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It Is Not Working: Examining An Employment Law Model For Determining Institutional Liability In Cases Of Sexual Assault By Student-Athletes

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IT IS NOT WORKING: EXAMINING AN EMPLOYMENT LAW MODEL FOR DETERMINING INSTITUTIONAL LIABILITY IN CASES OF SEXUAL ASSAULT BY STUDENT-ATHLETES

“Their apathy, their lack of apology I could live with, but what troubled me most was their failure to ask the single most important question: How do we ensure this does not happen again?”

I. CHALLENGING THE RULING ON THE FIELD: AN INTRODUCTION TO INSTITUTIONAL AND STUDENT-ATHLETE LIABILITY

Male student-athletes represent less than five percent on average of the university student body, but contribute to seventy-seven percent more known incidents of sexual coercion than other members of the male student population. Due to the high-profile status of university athletic programs, frequent press coverage can make it seem as though every semester there is a new case of student-athlete sexual assault, followed by an ineffective investigation that fails to hold either the student or the school sufficiently responsible. The latter of these inadequacies is the subject of this Comment, which asks why the universities and athletic departments that recruit, train, protect, and defend perpetrator-athletes seemingly cannot be held legally accountable for their roles in allowing campus sexual

1. While this Comment suggests a model for Title IX sexual assault adjudication based on Title VII jurisprudence in cases where the accused students are high-profile athletes, it does not take a stance on the emerging issue of whether student-athletes are in fact employees of their respective institutions under the Fair Labor Standards Act for purposes of minimum wage or worker’s compensation entitlement. For further discussion of the employment status of student-athletes, see generally Geoffrey J. Rosenthal, College Play and the FLSA: Why Student-Athletes Should Be Classified as “Employees” Under the Fair Labor Standards Act, 35 Hofstra Lab. & Amp. L.J. 133 (2018); Justin C. Vire, Leveling the Playing Field: Student Athletes Are Employees of Their University, 12 Cardozo Pub. L. Pol’y & Ethics J. 235 (2014). For an overview of recent judicial developments, see infra notes 16–17 and accompanying text.

2. See Chanel Miller, Know My Name, 301 (2019) (referring to Stanford University’s response to student-athlete Brock Turner’s assault of Chanel Miller).


In light of recent conversation challenging the legitimacy of student-athletes’ amateur status, it is worth examining potential applications of employment law liability standards to the arena of high-revenue college athletics.

Coaches and commentators alike have discussed the apparent inevitability of compensation for high-profile players. Recently, the NCAA has been making small concessions toward allowing university athletes to profit from their labor. In March 2019, the Association was obliged to accept a California court’s ruling that it cannot cap education-related scholarship packages for student-athletes. This followed on the heels of another decision, which held that the NCAA could not enforce rules prohibiting member schools

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5. See Lisa Wade, Rape on Campus: Athletes, Status, and the Sexual Assault Crisis, CONVERSATION (March 6, 2017, 10:14 PM) http://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255 [https://perma.cc/926B-G8SU] (listing specific instances of inadequate university response to sexual assault by student-athletes and suggesting “perverse incentive” causes universities to protect athletes for sake of profit). For a further discussion of Title IX’s failures in resolving issues of sexual assault, see infra notes 125–180 and accompanying text.

6. See, e.g., Hillary Hunter, Strike Three: Calling Out College Officials for Sexual Assault on Campus, 50 TEX. TECH L. REV. 277 (2018) (analyzing relationship between student-athletes’ heightened status on campus and insufficient liability standard under current Title IX interpretation). For a further discussion of how courts could apply Title VII as a model for interpreting Title IX sexual assault, see infra notes 194–208 and accompanying text (proposing employment-law standard of liability for universities in student-athlete assault cases, similar to Title VII as applied to coworker sexual harassment).


8. See Waldron, supra note 7 (noting challenges to NCAA’s amateurism model).

9. See In re Nat’l Collegiate Athletic Ass’n Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1068, 1109 (N.D. Cal. 2019) (holding NCAA rules capping education-related compensation for student athletes unreasonably restrained trade in violation of the Sherman Act). The court emphasized the “great disparity between the extraordinary revenue that Defendants garner from Division I basketball and FBS football, and the modest benefits that class members receive in exchange for their participation in these sports relative to the value of their athletic services and the contributions they make.” See id. at 1110 (concluding sacrifices student-ath-
from allowing players to profit from the sale and use of their names, images, and likenesses. After a decade of stubborn refusal, the NCAA responded by establishing a working group to consider changing its rules as to the compensation of student-athletes for the use of their names, images, and likenesses (hereinafter, “NIL”). Soon thereafter, California passed a law allowing in-state college athletes to receive NIL compensation, which the NCAA opposed despite its apparent open-mindedness toward the issue. Still, a push for legislation enabling student-athlete endorsements gained national support. In late October 2019, the NCAA Board of Governors voted unanimously to allow student-athletes to profit from NIL endorsements.
Alongside the ongoing fight for flexibility in NCAA regulation, a battle over compensation is occurring to a lesser extent between athletes and schools themselves. In August 2019, the Ninth District Court of Appeals affirmed an April 2017 decision from the Northern District of California that held student-athletes are not entitled to compensation by either the NCAA or their amateur athletic conference. The reasoning behind this recent decision, however, leaves open the question of whether student athletes can be considered employees of their respective universities. In September 2019, a New York State Senator proposed a bill that would go beyond allowing NIL compensation by outside entities, requiring universities in the state to compensate student-athletes directly. If major “amateur” athletics programs’ amateur status is finally on the table for discussion, it does not seem out of the question to consider reforming some of the other injustices playing out off the field, including the disproportionate number of sexual assaults committed by elite athletes.

This Comment proposes an incentive for universities to accept increased accountability for the actions of their most treasured students by recognizing the employment-like relationship between elite student-athletes and the institutions for which they play. Three NCAA divisions is expected to create rules to govern NIL opportunities. See id. (stating January 2021 as deadline).

15. For a further discussion of the ongoing debate regarding student-athlete “amateur” status, see infra notes 16–18 and accompanying text.

16. See generally Dawson v. Nat’l Collegiate Athletic Ass’n, 932 F.3d 905 (9th Cir. 2019) (reasoning that Division I Football Bowl Subdivision (FBS) football players are not employees of either NCAA or PAC-12 Conference according to Fair Labor Standards Act and California labor law).

17. See id. at 907 (declining to address employment relationship between student-athletes and their universities); see also Christine Colwell, Playing for Pay or Playing to Play: Student-Athletes as Employees Under the Fair Labor Standards Act, 79 L.A. L. REV. 900, 925–32 (2019) (suggesting many reasons given for students not being employed by NCAA or Conference could apply in positive to university).


19. See Belinda-Rose Young, et al., supra note 3, at 804 (finding male college athletes seventy-seven percent more likely than other male students to use sexual coercion, including violence).

20. See, e.g., Hunter, supra note 6, at 279–81 (explaining extent of oversight administrators have over elite student-athletes, who hold elevated social status in relation to non-athlete peers). Administrators and athletic departments have more control over the selection, training, and activities of student-athletes than of other students. See id. at 281 (explaining why heightened level of institutional re-
tle IX should be able to follow a Title VII model of vicarious liability in analyzing sexual assault cases naming college athletes as perpetrators because of the unique relationship between high-revenue sports participants and their universities. Using a Title VII standard of vicarious liability, even on a case-by-case basis, will raise the stakes for university athletic programs in the Title IX sexual assault context, likely leading to improved institutional deterrence and prevention measures. Universities and their students alike would be better served by policies that recognize the impact high-profile athletes’ social status has on their power and influence—for better or worse—over their peers.

II. RULES OF THE GAME: BACKGROUND

Despite some recent pushes to change their designation, all student-athletes are currently classified as students, rather than employees of their respective institutions. As such, athletes and all students of educational institutions are governed by Title IX of the Education Amendments of 1972 (”Title IX”). It is important to note that, even if athletes were considered employees, their conduct and the institution’s role in a sexual assault case would be analyzed according to Title IX, which applies to discrimination claims naming teachers and other employees as well as students. This

21. See, e.g., Colwell, supra note 17, at 925–32 (applying multi-factor test to determine student-athletes are analogous to employees of university). For a further discussion of the connection between universities’ control over student-athletes and the appropriateness of institutional sexual assault liability models under Title IX and Title VII, see infra notes 203–222 and accompanying text.

22. For a further discussion of the incentives created by stricter vicarious liability under Title IX, see infra notes 225–253 and accompanying text.

23. See generally Hunter, supra note 6 (discussing effect of campus social hierarchy on reporting and enforcing Title IX violations).

24. See Dawson v. Nat’l Collegiate Athletic Ass’n, 932 F.3d 905, 907 (9th Cir. 2019) (leaving question of football player’s employment relationship to university “if at all, for another day”).


Comment, rather than proposing a radical shift to employee designation for all student-athletes, suggests establishing a more flexible interpretation of Title IX that would allow courts to use Title VII as a model in cases where the relationship between the student-assailant and the institution reflects more control than a university has over the general student body.27

A. Title IX Liability

Title IX was enacted to ensure all students are protected equally.28 While the law has been effective as far as encouraging female participation in athletics and preventing discrimination in academic opportunities, it has fallen short when it comes to protecting students from each other.29 Sex discrimination prohibited under Title IX includes sexual violence and coercion, as a university’s tolerance of those offenses can create a campus environment inconsistent with the statute’s promise of equality.30 The law’s enforcement power is ostensibly based on the risk of schools losing federal funding if they are not compliant.31 However, this has

27. For a further discussion of how and why the Title VII standard would be an appropriate analog for Title IX analysis, see infra notes 194–208 and accompanying text.

28. See 20 U.S.C. § 1681 et seq. (1972) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .”). Almost all public and private universities fall under the purview of Title IX because their students are eligible to receive federal financial aid. See Title IX Frequently Asked Questions, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#who [https://perma.cc/86YE-WTXR] (last visited Mar. 29, 2020) (explaining any institution whose students benefit from federal financial aid programs is subject to Title IX regulation).

29. See Dawn E. Ellison, Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX, 75 N.C.L. Rev. 2049, 2146 (Sept. 1997) (“Peer sexual harassment can have a significant effect on a student’s access to educational opportunity. If Title IX is to be effective in guaranteeing equal educational opportunity to students regardless of their sex, the law must offer a viable remedy to students who are deprived of that equal opportunity when they are victimized by peer sexual harassment.”); see also Hunter, supra note 23 at 286 (discussing Title IX’s relative levels of success, and lack thereof, in increasing opportunities for women and addressing sexual violence, respectively). Hunter cites the heavy burden on plaintiffs under current interpretation of Title IX as a reason for its failure to hold universities liable and effect meaningful prevention. Id. (noting plaintiffs have rarely met burden for institutional liability).

30. See generally Office for Civil Rights, supra note 26 (updating guidance on sexual harassment policy under Title IX to reflect private rights of students).

never occurred, and schools are able to escape material consequences so long as they promise to change the offending policies after a Title IX investigation.32

Due to Supreme Court interpretation of Title IX from 1979, students have a right to private suit against their schools for peer-on-peer sexual harassment.33 The newfound applicability of Title IX sexual assault liability to institutions encouraged vigilance by schools in fear of litigation for almost twenty years, until a pair of Supreme Court cases in the late 1990s invented the “deliberate indifference” standard that courts apply to this day.34 The test, first articulated in Gebser v. Lago Vista Independent School District,35 a case of teacher-student sexual harassment, requires that a school have “actual notice” and react with “deliberate indifference” to a known risk of severe and pervasive sexually harassing behavior.36 The Court applied the same test a year later to a case of student-student harassment in Davis v. Monroe County Board of Education.37 Since then, “deliberate indifference” has been a difficult standard to meet for plaintiffs who have been sexually harassed by another student or by a school employee.38 A significant portion of cases brought against schools for sexual assault under Title IX have been dismissed on summary judgment or a motion to dismiss for failure to satisfy the prongs of actual notice and deliberate indifference.39

32. See Catharine A. MacKinnon, In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education, 125 Yale L.J. 2038, 2061 n.102 (2016) (noting, although between eighty and ninety percent of applicable schools are not compliant with Title IX, none have yet lost federal funding).

