social ties with abusive peers are predictors of violence against women.”<sup>150</sup>
- “Institutional support for alleged perpetrators often blames women and fails to hold athletes responsible for their actions. . . . [A]thletes bring more resources (financial and otherwise) into the judicial process and are better able than nonathletes to escape punishment for their crimes against women.”<sup>151</sup>
- “Star athletes, whose mediated images represent an idealized masculinity . . . enjoy elevated status within the masculine status hierarchy. . . . Within some subworlds of sport, crimes against women (both the act and the recounting of it) may be a

145. See Todd Crosset, *Male Athletes' Violence Against Women: A Critical Assessment of the Athletic Affiliation, Violence Against Women Debate*, 51 *QUEST* 244, 250 (1999) [hereinafter Crosset, *Male Athletes' Violence Against Women*].

146. *Id.*; see also Benjamin D. Locke & James R. Mahalik, *Examining Masculinity Norms, Problem Drinking, and Athletic Involvement as Predictors of Sexual Aggression in College Men*, 52 *J. COUNSELING PSYCHOL.* 279, 279, 281–82 (2005); Anders L. Sønderlund et al., *The Association Between Sports Participation, Alcohol Use and Aggression and Violence: A Systematic Review*, 17 *J. SCI. & MED. SPORT* 2, 2 (2014).

147. Crosset, *Male Athletes' Violence Against Women*, *supra* note 145, at 250.

148. *Id.* at 250–51.

149. *Id.*; see generally Dave Smith & Sally Stewart, *Sexual Aggression and Sports Participation*, 26 *J. SPORT BEHAV.* 384 (2003) (discussing that the need to be dominant and violent socialization are factors which cause men to be more violent toward women).

150. Crosset, *Male Athletes' Violence Against Women*, *supra* note 145, at 251.

151. *Id.* at 252.



demonstration of masculinity.”<sup>152</sup>

Crosset concludes, “Factors that increase the likelihood that an athlete will perpetrate a crime against a woman may also vary depending on his class, race, team culture, sport culture, and level of sport.”<sup>153</sup>

Other studies point to schools mishandling investigations of athletes accused of sexual violence. A 2014 survey of 440 institutions commissioned by the office of U.S. Senator Claire McCaskill (the “McCaskill Report”) found that many schools use investigatory and adjudication processes that fail to comply with best practices.<sup>154</sup> For example, while experts maintain that students should not participate in adjudication panels for campus sexual assault cases due to privacy concerns for victims or conflicts of interest because they may know peers who are victims or perpetrators; twenty-seven percent of institutions in the national sample, forty-three percent among large public institutions, and thirty percent among large private institutions, allow such student participation.<sup>155</sup> Significantly, the McCaskill Report found that “[m]ore than 20% of institutions in the national sample [gave] the athletic department oversight of sexual violence cases involving student athletes. . . . [And] allow[ed] their athletic departments to oversee cases involving student athletes.”<sup>156</sup>

Another study, conducted by ESPN’s *Outside the Lines*, focused on how athletes at ten schools with major sports programs were treated

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152. *Id.* at 253.

153. *Id.*; see also Todd Crosset, *Athletic Affirmation and Violence Against Women: Toward a Structural Prevention Project*, in MASCULINITIES, GENDER RELATIONS, AND SPORT 160 (Jim McKay et al., eds., 2000). A 2016 study in the journal *Violence Against Women* reported that more than half of athletes surveyed at a southern, public university admitted to sexually coercive behavior. Young et al., *supra* note 144, at 9, 10 tbl.2. Of the sexually coercive behaviors listed on the survey, almost all met the legal definition of rape. See *id.* at 10 tbl.2.

154. See STAFF OF S. SUBCOMMITTEE ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (2014) [hereinafter MCCASKILL REPORT], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>; see also Crosset, *supra* note 153, at 158; MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 53 (1992) (explaining that a young male athlete is conditioned to feel privileged and believe that if he works hard in practice and is a star in competitions, the school will take care of him); Jeff Benedict, *An Alarming Number of College Athletes Charged with Serious Crime*, SPORTS ILLUSTRATED (Sept. 8, 2010), <http://www.si.com/more-sports/2010/09/08/athletes-crime>; Scott Tinley, *College Football and Crime*, SPORTS ILLUSTRATED (Mar. 2, 2011), <http://www.si.com/more-sports/2011/03/02/cfb-crime>; cf. MESSNER & SABO, *supra* note 143, at 50–51 (“Between 1983 and 1986 . . . a U.S. college athlete was reported for sexual assault on an average of once every eighteen days.”).

155. See MCCASKILL REPORT, *supra* note 154, at 11.

156. *Id.* at 2, 11.

differently than non-athletes with regard to investigations and adjudications of sexual assault allegations.<sup>157</sup> The report concluded the following:

[Athletes benefit] from the confluence of factors that can be reality at major sports programs: the near-immediate access to high-profile attorneys, the intimidation that is felt by witnesses who accuse athletes and the higher bar some criminal justice officials feel needs to be met in high-profile cases. . . . Athletic department officials inserted themselves into investigations many times. Some tried to control when and where police talked with athletes; others insisted on being present during player interviews, alerted defense attorneys, conducted their own investigations before contacting police, or even, in one case, handled potential crime-scene evidence. Some police officials were torn about proper procedure—unsure when to seek a coach’s or athletic director’s assistance when investigating crimes. Some athletic programs have, in effect, a team lawyer who showed up at a crime scene or jail or police department—sometimes even before an athlete requested legal counsel. The lawyers, sometimes called by athletic department officials, were often successful in giving athletes an edge in evading prosecution—from minor offenses to major crimes. The high profiles of the athletic programs and athletes had a chilling effect on whether cases were even brought to police and how they were investigated. Numerous cases never resulted in charges because accusers and witnesses were afraid to detail wrongdoing, feared harassment from fans and the media, or were pressured to drop charges in the interest of the sports programs.<sup>158</sup>

Other commentators point out that certain schools are less likely to punish athletes and may even create an environment where athletes are above the law.<sup>159</sup> Indeed, recent cases, like the high profile situations at Baylor University, University of Tennessee, Florida State University, and other universities discussed below, suggest this may be a reality at some of the country’s major institutions.<sup>160</sup>

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157. Paula Lavigne, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 15, 2015), [http://www.espn.com/espn/otl/story/\\_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges](http://www.espn.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges).

158. *Id.*

159. *See id.* (comparing Florida State University athletics with other schools).

160. *See* Amanda Marcotte, *Football Culture Grows Up: Responses to Baylor’s Firing of Art Briles Shows that Justice Finally More Important than Winning Games*, SALON (May 27, 2016, 10:15 AM), [http://www.salon.com/2016/05/27/football\\_culture\\_grows\\_up\\_response\\_to\\_baylors\\_firing\\_of\\_art\\_briles\\_shows\\_that\\_justice\\_finally\\_more\\_important\\_than\\_winning\\_games/](http://www.salon.com/2016/05/27/football_culture_grows_up_response_to_baylors_firing_of_art_briles_shows_that_justice_finally_more_important_than_winning_games/). Even if schools do not make a conscious effort to provide special treatment to athletes or place the athletic department in charge of investigations, other “soft factors”—like access to counsel, witness apprehension of testifying against athletes, and the higher bar used by criminal justice officials in high-profile cases—contribute to a system where athletes receive significant advantages other students do not have in the disciplinary context. *See*

Without doubt, too many college athletes commit sexual violence and athletic departments, at least at certain schools, provide special treatment to athletes by treating them as though they are above the law.<sup>161</sup> There is no agreement on the precise extent and scope of the problem concerning athletes.<sup>162</sup> Some experts even dispute that athletes in general commit a disproportionate amount of sexual assaults.<sup>163</sup> Accordingly, it is especially important for the NCAA to conduct and monitor research on this issue, particularly as experts continue to identify the highest risk groups by sport, university, geographic region, and other factors. This will allow the NCAA to intelligently consider and implement rules and to devise educational programs with a clinical specificity that should increase the likelihood of the most meaningful change.

### *B. Recent High-Profile Matters Exemplify the Crisis*

There is a certain degree of chaos on both sides of the issue—in appropriately finding athletes responsible for acts of sexual violence and in protecting athletes that have been accused. Recent matters discussed below demonstrate how universities struggle to prioritize the protection of the student body, to appropriately investigate allegations, and to punish those found responsible, while protecting the fairness and due process rights of the complainant and the accused. These shortcomings include delays and partiality in the Title IX investigatory process,<sup>164</sup> obstructionist activity by athletic departments,<sup>165</sup> athlete transfers that allow them to escape the Title IX process,<sup>166</sup> and application of only

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DONNA LOPIANO ET AL., THE DRAKE GROUP, INC., POSITION STATEMENT: INSTITUTIONAL INTEGRITY ISSUES RELATED TO COLLEGE ATHLETE SEXUAL ASSAULT AND OTHER FORMS OF SERIOUS VIOLENCE 19, 21 (2016), <https://drakegroupblog.files.wordpress.com/2016/09/position-statement-athlete-sexual-assault-final1.pdf>.

161. See LOPIANO, *supra* note 160, at 22; Marcotte, *supra* note 160.

162. Precision is difficult when experts estimate that up to ninety-five percent of attempted rapes go unreported. See, e.g., FISHER, *supra* note 123, at 23.

163. See Lindsey Holden, *The NCAA's Sexual Assault Conundrum*, U.S. NEWS & WORLD REP. (Aug. 6, 2014, 10:10 AM), <http://www.usnews.com/news/articles/2014/08/06/the-ncaas-sexual-assault-conundrum>.

164. See, e.g., Michael Kessler, *Let's Give It Arrest: Why the NCAA Should Adopt a Uniform Disciplinary Policy*, 26 MARQ. SPORTS L. REV. 433, 434–35, 447 (2016).

165. See, e.g., Holly Hogan, *What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. REV. 317, 318 (2006).

166. See Melissa Korn, *Scores of College Athletes Who Faced Felony Charges Get Second Chance: At Least 108 College Athletes Punished for Serious Crimes Since 2011 Were Accepted by Another Team*, WALL STREET JOURNAL (March 2, 2017), <https://www.wsj.com/articles/scores-of-college-athletes-who-faced-felony-charges-get-second-chance-1488459601> (discussing the “inconsistent patchwork of school and conference policies,” relating to transfers by D1 basketball and football players charged with sexual assault). See, e.g., BAYLOR UNIV. BD. OF REGENTS, FINDINGS OF FACT 11 (2016) [hereinafter BAYLOR, FINDINGS OF FACT],

minor or no sanctions for athletes who commit sexual violence.<sup>167</sup> Shortcomings in protecting athletes' rights to fair proceedings include presumptions of guilt leading to scanty investigations and one-sided hearings.<sup>168</sup>

*I. Lawsuits Allege that Athletes Accused of Sexual Violence Receive Preferential Treatment*<sup>169</sup>

*Baylor University*: Lawsuits and investigations into the Title IX practices at Baylor University suggest a deeply flawed system by which the University has addressed allegations of sexual assault by athletes. So many allegations were made that Baylor mishandled sexual assault allegations against its athletes that it hired the law firm Pepper Hamilton in 2015 to conduct an independent investigation.<sup>170</sup> After more than 65 interviews with students and employees and a review of emails, phone records, and other documents, Pepper Hamilton concluded that Baylor failed to properly implement Title IX and the Violence Against Women Act.<sup>171</sup> Findings that Baylor acted "above the rules"<sup>172</sup> and prioritized football over the safety of its students included the following:

- Football coaches and staff met directly with complainants, did not report the allegations to the Title IX office and encouraged complainants not to report the incidents.<sup>173</sup>
- Football staff blamed and otherwise discredited complainants.<sup>174</sup>
- Football staff helped certain Baylor players who had pending allegations of sexual violence to transfer schools<sup>175</sup> and other players with known criminal backgrounds to transfer into

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<https://www.baylor.edu/rtsv/doc.php/266596.pdf>.

167. See, e.g., Hogan, *supra* note 165, at 345.

168. See generally Hogan, *supra* note 165, for a legal discussion on the athletic department's ideal role for sexual harassment claims and what practices they currently exercise. See, e.g., Kessler, *supra* note 164, at 447; Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 617, 651 (2003).

169. The "facts" and allegations in this Section are obtained from legal complaints, Title IX findings, statements made by the respective universities, and media reports. The author does not make any representations regarding their accuracy.

170. See Jeff Blumenthal, *Philly Lawyers Issue Shocking Baylor Sexual Assault Report*, PHILA. BUS. J. (May 26, 2016, 7:41 PM), [http://www.bizjournals.com/philadelphia/morning\\_roundup/2016/05/pepper-hamilton-baylor-sex-assault-starr-mccaw.html](http://www.bizjournals.com/philadelphia/morning_roundup/2016/05/pepper-hamilton-baylor-sex-assault-starr-mccaw.html).

171. *Id.*

172. BAYLOR, FINDINGS OF FACT, *supra* note 166, at 11.

173. *Id.* at 10–11.

174. *Id.* at 11.

175. *Id.* at 13.

Baylor's football program.<sup>176</sup>

- Football coaches and staff reinforced that there was no culture of accountability for misconduct.<sup>177</sup>
- The football program had its own ad hoc internal system of discipline.<sup>178</sup>

Civil claims and prosecutions before and after Pepper Hamilton's report illustrate Baylor's alleged failure to effectively pursue allegations against student-athletes.<sup>179</sup> For example, in April 2012, a woman filed a police report alleging that football player Tevin Elliott raped her.<sup>180</sup> Baylor football coach Art Briles allegedly knew about the accusations, but despite the mounting sexual assault allegations, made no reports to the Title IX office and played Elliott in nine of thirteen games that season.<sup>181</sup> Elliott was later found guilty of two counts of sexual assault and received a twenty-year prison sentence.<sup>182</sup> In another example, in March 2016, a different complainant allegedly notified Briles and various athletic department staff that Elliot had raped her, but merely was told by Briles' secretary that the office was "looking into [the allegations]."<sup>183</sup>

Another highly publicized circumstance involves Sam Ukwuachu, a rising football star. Briles recruited Ukwuachu after he was allegedly kicked off the team at Boise State University for a violent incident involving a female student.<sup>184</sup> Once at Baylor, Ukwuachu was indicted

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176. *Id.*

177. BAYLOR, FINDINGS OF FACT, *supra* note 166, at 13.

178. *Id.* at 11.

