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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[1]

> *"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?"*[2]

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.[3] 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.[4] 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. Vine, *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).

3. *See* Belinda-Rose Young, et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 Violence Against Women 795, 804 (2017) (describing disproportionate representation of student-athletes among college students named in sexual assault complaints).

4. *See* Kristy L. McCray et al., *Creating Change in Intercollegiate Athletics: The Sexual Assault Prevention Paradigm for Athletic Departments*, 1 J. Higher Ed. Athletics & Innovation 25, 28 (2018) (summarizing numerous highly publicized incidences of student-athlete violence against women over past decade).

assault to occur.[5] 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.[6]

Coaches and commentators alike have discussed the apparent inevitability of compensation for high-profile players.[7] Recently, the NCAA has been making small concessions toward allowing university athletes to profit from their labor.[8] 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.[9] This followed on the heels of another decision, which held that the NCAA could not enforce rules prohibiting member schools

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).

7. *See, e.g.,* Travis Waldron, *The NCAA is Losing its Fight to Keep Exploiting College Athletes*, HUFFPOST (updated Apr. 9, 2019) https://www.huffpost.com/entry/ncaa-pay-college-athletes-final-four_n_5ca61cb9e4b082d775e1d201 [https://perma.cc/6G7Q-WEKT] (reviewing proposals by lawmakers advocating increased compensation for college players); *see also* Dan Murphy, *UConn's Edsall: Paying College Players 'Inevitable'*, ESPN (Aug 5. 2019) https://www.espn.com/college-football/story/_/id/27328761/uconn-edsall-paying-college-players-inevitable [https://perma.cc/97BA-WVNR] (expressing college football coach's opinion that NCAA football is no longer an amateur sport). These statements are a few among many in a growing discourse surrounding the professionalization, and exploitation, inherent in the current college sports model. *See* Maria Koran, *Game Changer: Inside the Fight to End Exploitation of Athletes at US Colleges*, GUARDIAN (Oct. 5, 2019) https://www.theguardian.com/sport/2019/oct/04/ncaa-california-law-pay-student-athletes-colleges [https://perma.cc/SD5E-J3WM] (expressing widespread nature of efforts to allow students to receive payment in relation to athletic performance).

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 1058, 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.[10] 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").[11] 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.[12] Still, a push for legislation enabling student-athlete endorsements gained national support.[13] In late October 2019, the NCAA Board of Governors voted unanimously to allow student-athletes to profit from NIL endorsements.[14]

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letes make should be rewarded and NCAA's cap on education-related rewards constituted anticompetitive trade restraint).

10. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 739 Fed. Appx. 890, 892 (9th Cir. 2018) (holding NCAA can no longer prevent schools from capping players' educational benefits); *see also* Washington Bytes, *Fair Pay to Play and Video-Game Likeness: Revisiting the NCAA's Restrictions on Athlete Compensation*, FORBES (May 1, 2019, 9;40 PM), https://www.forbes.com/sites/washingtonbytes/2019/05/01/fair-pay-to-play-and-video-game-likeness-revisiting-the-ncaas-restrictions-on-athlete-compensation/#765d1e8979fa [https://perma.cc/42BM-RT37] (analyzing current status and potential repercussions of NCAA's moves toward allowing players to profit from their names, images, and likenesses).

11. *See* Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019, 2:40 PM) http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness [https://perma.cc/7GVY-6QUW] (reporting NCAA's intent to look into NIL compensation issues raised in proposed legislation); *see also generally* Jill Martin, *NCAA to Consider Allowing Athletes to Profit from Names, Image and Likeness*, CNN (updated May 15, 2019, 9:15 AM) https://www.cnn.com/2019/05/15/sport/ncaa-working-group-to-examine-name-image-and-likeness-spt-intl/index.html [https://perma.cc/F7XR-VRXM] (describing scope and structure of NCAA working group examining potential regulatory reform in reaction to court and legislative action).

12. *See* Jeremy Bauer-Wolf, *One Step Closer to Pay for California College Athletes*, INSIDE HIGHER ED (Sept. 11, 2019) https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness [https://perma.cc/3PH2-6WQV] (announcing approval of bill that would allow college athletes to profit from endorsements using name, image, and likeness, and stating NCAA "fiercely opposed" California bill).

13. *See* Greta Anderson, *The Push for Player Pay Goes National*, INSIDE HIGHER ED (Oct. 4, 2019) https://www.insidehighered.com/news/2019/10/04/us-congressman-propose-college-athlete-payment-bill [https://perma.cc/X59R-ZEAV] (reporting plans for federal NIL compensation bill). Because of the interstate nature of college athletics, a national law would be a more serious threat to the NCAA's amateurism rules than state-by-state legislation. *See id.* (suggesting single federal law would circumvent interstate commerce clause constitutionality argument raised by piecemeal state legislation).