33. See MacKinnon, supra note 32, at 2061–62 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 677–79 (1979) (creating private right of action for students against schools under Title IX)).

34. See id. at 2063–64 (describing outcomes of Gebser v. Lago Vista, 524 U.S. 274, 292 (1998), which established the “deliberate indifference” standard in the context of teacher-student harassment, and Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999), which applied the standard to student-student sexual harassment); see also Ellison, supra note 29, at 2143–45 (explaining that circuit courts applied Title VII standard of institutional liability to peer sexual harassment under Title IX before the Gebser case mandated deliberate indifference standard).


36. See id. at 292 (asserting Congress’s intent was for Title IX to require actual notice and deliberate indifference).

37. See Davis, 526 U.S. 629 (extending deliberate indifference test to student-on-student sexual harassment).


39. See MacKinnon, supra note 32, at 2040 n.5 (reporting deliberate indifference standard is often fatal at preliminary motion stage, and is main issue used by victims’ representatives to decide whether to bring Title IX case). MacKinnon’s
In 2007, the standard for “actual notice” was broadened somewhat among federal circuit courts. Two cases that year, *Williams v. Board of Regents* and *Simpson v. University of Colorado*, found pre-existing notice of conduct or proclivities to suffice under the “deliberate indifference” framework. In *Williams*, female college student Tiffany Williams filed a Title IX suit against the University of Georgia after she was gang-raped by three of the university’s athletes. Williams alleged the University knew the basketball player who initiated the sexual assault had a history of sexual misconduct when they recruited him, and subsequently failed to take necessary precautions to protect female students from him. The Tenth Circuit held the University was “deliberately indifferent” to the risk of harm posed by the student-athlete because it “knew of a need to . . . supervise in a particular area and . . . made a deliberate choice not to take any action.” The holding in *Williams* opened the door for Title IX plaintiffs to argue universities and their athletic departments have sufficient notice to be held responsible where they know of previous conduct by a student-athlete or recruit, even

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41. 477 F.3d 1282 (11th Cir. 2007).

42. 500 F.3d 1170 (10th Cir. 2007).

43. See MacKinnon, *supra* note 32 at 2075–76. (“In *Williams*, the known risk was specific to a perpetrator; in *Simpson*, to a university-sponsored program.”).

44. See *Williams*, 477 F.3d at 1288–1890 (discussing details of Williams’s sexual assault and university’s reaction to her allegations).

45. See *id.* at 1289–90 (explaining basketball player Tony Cole had previously been dismissed from other colleges for incidents related to sexual harassment and assault). University of Georgia’s men’s basketball head coach at the time, as well as the University’s President and Athletic Director, knew about Cole’s prior conduct when they recruited and admitted him. See *id.* at 1290 (“Because Cole did not meet UGA’s standards for admission, [the head coach] requested that [University President Michael] Adams admit Cole through UGA’s special admissions policy. Adams is the sole decision maker when admitting an applicant under the special admissions policy. Cole was admitted to attend UGA on a full scholarship.”).

46. *Id.* at 1295–96 (explaining University’s lack of action made students more vulnerable to harm).
where the past conduct occurred at a different school. This is important because the NCAA allows student-athletes to transfer to a new school and continue playing sports even when they have been expelled for rape. Applying the reasoning from Williams, courts can now hold university athletic departments liable for failing to protect women from transfer athletes with records of sexual misconduct.

Similarly, before Simpson, schools could only be held liable if they had prior knowledge that a specific assault would or did occur. Simpson opened the door for successful claims where an institution is aware of official or unofficial policies that use women as bait—essentially as escorts—in athletic recruiting. These baiting practices, which were already widely considered archaic when Simpson was decided, are evidently still extant on some college campuses.

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47. See id. at 1305 (Jordan, J., concurring) (“I see no reason why a funding recipient should avoid Title IX liability if, with prior knowledge of a prospective student’s or teacher’s documented prior acts of serious sexual misconduct, it admits the student or hires the teacher and then fails to conduct any monitoring or counseling, thereby placing other students in serious danger. In such a scenario, there should not and need not be any requirement that the victim be subjected to a second act of discrimination or harassment before there can be Title IX liability.”).


49. See Williams, 477 F.3d at 1296 (reasoning UGA’s failure to supervise Cole or inform student-athletes of sexual harassment policy resulted in harm to Williams); see also Kenny Jacoby, NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On, USA Today (Dec. 16, 2019) https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/ [https://perma.cc/B5C6-PZ27?type=image] (detailing NCAA’s practice of allowing sexual offenders to continue playing college sports with impunity). For a further discussion of the absence of NCAA policy regarding transfer athletes who have been expelled for sexual assault, see infra notes 165–174 and accompanying text.

50. See Simpson, 500 F.3d at 1174 (interpreting “actual notice” requirement to include institutional knowledge of general policies as well as individual incidents).

51. See Hunter, supra note 6, at 287 (citing Simpson, 500 F.3d at 1174). For further discussion of the University of Colorado’s effect on the actual knowledge standard, see infra notes 50–51 and accompanying text.

52. For further discussion of these problematic “hostess” programs, see infra notes 53–61, 58 and accompanying text. College sports programs have been using “hostess” programs to introduce high school students to the campus culture for over fifty years. See Dashiel Bennett, A Brief History of Campus Recruiting Hostesses, DEADSPIN (Dec. 9, 2009, 3:00 PM) https://deadspin.com/a-brief-history-of-campus-recruiting-hostesses-5422547 [https://perma.cc/236N-988M] (providing historic
In 2015, the defense lawyers for two Vanderbilt football players accused of rape referred to the team’s “hostess” program as part of a culture characterized by sex and alcohol, which they asserted was to blame for the defendants’ conduct.53 The 2017 Baylor football rape scandal revealed the existence of a similar “recruiting” program that led to prevalent, seemingly school-sanctioned sexual assault.54 Baylor was found non-compliant with Title IX after an investigation by Pepper Hamilton LLP.55 Baylor is only now considered compliant with Title IX conditionally upon the adoption of a long list of proposed policy changes.56

In another recent case, the University of Tennessee was found liable under Title IX for failing to take proper disciplinary action after eight female students reported sexual assault.57 The institution had been aware of athletic department policies encouraging a culture of sexual violence in athletic recruiting—specifically, by baiting prospective student-athletes through “hostess” programs.58

overview of “hostess” programs in light of controversial Tennessee recruiting practices). Each time a case comes to light, media coverage implies that the practice is harmful and outdated. See generally Mulhere, infra note 53 (reporting problematic nature of Vanderbilt’s “hostess” program in 2015); see also Hobson, infra note 54 (expressing surprise regarding existence of “hostess” program at Baylor in 2017).


57. See generally Doe v. Univ. of Tenn., 136 F. Supp. 3d 788 (M.D. Tenn. 2016) (supporting idea that Tennessee case was rare instance in which complainants actually prevailed under “deliberate indifference” standard).

58. See id. (noting institutional knowledge of recruiting policies is sufficient to subject university to liability).
Still, this special “prior knowledge” liability does not extend personally to the coaches, teachers, administrators, or other officials involved because Title IX creates a cause of action only against the institutions themselves.

As such, even if a victim can prove that particular actors were aware of informal policies or practices likely to encourage or tolerate sexual assault by athletes, the institution would not be held accountable unless the victim could show that the right person or persons knew. Congress enacted Title IX intending to eradicate inequality between the sexes in educational settings. This noble goal cannot be met until a realistic, effective framework is established for preventing and responding to sexual assaults on campus.

B. Title VII Liability

Like Title IX, workplace liability for sexual assault also stems from a statute based in equality. Title IX was modeled after Title IX and Sex Discrimination, Dep’t of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/7UQL-L776] (last updated Jan. 10, 2020) (providing brief explanation of thought process behind Title IX’s enactment). Further explanation of legislative intent is hard to come by, “[g]iven the absence of statutory text” regarding Congress’s reasoning for establishing the law. See Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations, CONG. RESEARCH SERV. 3 (Apr. 12, 2019) available at https://fas.org/sgp/crs/misc/R45685.pdf [https://perma.cc/ES4A-4BSD] (prescribing solutions to endemic sexual assault issue on college campuses). Because of this, the majority of Title IX interpretation and legal standards has come from the federal courts. See id. (noting lack of legislative action has forced courts to create their own standard).


Title VII of the Civil Rights Act. Title VII does not expressly state a prohibition on sexual assault or harassment, but the federal courts have repeatedly read sexual harassment and assault into the meaning of discrimination that affects an employee’s “terms, conditions, or privileges of employment.” Title VII protects employees from a range of abusive and harassing behaviors depending on their severity, but is generally understood to include rape and sexual assault. There are two cognizable claims under Title VII for sexual harassment: quid pro quo and hostile environment. The latter of these has largely shaped the interpretation of what qualifies as harassment under Title IX. The term of art used to determine conduct that constitutes a hostile environment, “severe or pervasive,” has been recognized by the Supreme Court in Title IX peer-to-peer sexual harassment cases.

Under Title VII, employers can be liable for their employees’ sexual harassment whether the perpetrator is the victim’s supervisor or a mere coworker. When the harasser is the victim’s supervisor, and the harassment culminated in a “tangible employment action,” strict liability applies to the employer. Where the accused is the victim’s supervisor, but no tangible employment action was

64. See 42 U.S.C. § 2000e et seq. (1964) (providing text of Title VII); Hunter, supra note 6, at 283 (“Congress intentionally derived Title IX from the language of Title VII of the Civil Rights Act.”).

65. See Black & Freeman, supra note 63, at 2 (describing interpretation courts have taken regarding Title VII’s application).

66. See id. at 4 (discussing extent of Title VII’s coverage).


68. See id. at 681 (asserting hostile environment jurisprudence under Title VII greatly impacted institutional liability standard under Title IX).

69. See id. (“In the Title IX context, the Supreme Court has applied Title VII’s ‘severe or pervasive’ standard only in a student-to-student sexual harassment case.”). See generally Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (addressing “severe or pervasive” standard in relation to peer-on-peer sexual harassment).

70. See Black & Freeman, supra note 55, at 8 n.51 (discussing Court’s interpretation of Title VII protection).

71. See id. (outlining two frameworks for supervisor sexual harassment liability). A “tangible employment action” can include firing, suspending, and failing to promote. See generally Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (defining “tangible employment action” as “a significant change in employment status” and providing examples); see also Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (providing examples of “tangible employment action[s]”).
taken, the employer has a possible affirmative defense. The available defense puts the burden on the employer to prove that it had “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.”

The distinction between supervisor and coworker standards and the availability of the affirmative defense serve the preventative and deterrent purposes of Title VII. These facets of the Title VII liability scheme encourage employers to educate supervisors, and to prevent and promptly correct behaviors once they are aware of a potential sexual harassment issue. Moreover, the strict liability of supervisor harassment where there is a tangible employment action incentivizes employers to be vigilant, rather than intentionally ignorant, of supervisors’ propensities.

The coworker sexual assault test is more difficult to satisfy. Where a coworker has sexually harassed or assaulted a fellow employee, the employer is held liable only if it knew or should have known that the accused was likely to commit such an offense, and still failed to intervene. This standard, although harder to prove than the test for supervisor liability, results in more findings for the harassed person than does Title IX’s “deliberate indifference” standard. While employers are given full due process and the oppor...