179. *See, e.g., Baylor University Board of Regents Announces Leadership Changes and Extensive Corrective Actions Following Findings of External Investigation*, BAYLOR UNIV. (May 26, 2016), <http://www.baylor.edu/mediacommunications/news.php?action=story&story=170207>.

180. Paula Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (Feb. 2, 2016), [http://www.espn.com/espn/otl/story/\\_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims](http://www.espn.com/espn/otl/story/_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims).

181. *See id.*

182. Tommy Witherspoon, *Ex-BU Football Player Gets 20 Years in Sexual Assaults*, WACO TRIB.-HERALD (Jan. 24, 2014, 12:01 AM), [http://www.wacotrib.com/news/courts\\_and\\_trials/ex-bu-football-player-gets-years-in-sexual-assaults/article\\_0e8c23fa-44cc-59da-a134-de9fe39a7d5e.html](http://www.wacotrib.com/news/courts_and_trials/ex-bu-football-player-gets-years-in-sexual-assaults/article_0e8c23fa-44cc-59da-a134-de9fe39a7d5e.html).

183. Complaint at 7, *Hernandez v. Baylor Univ. Bd. of Regents*, No. 6:16-CV-00069 (W.D. Tex. filed Mar. 30, 2016).

184. *See* Jessica Luther, *Silence at Baylor*, TEXASMONTHLY (Aug. 20, 2015), <http://www.texasmonthly.com/article/silence-at-baylor/>. The transfer process is a significant area of concern. Other schools, too, have been criticized for admitting students accused of sexual assault. *See, e.g., Allie Grasgreen, Alleged Rapist on the Roster*, INSIDE HIGHER ED (Sept. 13, 2013), <https://www.insidehighered.com/news/2013/09/13/vanderbilt-athlete-arrest-ed-alleged-rape-played-saturday-alcorn-state> (discussing Alcorn State admitting a Vanderbilt student-athlete who had been suspended from school at Vanderbilt, removed from the football

and charged with two counts of sexual assault against a female Baylor athlete.<sup>185</sup> The University investigation found him not guilty.<sup>186</sup> Ukwuachu was subsequently convicted criminally of sexual assault and sentenced to 180 days in jail.<sup>187</sup> Similarly, Baylor recruited Shawn Oakman, a talented football player who had been dismissed from the Pennsylvania State University (“Penn State”) football team in 2011 for allegedly grabbing the wrist of a female store clerk and for stealing.<sup>188</sup> After transferring to Baylor he was accused of another incident of sexual assault in 2013, but the victim declined to press charges.<sup>189</sup> Oakman continued to play for the team.<sup>190</sup> Then, in April 2016, he was arrested for

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team, and subsequently charged with rape); Jake New, *Oregon Files Counterclaim Against Student Suing Over Sexual Assault Case*, INSIDE HIGHER ED (Feb. 24, 2015), <https://www.insidehighered.com/quicktakes/2015/02/24/oregon-files-counterclaim-against-student-suing-over-sexual-assault-case> (describing a case in which a student alleged that University of Oregon knew about sexual assault allegations against transfer basketball player). Similarly, schools have been criticized for admitting high-profile recruits despite disturbing allegations or convictions against them. Sam Khan Jr., *Miss. State Allows Jeffery Simmons to Enroll After Arrest; DE Will Be Evaluated*, ESPN, [http://espn.go.com/college-football/story/\\_/id/15908764/mississippi-state-bulldogs-allow-recruit-jeffery-simmons-enroll-conditions](http://espn.go.com/college-football/story/_/id/15908764/mississippi-state-bulldogs-allow-recruit-jeffery-simmons-enroll-conditions) (last updated June 3, 2016, 12:27 PM) (football recruit who repeatedly punched woman on the ground was admitted to Mississippi State); Deric Lostutter, *4 Football Players From Hocking College Accused of Raping a Girl—Trent Mays, Steubenville Rapist, Is Team Captain*, TRUTHVOICE, <http://truthvoice.com/2015/09/4-football-players-from-hocking-college-accused-of-raping-a-girl-trent-mays-steubenville-rapist-is-team-captain/> (last updated Sept. 4, 2015, 5:19 PM) (reporting that a college football team’s captain had been convicted of rape during high school).

185. See Luther, *supra* note 184.

186. *Baylor to Investigate Case’s Handling After Sam Ukwuachu Sentenced*, ESPN (Aug. 22, 2015), [http://espn.go.com/college-football/story/\\_/id/13485476/sam-ukwuachu-baylor-bears-sentenced-180-days-jail-10-years-probation-sexual-assault-case](http://espn.go.com/college-football/story/_/id/13485476/sam-ukwuachu-baylor-bears-sentenced-180-days-jail-10-years-probation-sexual-assault-case); see also Joseph Santoliquito, *Life After Penn State for Shawn Oakman*, CBS PHILLY (July 2, 2012, 1:47 PM), <http://philadelphia.cbslocal.com/2012/07/02/life-after-penn-state-for-shawn-oakman/>.

187. *Baylor to Investigate Case’s Handling After Sam Ukwuachu Sentenced*, ESPN, *supra* note 186. Ukwuachu sought a new trial. The six points of error alleged in the appeal filed in Waco’s Tenth Court of Appeals included claims that the prosecutors “abused the grand jury process” and improperly intimidated one of the defense witnesses. See Tommy Witherspoon, *Former Baylor Player Ukwuachu Seeks New Trial in Sexual Assault Case*, WACO TRIB.-HERALD, [http://www.wacotrib.com/news/courts\\_and\\_trials/former-baylor-player-ukwuachu-seeks-new-trial-in-sexual-assault/article\\_12a9af6f-7943-52cc-af18-725902a8090c.html?mode=jqm](http://www.wacotrib.com/news/courts_and_trials/former-baylor-player-ukwuachu-seeks-new-trial-in-sexual-assault/article_12a9af6f-7943-52cc-af18-725902a8090c.html?mode=jqm) (last visited Jan. 27, 2017).

188. See Art Briles Reacts to Impending Dismissal by Baylor, ESPN (June 2, 2016), [http://espn.go.com/college-sports/story/\\_/id/15900437/art-briles-reacts-impending-dismissal-coach-baylor-bears](http://espn.go.com/college-sports/story/_/id/15900437/art-briles-reacts-impending-dismissal-coach-baylor-bears).

189. See Lindsey Foltin, *Former Baylor DE Shawn Oakman Was Accused of Assault in 2013*, FOX SPORTS (Apr. 25, 2016, 2:54 PM), <http://www.foxsports.com/college-football/story/baylor-bears-shawn-oakman-alleged-assault-incident-2013-rape-sexual-assault-042516>.

190. See *Former Baylor DE Shawn Oakman Accused of Assault in 2013*, SPORTS ILLUSTRATED (Apr. 25, 2016), <http://www.si.com/college-football/2016/04/25/baylor-bears->

sexual assault.<sup>191</sup> Since that time, numerous other women have come forward with allegations that they were sexually abused by Baylor football players.<sup>192</sup> As of this writing, the most recent lawsuit alleges “that 31 Baylor football players committed at least 52 acts of rape, including five gang rapes, between 2011 and 2014.”<sup>193</sup> The Baylor University graduate says she was gang raped in 2013 by two named football players, one of whom had been previously accused of engaging in a rape.<sup>194</sup>

As part of the damning Pepper Hamilton report, Baylor’s President, Ken Starr, resigned and its football coach, Art Briles, was fired (along with other football staff).<sup>195</sup> Plus, the NCAA is allegedly investigating Baylor.<sup>196</sup> However, without specific rules relating to sexual violence it is hard to predict the exact charges the NCAA may bring, if any.<sup>197</sup>

*University of Tennessee:* Like Baylor, the University of Tennessee has been accused of creating a culture that enabled student athletes to commit sexual assaults without ramification.<sup>198</sup> In February 2016, eight women filed a purported class action alleging that the University “intentionally acted by an official policy of deliberate indifference to

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shawn-oakman-2013-assault-accusation.

191. See Foltin, *supra* note 189.

192. See Paula Lavigne, *3 More Women Join in Baylor Suit Over Reaction to Rape Allegations*, ESPN (June 28, 2016), [http://www.espn.com/espn/otl/story/\\_/id/16597124/three-more-women-join-baylor-lawsuit-reaction-rape-allegations](http://www.espn.com/espn/otl/story/_/id/16597124/three-more-women-join-baylor-lawsuit-reaction-rape-allegations).

193. Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes by Football Players in 4 Years, ‘Show ‘em a Good Time’ Culture*, DALL. NEWS, <http://www.dallasnews.com/news/baylor/2017/01/27/new-baylor-lawsuit-describes-show-em-good-time-culture-cites-52-rapes-football-players-4-years> (last updated Jan. 27, 7:28 PM).

194. *Id.*

195. See Art Briles Reacts to Impending Dismissal by Baylor, *supra* note 188.

196. See Sam Cooper, *Report: NCAA ‘Casting a Wide Net’ on Baylor Potential Violations*, YAHOO! SPORTS (Feb. 4, 2017, 2:41 PM), <http://sports.yahoo.com/news/report-ncaa-casting-a-wide-net-on-baylor-potential-violations-194118253.html>; Sean Dotson, *Why Baylor Will Likely Face NCAA Scrutiny*, SPORTS ESQUIRES (May 26, 2016), <http://thesportsesquires.com/why-baylor-will-likely-face-ncaa-scrutiny/>.

197. The NCAA brought various charges against Penn State in connection with the incident involving Jerry Sandusky (a football coach) and sexual abuse of minors in Penn State locker rooms. Most of the sanctions were reversed and the NCAA’s handling of the situation was highly controversial. See Steve Eder, *N.C.A.A. Decides to Roll Back Sanctions Against Penn State*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/sports/ncaafootball/penn-states-postseason-ban-is-lifted.html>; Janet Pickel, *Penn State Football Sanctioned by NCAA Over Sandusky: Then and Now*, PENNLIVE (JULY 23, 2015, 6:59 AM), [http://www.pennlive.com/sports/index.ssf/2015/07/penn\\_state\\_football\\_sanctioned.html](http://www.pennlive.com/sports/index.ssf/2015/07/penn_state_football_sanctioned.html).

198. See Adam Stites, *Report: Tennessee Faces Sexual Assault Lawsuit Involving Current, Former Football Players*, SEC COUNTRY, <https://www.seccountry.com/tennessee/tennessee-faces-sexual-assault-lawsuit-involving-current-former-football-players> (last visited Jan. 27, 2017) (“[T]he university ‘enabled an environment of bad behavior and used a disciplinary system that favored the players . . . .’”).

known sexual assaults so as to create a hostile sexual environment.”<sup>199</sup> The allegations against the University included the following:

- The basketball program released a player accused of sexual assault “on good terms” pending his hearing before an administrative law judge, allowing him to transfer to another university.<sup>200</sup>
- The University waited until February 2016 to hold a hearing on conduct that allegedly occurred in October 2014.<sup>201</sup>
- The school took nearly six months to reach a conclusion in a separate investigation, which resulted in a finding of responsibility, but the school failed to take any serious disciplinary measures.<sup>202</sup> Additionally, the school told the complainant that the accused players were suspended from the football team, but the players were still allowed to be on campus and to use the academic support centers.<sup>203</sup> One of the accused players graduated in a special ceremony reserved for members of the athletic department.<sup>204</sup>
- The athletic department arranged for lawyers to represent the

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199. First Amended Complaint at 2, *Doe v. Univ. of Tenn.*, No. 3:16-cv-00199 (M.D. Tenn. filed Feb. 24, 2016).

200. *Id.* at 20.

201. *Id.* at 27–28.

202. *Id.* at 38. Other schools—and even criminal justice officials—have been accused of taking lax disciplinary measures against athletes. See John Canzano, *16 Years After Oregon State Football Gang-Rape Allegation, Brenda Tracy Steps from the Shadows*, OREGONIAN (Nov. 14, 2014, 10:50 AM), [http://www.oregonlive.com/sports/oregonian/john\\_canzano/index.ssf/2014/11/canzano\\_her\\_name\\_is\\_brenda\\_tra.html](http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2014/11/canzano_her_name_is_brenda_tra.html) (reporting that football players were sentenced to twenty-five hours of community service, participation in educational programs, and conduct probation; their coach suspended the players for one game); *Stanford Put on Defensive Over Assault Prevention Efforts*, FOX NEWS (June 8, 2016), <http://www.foxnews.com/us/2016/06/08/stanford-put-on-defensive-over-assault-prevention-efforts.html> (reporting that a Stanford swimmer agreed to a ban instead of going through expulsion proceedings, was convicted of rape, and received only a six-month sentence); Blake Neff, *Oklahoma: Tough on Racism, Weak on Assault, Burglary*, DAILY CALLER (Mar. 11, 2015, 10:04 PM), <http://dailycaller.com/2015/03/11/oklahoma-tough-on-racism-weak-on-assault-burglary/> (discussing repercussions for crimes committed by football players, including a football player who received a one-year suspension after being convicted of assault); Ben Rosen, *Vanderbilt Rapist Sentenced to 15 Years, Drawing Contrast to Stanford Sentence*, CHRISTIAN SCI. MONITOR (June 19, 2016), <http://www.csmonitor.com/USA/USA-Update/2016/0619/Vanderbilt-rapist-sentenced-to-15-years-drawing-contrast-to-Stanford-sentence-video> (stating that football player Brandon Vandenburg was sentenced to at least fifteen years in prison for encouraging “teammates to rape an unconscious woman he was dating, and filming it in his dorm room”; his teammate, Corey Batey, was also sentenced to fifteen-plus years for the same crime).