14. *See* Steve Almsay et al., *NCAA Says Athletes May Profit from Name, Image and Likeness,* CNN (October 29, 2019, 5:19 PM), https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation/index.html [https://perma.cc/ED68-WBVG] (reporting NCAA's reversal of position after California passed Fair Pay to Play Act). The NCAA's board decision will go into effect in 2021, by which point each of the

Alongside the ongoing fight for flexibility in NCAA regulation, a battle over compensation is occurring to a lesser extent between athletes and schools themselves.[15] 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.[16] The reasoning behind this recent decision, however, leaves open the question of whether student athletes can be considered employees of their respective universities.[17] 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.[18] 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.[19]

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.[20] Ti-

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 LA. 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).

18. *See* Joseph Nardone, *New York Senator Proposes Bill to Have College Athletes Paid Directly by Schools*, FORBES (Sept. 18, 2019, 4:28 PM), https://www.forbes.com/sites/josephnardone/2019/09/18/new-york-senator-proposes-bill-to-have-college-athletes-paid-directly-by-schools/#632bd3df4d17 [https://perma.cc/8FEZ-VS52] (describing bill proposed by State Senator Kevin Parker, which would give athletes NIL rights and require athletic departments to share percentage of annual revenues with student-athletes).

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.[21] 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.[22] 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.[23]

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.[24] As such, athletes and all students of educational institutions are governed by Title IX of the Education Amendments of 1972 ("Title IX").[25] 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.[26] This

sponsibility should apply where the perpetrator of sexual assault is a high-profile athlete). For a further discussion of how a vicarious liability standard akin to Title VII would lead to safer campuses more in line with goals of gender equality originally set forth in Title IX that have not yet been realized, see *infra* notes 252–253 and accompanying text.

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").

25. *See* 20 U.S.C. § 1681 *et seq.* (2020) (prohibiting educational discrimination on basis of sex).

26. *See* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html [https://perma.cc/84E3-GFLH] (last updated Jan. 10, 2020) ("Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX." (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998))).

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).

31. *See Title IX*, KNOW YOUR IX, https://www.knowyourix.org/college-resources/title-ix/ [https://perma.cc/YU9U-94T4] (last visited Apr. 28, 2020) (explaining universities risk their federal funding by failing to remedy educational environments in violation of Title IX).

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]

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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).

35. 524 U.S. 274 (1998).

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).

38. *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RTS. J. 755, 777 (1999) (criticizing *Gebser* rule as most stringent approach to vicarious liability under major civil rights statutes).

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.[40] Two cases that year, *Williams v. Board of Regents*[41] and *Simpson v. University of Colorado*,[42] found preexisting notice of conduct or proclivities to suffice under the "deliberate indifference" framework.[43] 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.[44] 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.[45] 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."[46] 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

research found that, in the first sixteen years following the *Gebser* decision, 176 cases analyzing the "deliberate indifference" standard of institutional liability for sexual assault were dismissed on summary judgment or Rule 12 motion, while in the same period, thirty-eight cases survived Rule 12 motions and 68 survived summary judgment motions (including some overlap from the aforementioned 38, which were again challenged on summary judgment). *See id.* MacKinnon has significant litigation experience, including decades of involvement in sexual harassment cases, which has supplemented her research to better inform her understanding of the significance of the deliberate indifference test in deciding cases on preliminary motions. *See id.*

40. *See* Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. CIV. RIGHTS–CIV. LIB. L.R. 95, 100 (2010) (explaining Tenth and Eleventh Circuits' interpretation of "actual notice").

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.[47] 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.[48] 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.[49]

Similarly, before *Simpson*, schools could only be held liable if they had prior knowledge that a *specific assault* would or did occur.[50] *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.[51] These baiting practices, which were already widely considered archaic when *Simpson* was decided, are evidently still extant on some college campuses.[52]

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.").

48. *See* Kenny Jacoby, *A Football Star Was Expelled for Rape Twice. A Secret Deal Scrubbed It From His Transcript.*, USA TODAY (updated Dec. 16, 2019) https://www.usatoday.com/in-depth/news/investigations/2019/12/12/oregon-ducks-player-accused-rape-plays-different-ncaa-school/4366387002/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiossports&stream=top [https://perma.cc/SR9W-GG98] (explaining Tristen Wallace, who was expelled from University of Oregon for sexual misconduct of "apparent predatory nature," transferred and continued to play NCAA football for another school).

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* Dashiell 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]

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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).

53. *See* Kaitlin Mulhere, *Hostesses? In 2015? Rape Trial Involving Former Vanderbilt U. Football Players Revives Debate Over the Use of Attractive Women to Rope in Athletic Recruits*, INSIDE HIGHER ED. (Jan. 27, 2015) https://www.insidehighered.com/news/2015/01/27/concerns-continue-about-role-hostesses-football-recruiting [https://perma.cc/DB5U-XWGN] (discussing outdated role of "hostess" programs in college athletic recruiting).