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72. See Black & Freeman, supra note 63, at 8 n.53 (stating availability of affirmative defense where victim’s supervisor did not take tangible employment action).

73. See Faragher, 524 U.S. at 807 (providing elements for affirmative defense to supervisor harassment).

74. See Black & Freeman, supra note 63, at 9. (adding that Court also intended to accommodate agency principles, which impose vicarious employer liability). See also Vance v. Ball State University, 570 U.S. 421, 429–30 (2013) (reinforcing Supreme Court’s position that agency law requires strict liability in cases of supervisor harassment).

75. See Black & Freeman, supra note 63, (discussing incentive provided to employers by vicarious liability standard).

76. See id. (noting legal benefits of implementing vicarious liability into Title VII framework). But see Tani, supra note 62, at 1862 (describing less ethical incentive posed by Title IX liability).

77. See, e.g., 29 C.F.R. § 1604.11(d) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”). See Black & Freeman, supra note 63, at 13 (explaining co-worker harassment standard is negligence, not strict liability).

78. See Black & Freeman, supra note 63, at 13 (laying out negligence test for co-worker sexual harassment).

79. Compare Walker, supra note 40, at 100–01 (observing “actual knowledge” and “deliberate indifference” have typically frustrated Title IX suits alleging institutional mismanagement of sexual assault claims) with Black & Freeman, supra note...
tunity to show that they did not know of the risk, employers also have a strong incentive to take proactive measures to rid the workplace of dangerous persons. In keeping with this incentive, many workplaces provide mandatory Title VII sexual harassment training. First, the training acts as a sort of insurance policy if the employer is being accused of doing nothing to prevent harassment. Second, the training—when done correctly and taken in earnest—is a genuine preventive measure that educates employees and supervisors about appropriate workplace behavior.

C. History of Proposed Solutions

This Comment is not the first to propose reform to the Title IX model of institutional liability. In the past, legal scholars and commentators have suggested various approaches to remedy, or even replace, the current standards of accountability. Among the

63, at 14 (“[A] company cannot escape liability by adopting a ‘see no evil, hear no evil’ strategy. An employer which lacks reasonable mechanisms or procedures for reporting misconduct, for example, may be charged with constructive knowledge of the co-worker harassment at issue.”).


81. See Sheila Engelmeier & Sue Fischer, Discrimination and Harassment Training ENGELMEIER & UMANN 1, 5, (last visited Jan. 24, 2020) available at https://www.e-ulaw.com/Articles/Discrimination_and_Harassment_Training.pdf [https://perma.cc/7YEW-SE2N] (noting most states do not require sexual harassment training, but most companies elect to include harassment training in their supervisor and manager training programs); see also Find Out If Your State Requires Sexual Harassment Training, INSPIRED eLEARNING (June 25, 2019), https://inspiredelearning.com/hr-compliance/state-specific-compliance-training/sexual-harassment-training-requirements-by-state/ [https://perma.cc/LGX7-5CDT] (listing state-by-state requirements for sexual harassment training).

82. See Engelmeier & Fischer, supra note 81 at 1 (stating, while EEOC does not strictly require that all workplaces offer sexual harassment training, most companies elect to include harassment training in their supervisor and manager training, particularly because courts look to effective training when assessing whether employer has taken steps to prevent harassment under Title VII).

83. See id. (suggesting “providing effective training to all employees makes a favorable impact on employees and creates a workplace environment free from harassment and discrimination”).

84. See, e.g., Ashley Hartmann, Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability, 48 WASH. U. J.L. & POL’Y 287 (2015) (demonstrating disconnect between sexual assault victims’ needs and the ineffective policies that are currently in place); Buchwald, supra note 67 (criticizing courts for relying on Title VII frameworks to solve Title IX cases); Emma Ellman-Golan, Saving Title IX: Designing More Equitable and Efficient Investigation Procedures, 116 MICH. L. REV. 155 (2017) (discussing methods of Title IX enforcement to reduce number of sexual assaults on college campuses).

most vocal is a call for common law tort liability, usually emphasizing premises liability because a majority of university sexual assaults occur on the school’s campus.86 If a university knows there have been prior assaults on campus property but fails to warn students or prevent future incidents, a victim can claim common law premises liability.87 Essentially, premises liability will hold institutions accountable for dorm-room rapes and encourage them to focus risk management efforts on the highest-risk areas on campus.88 It follows that holding universities to a greater liability standard for the abusive actions of one of their highest-risk populations—that of male student-athletes—will encourage schools to proactively investigate their athletic programs’ practices and policies regarding sexual assault.89

Several other theories of tort law have been used, with varying degrees of success, to attribute responsibility for students’ criminal acts to their educational institutions.90 Under the third-party liability doctrine, a university could potentially be liable in tort for the violent actions of a student-athlete if the criminal acts of the athlete reasons for the rate of male athletes’ violent behavior include hyper-masculine self-image and status, peer encouragement of abuse, training centered around aggression, and institutional tolerance and protection for perpetrators. See id. (suggesting potential explanations for correlation between athletic participation and violent behavior); see also B. David Ridpath, The Attitude Toward Sexual and Athlete Violence in College Sports Must Change, Forbes (Sept. 15, 2016, 9:04 PM), https://www.forbes.com/sites/bdavidridpath/2016/09/15/the-attitude-toward-sexual-and-athlete-violence-in-college-sports-must-change/#4be44bc35eaf [https://perma.cc/KN3V-TUXB] (discussing prior proposed changes to Title IX).

86. See generally Andrea A. Curico, Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law, 78 MONT. L. REV. 31 (2017) (exploring tort liability as method of influencing institutional reactions regarding sexual assault).

87. See Restatement (Third) of Torts: Phys. & Emot. Harm § 40 (Am. Law Inst. 2010) (designating university-student relationship as one giving rise to reasonable duty of care). See also Curico, supra note 86, at 62 (suggesting universities have special duty to protect students from dorm-based sexual assault where similar incidents have occurred in vicinity).

88. See Curico, supra note 86, at 62 (explaining how most on-campus sexual assaults occur within university-owned and -operated dormitories).

89. See Meyer, supra note 85, at 378 (stating increased likelihood of male athletes to sexually assault other students); see also Katie Malafronte, College Athletes More Likely to be Accused of Sexual Misconduct, CAMPUS SAFETY (Nov. 14, 2018) https://www.campussafetymagazine.com/clery/college-athletes-more-likely-accused-sexual-misconduct/ [https://perma.cc/LYN4-4YCJ] (noting that at West Virginia University, male athletes accounted for thirteen percent of Title IX complaints over six year period).

90. See generally Gil B. Fried, Illegal Moves Off-the-Field: University Liability for Illega Act of Student-Athletes, 7 SETON HALL J. SPORTS 69 (1997) (exploring various legal avenues that could be taken to impose institutional liability for individual athlete criminal conduct).
are reasonably foreseeable. If not the institution as a whole, at least the coaches and athletic departments that exercise significant control over the recruiting, training, and discipline of athletes should be considered to have a special relationship with student-athletes capable of triggering third-party duty. A theory of negligent recruiting has been proposed to hold universities accountable for admitting students whose records or propensities are or should be known at the time of recruitment.

Before Gebser and Davis, theories of tort-law negligence, including hostile work environment, allowed plaintiffs to assert claims against universities that knew or should have known of an assailant’s criminal tendencies. Today, courts will only impose tort liability where there exists explicit reason to believe there is a special relationship or assumption of duty to protect the plaintiff.

Contract theories of liability have also been used to implicate universities for injuries to students resulting from sexual assault. Accordingly, as a result of the purported contractual relationship between university and student, the university has a duty to protect that person while he or she is associated with the institution. Alternatively, plaintiffs can also argue that their enrollment constituted a contractual relationship creating a duty to keep them from harm from other students. Based on the contract theory, scholars

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91. See id. at 80 (suggesting based on Restatement (2d) of Torts §§ 315 and 319 that institutional liability for third-party conduct could apply where special relationship with student-athlete makes his violence foreseeable to university).

92. See Hunter, supra note 6, at 291 (assessing applicability of special situation duty theories to student-athlete harassers and their universities).

93. See Fried, supra note 90, at 83 (extending negligent hiring theory to university recruitment).

94. See id. at 85–86 (noting that analysis will focus on “whether the university created or implicitly condoned hostile environment”).

95. See generally See Restatement (Third) of Torts: Phys. & Emot. Harm § 40 cmt. 1 (Am. Law Inst. 2012) (describing circumstances in which courts have found affirmative duty of colleges to students, “often relying on other aspects [besides the student-school relationship] between the college and its students to justify imposing a duty”). See also Hunter, supra note 6, at 293 (proposing solutions to deficiencies of state tort law in addressing campus sexual assault).

96. See Fried, supra note 90, at 89 (discussing implied and express contractual relationship between university and students).

97. See id. (explaining how contract theory has been asserted to show duty of care to matriculated students).

98. See id. (“Both student-athletes and regular tuition-paying students are contractually agreeing to provide service or pay tuition in exchange for a university’s obligation to provide an education in an appropriate educational setting.”).
and courts have made arguments to support the application of Title VII doctrine to peer-to-peer student sexual assault.  

As it stands, the Supreme Court’s interpretation of Title IX creates a cause of action against universities only where victims can show that the institution itself acted with deliberate indifference despite having actual knowledge of a specific risk of sexual harassment.  

This narrow set of circumstances leaves many victims without a remedy where student-athletes who are under the special supervision and control of the university are allowed to commit sexual misconduct with impunity.  

While student-athletes need not be uniformly considered employees of their universities, a contract theory of liability allows courts to analyze the employment-like relationship inherent in certain high profile college sports when determining how to resolve sexual assault allegations against student-athletes.  

Similarly, theories of tort law including third party duty and premises liability create causes of action where an institution can be liable for the behavior of its students even without arguing that there is an employment-like relationship.  

These arguments collectively serve to bridge the gap between the Supreme Court’s generalized solution to Title IX sexual assault analysis from 1998 and the proposal laid out in this Comment with respect to a particu...
lar class of students who pose a statistically higher risk of danger to their peers.104

III. LIKE A BOSS: A BETTER MODEL IS NEEDED TO REVIEW TITLE IX SEXUAL HARASSMENT SUITS NAMING STUDENT-ATHLETES AS ASSAILANTS

This section expands on the problems with existing Title IX jurisprudence and proposes a new model that courts could use to achieve more just results for victims of campus sexual assault.105 First, subsection A reveals the source of inconsistencies in Title IX and Title VII sexual harassment standards, including an analysis of the critical response to the Supreme Court’s decision to use a higher standard in Title IX sexual harassment cases.106 Subsection B examines the effects of ineffective agency guidance on incentivizing institutional ignorance and introduces a possible solution.107 Finally, subsection C fleshes out a proposal for courts to adopt the agency principles of Title VII into their analysis of sexual assault cases under Title IX.108 Because agency law sounds in equity, the section concludes with a policy analysis to support the adoption of agency principles into the Title IX analysis of sexual assault cases naming high-profile athletes.109

A. Criticism of Title IX Interpretation under Gebser

The distinction the Supreme Court relied on in determining that sexual harassment in education, unlike in the workplace, does not present a direct basis for vicarious liability resulted from a textualist technicality.110 The majority in Gebser, which determined the

104. See Young, supra note 19, at 804 (finding male college athletes seventy-seven percent more likely than other male students to use sexual coercion, including violence).

105. For a further discussion of the proposed reform, see infra notes 199–213 and accompanying text.

106. For a further discussion of critical response to the case establishing the Title IX sexual harassment standard, see infra notes 110–129 and accompanying text.