203. First Amended Complaint, *supra* note 199, at 8, 34.

204. *Id.* at 35.



athletes.<sup>205</sup>

- Football players were permitted to continue playing on the football team after being accused of sexual assault.<sup>206</sup>

Subsequent to the filing of the lawsuit, additional women have made further allegations of sexual misconduct.<sup>207</sup> In July 2016, the parties reached a partial settlement.<sup>208</sup> The University agreed to pay \$2.48 million in exchange for the plaintiffs' agreement to withdraw the lawsuit.<sup>209</sup> In addition to the monetary payment, the University agreed to take additional steps to address sexual misconduct.<sup>210</sup> A specific requirement is that the University will no longer allow students to serve on disciplinary hearing boards in cases that involve sexual misconduct unless both sides agree.<sup>211</sup> It will also appoint an independent commission made up of individuals with expertise in federal law compliance programs to participate on Title IX hearing panels.<sup>212</sup> Finally, the University agreed to stop providing lists of attorneys to athletes accused of sexual misconduct, and will instead refer accused athletes to the local bar association for recommendations of attorneys.<sup>213</sup>

*Florida State University:* The story of current Tampa Bay Buccaneers quarterback Jameis Winston may be the most startling example of university and law enforcement inaction in the face of an allegation against a high-profile athlete. The facts are complicated, but in

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205. *Id.* at 3, 7.

206. *Id.* at 24, 45.

207. Anita Wadhvani & Matt Slovin, *Two More Women Join University of Tennessee Sexual Assault Lawsuit*, TENNESSEAN (Feb. 24, 2016, 5:05 PM.), <http://www.tennessean.com/story/sports/college/ut/2016/02/24/women-join-ut-sexual-assault-suit/80860462/>.

208. M.J. Slaby & Dustin Dopirak, *University of Tennessee Settles Title IX Lawsuit for \$2.48 Million*, KNOXVILLE NEWS SENTINEL (July 5, 2016), <http://archive.knoxnews.com/news/local/ut-settles-title-ix-lawsuit-for-248-million-36cfb409-2921-4d9c-e053-0100007f0d02-385623781.html>.

209. See Steve Almasy & Khushbu Shah, *University of Tennessee Settles Title IX Lawsuit with Eight Women*, CNN, <http://www.cnn.com/2016/07/05/us/tennessee-title-ix-lawsuit/> (last updated July 5, 2016, 10:48 PM); Nate Rau & Anita Wadhvani, *Tennessee Settles Sexual Assault Suit for \$2.48 Million*, TENNESSEAN (July 5, 2016, 8:37 PM), <http://www.tennessean.com/story/news/crime/2016/07/05/tennessee-settles-sexual-assault-suit-248-million/86708442/>.

210. Steve Megargee, *Tennessee Settlement Has Steps to Enhance Title IX Policies*, ASSOCIATED PRESS BIG STORY (July 6, 2016, 9:54 PM), <http://bigstory.ap.org/article/fdc3de512b1144c0ac3eb4dcb1492117/tennessee-settlement-has-steps-enhance-title-ix-policies>.

211. *Id.*

212. *Id.*

213. *Id.*; see also *No Charges in Alleged Notre Dame Sex Assault*, CBS CHI. (Dec. 16, 2010, 1:33 PM), <http://chicago.cbslocal.com/2010/12/16/suicide-victims-parents-criticize-notre-dame/> (discussing the suicide of a woman who made an accusation against a football player).

brief they allegedly are as follows: Erica Kinsman, a student at Florida State University (FSU), contacted the Florida State University Police Department (FSUPD), had a sexual assault examination, and filed a sexual battery incident report with the Tallahassee Police Department (TPD) on December 7, 2012.<sup>214</sup> At the time she did not know the accused's name, but she identified Jameis Winston, then a freshman quarterback, as the suspect the next month.<sup>215</sup> The TPD then called Winston on his cell phone and informed him of the allegation.<sup>216</sup> Winston and two other football players, who videotaped the alleged rape but threw out their phone containing the video, met with the athletic department, which allegedly immediately hired a high profile attorney.<sup>217</sup> Among other acts, the attorney took statements from the two football players that videotaped the incident who both said that the sex was consensual.<sup>218</sup> The TPD quickly concluded in a matter of weeks that it did not have sufficient evidence to arrest Jameis Winston.<sup>219</sup>

In November 2013, the media made public its record request to the TPD seeking information about the Winston incident.<sup>220</sup> As a result of this media attention, the TPD forwarded the inactive case to the Office of the State Attorney, then notified Winston's attorney (hired by the athletic department) and the school's administration of the media requests.<sup>221</sup>

The State District Attorney began investigating the case on November 14, 2013,<sup>222</sup> and three weeks later announced that he did not have sufficient evidence to proceed with the case.<sup>223</sup> The District Attorney acknowledged multiple problems with the investigation, stating that the police "just missed all the basic fundamental stuff that you are supposed to do."<sup>224</sup> The University later said that officials in the athletic

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214. *Timeline of Events in Jameis Winston Allegation*, USA TODAY SPORTS (Nov. 22, 2013, 2:07 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/11/22/jameis-winston-sexual-battery-allegation-florida-states-seminoles/3672039/>.

215. *Id.*

216. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), [http://www.nytimes.com/interactive/2014/04/16/sports/errors-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?\\_r=1](http://www.nytimes.com/interactive/2014/04/16/sports/errors-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?_r=1).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Timeline of Events in Jameis Winston Allegation*, *supra* note 214.

221. *Id.*

222. *Id.*

223. Bogdanich, *supra* note 216.

224. *Id.* Some of the alleged flaws included failing to ask the manager of the apartment complex where the rape allegedly occurred or if he had seen anyone who looked like the suspect, failing to search for information about the taxi that the parties took that night, not contacting the officer who first responded to the complaint, not attempting to obtain

department were aware of the allegation in January 2013, but failed to notify the Title IX coordinator.<sup>225</sup> Since no investigation occurred, Winston continued to play for the entire season, winning the 2013 Heisman Trophy in December 2013.<sup>226</sup>

FSU began a Title IX code of conduct investigation in December 2013, a year after the incident.<sup>227</sup> The Title IX investigation was closed on February 10, 2014.<sup>228</sup> However, an April 2014 New York Times report resulted in FSU reopening the investigation.<sup>229</sup> After numerous delays, during which time Winston continued to play football, a hearing was finally conducted on December 3, 2014, and Winston read a statement claiming consensual sex.<sup>230</sup> On December 21, 2014, the District Attorney released his decision concluding that the evidence was “insufficient to satisfy the burden of proof.”<sup>231</sup> Winston then participated in a championship game in January 2015.<sup>232</sup>

Erica Kinsman filed a lawsuit against FSU in January 2015, alleging that FSU officials demonstrated a “deliberate indifference” to her allegation and “fostered a ‘hostile educational environment.’”<sup>233</sup> On January 25, 2016, FSU settled the lawsuit by paying \$950,000 and

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surveillance video from the bar where Kinsman and Winston first interacted, nor attempting to interview potential eyewitnesses who were there on the night of the incident. *Id.*

225. Kevin Vaughan, *Police, FSU Hampered Jameis Winston Investigation*, FOX SPORTS (Oct. 10, 2014, 4:23 PM), <http://www.foxsports.com/college-football/story/jameis-winston-florida-state-tallahassee-police-hindered-investigation-documents-101014>.

226. Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html>. *The New York Times* later concluded that there was “virtually no investigation at all,” either by the police or the university. *Id.*

227. Rachel Axon, *Florida State Outlines Jameis Winston Response in Letter*, USA TODAY (Oct. 10, 2014, 8:35 AM), <http://www.usatoday.com/story/sports/ncaaf/acc/2014/10/10/jameis-winston-florida-state-sexual-assault-letter/17023797/>.

228. *Id.*

229. Bogdanich, *supra* note 216.

230. *Jameis Winston Reads Graphic Statement Giving His Side of the Story*, FOX SPORTS (Dec. 3, 2014, 10:58 PM), <http://www.foxsports.com/college-football/story/jameis-winston-graphic-statement-hearing-rape-accuser-says-hes-innocent-120314>.

231. Rachel Axon, *Florida State’s Jameis Winston Cleared in Code of Conduct Hearing*, USA TODAY (Dec. 21, 2014, 4:52 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/12/21/jameis-winston-florida-state-code-of-conduct-sexual-assault-allegation/20735355/>.

232. Adam Kilgore, *2015 Rose Bowl: Marcus Mariota and Oregon Crush Jameis Winston*, *Florida State*, USA TODAY (Jan. 1, 2015), [https://www.washingtonpost.com/sports/colleges/2015-rose-bowl-marcus-mariota-and-oregon-crush-jameis-winston-florida-state/2015/01/01/e9b3a642-91fc-11e4-ba53-a477d66580ed\\_story.html](https://www.washingtonpost.com/sports/colleges/2015-rose-bowl-marcus-mariota-and-oregon-crush-jameis-winston-florida-state/2015/01/01/e9b3a642-91fc-11e4-ba53-a477d66580ed_story.html).

233. Jared Shanker, *Florida State Reaches Settlement with Jameis Winston’s Accuser*, ESPN (Jan. 26, 2016), [http://espn.go.com/college-football/story/\\_/id/14644864/florida-state-settling-lawsuit-jameis-winston-accuser](http://espn.go.com/college-football/story/_/id/14644864/florida-state-settling-lawsuit-jameis-winston-accuser).

committing to five years of sexual assault awareness programs, as well as agreeing to publish annual reports on those programs.<sup>234</sup> FSU did not admit to wrongdoing.<sup>235</sup> Kinsman also sued Winston personally.<sup>236</sup> Winston countersued alleging, inter alia, defamation and maintaining that the incident was consensual.<sup>237</sup> This case was settled in December 2016.<sup>238</sup>

This matter, if the allegations are true, is an egregious example of an athletic department interfering with both law enforcement and Title IX investigations, providing an extra benefit to athletes (hired attorneys), not reporting timely the incident to Title IX office, and delaying all cooperation so that its star athlete could play in a championship bowl game and win the Heisman Trophy.

*University of New Mexico:* A University of New Mexico (UNM) student recently settled her lawsuit against UNM alleging that the school's athletic department hindered and interfered with the investigation of her sexual assault allegations against football players.<sup>239</sup> The facts alleged in the student's lawsuit are as follows: she was raped at gunpoint by UNM football players,<sup>240</sup> reported the rapes that evening to the campus police, and then had a sexual assault examination.<sup>241</sup> The UNM athletic department learned about the incident that same night but failed to immediately report the allegation to the University's Title IX coordinator.<sup>242</sup> The players were not interviewed by the police until after the players met with members of the athletic department and had time to prepare their "story."<sup>243</sup> The athletic department was instrumental in producing an alibi witness to the police, who the police later concluded

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234. See Tracy, *supra* note 226.

235. See Jameis Winston Reads Graphic Statement Giving His Side of the Story, *supra* note 230.

236. Tyler Kingkade, *FSU's Jameis Winston Rape Case Settlement Won't End the Controversy*, HUFFINGTON POST (Jan. 26, 2016, 1:52 PM), [http://www.huffingtonpost.com/entry/fsu-settlement-jameiswinston\\_us\\_56a6a377e4b0172c6593fce9](http://www.huffingtonpost.com/entry/fsu-settlement-jameiswinston_us_56a6a377e4b0172c6593fce9).

237. *Id.*

238. See Order, *Kinsman v. Winston*, No. 6:15-cv-00696 (M.D. Fla. filed Jan. 17, 2017).

239. Mike Bush, *Ex-Student Sues UNM Over Alleged Rapes*, ALBUQUERQUE J. (Feb. 20, 2015, 12:05 AM), <https://www.abqjournal.com/544135/exstudent-sues-unm-over-alleged-rapes.html>.

240. Complaint & Jury Demand at 4, *Spencer v. Univ. of N.M. Bd. of Regents*, No. 1:15-cv-00141 (D.N.M. filed Feb. 19, 2015) [hereinafter *Spencer Complaint*]; see also Matthew Reisen, *New Evidence Suggests UNMPD Misconduct in 2014 Case Involving Former UNM Football Players*, N.M. DAILY LOBO (Sept. 16, 2016, 11:26 AM), <http://www.dailylobo.com/article/2016/09/new-evidence-in-fb-case>.

241. *Spencer Complaint*, *supra* note 240, at 4.

242. *Id.* at 7.

243. *Id.*

to be inconsistent and unreliable.<sup>244</sup>

The Title IX office started an investigation but the players were permitted to participate on the team, despite the ongoing investigation.<sup>245</sup> Law enforcement declined to press charges.<sup>246</sup> The accuser filed a lawsuit against the University, claiming that it failed to conduct an adequate investigation and demonstrated deliberate indifference.<sup>247</sup> UNM's motion to dismiss the lawsuit was denied,<sup>248</sup> and the parties then settled out of court.<sup>249</sup>

*Stanford University*: The circumstances and court's sanction of a sexual assault by an athlete on Stanford University's campus went viral this past year. A twenty-three-year-old woman, who was not a Stanford student, was sexually assaulted by a Stanford varsity swimmer.<sup>250</sup> Witnesses discovered the swimmer lying on top of the woman's unconscious body, chased him down, and called the police.<sup>251</sup> The swimmer was immediately arrested and subsequently charged with a variety of criminal rape claims.<sup>252</sup> A jury convicted him<sup>253</sup> but the judge

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244. *Id.* at 8.

245. *Id.* at 20.

246. Spencer Complaint, *supra* note 240, at 18.

247. *Id.* at 29.

248. Memorandum Opinion & Order at 20, Spencer v. Univ. of N.M. Bd. of Regents, No. 1:15-cv-00141 (D.N.M. filed Jan. 11, 2016).

249. Joint Motion to Dismiss with Prejudice at 1, Spencer v. Univ. of N.M. Bd. of Regents, No. 1:15-cv-00141 (D.N.M. filed June 23, 2016).

250. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), [http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?\\_r=0](http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?_r=0).

251. *Id.*

252. These included "assault with intent to commit rape of an intoxicated or unconscious person, sexual penetration of an intoxicated person and sexual penetration of an unconscious person." Hannah Knowles, *Brock Turner Trial Continues in Second Week of Testimony*, STAN. DAILY (Mar. 21, 2016), <http://www.stanforddaily.com/2016/03/21/brock-turner-trial-continues-in-second-week-of-testimony/>.