54. *See* Hunter, *supra* note 6, at 278 ("[C]ourt documents allege that football staff members encouraged the use of sex to sell the program . . . .") (citing Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes by Football Players in 4 Years, 'Show 'em a Good Time' Culture*, DALL. MORNING NEWS (Jan. 27, 2017)); *see also* Will Hobson, *Baylor Rape Scandal Involves Recruiting 'Hostess' Program. These Things Still Exist?* WASH. POST (Feb. 2, 2017) https://www.washingtonpost.com/news/sports/wp/2017/02/02/baylor-rape-scandal-involves-recruiting-hostess-program-these-thing-still-exist/ [https://perma.cc/GC8Z-NPUA] (reporting that using women as bait in recruiting contributed to culture of sexual violence among Vanderbilt football players).

55. *See* Baylor University Board of Regents, *Findings of Fact*, BAYLOR UNIV. 1, 1, *available at* https://www.baylor.edu/thefacts/doc.php/266596.pdf [https://perma.cc/7B6Z-LFY4] (last visited Jan. 21, 2020) (listing circumstances surrounding Pepper Hamilton's engagement with Baylor University).

56. *See December 2018 Summary of Baylor's Title IX Improvements*, BAYLOR UNIV. (Dec.14, 2018), https://www.baylor.edu/thefacts/news.php?action=story&story=205332 [https://perma.cc/HKW9-5MBT] (listing explicit actions taken by university to be in better compliance with Title VII).

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.[59]

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.[60] Congress enacted Title IX intending to eradicate inequality between the sexes in educational settings.[61] This noble goal cannot be met until a realistic, effective framework is established for preventing and responding to sexual assaults on campus.[62]

B. Title VII Liability

Like Title IX, workplace liability for sexual assault also stems from a statute based in equality.[63] Title IX was modeled after Title

59. *See* Hunter, *supra* note 6, at 287–88 (citing to *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007)). Victims currently do not have a civil-suit recourse against coaches, administrators, or athletic program staff who tolerated or suppressed information about student-athlete sexual assault. *See id.* ("Decades of deeply-rooted precedent require Title IX sexual harassment suits to be raised against the university as opposed to individuals."). This often leaves victims without a remedy where the school can claim it did not have institutional knowledge of the behavior of a few bad actors in its employ. *See id.* (remarking courts and congress are unlikely to institute new, individual form of liability for where individual employees created hostile environment).

60. *See* Office of Civil Rights, *supra* note 26 (limiting knowledge by institution to knowledge by "[a] responsible employee . . . who has the authority to take action to redress the harassment").

61. *See* Office for Civil Rights, *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).

62. *See* Karen M. Tani, *An Administrative Right to be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1859 ("Stated simply, 'rape with legal impunity' creates 'second-class citizens.'" (quoting MacKinnon, *supra* note 32, at 182)).

63. *See generally* Christine J. Black & Wilson C. Freeman, *Sexual Harassment and Title VII: Selected Legal Issues*, CONG. RESEARCH SERV. (Apr. 9, 2018) *available at* https://fas.org/sgp/crs/misc/R45155.pdf [https://perma.cc/58YS-8Z6Y] (discussing basis of workplace liability for harassment).

VII of the Civil Rights Act.[64] 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."[65] 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.[66] There are two cognizable claims under Title VII for sexual harassment: *quid pro quo* and hostile environment.[67] The latter of these has largely shaped the interpretation of what qualifies as harassment under Title IX.[68] 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.[69]

Under Title VII, employers can be liable for their employees' sexual harassment whether the perpetrator is the victim's supervisor or a mere coworker.[70] When the harasser is the victim's supervisor, and the harassment culminated in a "tangible employment action," strict liability applies to the employer.[71] 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).

67. *See* Michael E. Buchwald, *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, 680–81 (2008) (recognizing that, by not expressly mentioning sexual harassment in either statute, Congress shifted responsibility of defining sexual harassment as discrimination to courts).

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.[72] 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."[73] The distinction between supervisor and coworker standards and the availability of the affirmative defense serve the preventative and deterrent purposes of Title VII.[74] 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.[75] 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.[76]

The coworker sexual assault test is more difficult to satisfy.[77] 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.[78] 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.[79] While employers are given full due process and the oppor-

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.[80] In keeping with this incentive, many workplaces provide mandatory Title VII sexual harassment training.[81] First, the training acts as a sort of insurance policy if the employer is being accused of doing nothing to prevent harassment.[82] Second, the training—when done correctly and taken in earnest—is a genuine preventive measure that educates employees and supervisors about appropriate workplace behavior.[83]

C. History of Proposed Solutions

This Comment is not the first to propose reform to the Title IX model of institutional liability.[84] In the past, legal scholars and commentators have suggested various approaches to remedy, or even replace, the current standards of accountability.[85] 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.").