107. For a further discussion of regulatory guidance, see infra notes 130–161 and accompanying text.

108. For a further discussion of the proposal, see infra notes 199–213 and accompanying text.

109. For a further discussion of policy, see infra notes 225–253 and accompanying text.

110. See Buchwald, supra note 67 (arguing that application of Title VII standards to Title IX sexual harassment cases is inadequate); Sexual Harassment in Education and Student Athletics: A Case for Why Title IX Sexual Harassment Jurisprudence Should Develop Independently of Title VII, 67 Md. L. Rev. 672, 679–680 (2008) (explaining that the Court in Gebser did not apply common law agency liability be-
in institutional liability test for Title IX sexual harassment used to this day, was a narrow five-justice majority whose reasoning turned on the literal language, rather than legislative intent, of the laws under consideration.\footnote{111} Failing to address the role Title VII had in creating Title IX, the justices instead distinguished a prior Title IX case in which the Court made a direct comparison between the two laws in order to establish sexual harassment as a form of discrimination under Title IX.\footnote{112}

1. A Divided Opinion

In a dissent penned by Justice Stevens, the remaining four justices agreed that the majority’s holding was “at odds with settled principles of agency law” under which an employer is liable where the harasser “was aided in accomplishing the tort by the existence of the agency relation.”\footnote{113} The dissent further asserts that Title IX, which was written in passive language to direct focus to the victims of discrimination, should therefore have “broader coverage than Title VII.”\footnote{114} Justice Stevens reasoned the purpose of Title IX’s prohibition against sex discrimination was to incentivize schools to adopt and enforce preventive policies that minimize risks of sexual harassment and assault.\footnote{115} He wrote:

cause the definition of “employer” in Title IX does not explicitly list agents of the institution as does the corresponding definition in Title VII.

\[111. See Kathleen Mary Elaine Mayer, Schools are Employers Too: Rethinking the Institutional Liability Standard in Title IX Teacher-on-Student Sexual Harassment Suits, 50 Ga. L. Rev. 909, 939 (2016) (noting Court in Gebser failed to consider Congressional intent).\]

\[112. See Buchwald, supra note 67, at 679–80 (“The Court refused to apply agency principles, clarifying that it had compared Franklin, a Title IX case, to Meritor, a Title VII case, only in reference to the general principle that sexual harassment can constitute discrimination in violation of Title IX.” (referring to Franklin v. Gwinnett Cnty. Pub. School, 503 U.S. 60 (1992) and Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986))); see also Gebser v. Lago Vista Independent School District, 524 U.S. 274, 283 (1998) (“Whether educational institutions can be said to violate Title IX based solely on principles of respondeat superior or constructive notice was not resolved by Franklin’s citation of Meritor. That reference to Meritor was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX . . . ”)).\]

\[113. See Gebser, 524 U.S. at 299 (Stevens, J. dissenting) (internal quotation marks omitted) (quoting Restatement (2d) of Agency, § 219(2)(d) (1957)). Justice Stevens’s dissent was joined by Justices Ginsburg, Souter, Breyer. See id.\]

\[114. See id. at 296 (emphasizing “broad sweep” of language in Title IX, citing to previous Supreme Court cases that held scope of statute’s coverage should correspond with that broad language).\]

\[115. See id. at 300 (discussing Congress’s purpose in making federal funding conditional on schools working to eradicate sex discrimination).\]
The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have the ‘authority to institute corrective measures on the district’s behalf.116

Justice Ginsburg’s separate dissent, joined by Justices Souter and Breyer, argued the Court should recognize schools’ effective reporting and remedial policies as an affirmative defense to Title IX charges of sexual harassment “[in] line with the tort law doctrine of avoidable consequences.”117 The dissenting Justices believed such a regime would disqualify plaintiffs whose injury resulted from their own failure to take advantage of available preventive and remedial measures.118 This principle mirrors the judicial interpretation of Title VII, which has long provided an affirmative defense for employers who have provided adequate preventive and corrective services where the plaintiff has failed to take advantage of those opportunities.119

2. Post-Gebser and Davis Commentary

Immediately after the Supreme Court created disparate standards of liability under Title VII and Title IX sexual harassment, commentators began criticizing the discrepancy.120 One such criticism lamented the fact that, under Gebser, minor schoolchildren now received less protection against sexual harassment by their teachers than adult employees have against the same conduct by

116. Id. at 300–01 (Stevens, J. dissenting) (criticizing majority’s holding).

117. See id. at 307 (Ginsburg, J. dissenting). The affirmative defense mentioned is available in cases of Title VII supervisor sexual harassment, where employers would otherwise be strictly liable. See id. (suggesting organizations should be able to avoid liability by proving they took appropriate preventative measures). For a further discussion of the Title VII defense, see supra notes 72–75 and accompanying text.

118. See Gebser, 524 U.S. at 307 (Ginsburg, J. dissenting) (modeling proposal after affirmative defense created by Court for employer-defendants in Title VII sexual harassment suits). For a further discussion of this proposed solution, see infra note 119 and accompanying text.

119. For a further discussion of the Title VII affirmative defense, see supra notes 72–74 and accompanying text.

120. For a further discussion of criticisms of Gebser in the months and years following the decision, see infra notes 121–130 and accompanying text.
their peers.\textsuperscript{121} The same article proposed that Congress amend Title IX to expressly authorize a vicarious liability standard, pointing as an example to multiple prior acts passed by Congress to supersede the Court’s interpretation of Title IX.\textsuperscript{122}

Another contemporary criticism of the inconsistency in the Court’s civil rights doctrine explains the faulty reasoning behind distinguishing \textit{Gebser} from Title VII cases:

The Court has accepted limited vicarious liability under Title VII, but rejected it under Title IX. . . . Yet, nothing in the statutory language or legislative history of these laws justifies the differences in the Court’s treatment of \textit{respondeat superior} liability under these statutes. . . . Thus, our conclusion is that the standard for vicarious liability should be the same under Title VII [and Title IX]. Under each statute, the Court should allow vicarious liability of employers to further the underlying goals for the statutes.\textsuperscript{123}

The majority in \textit{Gebser} attempted to justify its decision to require actual notice and deliberate indifference in Title IX sexual harassment cases by asserting that it would be contrary to public policy to expose voluntary federal funding recipients to post-hoc liability for violating conditions to the funding of which they did


\textsuperscript{122} See \textit{id.} at 598 (insisting Congress amend Title IX to include vicarious liability standard akin to that established for Title VII by judicial doctrine). In response to Supreme Court decisions determining that Title IX conditions reach only those parts of an educational institution that receive federal funding, Congress passed the Civil Rights Restoration Act of 1987, which explained its intent that Title IX reach all aspects of an educational institution. \textit{See id.} at 567–68 (discussing Civil Rights Restoration Act). Congress similarly overruled the Court with the Civil Rights Remedies Equalization Amendment of 1986, which clarified that state educational institutions waive Eleventh Amendment immunity by accepting federal funds, notwithstanding the Supreme Court’s holding to the contrary. \textit{See id.} at 568 (discussing Civil Rights Remedies Equalization Act).

\textsuperscript{123} Fisk & Chemerinsky, \textit{supra} note 38, at 799 (disagreeing with Court’s disparate standards of vicarious liability under Title IX and Title VII). Fisk and Chemerinsky go so far as to propose that a tort-law standard of strict agency liability should apply under all civil rights statutes. \textit{See id.} (“The preferable approach would be for the Court to interpret these civil rights statutes to further the underlying goals that they were meant to achieve: deterrence of violations of civil rights and compensation for injuries . . . . Holding employers liable for their employees’ actions creates an incentive for employers to prevent wrongful conduct.”).
not have express notice. This, too, drew negative attention among contemporary legal commentators, who disagreed with the Court’s reading of Title IX. The Court emphasized in Gebser and Davis that Title IX, unlike Title VII, is based in a contractual relationship between the federal government and its funding recipients, and therefore greater notice needs to be provided before litigation can deprive a school of funds due to sexual harassment.

However, federal funding recipients were already on notice that sex discrimination—which includes sexual harassment—is expressly prohibited by Title IX’s prohibition of discrimination in federally funded programs. Thus, the contract theory on which the Court based its holdings in Gebser and Davis does not necessarily lead to a significant distinction between the appropriate notice standards for sexual harassment suits under Title IX and Title VII. Government-funded educational institutions should therefore be liable for conduct about which they knew or should have known, rather than only the severe and pervasive conduct of which they had actual notice.


126. See Gebser, 524 U.S. at 286–90 (asserting federal funding recipients’ lack of actual notice made private remedy impossible under Title IX); see also Davis v. Monroe Cnty. Bd. of Educ. 526 U.S. 629, 640 (1999) (reiterating, under contract theory, "private damages are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue").

127. See Safier, supra note 125, at 1326 (noting sexual harassment had been previously recognized as form of sex discrimination in line of Supreme Court cases).

128. See id. at 1326–27 (“The importation of agency law principles into Title VII sexual harassment should have given [schools] clear notice of their potential liability under such a standard, given Congress’ intent to apply Title VII requirements to education through Title IX.”).

129. See Colling, supra note 125, at 1588–93 (advocating for agency-law standard more similar to Title VII sexual assault liability inquiry). Colling also suggested an affirmative defense such as the one proffered by Justice Ginsburg, which would protect schools that had taken appropriate measures to prevent harassment. See id. at 1596–97 (noting such scheme would “provide the necessary incentive for school districts to take preventative action”).
B. Practical Failures of Title IX in Addressing Sexual Assault

In practice, the Gebser ruling has created a nearly impossible hurdle for sexual harassment plaintiffs to overcome.\textsuperscript{130} The Department of Education, in its interpretations of Title IX and its investigations into compliance, has not done much to elucidate the matter.\textsuperscript{131} The vague and inconsistent administrative guidance has left schools unsure what precautions and procedures need to be in place, leading them to provide as little as possible in terms of prevention and deterrence measures.\textsuperscript{132}

Unclear requirements in Title IX policy create two distinct but entwined issues: universities fail to take preventive measures against sexual assault, and the Office of Civil Rights (“OCR”) is incapable of holding institutions accountable because it has failed to provide adequate notice of what measures are appropriate.\textsuperscript{133} While student-athletes do not need to be uniformly considered employees of their universities, a framework allowing courts to make the analogy for the purpose of heightening universities’ respondeat superior liability could fill some of the gaps left by agency guidance.\textsuperscript{134} As a result, universities will be incentivized to be vigilant and take protective measures against sexual assault by student-athletes.\textsuperscript{135}

1. Ineffective Guidance

Title IX’s prohibition of sex discrimination is the minimum response standard legally required of universities.\textsuperscript{136} The OCR, whose guidance has significant bearing on the policy framework of Title IX enforcement, is an administrative agency subject to the

\begin{itemize}
\item \textsuperscript{130} See MacKinnon, supra note 32, at 2090 (noting prescience of Gebser dissenters’ comment that Title IX would largely preclude recovery).
\item \textsuperscript{131} For a further discussion of the Education Department’s vague administrative guidance, see infra notes 137155 and accompanying text.
\item \textsuperscript{132} See MacKinnon, supra note 32, at 2102 (asserting OCR guidance since Gebser has been insufficient to provide adequate reprieve to survivors of sexual assault).
\item \textsuperscript{133} See id. (remarking on insufficiencies in OCR enforcement and guidance).
\item \textsuperscript{134} See id. at 2102–03 (suggesting supplementing OCR enforcement with updated institutional liability standard for private actions under Title IX would provide better remedies for survivors of campus sexual assault).
\item \textsuperscript{135} See id. at 2105 (“Under this proactive liability concept, rooted in Title IX’s plain language, the institutional incentive to address rape cultures and redress sexual assault in schools would be restored and significantly strengthened[.]”).
\item \textsuperscript{136} See Ashley Hartmann, Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability, 48 WASH. U. J.L. & Pol’y 287, 293 (2015) (asserting that rape myths and sex stereotypes influence universities’ compliance with Title IX and limit meaningful sexual assault response).
\end{itemize}
whims of appointed officials. While the OCR has the potential to effect meaningful policy change, it also has the ability to withdraw those changes. Allowing courts to have more flexibility in assessing institutional liability in Title IX sexual harassment suits would lessen the impact of political changes in the executive branch. With a facts-based inquiry into whether a particular student-athlete’s relationship to the school resembles an agency relationship, courts can achieve equitable outcomes despite a lack of effective OCR guidance on point.