253. Hannah Knowles, *Brock Turner Found Guilty on Three Felony Counts*, STAN. DAILY (Mar. 30, 2016), <http://www.stanforddaily.com/2016/03/30/brock-turner-found-guilty-on-three-felony-counts/>. Also, Stanford "conducted an investigation and banned [the swimmer] from setting foot on campus." *Stanford University Statement Regarding Brock Turner Case*, STAN. NEWS (June 6, 2016), <http://news.stanford.edu/2016/06/06/stanford-university-statement-regarding-brock-turner-case/>. Following his arrest, he agreed to withdraw from Stanford instead of going through a formal expulsion proceeding. *Stanford Attacker Started School amid Assault Prevention Efforts*, CHI. TRIB. (June 7, 2016, 11:14 PM), <http://www.chicagotribune.com/news/nationworld/ct-stanford-rape-case-20160607-story.html>. Furthermore, the national governing body of competitive swimming, USA Swimming, on June 6, 2016, banned the swimmer from competing at any USA Swimming-sanctioned events (which includes Olympic Trials). Ray Sanchez, *USA Swimming Bans Brock Turner for Life*, CNN (June 10, 2016, 11:40 AM), <http://www.cnn.com/2016/06/10/us/sexual-assault-brock-turner-swimming/>.

sentenced him only to six months in county jail and probation (seemingly because his father pleaded that his son's life was already destroyed).<sup>254</sup> This sparked nationwide outrage, including a petition to have the judge removed.<sup>255</sup>

The cases above, examples of athletic departments, schools, or the judicial system providing preferential treatment to athletes who have been accused of sexual assault, are recent but by no means new.<sup>256</sup> They are, however, receiving more media coverage and the public is more concerned than ever about the hideous problem of campus sexual assault.

## *2. Lawsuits Brought by Accused Athletes Against Universities Allege Unfair Processes*

While this Article's focus is on reducing the crisis of campus sexual assault by appropriately ensuring safe learning environments and punishing wrongdoers, a fundamental part of the solution is protecting the rights of the accused to fair processes and procedures. Reacting to increased media criticism and assessments by high-profile entities (including the White House and Congress) of the systemic failures in addressing campus sexual violence, some critics now argue that campuses are responding in too aggressive of a manner.<sup>257</sup> They point out

254. *Former Stanford Student Sentenced to Six Months in Jail for Sex Assault*, CTY. SANTA CLARA OFF. DIST. ATT'Y (June 2, 2016), <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2016/Turner-Sentencing.aspx>; see also Tom Cleary, *Full Letter to the Judge by Dan Turner, Brock's Father*, HEAVY (June 8, 2018, 3:24 PM), <http://heavy.com/news/2016/06/brock-turner-father-dad-dan-turner-full-letter-statement-stanford-rape/>.

255. Sanchez, *supra* note 253. In a statement, the Santa Clara District Attorney stated that "[t]he punishment [did] not fit the crime" and that "[t]he sentence [did] not factor in the true seriousness of this sexual assault, or the victim's ongoing trauma." *Former Stanford Student Sentenced to Six Months in Jail for Sex Assault*, *supra* note 254. "In an editorial, *The San Jose Mercury News* called the sentence 'a slap on the wrist' and 'a setback for the movement to take campus rape seriously.'" Stack, *supra* note 250. In fact, the swimmer served only a three-month sentence, and the judge is no longer hearing criminal cases. Emanuella Grinberg & Dan Simon, *Brock Turner Judge to No Longer Hear Criminal Cases*, CNN (Aug. 25, 2016, 10:54 PM), <http://www.cnn.com/2016/08/25/us/brock-turner-aaron-persky-judge-reassigned/>.

256. See Rachel Axon, *Colleges Under Fire for Handling of Sexual Assault Cases*, USA TODAY (Apr. 24, 2014, 8:18 PM), <http://www.usatoday.com/story/sports/college/2014/04/24/sexual-assault-colleges-jameis-winston-president-obama/8122831/>. This problem shows no signs of abating. The media continues to highlight additional examples of schools mishandling investigations of athletes alleged to commit sexual assault. See Jake New, *Student Says UNC Favored Athlete Accused of Rape*, INSIDE HIGHER ED (Sept. 14, 2016), <https://www.insidehighered.com/news/2016/09/14/u-north-carolina-student-says-officials-campus-police-mishandled-her-rape-report>.

257. See SAMANTHA HARRIS, THE HERITAGE FOUND., LEGAL MEMORANDUM NO. 165, CAMPUS JUDICIARIES ON TRIAL: AN UPDATE FROM THE COURTS 1-2 (Oct. 6 2015), [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM165.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM165.pdf); Yoffe, *supra* note 122.

that some schools have a heightened concern to protect their reputations and are operating with a presumption that the accused is guilty until proven innocent.<sup>258</sup> This argument appears to be substantiated by recent lawsuits with claims of anti-male bias.<sup>259</sup> These lawsuits, brought with increasing regularity by athletes against universities, are finding more success, especially based on claims of gender discrimination (e.g., Title IX processes are biased against the accused)<sup>260</sup> and due process violations<sup>261</sup> (e.g., accused are given inadequate time or ability to defend

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258. Yoffe, *supra* note 122. Moreover, the sheer number of OCR investigations since the 2011 DCL—more than three hundred—may have contributed to an increased concern by schools that the OCR will scrutinize their Title IX processes and procedures, especially once a complaint has been made. *OCR Has Closed Just 19% of Sexual Assault Investigations Since 2011*, EAB (Jan. 12, 2016, 11:19 AM), <https://www.eab.com/daily-briefing/2016/01/12/chronicle-ocr-has-closed-just-19-of-sexual-assault-investigations-since-2011>. Some experts argue that the concern has caused schools to more readily find accused students guilty in order to attempt to avoid an OCR investigation. Ashe Schow, *Education Department Incentivizes Colleges to Punish Rather than Find Truth*, WASH. EXAMINER (Nov. 6, 2014, 5:52 PM), <http://www.washingtonexaminer.com/education-department-incentivizes-colleges-to-punish-rather-than-find-truth/article/2555869>.

259. Although not recent, a situation at Duke University in 2006 illustrates the danger in presuming guilt when an allegation of alleged sexual violence is made. See *Fantastic Lies: Director's Take*, ESPN, <http://www.espn.com/30for30/film?page=fantasticlies>; Brian Lowry, *TV Review: ESPN's 'Fantastic Lies'*, VARIETY (Mar. 10, 2016, 10:15 AM), <http://variety.com/2016/tv/reviews/fantastic-lies-review-espn-30-for-30-duke-lacrosse-1201720190/>. A non-student went to law enforcement and alleged that some of the Duke lacrosse team had raped her. *30 for 30: Fantastic Lies* (ESPN television broadcast Mar. 13, 2016). Shortly into the police investigation, Duke, without performing its own investigation, suspended the entire lacrosse team, all of whom were present at the party involving the alleged incident, cancelled the lacrosse season, and fired the coach. *Id.* However, as the criminal case progressed, the evidence began to deteriorate. *Id.* The accuser's story became inconsistent, and the prosecuting district attorney tampered with the evidence. *Id.* The charges were dropped, the district attorney jailed and disbarred, and the players declared innocent. ESPN turned this into a documentary film, *Fantastic Lies. Id.*

260. See Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>; Ashe Schow, *Colleges Are Spending Millions Defending Themselves from Accused Student Lawsuits*, WASH. EXAMINER (Apr. 19, 2016, 4:30 PM), <http://www.washingtonexaminer.com/colleges-are-spending-millions-defending-themselves-from-accused-student-lawsuits/article/2588959>; Yoffe, *supra* note 122.

261. HARRIS, *supra* note 257, at 2; Yoffe, *supra* note 122. Another cause of action with similar underlying facts is breach of contract. Ashe Schow, *Due Process Denied: Judge Dismisses Lawsuit from Columbia Student Accused of Sexual Assault*, WASH. EXAMINER (Apr. 25, 2015, 5:00 AM), <http://www.washingtonexaminer.com/due-process-denied-judge-dismisses-lawsuit-from-columbia-student-accused-of-sexual-assault/article/2563594>; Ashe Schow, *Judge Upholds Accused Student's Gender-Bias Claim*, WASH. EXAMINER (Aug. 7, 2015, 4:44 PM), <http://www.washingtonexaminer.com/judge-upholds-accused-students-gender-bias-claim/article/2569840>. State laws differ on what agreements or relationships create contracts. Athletes who are suspended or expelled have argued that a contract existed between the university and them, and that their scholarship amounts to a contract—although the NCAA has argued that an athletic scholarship is not a contract. HARRIS, *supra* note 257,

themselves).<sup>262</sup> According to a recent article, between January 1 and April 19, 2016, there were eight rulings in favor of students accused of campus assault who sued their universities for gender discrimination and lack of due process.<sup>263</sup> Very few cases actually go to trial; most are settled after a motion to dismiss made by the school is denied.<sup>264</sup>

### *Gender Discrimination Claims Brought by the Accused*

*Columbia University*: A Second Circuit Court of Appeals decision likely will make it easier for students accused of sexual assault to succeed, at least initially, in pursuing claims against universities of anti-male bias in Title IX proceedings. The Second Circuit held that all the accused needs to allege is a “minimal plausible inference,” to defeat a motion to dismiss.<sup>265</sup> In July 2016, the Second Circuit vacated a district court’s dismissal of an athlete’s Title IX claims against Columbia

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at 2; *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Jan. 27, 2017). Case law is conflicting on this issue. *See* *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 752 (S.D. Ohio 2014) (settled); Complaint at 10, *Turner v. Tex. A&M Univ.*, No. 4:15-cv-01413 (S.D. Tex. filed May 27, 2015) (pending); Complaint at 9, *Henry v. Del. State Univ.*, No. 1:13-cv-02005 (D. Del. filed Dec. 6, 2013) (settled); Complaint at 1, *McLeod v. Duke Univ.*, No. 14 CVS 003075 (N.C. Super. Ct. filed Jan. 23, 2015) (pending). An example of the allegations made in these types of cases is *Austin v. University of Oregon*, where the accused athlete sued the University of Oregon for breach of his athletic scholarship. Second Amended Complaint at 21, *Austin v. Univ. of Or.*, No. 6:15-cv-02257 (D. Or. filed Feb. 4, 2016). The accused athlete alleged that the school responded to a complaint against him by suspending him on an “emergency” basis and punishing him for asserting *Miranda* rights during a criminal investigation. *Id.* at 6. At the disciplinary hearing, the accused athlete alleged that the school refused to allow him to subpoena witnesses and failed to provide him a “contested case hearing.” *Id.* at 9. The accused athlete claimed that the school’s actions breached “the terms of the contract, including the implied covenant of good faith and fair dealing.” *Id.* at 21.

262. Schow, *supra* note 260; Yoffe, *supra* note 122. Accused students have also claimed that school disciplinary procedures violated other constitutional rights, such as the privilege against self-incrimination or the equal protection clause. HARRIS, *supra* note 257, at 5–6; Yoffe, *supra* note 122. Neither has been well received. *See* *Gabrilowitz v. Newman*, 582 F.2d 100, 103–04 (1st Cir. 1978) (recognizing that an accused student’s statements at a disciplinary hearing may be used against him in a parallel criminal case, but concluding that although the choice whether to mount a defense in the school hearing at the risk of self-incrimination is difficult, “that does not make it unconstitutional”); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150, 2015 U.S. Dist. LEXIS 136796, at \*23 (D.S.D. Oct. 7, 2015) (holding that the dilemma facing an accused student on whether to testify “does not create a constitutional quandary”); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170, 2015 U.S. Dist. LEXIS 95577, at \*22 (W.D.N.C. July 22, 2015) (stating that an equal protection claim is not actionable absent a showing of “unequal treatment” and “discriminatory animus”).

263. Schow, *supra* note 260.

264. HARRIS, *supra* note 257, at 5.

265. *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).



University based on reverse sex discrimination.<sup>266</sup> There, a varsity athlete allegedly had consensual sex with a female student in May 2013.<sup>267</sup> The accused was informed of the allegation and one day later Columbia barred him from having contact with the accuser and restricted his access to residence halls.<sup>268</sup> The accused then was summoned to meet with a Title IX investigator.<sup>269</sup> He was interviewed but allegedly at no time was he told he had any rights, including a right to submit a written statement, meet with a student advocate, or seek advice and counsel from the Dean of Students.<sup>270</sup> The accused informed the Title IX investigator that he had witnesses who would support his claim and that the alleged act was consensual.<sup>271</sup> However, the Title IX investigator never interviewed the witnesses nor discussed them in her Title IX investigatory report to the panel adjudicating the matter.<sup>272</sup>

In February 2014, a Title IX hearing occurred before a panel of three people, including a graduate student.<sup>273</sup> “The hearing lasted less than two hours.”<sup>274</sup> No attorneys participated.<sup>275</sup> “The panel did not call any witnesses.”<sup>276</sup> The panel suspended the accused from school until Fall 2015 and gave him no credit for his Spring 2014 classes that he was taking at the time.<sup>277</sup> The accused appealed the matter to the Dean.<sup>278</sup> Interestingly, in that appeal, the accuser specifically requested the severity of the accused’s punishment be reduced.<sup>279</sup> The Dean denied the appeal, stating, *inter alia*, that witnesses would have been irrelevant because they did not witness the behavior.<sup>280</sup>

The accused then sued Columbia, alleging sex discrimination in violation of Title IX and state law.<sup>281</sup> The Second Circuit held that the

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266. *Id.* at 48 (citing *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015)).

267. Complaint at 2, *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016) (No. 14-cv-03573). All the facts in this section are from the accused student’s complaint. This Article makes no representations regarding their accuracy.

268. *Columbia Univ.*, 831 F.3d at 49.

269. *Id.*

270. *Id.* at 49–50, 53.

271. *Id.* at 49, 52.

272. *Id.*

273. *Columbia Univ.*, 831 F.3d at 52.

274. *Id.*

275. *See id.*

276. *Id.*

277. *Id.*

278. *Columbia Univ.*, 831 F.3d at 52.

279. *Id.*

280. *Id.*

281. *Id.* at 53.