80. *See* Walker, *supra* note 40, at 100–01 (describing new form of victim-friendly liability, "before-the-fact-deliberate indifference").

81. *See* Sheila Engelmeier & Sue Fischer, *Discrimination and Harassment Training*, ENGELMEIER & UMANAH 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); s*ee 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).

85. *See* Jayma M. Meyer, *It's on the NCAA: A Playbook for Eliminating Sexual Assault*, 67 SYR. L. REV. 357, 378–80 (2017) (discussing increased rate of sexual violence among athletes as compared to overall student population). Proposed

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

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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 Illegal Acts 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.[91] 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.[92] 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.[93]

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.[94] 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.[95]

Contract theories of liability have also been used to implicate universities for injuries to students resulting from sexual assault.[96] 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.[97] Alternatively, plaintiffs can also argue that their enrollment constituted a contractual relationship creating a duty to keep them from harm from other students.[98] 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. l (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.[99]

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.[100] 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.[101] 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.[102] 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.[103] 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-

99. *See* Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH & LEE L. REV. 55, 107–10 (1998) (noting circuit split in 1998—before *Davis* standardized test for peer harassment—as evidence that courts could apply Title VII standard to determine liability for student-athlete sexual harassment under Title IX). *See, e.g.*, Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949, 957 (4th Cir. 1997) (finding University properly applied Title VII "knew or should have known" standard to Title IX sexual harassment case) (vacated *en banc* 1998); *see also, e.g.*, Yusuf v. Vassar College, 35 F.3d 709, 713 (2d Cir. 1994) (requiring "intentional discrimination" standard in Title IX case where university was accused of erroneous outcome in sexual harassment disciplinary proceedings).

100. For a further discussion of the "deliberate indifference" standard first articulated by the Supreme Court in 1998, see *supra* notes 34–39 and accompanying text.

101. For a further discussion of how difficult it has been for victims to meet the "deliberate indifference" standard, see *supra* note 39 and accompanying text. For a further discussion of the lack of alternate remedy available to victims of campus sexual assault, see *infra* notes 165, 188–190, and accompanying text.

102. *See* Davis & Parker, *supra* note 99, at 109–10 (recounting courts' discussion of contractual nature of athlete-university relationship when deciding whether commercial reality amounted to employment status such that Title VII standard of liability could be implicated into Title IX sexual harassment analysis).

103. For a further discussion of the various tort theories that have been proposed to reform campus sexual assault litigation, see *supra* notes 86–95 and accompanying text.

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-

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.[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.[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."[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."[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.[115] He wrote:

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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

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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.[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.[122]

Another contemporary criticism of the inconsistency in the Court's civil rights doctrine explains the faulty reasoning behind distinguishing *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 *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.[123]

The majority in *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

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121. *See* Amy K. Graham, *Gebser v. Lago Vista Independent School District: The Supreme Court's Determination That Children Deserve Less Protection Than Adults from Sexual Harassment*, 30 LOY. U. CHI. L.J. 551, 588–89 (1999) (noting unreasonable effect caused by Court's inconsistent holdings, issued four days apart, regarding Title VII and Title IX vicarious liability).

122. *See 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. *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. *See id.* at 568 (discussing Civil Rights Remedies Equalization Act).

123. Fisk & Chemerinsky, *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. *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.[124] This, too, drew negative attention among contemporary legal commentators, who disagreed with the Court's reading of Title IX.[125] 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.[126]

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.[127] 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.[128] 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.[129]

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124. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289–90 (1998) (asserting federal funding recipients lacked actual notice of potential liability).

125. *See* Daniel P. Colling, *Statutory Modification Needed for Title IX in Light of Gebser v. Lago Vista Independent School District*, 45 WAYNE L. REV 1565 (1999); *see also* Kristen Safier, *A Request for Congressional Action: Deconstructing the Supreme Court's (In)Activism in* Gebser v. Lago Vista Independent School District, *118 S. Ct. 1989 (1998) and* Davis v. Monroe County Board of Education, *119 S. Ct. 1661 (1999)*, 68 U. CIN. L. REV. 1309, 1326 (2000) (criticizing Court in *Gebser* for narrow construction of Title IX sexual harassment test).

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.[130] The Department of Education, in its interpretations of Title IX and its investigations into compliance, has not done much to elucidate the matter.[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.[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.[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.[134] As a result, universities will be incentivized to be vigilant and take protective measures against sexual assault by student-athletes.[135]

1. *Ineffective Guidance*

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

130. *See* MacKinnon, *supra* note 32, at 2090 (noting prescience of *Gebser* dissenters' comment that Title IX would largely preclude recovery).

131. For a further discussion of the Education Department's vague administrative guidance, see *infra* notes 137155 and accompanying text.

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).

133. *See id.* (remarking on insufficiencies in OCR enforcement and guidance).

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).

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[.]").