Although the OCR has periodically released guidelines to advise colleges on how best to address these issues, the Department of Education’s formal role in regulatory oversight has been increasingly limited. Its most recent binding statement is from 2001, just after the Supreme Court set the standard for analyzing sexual harassment liability under Title IX. There have been many interim policy statements issued by the OCR, but none since 2001 have been passed through the notice-and-comment administrative

137. See id. at 297–98 (noting power of OCR’s advisory capacity in advocating for progressive responses to university discrimination, particularly praising Dear Colleague Letter). Since Hartmann’s Note, the new administration’s OCR has withdrawn the 2011 Dear Colleague Letter and enacted a politically different set of policies regarding sexual assault response, shifting its focus to the rights of the accused. See Candice Jackson, Dear Colleague, Dep’t of Educ. (Sept. 22, 2017), available at https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf (rescinding previous administration’s Dear Colleague Letter).

138. See Office for Civil Rights, Sex Discrimination, Policy Guidance, Dep’t of Educ., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/sex.html [https://perma.cc/J364-SS2X] (last updated Apr. 21, 2020) (noting 2017 guidance withdrew statements of policy and guidance published by OCR under previous administration); see also Tani, supra note 62 at 1892 (noting OCR’s susceptibility to change due to successive administrations’ political influence).

139. See R. Shep Melnick, The Transformation of Title IX: Regulating Gender Equality in Education, 262–64 (2018) (criticizing effect of political parties’ expansion and retrenchment of OCR guidelines and remarking, “neither OCR nor the courts have given any serious consideration to how Title IX regulation has contributed to the pathologies of commercialized college sports”).

140. For a further discussion of how applying Title VII institutional liability to Title IX cases on a case-by-case basis would be an appropriate solution, see infra notes 214–222 and accompanying text.


142. See Office for Civil Rights, supra note 30 (revising 1997 guidance in response to 1998 and 1999 Supreme Court decisions).
regulatory process that implements the statements as agency rules with the force and effect of law.\(^\text{143}\)

Moreover, the current administration has repealed prior policy statements that provided enforcement instruction, leaving a gap in Title IX interpretation while the Department “develop[s] an approach to student sexual misconduct that responds to the concerns of stakeholders . . . through a rulemaking process that responds to public comment.”\(^\text{144}\) Even before the previous administration’s guidance was withdrawn, it was not uniformly implemented by schools and courts.\(^\text{145}\) For example, the OCR’s 2011 write-up on sexual harassment rights included the assertion that “[i]f a school knows or reasonably should know about sexual harassment or sexual violence . . . the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.”\(^\text{146}\) In practice, courts deciding Title IX cases rarely, if ever, used a “knew or should have known” standard of institutional culpability.\(^\text{147}\) The OCR’s vague and inconsistent guidelines have resulted in relatively laissez-faire campus sexual harassment policies

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\(^\text{145}\) See S. Daniel Carter, In Defense of the Title IX Dear Colleague Letter, HuffPost (Sep. 16, 2017) https://www.huffpost.com/entry/in-defense-of-the-title-ix-dear-colleague-letter-b_59bddd9ae4b0f6b71800c3a2f?guccounter=1&guce_referrer=ahR0eHM6Ly93d3cuZz9vZ2xiLmNvbS8&guce_referrer_sig=AQAAAAxNyOvyH19E9gcBVu8Bke4R6oX-mjRrmse9C8n1hVRK1hN0J3YXE_Il7cxHE4m1kuwHgbSXXKSYDB_wGn-LFqq_lkFSmwd8Ca6uXfJ0jcmXtj7e8E30ZwUMbKKEQusfnJc6-A9q9hCQIcxEpklJpJnbooydPRmipVzCL1DNF [https://perma.cc/37N4-VM7] (stating 2011 Letter was only “one step on the road to improving how educational institutions better respond to sexual violence”).


\(^\text{147}\) See Ellison, supra note 29 at 2144 (discussing standard used in assessing vicarious liability under Title IX).
that go unpunished until tragedy strikes.\footnote{Walker, supra note 40, at 99–100 (referring to universities’ risk management strategy of refusing to investigate for fear of creating actual notice).} When that does happen, the school is reprimanded, but not penalized, by the OCR.\footnote{See What is Title IX?, WOMEN’S SPORTS FOUNDATION \url{https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/} (“When institutions are determined to be out of compliance with the law, the United States Department of Education (OCR) finds them ‘in compliance conditioned on remedying identified problems.’”).}

When the OCR investigates and proposes resolutions to allegations that universities have failed to meet the requirements of Title IX, it issues a letter to the school with its findings and suggests minimum improvements the school must make to be in compliance going forward.\footnote{See Office for Civil Rights, How the Office for Civil Rights Handles Complaints, DEP’T OF EDUC., \url{https://www2.ed.gov/about/offices/list/ocr/complaints-how.html} (“OCR’s determination will be explained in a Letter of Findings sent to the complainant and recipient. Letters of Findings contain fact-specific investigative findings and dispositions of individual cases.”).} These decisions are made on a case-by-case basis, and as a result, there is no binding framework for the resolutions given.\footnote{See id. (“Letters of Findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such.”); see also Walker, supra note 40, at 99 (noting OCR’s vague policy guidance and ad hoc compliance review as contributing factors to schools’ broad discretion in developing and enforcing sexual assault response policy).} The few formal policy statements the OCR makes public are approved by individual officials who are employed by an understaffed executive agency.\footnote{See Office for Civil Rights, supra note 150 (“OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.”); see also Andrew Kreighbaum, Under DeVos, a Smaller Department of Education, INSIDE HIGHER ED (June 13, 2018), \url{https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began} (reporting OCR lost eleven percent of its already insufficient workforce between 2017 and 2018 under newly appointed Secretary of Education).} Further, the language of these advisory documents often falls short of actionable advice.\footnote{See Kristy L. McCray, Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study, 16 TRAUMA, VIOLENCE, & ABUSE 438, 441 (2015), (referring to language of 2011 Dear Colleague Letter as too vague to facilitate uniform compliance).} The current manual for interpreting and enforcing Title IX has been criticized for its vagueness, which gives the OCR staff broad discretion to dismiss claims.\footnote{See Andrew Kreighbaum, As Civil Rights Office Gets More Money, It Limits Investigations, INSIDE HIGHER ED (March 30, 2018), \url{https://www.insidehighered.com/news/2018/03/30/more-money-civil-rights-office-comes-it-narrows-its-investigative-work} (noting that 2017 manual directs staff to dismiss complaints based on “credible information” that indicates investiga-}
activity, despite a recent increase in funding from Congress that could be interpreted as the legislature rejecting the administration’s education priorities.155

Relying on a more consistent base of case law rather than politically motivated advisory documents may stabilize the doctrine of institutional sex discrimination review.156 The Equal Employment Opportunity Commission ("EEOC" or the "Commission"), another civil rights agency within the federal government, adjudicates cases whose holdings then have precedential force on future employment discrimination matters.157 Additionally, the EEOC is empowered to sue nonfederal employers for discrimination and to serve as amicus curiae in non-EEOC cases.158 The EEOC’s Title VII doctrine has evolved over decades to include protection against sexual orientation discrimination, among other shifts in keeping with the modern understanding of equality.159 Even with a 2-1 Republican majority, the Commission has expressed an unwillingness to go back on its decision that gender identity is a cognizable form of discrimination under Title VII.160 If Title IX adjudication were

155. See id. ("Although the omnibus spending package has been interpreted as Congress rejecting several DeVos priorities, it won’t undo the change in course her department has already chartered for the Office for Civil Rights.")

156. For a further discussion of useful regulatory guidance, see infra notes 157–161 and accompanying text.


modeled after Title VII in some cases, EEOC decisions and advisory
guidance could serve as persuasive support for victims of sexual vio-
ence by student-athletes.161

2. Doing the Bare Minimum

The judicial interpretation of Title IX incentivizes institutional
ignorance.162 Rather than punishing the university for what it should have
known, Title IX liability attaches only where the university actually knew
and consciously disregarded specific warning signs—a bar that is easily
cleared by burying one’s head in the sand.163 By refusing to look into
possible sources of harm to students, schools can shield themselves from vicarious liability under
Title IX.164

Further, when institutions have investigated claims and found
students guilty of sexual assault, fewer than a third of those students
have been expelled from the school.165 Many are allowed to return
to play sports.166 Even those student-athletes who are suspended or
expelled after being found responsible for sexual assault are al-
lowed, under current NCAA policy, to transfer to another NCAA
rently on bipartisan commission believe LGBT discrimination is banned by federal law).

161. For a further discussion of the limited availability of employment law
doctrine to Title IX sexual harassment suits, see infra notes 213–258 and accompa-
nying text.

162. See Meyer, supra note 85, at 387–88 (assessing universities’ roles in main-
taining “indifference” to avoid liability under Title IX).

163. See Tani, supra note 62, at 1861–62 (explaining that cases establishing
actual knowledge standard “arguably incentivized institutions to ‘bury their heads
in the sand’ rather than actively prevent rights violations, lest they accrue the kind
of knowledge that might trigger liability”).

164. See Fisk & Chemerinsky, supra note 38, at 777 (predicting that, by using
Gebser standard to review institutional handling of peer-to-peer sexual harassment,
Supreme Court would “give schools every incentive to avoid gaining knowledge of
problems” because “a school . . . that remains ignorant of sexual harassment is
never liable”).

165. See MacKinnon, supra note 32, at 2061–62 (noting lack of punishment by
university of student-athletes found guilty of sexual assault). The nature of Title
IX investigations is such that the only remedy is internal disciplinary action, which
is up to the discretion of the school. See id. (discussing remedies available to student
victims of sexual assault). In the case of especially prized players, the school’s
athletic department often intervenes on the behalf of the accused, sourcing char-
acter witnesses and providing legal counsel of a quality not afforded to the victim.
See id. (describing how disparate circumstances between student-athlete perpetra-
tors and traditional student victims can affect access to justice).

166. See Aislinn Toohey, No Means No: Possible Reforms to Remedy the Way Univer-
sities Handle Sexual Assault Allegations in College Athletics, 2 GEO. ENT. & MEDIA ALL.
L. REV. 2, 9 (2018) (citing instances where athletic departments allowed students
to return to play during and after accusations of sexual misconduct).
school and resume play.167 The NCAA has considered, but never implemented, rules that would keep student-athletes with records of domestic and sexual violence off elite college teams, or at least prevent schools from providing them with scholarship funding.168 As one advocate of sexual violence reform in the NCAA has written:

The NCAA has . . . authority to enact a bylaw requiring all member institutions to conduct criminal background checks as a condition of an athlete’s participation in athletics. This is analogous with its current requirements on drug testing. Instead of having universities being reactive or protective concerning athlete violence, the NCAA can mandate as a voluntary organization that universities to take preemptive measures to combat the violence. Criminal background checks offer such a preemptive measure that the NCAA should consider when evaluating its role in helping decrease athlete violence. More than anything it is simply the right thing to do and a bold move to change a culture that desperately needs it.169

Although the NCAA has agreed to work on improving its sexual violence policy in response to pressure from lawmakers, the organization has not yet developed a rule prohibiting member schools from accepting athletes with criminal or civil records of sexual violence.170 A few schools, including Indiana University as well as the member universities of the Big Sky Conference, have implemented their own policies prohibiting the acceptance of transfer

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students with records of sexual violence. This development acknowledges a reality that many other schools are trying desperately to avoid: that it is possible to foresee, and prevent, some of the violent behavior by student-athletes. If Indiana has the foresight to ban students with violent records, surely other major athletics institutions can take similar preventive measures. It is not as if NCAA Division I schools each exist within a vacuum, unable to take note of others’ efforts to reform.