*McDonnell-Douglas* standard for evaluating Title VII employment discrimination claims on a motion for summary judgment also controls Title IX sex discrimination claims on a motion to dismiss.<sup>282</sup> As a result, a Title IX complaint need only plead facts that support a “minimal inference of bias” to raise a “temporary presumption” of discriminatory motivation.<sup>283</sup> The court found that the complaint satisfied this “low standard,” especially with the allegations relating to whether the accuser was a willing participant (i.e., whether she was coerced).<sup>284</sup> The court found the following relevant:

- “Both the investigator and the panel declined to seek out potential witnesses [the] [p]laintiff had identified as sources of information favorable to him.”<sup>285</sup>
- “The investigator and the panel failed to act in accordance with University procedures designed to protect accused students.”<sup>286</sup>
- “The investigator, the panel, and the reviewing Dean . . . reached conclusions that were incorrect and contrary to the weight of the evidence.”<sup>287</sup>
- Columbia “chose to accept an unsupported accusatory version over [the] [p]laintiff’s, and declined even to explore the testimony of [the] [p]laintiff’s witnesses.”<sup>288</sup>
- At the time of the disciplinary hearing, Columbia was under intense public scrutiny for its handling of sexual assault, and the school was “sensitive” to these criticisms.<sup>289</sup>
- It was plausible to conclude that the Title IX coordinator was biased, considering that (1) “she had suffered personal criticism in the student body for her role in prior cases in which the University was seen as not taking seriously the complaints of female students[.]” and (2) she knew the school had been criticized for allegedly conducting investigations in a way that favored athletes.<sup>290</sup>

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282. *See id.* at 56.

283. *Columbia Univ.*, 831 F.3d at 56.

284. *Id.* at 48, 56–57.

285. *Id.* at 56.

286. *Id.* at 56–57.

287. *Id.* at 57.

288. *Columbia Univ.*, 831 F.3d at 57.

289. *Id.* The Second Circuit said, “There is nothing implausible or unreasonable about the Complaint’s suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults.” *Id.* at 58.

290. *Id.*

The Second Circuit concluded, “[I]t is entirely plausible that the University’s decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault.”<sup>291</sup>

Thus, this case likely makes it easier for athletes to succeed at least initially with anti-male gender bias lawsuits under Title IX. This is especially important in cases involving private schools—like Columbia—where the university is not obligated to observe due process guarantees to the same degree as public institutions.<sup>292</sup> Another possible impact of this case is that we will see an increase in settlements by schools, either after allegations of anti-male bias are made but before litigation is brought, or as a result of an increase in courts rejecting schools’ motions to dismiss.

*Yale University:* Another high-profile anti-male bias matter involves Yale University. There, it was alleged that Yale made a judgment of guilt regarding the accused without giving him an opportunity to challenge his *accuser’s* credibility.<sup>293</sup> The alleged facts are that the captain of the basketball team was accused of engaging in non-consensual sex almost a year after the incident.<sup>294</sup> Allegedly, the parties had previously engaged in consensual sex a number of times.<sup>295</sup> The accuser allegedly did not want to file a complaint against the basketball player, but has said that the Title IX coordinator “pressured” her to cooperate and gave her false information about the accused.<sup>296</sup> Yale conducted a Title IX investigation and expelled the accused right before the team played in the 2016 NCAA March Madness basketball tournament.<sup>297</sup> The accused subsequently brought a complaint against Yale alleging that the sex was consensual,<sup>298</sup> and that Yale overreacted to public criticism and unfairly used him as an example of how tough it handles investigations of sexual assault.<sup>299</sup> Given the timing of the expulsion—immediately before Yale’s participation in March Madness—this incident received a lot of public attention.<sup>300</sup> The

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291. *Id.* at 57.

292. *See, e.g., Columbia Univ.*, 831 F.3d at 51–52.

293. Complaint & Jury Demand at 27, 38, *Montague v. Yale Univ.*, No. 3:16-cv-00885 (D. Conn. filed June 9, 2016).

294. *Id.* at 1.

295. *Id.*

296. *Id.* at 8.

297. *Id.* at 35.

298. Complaint & Jury Demand, *supra* note 293, at 8. The complainant charges breach of contract and defamation. *Id.* at 37.

299. *See id.* at 36.

300. *See id.* at 36–37.

accused's lawsuit is on-going.<sup>301</sup>

*Due Process Claims Brought by the Accused*<sup>302</sup>

Athletes at public universities who have been accused of sexual assault are increasingly claiming that their due process rights have been violated by their schools.<sup>303</sup> To state a claim that their due process rights have been violated, complainants must show that they have been deprived of a cognizable liberty or property interest within the meaning of the Fourteenth Amendment.<sup>304</sup> Courts have held that students have a protected property interest in their continued school enrollment and that students facing school discipline maintain a liberty interest in their reputations.<sup>305</sup> And, courts have held that athletes have a property right in their scholarships.<sup>306</sup> On the other hand, it is well-established that athletes do not possess a property right in participating in intercollegiate athletics. It is important to note that only public institutions are required to provide due process rights under the Fourteenth Amendment.<sup>307</sup> Hence, neither Yale nor Columbia, for example, could be sued for a Fourteenth Amendment due process claim of action.

Procedural due process requires the following:

[P]rocedural due process minimally requires notice and an opportunity to be heard. Further, fundamental fairness requires that the hearing take place “at a meaningful time and in a meaningful manner.” . . . [T]he level of procedural protection necessary “depends on three variables: 1)

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301. *Montague v. Yale Univ.*, No. 3:16-cv-00885 (D. Conn. filed June 9, 2016).

302. In *Doe v. University of Cincinnati*, a football player anonymously filed a complaint against the school, alleging, among other things, that the school violated the accused athlete's due process rights by not following its own disciplinary code. See Verified Complaint & Jury Demand at 43, *Doe v. Univ. of Cincinnati*, No. 1:15-cv-00600, (S.D. Ohio filed Sept. 16, 2015). The accused alleged that he never received a list of evidence and witnesses as required by the school's procedures and had seventy-two-hours' notice and the accused's advisor had twenty-seven-hours' notice. *Id.* at 32–33. In September 2015, the trial court denied the accused student's motion for a temporary restraining order prohibiting the school from suspending him from the University in violation of his due process rights and rights under Title IX. *Doe v. Univ. of Cincinnati*, No. 1:15-cv-00600, 2015 U.S. Dist. LEXIS 132864, at \*1 (S.D. Ohio Sept. 30, 2015). The trial court found that the accused athlete had not demonstrated a likelihood of success on the merits for either claim. *Id.* at \*8–9.

303. Max Kutner, *Suspended College Athlete Suing U.S. Over Sexual Assault 'Guidance,'* NEWSWEEK (Apr. 20, 2016, 1:52 PM), <http://www.newsweek.com/grant-neal-lawsuit-sexual-assault-pueblo-450334>.

304. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

305. See, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); see also *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

306. See e.g., *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987).

307. See *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150, 2015 U.S. Dist. LEXIS 136796, at \*3, \*4 (D.S.D. Oct. 7, 2015) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)).

the nature of the interest protected; 2) the danger of error and the benefit of additional or other procedures; and 3) the burden on the government such procedures would present.”<sup>308</sup>

Substantive due process claims require a deprivation of liberty or property that was so arbitrary as to shock the conscience.<sup>309</sup> Thus, whether an accused’s due process rights have been violated is a heavily context-dependent inquiry.<sup>310</sup>

The preponderance of the evidence standard and new state law consent standards have been the most frequent bases for students to bring due process claims.<sup>311</sup> Both the new consent standards that are more demanding than Title IX’s standard of “unwelcomeness” and Title IX’s preponderance of the evidence standard that is less than the beyond a reasonable doubt standard in criminal proceedings frequently involve a “he said” versus “she said” dynamic due to the lack of witnesses.<sup>312</sup> Plus, the parties and any other witnesses in these cases are often under the influence of drugs or alcohol during the alleged encounter, and they may have little or no memory of what happened.<sup>313</sup> Especially combined with the lower burden of proof standard, accused students are arguing that they

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308. *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170, 2015 U.S. Dist. LEXIS 95577, at \*8 (W.D.N.C. July 22, 2015) (first quoting *Goss*, 419 U.S. at 579 (1975); and then quoting *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976)); *see also Mathews*, 424 U.S. at 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

309. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).

310. *Tanyi*, 2015 U.S. Dist. LEXIS 95577, at \*3. Additionally, only public schools are subject to federal due process claims. Neither a private school’s receipt of federal funds, nor its adoption of Title IX grievance procedures, nor its adherence to OCR guidance renders it a state actor subject to constitutional due process requirements. *See Tsuruta*, 2015 U.S. Dist. LEXIS 136796, at \*4–5 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)). *See also Doe v. Wash. & Lee Univ.*, No. 6:14-cv-0052, 2015 U.S. Dist. LEXIS 102426, at \*23, \*25 (W.D. Va. Aug. 5, 2015); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462–71 (S.D.N.Y. 2015) (granting summary judgment motion for due process claim where accused student failed to demonstrate material issue of fact that private university’s disciplinary proceedings were flawed and, even if the proceedings were flawed, that such deficiencies were due to gender bias) (“That said, a ‘private university, college, or school may not arbitrarily or capriciously dismiss a student.’” (quoting *Bleiler v. Coll. of the Holy Cross*, No. 11-11541, 2013 U.S. Dist. LEXIS 127775, at \*14 (D. Mass. Aug. 26, 2013))).

311. *See generally HARRIS, supra* note 257 (discussing multiple due process claims). *See also Harlan Levy, The New World of Campus Sexual Assault*, HUFFINGTON POST (Apr. 6, 2016, 10:29 AM), [http://www.huffingtonpost.com/harlan-levy/the-new-world-of-campus-s\\_b\\_9619786.html](http://www.huffingtonpost.com/harlan-levy/the-new-world-of-campus-s_b_9619786.html) (noting that historically different standards were applied to men and women such that if a female student alleges sexual assault by an intoxicated male student, he may be suspended or expelled even if she appeared to be a willing participant and never said no).

312. *See Levy, supra* note 311.

313. *See id.*

have not received a fair hearing.<sup>314</sup>

Another type of claim focuses on the DCL requirement that schools immediately protect their campuses and dispense interim sanctions *before* a full investigation and disciplinary hearing, even though credibility and reliability determinations have not yet been made.<sup>315</sup> Courts have also held that due process rights have been violated if the accused is not provided adequate time to develop a defense before the disciplinary hearing.<sup>316</sup> Most recently, for example, a California court of appeals upheld a lower court's holding that the University of South California did not give adequate notice to the accused athlete to develop a defense or otherwise challenge the accuser's allegations and accordingly violated the accused's due process rights.<sup>317</sup>

Thus, although in the Title IX context, procedural due process minimally requires fair notice and an opportunity to be heard, and substantive due process requires that the processes and decisions not be arbitrary or capricious, how much, what form, and the timing of notice and opportunity is very much a fact-specific inquiry. The cases brought since the 2011 DCL show little consistency.

These cases illustrate that the goals of providing justice for the accuser, ensuring a safe and equal learning environment for all students, and punishing students who have engaged in sexual misconduct, also need to protect the fairness and due rights of the accused. Unfair proceedings that lead to unreliable outcomes benefit no one. As Professor Jeannie Suk, a Harvard Law professor, points out, "Fair process must be open to the possibility that either side might turn out to be correct. If the process is not at least open to both possibilities, we might as well put sexual-misconduct cases through no process at all."<sup>318</sup> All students should be afforded due process protections. Participation in intercollegiate athletics alone does not generally provide athletes with additional due

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314. See, e.g., Amended Complaint at 20, *Doe v. Lhamon*, No. 1:16-cv-01158 (D.D.C. filed Aug. 15, 2016).

315. See, e.g., *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 592–93 (S.D. Ohio 2016).

316. See *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 927 (E.D. Mich. 2015).

317. Opinion at 20–31, *Doe v. Univ. of S. Cal.*, No. B262917 (Cal. Ct. App. Apr. 5, 2016); see also *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170, 2015 U.S. Dist. LEXIS 95577, at \*6 (W.D.N.C. July 22, 2015) (denying motion to dismiss where the school gave the accused student only twenty-four-hours' notice of new charges before the hearing); *Sterrett*, 85 F. Supp. 3d at 927–29 (denying motion to dismiss where the school failed to provide notice to the accused student prior to his initial meeting with the Title IX investigator and failed to provide the accused student a meaningful opportunity to respond, explain, and defend the alleged misconduct prior to the Title IX investigator's issuance of the final report).

318. Suk, *supra* note 1.

process protections.<sup>319</sup> However, courts have held that financial aid bestows a property interest on athletes.<sup>320</sup> But, either way, fairness dictates that the due process protections discussed herein be available to all students, including athletes.

### III. CURRENT NCAA FRAMEWORK

The NCAA recognizes the importance of addressing the problem of sexual assault by athletes—its literature refers to campus sexual assault as an “abhorrent” problem.<sup>321</sup> Nonetheless, the NCAA has no rules and therefore no sanctions for acts of sexual assault by athletes or misconduct by athletic departments.<sup>322</sup> It provides only guidelines (i.e., suggestions and recommendations).<sup>323</sup> Specifically, on August 6, 2014, the NCAA proposed and unanimously approved the NCAA Executive Committee Statement on Sexual Violence Prevention and Compliant Resolution stating that the “Executive Committee recognizes the importance of addressing the abhorrent societal issue of sexual violence.”<sup>324</sup> This resolution mandates that institutions’ athletics department must

- [c]omply with campus authorities and ensure that all athletics staff, coaches, administrators and student-athletes maintain a hostile-free environment for all student-athletes regardless of gender or sexual orientation; know and follow campus protocol for reporting incidents of sexual violence; report immediately any suspected

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319. See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987).

320. See, e.g., *id.* (holding the plaintiffs established a property right in the scholarship funds); *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 108, 110 (D. Minn. 1982) (holding that a student was denied due process when he was deprived of athletic eligibility).

321. See, e.g., NCAA Exec. Comm., *NCAA Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution to Deborah Wilson*, ADDRESSING SEXUAL ASSAULT AND INTERPERSONAL VIOLENCE: ATHLETICS’ ROLE IN SUPPORT OF HEALTHY AND SAFE CAMPUSES (2014), <http://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf>. The NCAA’s Social Environments Study, conducted in 2012 and 2016, suggests college athletes may exhibit aggressive behaviors outside of sports. See Lydia Bell & Tom Paskus, NCAA Study of Student-Athlete Social Environments, Presentation at the 2014 NCAA Convention (Jan. 15, 2014), [https://www.ncaa.org/sites/default/files/social\\_environments\\_draft\\_convention2014\\_0.pdf](https://www.ncaa.org/sites/default/files/social_environments_draft_convention2014_0.pdf). For example, thirteen percent of men and seven percent of women reported that they had trouble controlling their behavior; nineteen percent of men and six percent of women reported that “[g]iven enough provocation, [they] may hit another person,” and nineteen percent of men and eight percent of women reported that they had “become so mad that [they] have broken things.” *Id.* Athletes may experience difficulty leaving aggressive tendencies on the field and out of their personal lives. See *id.*

322. See Anthony Bennett, *Will Baylor Face NCAA Charges in the Sexual Assault Scandal?*, HEAVY (May 26, 2016, 12:24 PM), <http://heavy.com/sports/2016/05/art-briles-fired-ncaa-scandal-sexual-assault-football/>.