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).

whims of appointed officials.[137] While the OCR has the potential to effect meaningful policy change, it also has the ability to withdraw those changes.[138] 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.[139] 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.[140]

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.[141] Its most recent binding statement is from 2001, just after the Supreme Court set the standard for analyzing sexual harassment liability under Title IX.[142] 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 [https://perma.cc/G5U2-MWFE] (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/rr/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.

141. *See* NASPA – Student Affairs Administrators in Higher Education, *Background Brief: Title IX & Sexual Assault Prevention and Response*, NASPA (2018) *available at* https://www.naspa.org/images/uploads/main/Title_IX_Sexual_Assault_Background_Brief_FINAL.pdf [https://perma.cc/U6Y6-VWT3] (outlining expansion and reduction of OCR's regulatory guidance regarding sexual assault).

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.[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."[144] Even before the previous administration's guidance was withdrawn, it was not uniformly implemented by schools and courts.[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."[146] In practice, courts deciding Title IX cases rarely, if ever, used a "knew or should have known" standard of institutional culpability.[147] The OCR's vague and inconsistent guidelines have resulted in relatively laissez-faire campus sexual harassment policies

143. *See Office for Civil Rights Issues Dear Colleague Letter on Title IX*, CLERY CENTER (Sep. 22, 2017) https://clerycenter.org/article/office-for-civil-rights-issues-dear-colleague-letter-on-title-ix/ (noting 2001 *Revised Guidance*, unlike Dear Colleague Letters, is binding regulation).

144. Jackson, *supra* note 137 (withdrawing Obama-era policy statements on sexual violence). The OCR has yet to replace the 2011 Dear Colleague Letter and 2014 Q&A on Title IX and Sexual Violence with a concrete policy. *See* Office for Civil Rights, *Sex Discrimination*, DEP'T OF EDUC., (last visited Jan. 17, 2020) https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html [https://perma.cc/3CER-RCXR] (listing most recent development as 2017 withdrawal of 2011 and 2014 guidance).

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-colleagueletter_b_59bddb9ae4b06b71800c3a2f?guccounter=1&guce_referrer=ahR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referer_sig=AQAAANXYuOyHIEn9cgBVu8sBkc4R6oX-mJRrm8e9C8n1hVRk1bNqD_YXE_It7cxHE4mn1kuwHglbSXkSfYDB_wCn-LFqg_fkFSmwzd8Ca6ulXJ0rjcmXt7e8E30ZwUMBkKKEQusfuIccbAG9qHCQLxEpkIpJnbooydPfRm4pVzCL1DNF [https://perma.cc/37N4-VYM7] (stating 2011 Letter was only "one step on the road to improving how educational institutions better respond to sexual violence").

146. *See* Office for Civil Rights, *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, DEP'T OF EDU., https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html [https://perma.cc/K3S9-F6M7] (last updated Jan. 10, 2020) (explaining what schools must do to comply with Title IX's prohibition on sexual harassment and sexual violence).

147. *See* Ellison, *supra* note 29 at 2144 (discussing standard used in assessing vicarious liability under Title IX).

that go unpunished until tragedy strikes.[148] When that does happen, the school is reprimanded, but not penalized, by the OCR.[149]

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.[150] These decisions are made on a case-by-case basis, and as a result, there is no binding framework for the resolutions given.[151] The few formal policy statements the OCR makes public are approved by individual officials who are employed by an understaffed executive agency.[152] Further, the language of these advisory documents often falls short of actionable advice.[153] 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.[154] As a result, the OCR has reduced its investigative

148. *See* Walker, *supra* note 40, at 99–100 (referring to universities' risk management strategy of refusing to investigate for fear of creating actual notice).

149. *See What is Title IX?*, WOMEN'S SPORTS FOUNDATION https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/ [https://perma.cc/74AW-7G75] ("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.'").

150. *See* Office for Civil Rights, *How the Office for Civil Rights Handles Complaints*, DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/complaints-how.html [https://perma.cc/5A5Q-RUVY] (last updated Jan. 10, 2020) ("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.").

151. *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).

152. *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), https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began [https://perma.cc/QJ7R-5DNG] (reporting OCR lost eleven percent of its already insufficient workforce between 2017 and 2018 under newly appointed Secretary of Education).

153. *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).

154. *See* Andrew Kreighbaum, *As Civil Rights Office Gets More Money, It Limits Investigations*, INSIDE HIGHER ED (March 30, 2018), https://www.insidehighered.com/news/2018/03/30/more-money-civil-rights-office-comes-it-narrows-its-investigative-work [https://perma.cc/S9MQ-7Q4E] (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

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tion is "no longer appropriate," without defining or explaining either of these terms).

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.