The existence of policies which seek to eliminate dangerous persons from the student body, on its own, should be enough to defeat the constructive notice test in schools that choose not to take such preventive measures. The argument that schools cannot screen students diligently before admitting them falls apart with re-

171. See Armour, supra note 168 (reporting on Big Sky Conference’s Serious Misconduct Rule, which prevents anyone with history of sexual violence or exploitation from participating in athletics); see also Jeremy Bauer-Wolf, Why Do Colleges Recruit Athletes Who Have Committed Sexual Assault, Inside Higher Ed (May 18, 2017) https://www.insidehighered.com/news/2017/05/18/indiana-ban-sexual-assault-offenders-applauded-not-adopted-elsewhere [https://perma.cc/8XTG-PSLG] (reporting Indiana University’s policy banning athletes with history of sexual assault). The Indiana rule was based on a similar rule from the Southeastern Conference (“SEC”), but while the SEC rule applies only to cross-conference transfers, the Indiana policy bars all freshman and transfer students with a record of sexual violence. See id. (comparing SEC policy with Indiana University policy).

172. See Armour, supra note 168 (outlining existing policies prohibiting students with violent records from transferring to new athletic team). The NCAA and its member institutions and conferences are aware of the policies at Indiana and in the Big Sky Conference, but either do not acknowledge these solutions at all or attempt to defend their non-adoption with claims that such a policy would be too difficult to implement across state lines, where the definitions and enforcement of sexual assault crimes vary. See id. The Big Sky Conference was able to overcome this apparent obstacle despite its member schools’ locations across ten states. See id. (asserting multi-state nature of conference does not necessarily preclude creation of workable policy).

173. See Bauer-Wolf, supra note 171 (discussing Indiana’s policy banning transfers with violent records). Indiana University’s own conference, the Big 10, has not implemented a conference-wide ban on sexual assault transfers. See id. (noting Big 10 does not have “serious misconduct” prohibition on student-athlete transfers). Katherine Redmond Brown, founder of the National Coalition Against Violent Athletes, describes policies such as Indiana’s as a risk management method for universities, adding that institutions adopting bans on students with violent records underscore the serious consequences for Title IX violations. See id. (“To Brown, this sort of policy doesn’t discriminate against athletes but rather is an investment in risk management for a college or university. She noted that the recidivism rate for sexual assault offenders is high.”).

174. See Brown, supra note 173 (noting known risk of recidivism among sexual assault offenders).

175. For a further discussion of institutional knowledge, see infra notes 177–180 and accompanying text.
spect to high-profile athletes. In *Simpson*, the Tenth Circuit suggested that a school can be deemed to have *actual* knowledge when it is aware of a trend within the school’s athletic department specifically, and in the peer culture of certain organizations at large, of dangerous male behavior. In the *Simpson* case, academic evidence was combined with prior incidents by Colorado football players, as well as an official policy that encouraged young women to show recruits a “good time,” to establish the university’s actual knowledge.

Were Title IX and its judicial interpretation not controlling, common law tort liability would likely hold schools accountable in cases where information was avoided to protect athletes from sexual assault claims. If the test for institutional liability for peer sexual harassment was based on what the school should have known, rather than the stringent standard of actual knowledge, universities

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176. *See Fisk & Chemerinsky, supra* note 38 (stating that, for public K-12 schools, effective argument against strict liability for peer harassment is schools’ inability to choose which students to admit). Universities, unlike public school districts, have the means and legal right to turn away would-be students based on a variety of factors. *See Hunter, supra* note 6, at 281 (discussing how institutional decisions affect admission of student-athletes). Because prominent athletic departments actively seek out and vet potential athletes, the defense that they could not gain knowledge of a potential recruit’s violent tendencies is a weak argument. *See id.* (noting depth of research and investigation into student-athletes’ personal lives during recruitment and asserting, “[g]iven the actions of coaches, athletic directors, and school officials bringing athletes to campus and student-athletes’ propensity for sexual violence, schools must do more to adequately protect their students”).

177. *See Walker, supra* note 40, at 119–20 (“In addition to describing prior misconduct by CU football players and recruits as a basis for establishing actual knowledge of hostile environment harassment, the Tenth Circuit also cited several national studies on the disproportionate role of student-athletes in campus sexual assault. This citation raises the possibility that a school could be deemed to have actual knowledge of the dangerous peer culture in certain male organizations even without specific information about previous misconduct involving teams or chapters on campus. CU knew that its football players and recruits were likely to be involved in a disproportionately high number of sexual assaults based on academic research that ‘male student athletes [are] more prone to commit sexual assault than other male students.’ To its credit, CU cited two of these studies in a handbook distributed to football players before the 2001 season, which suggests that the school was aware that male athletes are a high risk group.”).

178. *See Walker, supra* note 40, at 120 (noting that, in combination, these factors created situation so obviously dangerous “that the school will be deemed to have actual knowledge of this elevated risk merely by promulgating such a reckless policy”).

179. *See Fisk & Chemerinsky, supra* note 38, at 792 (discussing common law negligence test).
and athletic departments would have an incentive to look into recruits’ potential for or history of violence against women.\textsuperscript{180}

Due to the fact that alleged perpetrators are actually fifty percent more likely than alleged victims to file suit against the university following a sexual assault disciplinary hearing, some schools may be hesitant to come down on the side of the victim, even when the evidence meets or exceeds the preponderance standard required by Title IX.\textsuperscript{181} The number and variety of claims available to accused students makes it difficult for universities to predict and prevent liability against their claims while enforcing Title IX.\textsuperscript{182} This may become even more of a factor in schools’ calculus when deciding whether to investigate a Title IX complaint, as the current executive administration has issued policy statements advocating for increased protections for accused students.\textsuperscript{183} Moreover, the actual cost of litigating Title IX claims is often negligible to universities, particularly set against the vast influx of revenue that a successful sports team can provide.\textsuperscript{184}

\begin{itemize}
\item \textsuperscript{180} See \textit{id}. (suggesting notice-based vicarious liability would incentivize schools to investigate where they have reason to suspect problems).
\item \textsuperscript{181} See Claire Gordon, \textit{Study: College Athletes Are More Likely to Gang Rape}, ALJAZEERA AMERICA (Feb. 26, 2015), http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/2/26/united-educators-sexual-assault-study.html [https://perma.cc/BZ6H-3Q5U] (noting potential post-disciplinary litigation by accused students has led some schools to avoid finding them responsible in the first place). The article notes that these suits actually cost less for universities than do successful Title IX suits by victims, which trigger costs beyond damages, including public relations response, declines in donations, and the costs associated with implementing the government’s proposed reforms. \textit{See id}. (“In the harshest calculus, some schools may consider it cheaper to hurt the alleged victim. But . . . that math doesn’t work, at least not anymore.”).
\item \textsuperscript{182} See generally Amy R. LaMendola, \textit{School’s or School Official’s Liability for Unfair Disciplinary Action Against Student Accused of Sexual Harassment or Assault}, 34 A.L.R.7th 1 (2017) (addressing numerous allegations made by students accused of sexual harassment, and their respective success in holding school or officials liable).
\item \textsuperscript{184} See Ann Scales, \textit{Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes}, 15 MICH. J. GENDER & L. 205, 288 (2009) (“The damages paid and defense attorneys’ fees expended while dragging plaintiffs out past summary judgment and appeal are chicken-feed, meaningless compared to the University’s allegiance to big-time sports. Moreover, Title IX plaintiffs cannot, to date, achieve significant injunctive relief against educational institutions, or at least not injunctive relief that will matter over the long run. Universities have nothing, really, to fear from Title IX.”).
\end{itemize}
3. **Coworker Harassment as a Fitting Model**

Title IX was modeled after Title VII of the Civil Rights Act, but interpretation of the statute as related to sexual assault allegations does not follow the same framework as a Title VII sexual harassment or discrimination complaint. Title IX jurisprudence refused to view teachers, and therefore did not even consider viewing students, as agents of the schools they represent. As a result, there is not a built-in avenue of accountability for a university; in other words, the doctrine of *respondeat superior* does not apply.

While students of course have the option to bring criminal charges against their abusers, the criminal complaint process can be traumatizing and does not provide a tangible remedy for the victim. Even in cases where sexual assault victims have successfully brought cases against high-profile athletes, the sentences have been laughably light. This leaves civil suit as a preferable alternative—or it would, if the affected students had any realistic re-

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185. See Synopsis of Purpose of Title IX, Legislative History, and Regulations, JUSTIA (last updated Apr. 2018), https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix/ [https://perma.cc/7UGQ-NTL6] (discussing how Title IX was proposed with understanding that education opportunities are inextricably linked with employment opportunities for women—implying it is not far off to suggest that laws for equality in both spaces, and how they are implemented, should be analogous).

186. See *Mayer*, supra note 111, at 924 (explaining that Supreme Court contemplated in *Gebser*, but ultimately decided against, imposing standard of *respondeat superior* or constructive notice—consistent with Title VII agency principles—in Title IX teacher-student harassment cases).

187. See *id.* at 932 (recognizing how “[*t*]he *Gebser* Court divorced an educational institution’s liability for the acts of its employees from *respondeat superior*”).

188. See Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992) (establishing monetary remedy for private action finding intentional violation of Title IX). Unlike a private Title IX suit against a university, a criminal sexual assault investigation affords no monetary relief for the victim, even if the accused is found guilty. *Title IX Investigation vs Criminal Investigation*, COLO. COAL. AGAINST SEXUAL ASSAULT, https://www.ccasa.org/current-issues/title-ix-investigation-vs-criminal-investigation/ [https://perma.cc/A32M-PCK4] (last visited Jan. 23, 2020) (comparing respective benefits and drawbacks of Title IX and criminal investigations for sexual assault). Additionally, criminal cases often take years and their records are made public regardless of the outcome, whereas Title IX suits are resolved within sixty days and are not public. See *id.* (outlining Title IX’s due process provisions).

course against the institution that ignored or even encouraged their attackers’ behavior in the first place.  

4. Employment-Like Relationship Between Colleges and Athletes

For decades, legal scholars have supported employee designation for student-athletes based on the nature of the university-athlete relationship and the commercial nature of collegiate athletics. Courts have never conclusively settled the issue of student-athletes’ employment status. In *Dawson v. NCAA*, the Ninth Circuit was careful neither to ask nor answer whether college athletes are technically employees of their universities.

Similarly, a former Villanova University football player prevailed in a preliminary challenge to his minimum wage suit against the school and the NCAA. The district court, noting there is no amateurism exception to the Fair Labor Standards Act (“FLSA”), allowed the parties to proceed with discovery to show whether a scholarship athlete is an employee and therefore owed minimum

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190. See *Ridpath*, *supra* note 85 (noting lengths universities will go to in “an almost desperate attempt to protect the athletic brand”). While victims could sue their individual attackers, those students are likely judgment-proof—especially athletes who, as established, are not allowed to make money while in school under current NCAA regulations. See *Anderson*, *supra* note 13 (explaining NCAA athletes currently cannot profit from athlete status while in school). For further discussion of student-athletes and compensation, see *supra* notes 7–16 and accompanying text.

191. See *Davis & Parker*, *supra* note 99, at 108–09 (summarizing arguments of scholars who argue student-athletes qualify for designation as employees based on workers’ compensation standards as well as institutions’ control over athletes and commercial gain from their performance).