323. See WILSON, *supra* note 321, at 5.

324. NCAA Exec. Comm., *supra* note 321.

sexual violence to appropriate campus offices for investigation and adjudication;

- [e]ducate all student-athletes, coaches and staff about sexual violence prevention, intervention and response;
- [a]ssure compliance with all federal and applicable state regulations related to sexual violence prevention and response; and
- [c]ooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all other students and staff on campus.<sup>325</sup>

This resolution does not have the force of NCAA rules which carry penalties for non-compliance.<sup>326</sup> Further, it is not comprehensive. For example, the resolution does not address practices by certain athletic departments, such as arranging for athletes to receive early legal advice or representation in the event of allegations of criminal sexual conduct.<sup>327</sup>

Following this resolution, the NCAA's Committee on Sportsmanship and Ethical Conduct authored a handbook titled *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*.<sup>328</sup> The handbook provides many suggestions such as requiring further education of athletic department and athletes about sexual violence prevention.<sup>329</sup> It also specifically directs athletic departments to cooperate with campus procedures but not "manage, directly control or interfere" with campus investigations.<sup>330</sup> It recites many of the resolutions noted above and adds many helpful proposals as to how to better prevent incidents of sexual assault by athletes.<sup>331</sup> But, again, violations carry no penalties given that the handbook provides only guidance and suggestions.<sup>332</sup> Additionally, its

325. *Id.*

326. See Jake New, *No Special Treatment*, INSIDE HIGHER ED (Aug. 14, 2014), <https://www.insidehighered.com/news/2014/08/14/ncaa-athletics-departments-shouldnt-oversee-investigations-sex-assault-allegations>.

327. See NCAA Exec. Comm., *supra* note 321.

328. WILSON, *supra* note 321; Rachel Stark, *NCAA Releases New Handbook Addressing Sexual Assault*, NCAA (Sept. 3, 2014, 3:03 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-releases-new-handbook-addressing-sexual-assault>.

329. WILSON, *supra* note 321, at 5.

330. NCAA Exec. Comm., *supra* note 321.

331. See *id.*; WILSON, *supra* note 321, at 5, 27–31.

332. See New, *supra* note 326. At about the same time, the NCAA partnered with the White House in a campaign called *It's On Us*, to compact sexual assault on campuses. Amy Wimmer Schwarb, *NCAA, White House Partner to Combat Sexual Violence on Campus*, NCAA (Sept. 19, 2014, 12:16 PM), <http://www.ncaa.org/about/resources/media-center/>



proposals are dependent upon adoption by each school<sup>333</sup> and, hence, there is no uniformity among schools.<sup>334</sup>

Following up on the handbook, the NCAA published a tool kit that provides more detailed suggestions and best practices to prevent sexual violence.<sup>335</sup> In the preface, the NCAA notes that “[t]he prevalence and damaging effects of sexual violence on . . . student athletes . . . are extreme and unacceptable.”<sup>336</sup> It targets five areas with checklists and implementation tools for each: Leadership, Collaboration, Compliance and Accountability, Education, and Student-Athlete Engagement.<sup>337</sup> While extremely helpful, it does not recommend that any rules with sanctions be imposed for a school’s failure to abide by any of the suggestions.<sup>338</sup>

Most recently, an athlete—whose mother had been raped when she was in college—circulated a petition to have the NCAA ban all athletes found to commit sexual violence.<sup>339</sup> The petition has been signed by almost 200,000 people.<sup>340</sup> No doubt, at least partially in response to this petition, the wide spread media attention of misconduct at certain universities like Baylor,<sup>341</sup> the lack of uniformity among states and schools,<sup>342</sup> and the continuing prevalence of this complicated problem,

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news/ncaa-white-house-partner-combat-sexual-violence-campus. The campaign focuses on encouraging bystander intervention and developing a culture that makes sexual assault unacceptable on college and university campuses. *Fact Sheet: The “It’s On Us” Campaign Launches New PSA, Marks One-Year Since Launch of “It’s On Us” Campaign to End Campus Sexual Assault*, WHITE HOUSE PRESIDENT BARACK OBAMA (Sept. 1, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/01/fact-sheet-its-us-campaign-launches-new-psa-marks-one-year-launch>.

333. Stark, *supra* note 328.

334. *Id.*

335. SPORTS SCI. INST., NCAA, SEXUAL VIOLENCE PREVENTION: AN ATHLETICS TOOL KIT FOR A HEALTHY AND SAFE CULTURE (2016), [http://www.ncaa.org/sites/default/files/SSI\\_Sexual-Violence-Prevention-Tool-Kit\\_20161117.pdf](http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf).

336. *Id.*

337. *Id.* at 1.

338. *See id.*

339. Darius Adams, *Dear NCAA: My Mom is a Rape Survivor and You Can Help*, CHANGE.ORG, <https://www.change.org/p/dear-ncaa-create-a-policy-that-bans-violent-athletes> (last visited Jan. 27, 2017).

340. *Id.*; Jake New, *No More Second Chances?*, INSIDE HIGHER ED (Sept. 29, 2016), <https://www.insidehighered.com/news/2016/09/29/big-12-commissioner-tells-sports-departments-not-accept-athletes-histories-violence>.

341. *See* Zac Ellis, *A Timeline of the Baylor Sexual Assault Scandal*, SPORTS ILLUSTRATED (May 26, 2016), <http://www.si.com/college-football/2016/05/26/baylor-art-briles-sexual-assault-ken-starr>; *see also* *In Wake of Baylor Scandal, NCAA Addresses Sexual Violence*, USA TODAY (Aug. 4, 2016, 5:40 PM), <http://www.usatoday.com/story/sports/college/2016/08/04/ncaa-rules-sexual-violence-baylor-scandal/88227148/>.

342. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual*

the NCAA Board of Governors on August 4, 2016, requested that the leadership in Divisions I, II, and III consider developing legislation to address college athletes involved in reported acts of sexual violence.<sup>343</sup> The areas are to include “compliance with campus authorities as well as state and federal laws, proper reporting protocols and more education within the athletic department about prevention and intervention [of acts of sexual violence].”<sup>344</sup> Accordingly, the NCAA Board of Governors voted to create a new committee that will “focus on strategies for prevention and continued education about sexual violence at colleges and universities.”<sup>345</sup> The committee will include university presidents and chancellors, experts in the fields of student services and [sexual] assault prevention, and other leaders.<sup>346</sup> Hopefully, the NCAA’s new committee will propose and the NCAA membership will enact rules along the lines suggested herein that will begin to better resolve this most insidious problem.

#### IV. PROPOSALS TO ADDRESS SEXUAL VIOLENCE BY COLLEGE ATHLETES

As demonstrated in this Article, the current system is not working consistently or effectively when it comes to the problem of campus sexual violence and is even further deficient in terms of college athletes and sexual violence.<sup>347</sup> Unquestionably, especially at some Division I schools, there are dual standards for athletes compared to the general student populations with respect to the handling of allegations. At some schools, athletes are treated preferentially,<sup>348</sup> while at some other schools

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*Assault*, CNN (Dec. 21, 2015, 4:38 PM), <http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/index.html>.

343. Amy Wimmer Schwarb, *Board Urges Legislation to Address Sexual Violence*, NCAA (Aug. 4, 2016, 2:22 PM), <http://www.ncaa.org/about/resources/media-center/news/board-urges-legislation-address-sexual-violence>.

344. *NCAA Asks School Leaders to Look at Sexual Violence Measures*, ASSOCIATED PRESS BIG STORY (Aug. 4, 2016, 5:36 PM), <http://www.bigstory.ap.org/article/b8da6053d10a4e09882322cac91d5c5e/ncaa-asks-school-leaders-look-sexual-violence-measures>.

345. Schwarb, *supra* note 343.

346. *Id.*; see also Mark Emmert Wants Rules Giving NCAA Power to Punish for Sexual Violence, USA TODAY (Sept. 13, 2016, 4:56 PM), <http://www.usatoday.com/story/sports/college/2016/09/13/ncaa-president-mark-emmert-rule-policy-punish-schools-sexual-violence/90318968/>.

347. Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, 6 HARV. J. SPORTS & ENT. L. 373, 399 (2015) (“A shield has been created by the inextricably linked security, police, teams and leagues, creating a class of individuals that are seemingly above reproach.”).

348. Adam Silverstein, *Ex-FSU Official: Football Players Got Special Treatment in Sex Assault Cases*, CBS SPORTS (Nov. 26, 2015), <http://www.cbssports.com/college-football/news/ex-fsu-official-football-players-got-special-treatment-in-sex-assault-cases/>.

athletes' rights to fair treatment are denied.<sup>349</sup> Both are obstacles to resolving the crisis. Accordingly, these proposals reflect the criticisms of the DCL's guidelines, apply findings from cases and requirements from state law as they affect both the accused and accuser, and make suggestions for reform that focus on preventing sexual misconduct, protecting both the safety of the complainant and the campus, ensuring that due process rights and fair standards are applied to everyone involved, and prohibiting special treatment of athletes accused of sexual violence.<sup>350</sup> These proposals include measures that should be taken before an athlete is permitted to participate in intercollegiate athletics and regularly during an athlete's participation in intercollegiate athletics.<sup>351</sup>

These rules do not strip athletes of any fundamental rights.<sup>352</sup> Playing intercollegiate sports is a privilege, not a right.<sup>353</sup> Furthermore, courts recognize that a right of privacy is reduced with respect to athletes.<sup>354</sup> Intercollegiate athletics is an extracurricular activity, the nature of which requires certain restrictions (e.g., random drug testing) that otherwise might not be acceptable if applied to the general student population. As noted above, the NCAA enforces all types of eligibility requirements, whether concerning academic standards (both prior to and throughout college),<sup>355</sup> substance abuse standards (whether consumed in or out of season),<sup>356</sup> anti-gambling standards (on real and fantasy games),<sup>357</sup> and standards designed to protect amateurism (payments and other impermissible benefits received prior to or during college).<sup>358</sup> Rules and enforcement regarding the misconduct of sexual assault are perhaps

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349. See New, *supra* note 260 (discussing recent cases where colleges were found to deprive students of rights including due process).

350. See *infra* Section IV.A.

351. See *infra* Section IV.A. These rules apply equally to men and women. See *infra* Section IV.A.

352. See *infra* Section IV.A.

353. John T. Wolohan, *Court Determines that Interscholastic Sports Participation Is Privilege, Not Right*, ATHLETIC BUS., <http://www.athleticbusiness.com/rules-regulations/court-determines-that-interscholastic-sports-participation-is-privilege-not-right.html> (last visited Jan. 27, 2017). This Article makes no suggestions regarding the cancellation of athletic scholarships, which should be left up to the individual schools.

354. For example, a reduced right of privacy of athletes is recognized in the context of extra random drug testing. See, e.g., *Hill v. NCAA*, 865 P.2d 633, 637 (Cal. 1994). Similarly, additional disclosure requirements regarding acts of sexual violence could be justified further due to an athlete's diminished right of privacy.

355. *Academics*, NCAA, <http://www.ncaa.org/remaining-eligible-academics> (last visited Jan. 27, 2017).

356. NCAA, *supra* note 12, § 3.2.4.7.

357. *Id.* § 10.3.

358. *Id.* § 12.

even more needed than many of the other current eligibility rules.<sup>359</sup>

To review, some of the particular problems unique to college athletes and sexual violence at some colleges that necessitate the new rules include

- subcultures that athletes are above the law;<sup>360</sup>
- athletic departments providing athletes with “near-immediate access to high profile attorneys”;<sup>361</sup>
- pressure exerted by athletic departments, especially “beloved” coaches to intercede in Title IX investigations at schools and in law enforcement’s efforts;<sup>362</sup>
- separate systems of internal discipline for athletes;<sup>363</sup>
- reluctance by local law enforcement to get involved in “bringing down” high profile athletes;<sup>364</sup>
- aggressive behavior on the field that can translate into aggressive behavior off the field; and<sup>365</sup>
- attitudes by some athletes that they are special and entitled and not subject to college norms as a result of having received special admission, special eating tables, special grades, special tutors, special clothes, or special spending money.<sup>366</sup> Indeed,

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359. Public outcry to numerous domestic and sexual assault allegations against professional players has resulted in professional leagues taking stronger roles in preventing domestic and sexual assault. More than any other, the NFL’s new conduct policy has been cited as a significant step in the right direction. Withers, *supra* note 347, at 376. Among other requirements, it requires teams to report domestic or sexual assault to the NFL, including conduct that has not resulted in an arrest. NAT’L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 7 (2014), [http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3\\_000000441637.pdf](http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3_000000441637.pdf).

360. See, e.g., Gregory Schiller, *Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence: Regina v. Marty McSorley*, 10 Sports L.J. 241 (2003).

361. Lavigne, *supra* note 157; see also Paula Lavigne, *How OTL Completed Its Investigation*, ESPN (June 15, 2015), [http://espn.go.com/espn/otl/story/\\_/id/13039153/how-lines-completed-athletes-police-investigation-10-schools](http://espn.go.com/espn/otl/story/_/id/13039153/how-lines-completed-athletes-police-investigation-10-schools).

362. Paula Lavigne & Nicole Noren, *Athletes, Assaults and Inaction*, ESPN (Aug. 25, 2014), [http://www.espn.com/espn/otl/story/\\_/id/11381416/missouri-tulsa-southern-idaho-fac-e-allegations-did-not-investigate-title-ix-cases](http://www.espn.com/espn/otl/story/_/id/11381416/missouri-tulsa-southern-idaho-fac-e-allegations-did-not-investigate-title-ix-cases).