157. *See Administrative Enforcement and Litigation*, U.S. EQUAL OPPORTUNITY EMPL. COMM'N, https://www.eeoc.gov/eeoc/enforcement_litigation.cfm [https://perma.cc/7AN9-AEW7] (last visited Apr. 26, 2020) ("Commission Decisions are the Commission's determination on a specific charge of discrimination involving a private employer, or a state or local government employer, where the Commission votes to express official agency policy to be applied in similar cases by EEOC. They are distinct from appellate decisions by the Commission on federal employees' complaints of discrimination."). Commission Decisions, unlike Letters of Determination that EEOC field offices are authorized to make, must be approved by a majority of the Commissioners because they represent official EEOC policy. *See Commission Decisions and Commission Opinion Letters*, U.S. EQUAL OPPORTUNITY EMPL. COMM'N https://www.eeoc.gov/laws/decisions/index.cfm [https://perma.cc/UFK9-XQKY] (last visited Apr. 29, 2020) (noting Commission Decision process).

158. *See Administrative Enforcement and Litigation*, U.S. EQUAL OPPORTUNITY EMPL. COMM'N, https://www.eeoc.gov/eeoc/enforcement_litigation.cfm [https://perma.cc/AD7F-HHEL] (last visited Apr. 29, 2020) (describing roles of EEOC in employment litigation).

159. *See, e.g.*, Baldwin v. Dep't of Transportation, 2015 WL 4397641 at *5 (E.E.O.C. July 15, 2015) (holding that Commission recognizes sexual orientation discrimination as subset of sex discrimination under Title VII).

160. *See* Ben Penn et al., *Justice Department Urges Civil Rights Agency to Flip LGBT Stance*, BLOOMBERG (Aug. 13, 2019, 5:02 PM), https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance [https://perma.cc/2VP3-UEE7] (reporting that two of three commissioners cur-

modeled after Title VII in some cases, EEOC decisions and advisory guidance could serve as persuasive support for victims of sexual violence 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 allowed, 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 accompanying text.

162. *See* Meyer, *supra* note 85, at 387–88 (assessing universities' roles in maintaining "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 character witnesses and providing legal counsel of a quality not afforded to the victim. *See id.* (describing how disparate circumstances between student-athlete perpetrators and traditional student victims can affect access to justice).

166. *See* Aislinn Toohey, *No Means No: Possible Reforms to Remedy the Way Universities 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

167. *See* Kendall Baker, *The NCAA's 'Predator Pipeline'*, AXIOS (Jan. 23, 2020) https://www.axios.com/ncaa-athletes-sexual-assault-rules-e0d53060-384c-4d76-8fff-77b05b3702d0.html [https://perma.cc/CAF4-PQ6Z?type=image] (describing framework that allows predator-athletes to continue to play NCAA sports).

168. *See* Nancy Armour, *NCAA Continues to Drop the Ball by Accepting Athletes Punished for Sexual Assault*, USA TODAY (Apr. 4, 2019, 8:06 PM), https://www.usatoday.com/story/sports/columnist/nancy-armour/2019/04/04/ncaa-failures-accepting-athletes-punished-for-sexual-assault/3369687002/ [https://perma.cc/488S-DRTZ] (expressing disappointment in NCAA's persistent refusal to implement prohibition on student-athletes with violent records).

169. 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/9Y5L-XGD7] (explaining power NCAA has to decrease incidents of sexual violence committed by student-athletes).

170. *See* Dan Murphy, *NCAA Board of Governors Seeking to Change Policies on Athletes with a History of Sexual Violence*, ESPN (Jan. 22, 2020) https://www.espn.com/college-sports/story/_/id/28541927/ncaa-board-governors-seeking-change-policies-athletes-history-sexual-violence [https://perma.cc/YFS9-QVF9] (reporting NCAA's "commit[ment] to addressing this very important issue").

students with records of sexual violence.[171] 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.[172] If Indiana has the foresight to ban students with violent records, surely other major athletics institutions can take similar preventive measures.[173] It is not as if NCAA Division I schools each exist within a vacuum, unable to take note of others' efforts to reform.[174]

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.[175] 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 in 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.[176] 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.[177] 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.[178]

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.[179] 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

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.[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.[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.[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.[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.[184]

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180. *See id.* (suggesting notice-based vicarious liability would incentivize schools to investigate where they have reason to suspect problems).

181. *See* Claire Gordon, *Study: College Athletes Are More Likely to Gang Rape*, AL-JAZEERA 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-3Q3U] (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. *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.").

182. *See generally* Amy R. LaMendola, *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).

183. *See* Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES (Aug. 29, 2018), https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html [https://perma.cc/5NE7-ZAQ3?type=image] (noting disapproval by victims' rights advocates, who argue new rule will make it easier for abusers to get away with sexual assault).

184. *See* Ann Scales, *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.").

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.[185] Title IX jurisprudence refused to view teachers, and therefore did not even consider viewing students, as agents of the schools they represent.[186] 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.[187]

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.[188] Even in cases where sexual assault victims have successfully brought cases against high-profile athletes, the sentences have been laughably light.[189] This leaves civil suit as a preferable alternative—or it would, if the affected students had any realistic re-

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).