193. 932 F.3d 905 (9th Cir. 2019).


wage.196 The standard to be applied in the Eastern District of Pennsyl-
vania upon the completion of discovery is the economic realities test, a common law doctrine suggested by the FLSA.197 Given these
recent developments and the history of theoretical comparison be-
tween student-athletes and employees, it follows that Title VII is a
fitting model for cases of sexual assault by players of high-revenue
college sports.198

C. Title VII Model of Vicarious Liability for Student-Athlete
Assault

In many respects, Division 1 athletes in high-revenue sports are
more akin to university employees than they are to other college
students.199 Although courts rarely uphold employee status for stu-
dent-athletes, they do entertain claims and go through the full com-
mon law analysis.200 Some judges assert that athletes, particularly
those whose sports bring in significant profit for the school, may be
able to show an employment-like relationship to their universities
under existing doctrine.201 The law should reflect athletes’ respon-
sibility as de facto campus representatives.202

It is well documented that high profile student-athletes enjoy
an elevated social status as compared to their non-athlete peers.203
Along with that status comes great influence over the attitudes and

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196. See Deschenaux, supra note 195 (describing success of plaintiff in Livers in defeat—albeit limited—of presumption against employment status).
197. For a further discussion of the economic realities doctrine and its appli-
cability to determining employment status for vicarious liability, see infra notes 214–222 and accompanying text.
198. For a further discussion of using the Title VII model to determine insti-
tutional liability in certain Title IX cases, see infra notes 199–254 and accompany-
ing text.
199. See Livers, No. CV 17-4271, 2018 WL 3609839, at *4–*5 (allowing plaintiff
to proceed with argument that collegiate athletes and work study participants are
distinct from other student groups based on non-academic nature of these activi-
ties and extent of discretionary control exerted by university administrators).
200. See Berger v. NCAA, 843 F.3d 285, 290 (7th Cir. 2016) (recognizing ex-
pansive nature of Supreme Court employee status doctrine but limiting its applica-
tion because of NCAA tradition of amateurism).
201. See id. at 294 (Hamilton, J., concurring) (reasoning that student-athletes
in revenue-generating Division I sports such as football and basketball could plau-
sibly show employment-status under economic realities test).
202. See generally Hunter, supra note 6 (discussing athletes’ status and influ-
ence on campus).
203. See id. at 279–80 (linking “rape culture on campus” to student-athletes);
see also Davis & Parker, supra note 99, at 66 (“Because star athletes are held in such
high esteem, they frequently find themselves worshiped by their adoring publics.’
A consequence of this adoration is that athletes are afforded a place in society
which, at least historically, has given them and the public the perception that they
are impervious to the standards that dictate the behavior of others.”) (quoting
behaviors of young men, which is exacerbated by universities’ fervent promotion of athletes in the interest of financial gain. As a result, a decent argument could be made for why student-athletes, at least those in the most lucrative sports, should be held to something higher than a typical Title IX student standard, perhaps approaching something closer to a Title VII supervisor harassment model.

While athletes are not in fact the supervisors of their fellow students, the policy that supports the distinct standard of supervisor sexual harassment is similarly applicable to high-status student-athletes. As some of the most visible representatives of an institution, student-athletes are more socially powerful than their peers. This power dynamic, often backed by an institutional tendency to support and defend athletes above other students, creates the same kind of asymmetry that explains a special standard for supervisor sexual harassment in the workplace.

Athletes, like supervisors, have more direct supervision from the institution and more stake in upholding its reputation than do other members of the student body. Athletes, of course, are not capable of inducing “tangible employment actions” against their


204. See Davis & Parker, *supra* note 99, at 67 (noting influence athletes have over peers and general population, and that “this influence could be expected given the enormous efforts devoted to packaging, exposing, and promoting athletes for commercial purposes”).

205. See id. at 107–110 (discussing unique contractual relationship between student-athletes and universities that gives rise to potential employee status); see also id. at 94 (noting Supreme Court precedent that supervisor liability applies where harasser is agent of school).

206. See Black & Freeman, *supra* note 55, at 8 (discussing considerations determining employer liability). The policy behind holding supervisors to a higher standard of accountability is based in their elevated status and institutional empowerment that create an asymmetrical power dynamic between supervisors and their subordinates. See id. (referring to “misuse of supervisory authority”) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 804 (1998)).

207. See Hunter, *supra* note 6, at 279 (indicating student-athletes’ “much higher status . . . within the school’s hierarchy”).

208. See Hunter, *supra* note 6, at 279 (noting institution’s tendency to defend athletes at expense of fair and ethical administration of law and policy in sexual assault proceedings).

209. See *The Student-Athlete, Academic Integrity, and Intercollegiate Athletics, Am. Council on Educ.*, at 2 (2016), available at https://www.acenet.edu/Documents/ACE-Academic-Integrity-Athletics.pdf [https://perma.cc/BT8W-7SEX] [hereinafter “ACE Report”] (“Intercollegiate athletics is a high-reward area for institutions and students alike, but with those rewards also come potential risks. Without proper supervision, athletics can be overlooked in institutional risk management efforts and should be monitored on an ongoing basis.”).
peers, but their influence and status can encourage retaliatory behavior that would be actionable in the workplace under Title VII.210 Members of teams, the athletic departments, and wider campus communities often contribute to social ostracizing of the accuser in defense of particularly well-known and liked athletes.211 As a result, the victim in a student-athlete sexual assault suit has a heavier burden, both inside and outside of the formal proceeding, than a typical coworker sexual assault complainant.212 Under a Title VII model of liability, institutions, rather than victims, would have the burden to show whether enough was done to prevent and remedy sexual assault.213

1. Determining Whether a Title VII Model is Appropriate: Case-by-Case Analysis

Courts determine employment status on a case-by-case basis when deciding whether to award minimum wage, overtime, and worker’s compensation under the FLSA.214 Courts also assess the supervisor and coworker standard on a case-by-case basis in Title VII suits.215 However, courts should take all relevant facts of a student-athlete’s relationship to his peers, along with the amount of

210. See Hunter, supra note 6, at 279–80 (suggesting victims hold university administrators liable for injuries). Title VII plaintiffs can prevail on claims of retaliation where the harasser or employer punishes the victim or deprives her of opportunities after her complaint. See Facts About Retaliation, U.S. Equal Opportunity Empl. Comm’n, (last visited March 26, 2020) https://www.eeoc.gov/laws/types/retaliation.cfm [https://perma.cc/E49R-DBZF] (explaining how employers can be liable for retaliating against employee for complaining about harassment). When a victim of campus sexual assault reports a high-profile athlete, the response from the campus community and administration can be similarly retaliatory. See Hunter, supra note 6, at 279 (stating it is “not uncommon” for school officials to interfere with sexual harassment investigations in which student-athletes are accused).

211. See Jordan Mondell, College Athletes Shouldn’t Get a Free Pass for Sexual Assault, Pitt News (Jan. 8, 2018), https://pittnews.com/article/125983/sports/college-athletes-shouldnt-get-a-free-pass-for-sexual-assault/ [https://perma.cc/X95W-9STX] (providing example of alleged rape victim whose complaint was dismissed but resulted in death threats from peers and football fans, leading her to drop out).

212. See MacKinnon, supra note 32, at 2096 (“The social norms of credibility, the social burdens of proof, are stacked against the survivor; so is the legal liability standard.”).


214. For a further discussion of employment status determinations under the FLSA, see infra note 218 and accompanying text.

215. For a further discussion of Title VII supervisor and coworker status, see supra notes 70–83 and accompanying text.
control the school exercises over him, into account when determining whether to analyze a Title IX case using the Title VII model. If the student does not have an employment-like relationship with the school, the school should be able to retain the harder-to-satisfy standard of deliberate indifference because it is less likely the school could or should have known of any danger the student posed.

To show whether a person is an employee under federal statutes, including the FLSA, courts must assess the totality of the circumstances, considering the economic reality of the working relationship. There is no standard economic reality test, but most are multi-factor analyses that emphasize the importance of the control the would-be employer exerts over the alleged employee. The relationship between universities and student-athletes is inherently a relationship based in control. The Department of Labor (“DOL”) has indicated support for the economic realities test to determine employment status, offering agency guidance in the form of a recommended six-factor version of the test.

The DOL agrees with the NCAA that student-athletes are not employees under a strict application of relevant employment statutes because participation in college athletics is not motivated by an immediate promise of compensation. Still, payment is only one

216. For a further discussion of the factors to be considered in a case-by-case analysis to determine whether a student has employment-like status, see infra notes 218–224 and accompanying text.

217. For a further discussion of the case-by-case control analysis and its effect on liability, see infra notes 218–224 and accompanying text.

218. See Colwell, supra note 17, at 906 (expressing variety of methods used by Federal Courts to determine employment status).

219. See generally Berger v. Nat’l Collegiate Athletic Ass’n, 843 F.3d 285 (discussing examination of economic reality of working relationships); see also Levitin v. Northwest Cnty. Hosp., 923 F.3d 499, 501 (7th Cir. 2019) (noting other factors of test beyond scheduling and supervision include nature of skill required for job and responsibility for costs of supplies, fees, etc.).

220. See Barbara Osbourne & Claire Duffy, Title IX, Sexual Harassment, and Policies at NCAA Division IA Athletic Departments, 15 J. LEGAL ASPECTS OF SPORT 59, 75 (2005) (“Coaches have a significant amount of control over a student-athlete’s life. Their schedules, participatory experience, amount of playing time, and whether or not they will receive or retain a scholarship is largely up to the discretion of a coach.”).

221. See generally U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (July 15, 2015) No. 2015-I, 2015 WI. 4449086, at *1 (describing economic realities test that has developed as alternative to general common law control test).

222. See Colwell, supra note 17, at 910 (noting DOL’s and NCAA’s view that collegiate athletes are not employees under federal statutes); Field Operations Handbook, Chapter 10 – FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits, at 10b05(e), Dep’t of Labor (updated March 31, 2016), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf
of many factors to be considered under common-law agency analysis, the most significant of which is the extent of control a purported employer is authorized to exert over the purported employee.\footnote{223} Without going so far as to designate athletes generally as employees, a case-by-case analysis would reveal the extent to which a university’s athletic department determines and monitors particular athletes’ activities.\footnote{224}

2. Policy Rationale for Stricter Liability

Many institutions are suspected of unfairly shielding their star athletes from Title IX investigations.\footnote{225} When a high-profile athlete is accused, the university is put in the spotlight.\footnote{226} To avoid this kind of bad publicity, some institutions’ administrative response to sexual assault allegations naming student-athlete perpetrators has been questionable.\footnote{227} Under a Title VII model, interference by athletic departments in Title IX investigations could foreseeably give way to proactive anti-discrimination training and risk-averse recruiting practices, providing a more ethical means of achieving universities’ desired end.\footnote{228}

As of April 2020, the OCR had 302 open investigations of sexual violence discrimination in post-secondary educational institutions.\footnote{229} An ESPN “Outside the Lines” survey published in [https://perma.cc/8EWT-5Z7Y] (“interscholastic athletics . . . do not result in an employer-employee relationship between the student and the school or institution.”); see also Donald Remy, NCAA Responds to Union Proposal, NCAA (last visited March 29, 2020) [https://perma.cc/K823-PQ4Q] (noting Remy as NCAA Chief Legal Officer and stating “[s]tudent-athletes are not employees within any definition of the National Labor Relations Act or [FLSA]).\footnote{223. \footnote{See id. (addressing variety of factors used by courts in employment-status analyses).}}

\footnote{224. \footnote{See id. (acknowledging employment status for minimum wage and other purposes is determined through fact-sensitive analysis of individual’s relationship with would-be employer).}}

\footnote{225. \footnote{See Hunter, supra note 6, at 278 (detailing Baylor University administrators caught attempting to protect players from legal woes).}}