363. E.g., BAYLOR, FINDINGS OF FACT, *supra* note 166, at 1, 12.

364. Paula Lavigne, *OTL: Over Two-Thirds of Accused FSU Athletes Don’t Face Prosecution*, ESPN (June 14, 2015), [http://www.espn.com/blog/ncfnation/post/\\_/id/111515/otl-over-two-thirds-of-criminally-accused-fsu-athletes-dont-face-prosecution](http://www.espn.com/blog/ncfnation/post/_/id/111515/otl-over-two-thirds-of-criminally-accused-fsu-athletes-dont-face-prosecution).

365. Nina Passero, *Effects of Participation in Sports on Men’s Aggressive and Violent Behaviors*, N.Y.U. APPLIED PSYCHOL. OPUS, <http://steinhardt.nyu.edu/appsycho/opus/issues/2015/fall/passero> (last visited Jan. 27, 2017).

366. Many FBS and Division I athletes receive athletic scholarships up to the cost of attendance (COA). But the COA award allegedly can be manipulated to be higher than actual COA, plus athletes may receive Pell Grants (federal government grants awarded on a needs basis), state government grants awarded on a needs basis, NCAA special funds, and funds

certain athletes receive prohibited special benefits from donors to the athletic department that are inconsistently detected and punished.<sup>367</sup>

In order to solve these problems, this Article proposes specific rules. Importantly, the NCAA must play a central role in further crafting, implementing, and reviewing the rules to make certain they are maximally effective in reducing the crisis and are not being manipulated, but also in verifying that they treat all concerned fairly and do not discriminatorily impact certain subgroups of athletes.<sup>368</sup>

### *A. Recommended Rule Changes*

The NCAA should adopt the following Recommended Rules (RRs).<sup>369</sup>

#### *1. Recruits: Disclosures, NCAA Criminal Background Checks, and Prohibitions*

Prospective athletes must make a disclosure regarding acts of sexual violence.<sup>370</sup> On the Student-Athlete Notification Form Statement or

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administered by the U.S. Olympic Committee pursuant to Operation Gold Grant program, for example. NCAA, *supra* note 12, § 15. See also Jon Solomon, *Pell Grants for Players: Division I Athletes in Alabama Got \$4.8 Million in Need-Based Aid*, AL.COM (Apr. 10, 2014, 5:00 AM), [http://www.al.com/sports/index.ssf/2014/04/pell\\_grants\\_for\\_players\\_divisi.html](http://www.al.com/sports/index.ssf/2014/04/pell_grants_for_players_divisi.html).

367. As Bob Bowlsby, Commissioner of the Big 12 Conference said in 2014, “The infractions committee hasn’t had a hearing in almost a year, and I think it’s not an understatement to say cheating pays presently.” Dennis Dodd, *Big 12’s Bowlsby Rips NCAA Enforcement, Says ‘Cheating Pays,’* CBS SPORTS (July 21, 2014), <http://www.cbssports.com/college-football/news/big-12s-bowlsby-rips-ncaa-enforcement-says-cheating-pays/>.

368. The Department of Education’s guide, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, states that three out of four colleges and universities collect high school disciplinary information, and eighty-nine percent of these institutions use the information to make admissions decisions. The guide warns that such efforts, while designed to identify potential threats to campus safety, can have the unjustified effect of discriminating against individuals on the basis of race, inter alia, and may not serve the stated goal. U.S. DEP’T OF EDUC., BEYOND THE BOX: INCREASING ACCESS TO HIGHER EDUCATION FOR JUSTICE-INVOLVED INDIVIDUALS 6 (2016) [hereinafter U.S. DEP’T OF EDUC., BEYOND THE BOX], <http://www2.ed.gov/documents/beyond-the-box/guidance.pdf>.

369. Significantly, the NCAA will be required to gather data that will permit more detailed review of the appropriate scope of rules and sanctions. However, these rules are necessary now (pending further research) due to a number of factors, including the seriousness of the problem, certain studies suggesting increased acts of sexual assault by athletes compared to other students, and studies demonstrating that persons committing sexual assault frequently are serial offenders. See generally David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002) (discussing serial offenders). These rules attempt to make sanctions more uniform and processes more fair and consistent with the principle that one is innocent until proven guilty, regardless of whether a school or law enforcement investigates the allegation.

370. The Common Application used by more than 600 colleges and universities requires

preferably another form developed specifically for this purpose, recruits must disclose if at any time since they were sixteen years old<sup>371</sup> they (1) have been adjudicated guilty of a felony relating to sexual violence, or (2) are subject to any pending criminal charges relating to sexual violence. In addition, an NCAA Independent Office<sup>372</sup> must conduct criminal background checks for information relating to sexual violence on all recruits.<sup>373</sup>

Recruits that have a background check showing a guilty adjudication of an act of sexual violence or who respond affirmatively to the disclosure must be presumed to be ineligible to participate in intercollegiate sports. Recruits, however, must be given an opportunity to seek a waiver to this rule. They may explain the circumstances including the severity of the act and why they believe they have been rehabilitated and are unlikely to engage in similar or other violent behavior in the future. The NCAA Independent Office would evaluate the waiver request and make a formal report that it would provide to schools recruiting the athlete. Schools then may decide—based on the information provided by the recruit, the NCAA’s report, and any independent fact gathering in which it engages—whether to make an exception and, if admitted in the normal admissions process, give the recruit a second chance including possibly redshirting the athlete for a year and imposing special requirements (extra-strict supervision and conduct rules).<sup>374</sup> The waiver also would be conditioned on a zero-tolerance rule—“no further sexual violence

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that applicants disclose whether they have been adjudicated guilty or convicted of a misdemeanor or felony. Christine Amario, *The Common Application Used for College Admissions at More Than 600 Institutions is Changing a Question It Asks About Student Criminal Records, as the U.S. Department of Education Urges Schools to Drop the Question Altogether*, ASSOCIATED PRESS (May 9, 2016, 5:55 p.m.), <https://www.usnews.com/news/us/articles/2016-05-09/common-application-changing-question-on-criminal-record>. Also, many schools (e.g., University of Central Oklahoma), require applicants to disclose whether they have been found guilty of a felony and to explain the circumstances. *Felony Application Disclosure Form*, UNIV. CTR. OKLA., <http://www.uco.edu/student-affairs/conduct/felony/felony%20disclosure%20form.asp> (follow accompanying link under “Felony Application Disclosure Form”) (last visited Jan. 27, 2017). Moreover, many job applications similarly require such disclosures. E.g., RITE-AID PHARMACY, APPLICATION FOR EMPLOYMENT, [https://content.riteaid.com/www.riteaid.com/w-content/images/careers/RiteAid\\_employment\\_application.pdf](https://content.riteaid.com/www.riteaid.com/w-content/images/careers/RiteAid_employment_application.pdf).

371. U.S. DEP’T OF EDUC., *BEYOND THE BOX*, *supra* note 368, at 23 (recommending a time limitation on similar disclosures).

372. The NCAA Independent Office is described below in Section IV.B.

373. This would be similar to the due diligence the NCAA performs regarding academic eligibility of recruits. *See* NCAA, *supra* note 12, § 14.01.1.

374. This would be similar to the NCAA’s current rule that requires freshmen who do not have a 2.3 grade point average in a core set of high school classes to be redshirted and be academically successful their first semester in order to practice the rest of the year. *2.3 or Take a Knee*, NCAA, <http://www.ncaa.org/static/2point3/> (last visited Jan. 27, 2017).

findings.” The waiver decision and conditions must be made at the respective school by a panel, independent of the athletic department. The Independent School Panel would be comprised of three investigators—lawyers or law enforcement experts not connected in any way to the school. If the athlete attends the school, the school must submit a report of all information it and the panel considered to the NCAA Independent Office.

### 2. *Current Athletes: Ongoing Disclosures of Acts of Sexual Violence*

Current athletes must affirm annually whether they (1) have been adjudicated guilty of a felony relating to sexual violence, or (2) are subject to any pending criminal charges relating to sexual violence.<sup>375</sup> Positive affirmations shall be provided to the NCAA Independent Office and the respective school’s Title IX office. RR nos. 3 or 4 below would apply if they have not already been triggered.<sup>376</sup>

### 3. *Sanctions at the Time of Accusation*

Schools must temporarily suspend from all team activities athletes who are plausibly accused of sexual assault.<sup>377</sup> The Independent School Panel described in RR no. 1 above, must within five days after notice of an accusation,<sup>378</sup> make a preliminary determination whether the athlete has been plausibly accused (i.e., there is reasonable suspicion that the accusations are credible).<sup>379</sup> Reasonable suspicion requires a review of

375. Athletes already are required to submit information to the NCAA in a variety of circumstances. For example, they must agree to be tested for banned substances by the NCAA. NCAA, *supra* note 12, §§ 3.2.4.7, 14.1.4.1. Moreover, athletes must disclose their location during summer months. NCAA, 2016–17 NCAA YEAR-ROUND DRUG-TESTING SITE COORDINATOR MANUAL 5 (2016), [http://www.ncaa.org/sites/default/files/2017\\_SSI\\_Year-RoundSiteCoordinatorManual\\_20170104.pdf](http://www.ncaa.org/sites/default/files/2017_SSI_Year-RoundSiteCoordinatorManual_20170104.pdf).

376. *See infra* Sections IV.A.3–4.

377. Pre-resolution sanctions (RR nos. 3 and 4 herein) especially warrant study to verify that they are effective, practical, fair, and not being manipulated. *See infra* Section IV.A.4. Of course, these rules apply only to those students not suspended from school by the Title IX office because of an act of sexual violence.

378. *See supra* Section IV.A.1. The school may be on notice about the accusation of sexual violence from the complainant, the accused (RR no. 2 above), law enforcement, or other person reporting the incident. *See supra* Section IV.A.2. Also, notice is imputed if the school “in the exercise of reasonable care should have known.” Cari Grieb, *NCAA’s Response to Sexual Assault Controversies Hasn’t Been Strong Enough*, SPORTING NEWS (Aug. 26, 2016), <http://www.sportingnews.com/ncaa-football/news/ncaa-response-to-sexual-assault-football-controversies-baylor-commentary/1u2dqjk6y8h8gludw5zrsco9e>.

379. The United States Olympic Committee’s (USOC) *SafeSport Policies* also provide a robust framework on how to handle sexual misconduct cases. *See generally* U.S. OLYMPIC COMM., *SAFE SPORT POLICIES* (2012), <http://assets.ngin.com/attachments/document/0104/77>

the totality of the circumstances.<sup>380</sup> It is practical, non-technical, and requires each panel member to apply their expertise—to draw on their experience and common sense—to determine if the allegations are reasonably trustworthy (i.e., have an appearance of truth, honesty, or sincerity).<sup>381</sup> It typically would require more evidence than just the accused saying he or she did not give consent. For example, evidence of bruising or other trauma, while not necessary, would be the type of evidence that might lead to reasonable suspicion. This is entirely a context-specific determination.

If the Independent School Panel does not conclude there is reasonable suspicion, it must consider whether interim measures other than suspension are appropriate such as mandated counseling sessions.<sup>382</sup> Athletic financial aid must not be revoked at this stage.

#### *4. Sanctions at the Time of Arrest by Law Enforcement or Charge by a School*

Athletes arrested by law enforcement must be suspended immediately from all team activities if they have not already been suspended as a result of RR no. 3.<sup>383</sup> Or, if the athlete is charged<sup>384</sup> by the

69/090712\_USOC\_Safe\_Sport\_Policy\_FINAL.pdf (providing policies to improve the development and safety of athletes and participants involved in sport). The policies include a clear reporting, investigative process, and hearing procedure for allegations of misconduct, which “will in no way interfere with an ongoing criminal investigation or prosecution.” *Id.* at 15. “The USOC may suspend the accused individual where there is a reasonable belief that the individual has committed emotional, physical or sexual misconduct” (i.e., the evidence must be “sufficient to support a reasonable belief”); when appropriate, “the USOC may institute a formal investigation and hearing procedure.” *Id.* at 15–16.

380. *See id.* at 15.

381. Reasonable suspicion is the standard used by law enforcement to stop and frisk a person for weapons. *Terry v. Ohio*, 392 U.S. 1, 33 (1968). It is less than the probable cause standard required for an arrest warrant. *Illinois v. Gates*, 462 U.S. 213, 246 (1983). Further research could demonstrate a need to apply the slightly higher standard of probable cause at this stage. Generally, burdens of proof, in increasing order of stringency, are as follows: reasonable suspicion (e.g., stop and frisk); probable cause (e.g., warrant); preponderance of the evidence (e.g., Title IX school proceedings); clear and convincing evidence (e.g., civil cases); beyond a reasonable doubt (e.g., criminal cases). *Illinois*, 462 U.S. at 246; *California ex rel. Cooper v. Mitchell Bros’ Santa Ana Theater*, 454 U.S. 90, 93 (1981); *In re Winship*, 397 U.S. 358, 362 (1970); *Terry*, 392 U.S. at 33; OCR, Q&A, *supra* note 56, at 13.

382. *College Athletes and Crime: What Happens When Players Break the Law?*, FINDLAW, <http://education.findlaw.com/higher-education/college-athletes-and-crime-what-happens-when-players-break-the-l.html#sthash.lkdFX75T.dpuf> (last visited Jan. 27, 2017).

383. *See supra* Section IV.A.3.

384. This Article uses “charged” to mean that the Title IX office has informed, either verbally or in writing, the accused that he or she is the subject of a Title IX complaint and official investigation. Title IX guidelines do not specify any particular burden of proof necessary for charging a student.



Title IX office only (with no law enforcement arrest), the Independent School Panel described in RR no. 1 above must within five days determine if there is probable cause for the charge.<sup>385</sup> Probable cause means that there is sufficient information to warrant a reasonable person's belief that the accused committed the assault (e.g., there is a substantial chance or fair probability of the accused's misconduct).<sup>386</sup> If there is probable cause, the athlete must be suspended (or continued to be suspended) from team activities, pending a final resolution. The Independent School Panel makes no determination if there has been a criminal arrest because in that circumstance, law enforcement has made a determination of probable cause.