189. *See* Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (June 8, 2016), https://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html [https://perma.cc/A5CS-2DZT?type=image] (reporting Turner's mere six-month jail sentence for sexually assaulting an unconscious woman). Turner defended his actions as resulting from "a culture of drinking, peer pressure and sexual promiscuity" at Stanford University. *Id.* (internal quotation marks omitted) (indicating excuses used by high profile athletes accused of sexual assault).

course against the institution that ignored or even encouraged their attackers' behavior in the first place.[190]

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.[191] Courts have never conclusively settled the issue of student-athletes' employment status.[192] In *Dawson v. NCAA*,[193] the Ninth Circuit was careful neither to ask nor answer whether college athletes are technically employees of their universities.[194]

Similarly, a former Villanova University football player prevailed in a preliminary challenge to his minimum wage suit against the school and the NCAA.[195] 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

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).

192. *See* Livers v. Nat'l Collegiate Athletic Ass'n, No. CV 17-4271, 2018 WL 3609839, at *5 (E.D. Pa. July 26, 2018) (observing "absence of any controlling law conclusively precluding the possibility that a student athlete can be covered as an FLSA employee").

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

194. *See generally* Thomas Baker, *Narrow Decision Favoring NCAA and PAC-12 Fails to Resolve Whether College Athletes are Employees*, FORBES (Aug. 15, 2019), https://www.forbes.com/sites/thomasbaker/2019/08/15/narrow-ninth-circuit-decision-favoring-the-ncaa-and-pac-12-fails-to-resolve-whether-college-athletes-are-employees/#6645ea46312a [https://perma.cc/EHQ8-RQZN] (discussing college athletes' possible employment status as to their universities).

195. *See Livers*, No. CV 17-4271, 2018 WL 3609839, at *5 (holding student-athlete not necessarily precluded from employment status with respect to University and NCAA); *see also* Joanne Deschenaux, J.D., *Former College Athlete's Minimum-Wage Suit Goes Forward*, SHRM (Aug. 22, 2018), https://www.shrm.org/resources andtools/legal-and-compliance/employment-law/pages/court-report-football-player-flsa.aspx [https://perma.cc/9UE3-MJXY] (noting two other federal courts had dismissed similar minimum wage suits by student-athletes).

wage.[196] The standard to be applied in the Eastern District of Pennsylvania 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 between 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 student-athletes, they do entertain claims and go through the full common 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' responsibility 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

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 applicability 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 institutional liability in certain Title IX cases, see *infra* notes 199–254 and accompanying 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 activities and extent of discretionary control exerted by university administrators).

200. *See* Berger v. NCAA, 843 F.3d 285, 290 (7th Cir. 2016) (recognizing expansive nature of Supreme Court employee status doctrine but limiting its application 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 plausibly show employment-status under economic realities test).

202. *See generally* Hunter, *supra* note 6 (discussing athletes' status and influence 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.[204] 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.[205]

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.[206] As some of the most visible representatives of an institution, student-athletes are more socially powerful than their peers.[207] 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.[208]

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.[209] Athletes, of course, are not capable of inducing "tangible employment actions" against their

Merrill Melnick, *Male Athletes and Sexual Assault*, J. PHYSICAL EDUC., RECREATION, & DANCE 32, 33 (May–June 1992)).

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.").

213. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (discussing differences in proof required under Title IX and Title VII sexual harassment suits).

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.[216] 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.[217]

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.[218] 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.[219] The relationship between universities and student-athletes is inherently a relationship based in control.[220] 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.[221]

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.[222] Still, payment is only one

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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 Cmty. 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. 2015-1, 2015 WL 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 10b03(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.[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.[224]

2. *Policy Rationale for Stricter Liability*

Many institutions are suspected of unfairly shielding their star athletes from Title IX investigations.[225] When a high-profile athlete is accused, the university is put in the spotlight.[226] To avoid this kind of bad publicity, some institutions' administrative response to sexual assault allegations naming student-athlete perpetrators has been questionable.[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.[228]

As of April 2020, the OCR had 302 open investigations of sexual violence discrimination in post-secondary educational institutions.[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) http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal [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]").

223. *See id.* (addressing variety of factors used by courts in employment-status analyses).

224. *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).

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

226. *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.").

227. *See id.* (describing universities' head-in-the-sand response to sexual assault allegations, particularly against profitable athletes).

228. *See id.* at 280, 295, 305 (noting university athletic departments' influence over and knowledge of athletes' behavior).

229. *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

tix.html [https://perma.cc/S9R6-RHUH] (last updated Apr. 3, 2020) (listing all open Title IX- Sexual Violence investigations at post-secondary level as of Apr. 3, 2020).