\footnote{226. \footnote{See id. at 279 (citing Jessica Luther, Unsportsmanlike Conduct: College Football & the Politics of Rape, 123–26 (Dave Zirin ed., 2016) (“It is understandable why schools may want to salvage the reputation of their athletes in order to keep their talents present on the athletic roster—athletic programs are a major source of pride and revenue for schools.”).}}

\footnote{227. \footnote{See id. (describing universities’ head-in-the-sand response to sexual assault allegations, particularly against profitable athletes).}}

\footnote{228. \footnote{See id. at 280, 295, 305 (noting university athletic departments’ influence over and knowledge of athletes’ behavior).}}

\footnote{229. \footnote{See Office for Civil Rights, Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools, DEP’T OF EDUC. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/}}
November 2018 reflected the overall trend that student-athletes are around three times more likely to be named as respondents in Title IX sexual assault investigations than are other students.230 The survey also sheds some light on schools’ perceptions and assumptions about student-athlete sexual assault.231

Some universities refused to provide any data, particularly related to records naming athletes as respondents, claiming the study would be an invasion of student privacy.232 Some refused to respond, deciding that the study was not a worthy use of limited Title IX office resources.233 Other universities were more forthcoming.234 An administrator at Kansas State University said in response to the findings, “[i]f we don’t know this, we should know this.”235 University representatives’ reactions to the data—and even their refusal to participate in the study—raise questions about the amount of knowledge universities already have or could have about the prevalence of student-athlete sexual violence.236 While sixty-nine
percent of responding universities state they expect there would be no difference between athletes and non-athletes with respect to sexual assault, and eighteen percent expect that student-athletes would actually be less likely to be named in sexual assault complaints, the data shows that these predictions, if honest, are based in mistaken assumptions that could be remedied by looking into universities’ existing data.237

What universities’ Title IX offices do make sure to do, more often than not, is notify the athletic department when athletes are accused.238 This practice has long been criticized as providing an unfair advantage to athlete-respondents, who receive the full support of their team and university, often including defense counsel of a caliber unattainable for the alleged victim.239 Another procedure many universities engage in is providing Title IX training to athletes, although the majority of respondents to the “Outside the Lines” survey admitted they did not feel their universities’ training was very effective.240

College athletic recruiters put immense time and effort into selecting high-school students to invite to play at the collegiate level.241 Frequently, these recruiters cite character above talent as the top criteria they look for in potential recruits.242 Presumably, aside the concern of Title IX resources, it seems unusual that some universities are unwilling to look into existing data for patterns that could help mitigate campus sexual assault. See id.

237. See id. (noting that Title IX offices’ expectations and assumptions are out of line with reality of sexual assault data).

238. See Paula Lavigne, Conference Breakdown: Sexual Misconduct Complaints at Each Power 5 School, ESPN (Oct. 25, 2018), https://www.espn.com/espn/oil/story/_/id/25080028/otl-analysis-tracking-title-ix-complaints-athletes-power-5-schools [https://perma.cc/PHQ9-XG7Z] (detailing sexual misconduct complaints and procedures for contending with them in Power 5 schools). Thirty-four percent of schools responding said they give no notice to the athletic department, while nineteen percent said they have a formal policy of providing notice and an additional thirty-eight percent said they have an informal practice of notifying the athletic department when an athlete is named as a respondent. See id. (adding remaining nine percent said question was not applicable).

239. See Hunter, supra note 6, at 287 (showing university athletic department’s knowledge of claim can lead to disruption in Title IX investigation process).

240. See Lavigne, supra note 238 (stating that forty-one percent of survey responses said they felt their school’s Title IX training was extremely or very effective, while fifty-nine percent said their school’s training was somewhat or not effective).


242. See generally John O’Sullivan, Dear Potential Recruit, Your Talent Only Gets You So Far, CHANGING THE GAME PROJECT (Aug. 10, 2016), https://chang-
then, the most prominent players on a team will have been well vetted by the time they step foot on a college playing field.243

If recruiters are taking students’ propensity to harm their fellow students into account, it does not show.244 The leaders of teams are more likely than other team members to commit sexual assault, according to a study published in March 2019.245 According to the study, athletes are also “more likely than men in the general university population to commit alcohol-involved sexual assault, particularly multiple times.”246

One of the oft-cited reasons universities invest so much time, effort, and capital into their athletics programs is that it gets the word out about the institution.247 However, negative press can have


244. See id. (admitting that college coaches do not look as hard at top-rated recruits to decide to pursue them). Sources that emphasize the importance of students’ “character” offer few details as to what an evaluation of that attribute actually entails, or which particular qualities would disqualify an otherwise impressive recruit. See, e.g., Bastie, supra note 243 (listing “character” as one of top traits coaches look for in recruits, but not explaining what behaviors constitute good or bad character).

245. See John D. Foubert et al., Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study, 26 VIOLENCE AGAINST WOMEN 296, 306 (2019). (“Athletes are similar to fraternity men in that they are more likely than men in the general university population to commit alcohol-involved sexual assault, particularly multiple times. By contrast to fraternities, the most dangerous men on athletic teams tend to be the leaders. Thus, a high-profile athlete may be at particular risk of committing sexual violence. Anecdotal evidence for this possibility is ample in the news media. The present finding adds quantitative support to that assertion.”).

246. Id. (finding a correlation between participation in college sports and repeat sexual assault perpetration). The study analyzed the likelihood of repeat campus sexual assault perpetration, considering the effects fraternity membership, athletic participation had on the likelihood of student sexual assault. See id. (finding athletic and fraternity participation correlate to risk of sexual violence). Findings suggest that the majority of rapes by college men where the victim was under the influence of alcohol were committed by serial perpetrators. See id. (analyzing risk of sexual violence recidivism among college men in various circumstances).

a more significant impact than positive press on a university’s reputation. While winning a national championship is likely to boost applications for the next academic year, a nationally publicized sexual assault scandal can be counted on to bring a devastating hit to public goodwill. This criticism can be quantified in lost donations and decreased applications for enrollment. It follows that, if only to reduce the risk of a public relations nightmare and to save themselves some money, universities’ own best interests lie in preventing and responding appropriately to student-athlete sexual assault.

Many programs and organizations already recognize the importance of better incorporation and enforcement of university behavioral policies in their athletic departments. These stakeholders urge higher standards of accountability in athletic departments as a means of managing and preventing the risks associated with student-athlete participation. The current “deliberate indifference” standard that all but explicitly encourages cover-ups is

248. For a further discussion of the impact of negative publicity on a university’s reputation, see infra notes 249, 250 and accompanying text.

249. See Gordon, supra note 181 (recognizing decreases in donations and applications as indirect consequences of Title IX violation).


251. See De Bode, supra note 250 (underlining connection between university funding and negative press associated with campus sexual assault).

252. See ACE Report, supra note 209, at 4 (“Presidents, provosts, and other college and university administrators need to communicate values and expectations to athletic directors, athletic staff, and coaches clearly and frequently.”). The ACE Report is the culmination of a Roundtable held on April 22, 2016, comprising professors, athletic directors, and other administrators from a wide variety of universities across the nation, as well as other stakeholders. See id. at 11–12 (describing meeting and listing participants).

253. See id. at 4 (stating best practices for universities include articulating “bright lines” between acceptable and unacceptable behaviors because “[athletic departments having] clear expectations and regular reviews of whether programs are meeting institutional expectations is the best defense against the pressure outside interests can bring to bear on individuals in a win-at-all-costs approach to college athletics”).
thus directly averse to the capitalist goals of major Division I athletic programs.254

IV. END GAME: CONCLUSION AND NEXT STEPS

Importing principles from Title VII analysis into Title IX sexual harassment cases would create a more equitable adjudication process for victims of student-athlete sexual assault by encouraging stricter adherence to anti-harassment policies, no matter the social status or revenue potential of the individual accused.255 Rather than allowing schools to escape liability on the promise that they will become compliant with Title IX in the future, the law should provide an affirmative defense for institutions whose anti-discrimination policies and practices are already sufficient.256 This would make Title IX jurisprudence consistent with Title VII and would provide a real incentive, backed with real consequences, for universities to implement effective preventive policies.257 It would also mitigate the concern of switching to a model with a higher burden on schools, easing the transition and making the change practically insignificant to universities whose reporting and investigation practices already effectively deter and resolve sexual assault.258

One may argue students should not be held to an employment liability standard when, at publicly funded educational institutions, even teachers and administrators are not necessarily held to such a standard.259 The issues are not mutually exclusive.260 A workable

254. For a further discussion on the “deliberate indifference” standard, see supra notes 33–39 and accompanying text.
255. See Graham, supra note 121, at 589 (contrasting fairness of Title IX and Title VII enforcement models).
256. See id. at 596 (noting J. Ginsburg’s recommendation in Gebser dissent in support of creating affirmative defense similar to that created by Supreme Court for Title VII defendants).
257. See id. at 596–97 (noting framework more similar to Title VII would “encourage schools to institute policies and thoroughly investigate claims of sexual harassment”).
258. See id. (discussing effects of lower standard of proof for Title IX sexual harassment).
259. See Mayer, supra note 111 (explaining standards of Title VII and Title IX sexual assault liability). While administrators are subject to Title VII supervisor liability if they assault their employees, the odd reality of Title IX jurisprudence makes is such that students, if assaulted by the same agents of the university, are not entitled to the same protections. See id. at 933–35 (arguing teacher-student harassment should be assessed according to agency principles, incorporating Title VII jurisprudence into analysis of Title IX sexual harassment suits against employees).
260. See generally Buchwald, supra note 67 (proposing concurrent but independent progress in jurisprudence for sexual harassment in education and employment).
reform would allow all school “employees,” including student-athletes, to answer to a standard of Title VII liability.\(^{261}\) In fact, commentators have previously suggested teachers ought to be held to the even stricter standard of supervisory sexual harassment due to the nature of their relationships and power dynamics with students.\(^{262}\)

If universities are going to continue to prize their elite athletes above other students, they need to follow up that power with the correlative responsibility.\(^{263}\) Society, and the schools themselves, have already put male college basketball and football players on a high pedestal.\(^{264}\) It is unnecessary and unfair to protect such athletes’ perch with a barbed wire fence of institutional ignorance and bare-bones compliance.\(^{265}\) Holding institutions more accountable for their failures in protecting the vast majority of their students may encourage them to adopt—and execute—more realistic, effective policies regarding student-athlete sexual assault.\(^{266}\)

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\(^{261}\) See generally Mayer, supra note 111 (suggesting Title VII liability for all sexual harassment by employees, including assault of students by teachers).

\(^{262}\) See id. (criticizing distinction in liability between principal-teacher and teacher-student harassment, when both involve supervisory power dynamics).

\(^{263}\) See Meyer, supra note 85 (explaining “star athletes . . . enjoy elevated status within the masculine status hierarchy” and “athletes bring more resources (financial and otherwise) into the judicial process and are better able than nonathletes to escape punishment for their crimes against women”).

\(^{264}\) See id. at 48 (detailing unusual treatment given to some athletes, including “special admission, special eating tables, special grades, special tutors,” and more). Student-athletes’ special treatment can lead to a sense of entitlement and a feeling—not always incorrect—that they are not subject to the same rules and norms as other students. See id. (discussing effect of special treatment on athletes’ attitudes and behavior).

\(^{265}\) See id. at 387–90 (listing several instances of institutional “deliberate indifference” policies that led to unjust results for victims of assault by members of big-name athletic programs). There is ample evidence that schools and athletic programs intentionally ignore behaviors by athletes, then assist in delaying or needlessly interfere with the disciplinary and judicial processes. See id. (suggesting standard of deliberate indifference, as currently understood and applied by courts, is too high to meet in most cases even where school is demonstrably at fault).

\(^{266}\) For a further discussion of how institutional liability can encourage vigilance against sexual assault, see supra notes 225–265 and accompanying text.

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