#### *5. Sanctions at the Time of Final Resolution of Allegations*

Any athlete found guilty of sexual violence by either a Title IX office (after appeal rights have expired)<sup>387</sup> or the courts (after a final judgment) must be banned from intercollegiate sports.

#### *6. Role of Athletic Departments*

Athletic departments must not interfere in any investigation where an athlete is accused of sexual misconduct. This includes prohibiting athletic departments from

- arranging for or securing lawyers for the athlete, including not maintaining lists of potential lawyers;<sup>388</sup>
- contacting or otherwise communicating, directly or indirectly, with the accuser;
- contacting or otherwise communicating, directly or indirectly, with any of the witnesses or other persons with knowledge of the alleged sexual misconduct about the circumstances; and
- engaging in any informal liaisons—no phone calls or meetings, directly or indirectly—with law enforcement or the Title IX office.

Moreover, athletic departments must inform all their coaches and staff that they are “responsible employees,”<sup>389</sup> requiring them to report immediately to the Title IX office knowledge of any acts of sexual misconduct. Such a report is one of the triggering events for application

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385. See *supra* Section IV.A.1.

386. *Illinois*, 462 U.S. at 243 n.13.

387. NCAA, *supra* note 12, § 32.10.1.

388. Referrals to campus services, legal aid, or other “neutral” legal referral services are permitted.

389. OCR, Q&A, *supra* note 56, at 14.

of the prohibitions on the athletic department listed in this rule.

### 7. Law Enforcement Cooperation

Schools must cooperate with law enforcement's efforts. Athletic departments must be required to enter into a memorandum of understanding that explicitly states that they will cooperate with law enforcement, and that athletic departments and law enforcement will not engage with each other outside official channels.<sup>390</sup>

### 8. Transfer Records

Transfer records of athletes must note not only if an athlete has been convicted of (or held responsible for) an act of sexual violence, but also must note when a plausible allegation has been made and reported to the Title IX office, an investigation is ongoing (whether a campus Title IX investigation or criminal justice investigation), or an athlete has been arrested by law enforcement for an act of sexual violence.<sup>391</sup> Transfer records shall also include reference to the athletes' statements regarding acts of sexual violence prior to enrollment where a waiver was granted (RR no. 1 above).<sup>392</sup>

Plus, coaches at the transferor school must be required to disclose any convictions, findings of responsibility, determinations of plausible allegations, ongoing investigations, or arrests relating to acts of sexual violence in any conversation with the transferee school if the conversation occurs prior to the actual transfer of any formal records.<sup>393</sup>

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390. This would reinforce RR no. 6 above that prohibits athletic departments from interfering with or attempting to extract favors from law enforcement. *See supra* Section IV.A.6.

391. Of course, requirements under FERPA and any relevant state laws must be followed. Under FERPA, disclosure to another school can occur, inter alia, when an institution has taken disciplinary action against a student arising from a sex offense; in postsecondary institutions, a student has been found to have violated institutional policies in connection with an offense; in the context of enrollment or transfer, if the student has the opportunity to view the disclosure; or a school determines an articulable and significant threat exists to the health and safety of the student or others. 20 U.S.C. § 1232g(b)(6)(A)–(B) (2012). The statute and its accompanying guidance do not specifically address circumstances where a student has been merely accused of or charged with sexual assault, or withdrawn from an institution prior to disciplinary action. *See id.*

392. *See supra* Section IV.A.1.

393. While some conferences now have rules prohibiting transfers into schools by athletes involved in an ongoing Title IX investigation or who have been disciplined for sexual violence, there needs to be a uniform national rule. The Southeastern Conference (SEC) was the first of the major college sports conferences to adopt a rule banning college athlete transfers who had been disciplined for violent/sexual misconduct at their previous college or university. David Ching, *SEC: Schools Can't Take Transfers with Serious Misconduct Past*, ESPN (May 30, 2015), [http://espn.go.com/college-football/story/\\_/id/12977228/sec-adopts-](http://espn.go.com/college-football/story/_/id/12977228/sec-adopts-)

### 9. Maintenance of Lists and Exceptions

For a minimum of ten years, the NCAA Independent Office must maintain a list of all athletes that have answered affirmatively to the disclosures in RR nos. 1 and 2 above or that had positive background checks for acts of sexual violence.<sup>394</sup> Plus, the NCAA Independent Office must maintain detailed records of any waivers or decisions not to suspend pursuant to RR nos. 1, 3, and 4, including the extenuating circumstances, and reasons for the decision.<sup>395</sup> Additionally, schools must inform the NCAA Independent Office immediately once an athlete has been temporarily or permanently suspended from athletics due to an incident involving sexual assault. All these records must be available to independent researchers (with confidential identifying information redacted).

### 10. Victim and Teammate Whistleblower Protections

Athletes must be given specific immunity from sanctions imposed

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proposal-prevents-transfer-students-histories-domestic-violence-sexual-assault. The rule bans the transfer into an SEC school of college students who have been disciplined for sexual misconduct, defined as “sexual assault, domestic violence or other forms of sexual violence.” Mark Long, *SEC Expands ‘Serious Misconduct’ Rule for Transfer Students*, ASSOCIATED PRESS BIG STORY (June 3, 2016, 5:22 PM), <http://bigstory.ap.org/article/75630a6aaf3d44f7afc4bfcf0d9ec3ad/sec-expands-serious-misconduct-rule-transfer-students>; Jon Solomon, *SEC Meetings: New Rule Prevents Transfers with ‘Serious Misconduct’*, CBS SPORTS (May 29, 2015), <http://www.cbssports.com/college-football/news/sec-meetings-new-rule-prevents-transfers-with-serious-misconduct/>. The rule does not apply to circumstances where the athlete had “limited discipline applied by a sports team, or temporary disciplinary action during an investigation.” Solomon, *supra* note 393. Furthermore, “the SEC rule doesn’t specifically address what happens if an athlete is dismissed from a team due to an arrest and is later found innocent or charges are dropped.” *Id.* The SEC also considered applying a rule to incoming freshmen. Robbie Andreu, *SEC Expands Misconduct Rule*, GATORSPORTS.COM (June 3, 2016, 3:45 PM), <http://www.gatorsports.com/article/20160603/articles/160609876>. One reason the proposal was not passed was because reporting requirements when minors are involved vary from state to state, and thus the rule could be hard to apply. *See* Long, *supra*. The Pac-12 Conference requires that “student-athlete transfers who are ineligible to re-enroll at any of their previous colleges or universities will be automatically deemed ineligible to receive athletic aid from a Pac-12 university and cannot join any university team or participate in their activities.” *Pac-12 Announces New Policy Dealing with Misconduct Issues of Transfer Student-Athletes*, PAC-12 CONFERENCE (Mar. 12, 2016), <http://pac-12.com/article/2016/03/12/pac-12-announces-new-policy-dealing-misconduct-issues-transfer-student-athletes>. The Big 12 adopted a rule similar to that in the Pac-12. Dennis Dodd, *Big 12 May Pass Rule Vetting Freshmen for Misconduct Before Enrollment*, CBS SPORTS (Sept. 23, 2015), <http://www.cbssports.com/college-football/news/big-12-may-pass-rule-vetting-freshmen-for-misconduct-before-enrollment/>. Notably, the Big 12 has said that it “may consider applying to incoming freshmen a rule that would ban schools from taking players that have engaged in violent and sexual misconduct.” *Id.*

394. *See supra* Sections IV.A.1–2.

395. *See supra* Sections IV.A.1, 3–5.

by the athletic department for violations of substance abuse policies if they report incidents of sexual misconduct. This applies both to accusers and bystanders. Specifically, the athletic department must not impose any penalties—no retaliation—for any athlete who has been indulging in substance abuse at the time of the incident if they report the sexual misconduct or participate in any investigation. And, there must be no team penalties imposed in such cases.

### *11. Modification of Current NCAA Bylaws*

The NCAA must modify its current bylaws to explicitly reference sexual assault every place it is appropriate. For example, current rules that sanction schools for a lack of institutional control must also apply to a school's failure to abide by the newly enacted rules.<sup>396</sup> The NCAA must also explicitly add that the proscription of sexual crimes is included in the parameters of section 2.4, which requires adherence to fundamental values such as respect, fairness, civility, honesty, and responsibility<sup>397</sup> and section 10.1 which prohibits unethical conduct.<sup>398</sup> Section 19.01.2, which requires individuals employed by or associated with athletic departments to have high moral values and always engage in exemplary conduct,<sup>399</sup> must be amended to state specifically that it is violated if any individual or school fails to abide by any rules relating to sexual misconduct.

Section 16.02.3 which prohibits extra benefits or special arrangements to athletes not authorized by the NCAA<sup>400</sup> must be amended to explicitly state that it applies to situations relating to sexual violence discussed herein (e.g., prohibition of athletic departments or donors hiring and paying for legal counsel). This would include amending section 16.3.2 that provides,

An institution may provide actual and necessary expenses to attend proceedings conducted by the institution, its athletics conference or the NCAA that relate to the student-athlete's eligibility to participate in intercollegiate athletics or legal proceedings that result from the student-athlete's involvement in athletics practice or competitive events. The cost of legal representation in such proceedings also may be provided by the institution (or a representative of its athletics

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396. NCAA, *supra* note 12, § 2.1.1.

397. *Id.* § 2.4.

398. *Id.* § 10.1.

399. *Id.* § 19.01.2.

400. *Id.* § 16.02.3.

interests).<sup>401</sup>

These are only a few examples. The bylaws should be comprehensively revised to appropriately include the newly enacted rules.

*B. NCAA Must Establish an Independent Office  
that Specifically Addresses the Sexual Assault Crisis*

The NCAA must establish an Independent Office (the “Office”) that would be charged with effectively and uniformly addressing this crisis. The Office would (1) maintain lists of recruits presumed ineligible and current athletes suspended temporarily or permanently from athletics due to acts of sexual misconduct; (2) maintain the disclosures, background checks, and related information from RR nos. 1–5 and 8 above;<sup>402</sup> (3) conduct its own research based upon, *inter alia*, the data discussed above; and (4) provide databases (with confidentiality protections) to independent researchers.

Additionally, the Office would review any applications for a waiver by recruits who have been presumed ineligible due to past sexual misconduct. The Office would conduct an investigation and write a report of its findings, taking a holistic view of all the facts including the degree of violence, the age of the recruit at the time of the incident(s), the rehabilitative steps taken, etc., which would be included in a database along with the respective recruits’ subsequent history in school if they are granted a waiver.

Furthermore, the Office must develop comprehensive educational programming for athletic departments that is targeted at prevention of sexual violence, including life-skills programs aimed at anger management, substance abuse, impulse control, binge drinking, attitudes of power and control, among others, and bystander intervention training programs. The materials, which would include in-person teaching materials, interactive programming, and other targeted programs, would be developed for athletes and separately for athletic coaches and athletic department administrators. These materials would be updated annually.

It is of the utmost importance that the NCAA and independent researchers use the databases to conduct additional studies in this area to confirm additionally that

- due process rights of the accused are respected;
- subgroups of athletes, like African Americans, are not

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401. NCAA, *supra* note 12, § 16.3.2.

402. *See supra* Sections IV.A.1–5, 8.

discriminatorily impacted; and

- athletes are given “second chances” if sufficient evidence demonstrates they have been rehabilitated and that the “second chances” are not abused.

A certain percentage of NCAA revenues from the March Madness basketball tournament<sup>403</sup> must be designated to establish and maintain the Office and conduct the criminal background checks and necessary investigations and research. Additionally, the NCAA must encourage the College Football Playoffs (CFP) to allocate a certain percentage of its revenues to maintain the Office.<sup>404</sup> Finally, the NCAA shall encourage schools to earmark a certain percentage of the funds provided to them from March Madness and CFP revenues for the purpose of educating athletes about sexual violence.<sup>405</sup>

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403. This proposal is not unlike proposals made by the Knight Commission on Intercollegiate Athletics this year, that one hundred percent of the funds received by member institutions be restricted to supporting athletes’ education and providing them with appropriate health and safety benefits and protections. Also, the Knight Commission proposed the creation of an “academic achievement fund” whereby funds would be awarded to member schools based on their academic achievement and not on appearances and wins. *See Knight Commission Calls for NCAA to Transform its Guidelines for March Madness Revenues to Better Support College Athletes and Protect Financial Integrity*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 10, 2016), <http://www.knightcommission.org/resources/press-room/965-may-10-2016-knight-commission-calls-for-ncaa-to-transform-its-guidelines-for-march-madness-revenues-to-better-support-college-athletes-and-protect-financial-integrity>.

404. The CFP is plenty profitable. For example, The CFP entered into a twelve-year contract with ESPN for about \$5.6 billion to broadcast the playoff and associated Bowl games through 2025. Jerry Hinnen, *ESPN Reaches 12-Year Deal to Air College Football Playoffs*, CBS SPORTS (Nov. 21, 2012, 2:03 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12year-deal-to-air-college-football-playoffs>. Further, the CFP Trophy is sponsored by Dr. Pepper for an estimated \$35 million for sponsorship rights through 2020. *See* Michael Smith, *Dr. Pepper Pours It On*, STREET & SMITH’S SPORTS BUS. J. (Dec. 1, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/12/01/In-Depth/Dr-Pepper.aspx>.

405. The NCAA currently has a Value-Based Revenue Distribution Working Group that divides March Madness revenues, inter alia. Revenues from the March Madness tournament totaled almost \$900 million in 2016. Mitchell Stabbe, *It’s March Madness! Know the NCAA’s Rulebook or Risk a Foul Call Against the Unauthorized Use of Its Trademarks*, BROADCAST L. BLOG (Mar. 15, 2016), <http://www.broadcastlawblog.com/2016/03/articles/its-march-madness-know-the-ncaas-rulebook-or-risk-a-foul-call-against-the-unauthorized-use-of-its-trademarks/>. Under current guidelines, twenty-five percent of NCAA revenues received by member institutions are restricted to support athletes’ education and provide other benefits. And, under current guidelines, forty percent distributed to member institutions is based on appearances and successes of the team in the tournament. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 403.

## CONCLUSION

There are huge deficiencies in attempts to control the problem of campus sexual violence, particularly as it relates to college athletes. The NCAA can make a significant impact immediately by implementing the rules proposed above. It is unquestionably the best-placed institution to bring a consistent, fair, and informed solution to bear on this problem nationally.