230. *See* Paula Lavigne, *OTL: College Athletes Three Times More Likely to be Named in Title IX Sexual Misconduct Complaints*, ESPN (Nov. 2, 2018), https://www.espn.com/espn/otl/story/_/id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints [https://perma.cc/774D-JWCK] (finding, based on data collected from thirty-two Power 5 universities, that athletes were three times more likely than other students to be accused in Title IX complaints in recent years). The survey analyzed data from complaints concerning allegations of various forms of misconduct, including sexual and domestic violence, sexual coercion and exploitation, stalking, and retaliation. *See id.* (finding 6.3 percent, on average, of Title IX complaints in these categories named student-athlete respondents).

231. *See id.* (citing Young, *supra* note 19, at 795) (relying on rape myth that "women make false allegations of sexual assault to target innocent men").

232. *See id.* (reporting that several schools stated violation of privacy as a reason for not releasing data, even though the public records request explicitly allowed responding universities to omit names and identifying information from the complaints). The University of Virginia tried to charge over $30,000 to pull Title IX records—not including athlete-specific data, which the university refused to provide altogether. *See id.* (illustrating university's attempt to stall investigative work).

233. *See id.* (quoting Virginia Title IX official who said it would not be "the best use of our extremely limited resources to try to pull this data for a story"). Around three-quarters of Title IX offices across all divisions who responded to the survey reported being understaffed. *See id.*

234. *See id.* (reporting that Kansas State, even though it did not previously have specific record of complaints naming athletes, compiled data in response to survey).

235. *Id.* (quoting Jeff Morris, Vice President of Communications and Marketing at Kansas State).

236. *See id.* (providing recent data that demonstrates athletes were three times more likely than other students to be accused in Title IX complaints). Setting

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,

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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/otl/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).

241. *See College Recruiting Process: How Do Colleges Recruit Athletes*, NEXT COLLEGE STUDENT ATHLETE (last visited Mar. 29, 2020) https://www.ncsasports.org/recruiting/how-to-get-recruited/college-recruiting-process [https://perma.cc/3Q3L-U67R] (listing various steps involved in college athlete recruitment process).

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

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ingthegameproject.com/every-potential-college-recruit-know/ [https://perma.cc/QB63-G637] (discussing desirable qualities for college athletics recruits) *see also* Becky Carlson, *An Open Letter to the Athlete We Must Stop Recruiting*, INSIDE HIGHER ED (June 5, 2017), https://www.insidehighered.com/admissions/views/2017/06/05/open-letter-coach-high-school-athletes-seeking-be-recruited [https://perma.cc/JGQ9-EJ3E] (explaining character traits that may negatively affect team culture, hurting high school students' recruiting chances).

243. *See* Fred Bastie, *Recruiting Column: What are College Coaches Really Looking For?*, USA TODAY (Sept. 14, 2016), https://usatodayhss.com/2016/recruiting-column-what-are-college-coaches-really-looking-for [https://perma.cc/J8BV-GX7B] (explaining that college coaches evaluate students' character, work ethic, "mental and physical toughness," academics, and coachability in addition to athletic ability).

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).

247. *See* John U. Bacon, *Why Do Colleges Spend Millions On Football*, NPR MORNING EDITION (Aug. 31, 2016, 5:10 AM), https://www.npr.org/2016/08/31/492057117/why-do-colleges-spend-million-to-compete-in-football-our-commenta-

a more significant impact than positive press on a university's reputation.[248] 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.[249] This criticism can be quantified in lost donations and decreased applications for enrollment.[250] 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.[251]

Many programs and organizations already recognize the importance of better incorporation and enforcement of university behavioral policies in their athletic departments.[252] These stakeholders urge higher standards of accountability in athletic departments as a means of managing and preventing the risks associated with student-athlete participation.[253] The current "deliberate indifference" standard that all but explicitly encourages cover-ups is

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tor-asks [https://perma.cc/VKF4-VVLE] (emphasizing attracting public attention among rationale for universities' expensive Division I football programs).

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).

250. *See* Lisa De Bode, *Donation Checks Go Unsigned in Protest Over Sexual Assault*, AL JAZEERA AMERICA (May 2, 2014, 2:48 PM), http://america.aljazeera.com/articles/2014/5/6/alumni-sexual-assaultcampusendowmentharvard-dartmouth.html [https://perma.cc/5ALJ-8RJ6] (referencing decrease in university donations following sexual assault media coverage); *see also* Michael McDonald & John Lauerman, *Dartmouth Applications Drop After Tumultuous Year of Protests*, BLOOMBERG (Feb. 11, 2014, 12:01 AM), https://www.bloomberg.com/news/articles/2014-02-10/dartmouth-freshman-applications-drop-14-prompting-scrutiny [https://perma.cc/9GFD-3F33] (using Dartmouth University as case study for decline in prospective student applications following sexual assault press).

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]

*Margaret Nolan**

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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