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Personal Fouls: How Sexual Assault By Football Players Is Exposing Universities to Title IX Liability

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Personal Fouls: How Sexual Assault By Football Players Is Exposing Universities to Title IX Liability

Cover Page Footnote

This Article is published in memory of Michael Fedorchak and Rosetta Hart. The author extends much appreciation to Andy Moore and Patrick Birney for their editorial contributions.

Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability

Christopher M. Parent^{*}

Why do we care? What difference does it make if some 250 or 300 institutions abuse athletics and their own stated academic missions? . . . We care because all students are important—all young people are valuable—not simply our own. . . . We also care because the whole educational enterprise is connected, and it is wrong to say, “Let them go; we will watch their banditry from our high place on the hill.”

—A. Bartlett Giamatti¹

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¹ In JOHN R. GERDY, *THE SUCCESSFUL COLLEGE ATHLETIC PROGRAM: THE NEW STANDARD* 162 (1997) (quoting former Yale University President and former Major League Baseball Commissioner A. Bartlett Giamatti from a 1987 address to Williams College entitled *The State of the College Game*).

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INTRODUCTION

Brittany Benefield had just turned fifteen years old when she began attending the University of Alabama at Birmingham (UAB) in the Spring of 2000.² A gifted student who was recruited by UAB as a result of her academic success,³ Benefield began her college career younger than most of her classmates, but with the same promise and outlook.

Tragically, Benefield's descent was a rapid one. By December of Benefield's first year at UAB, Benefield had been the alleged victim of numerous sexual assaults by at least twenty-six members of the UAB football team, who had dubbed Benefield their "play thing."⁴ During her brief one-year stint at the University, UAB football players who resided in Benefield's dormitory had introduced the minor to drugs, alcohol, and sex.⁵ According to Benefield and her attorneys, UAB witnessed Benefield's life "spiraling out of control,"⁶ but did nothing substantial to quell the problem and protect the child whose talents they had sought so

² Plaintiff's Complaint ¶ 19, *Benefield v. Bd. of Trs. of the Univ. of Ala.* at Birmingham, 214 F. Supp. 2d 1212 (N.D. Ala. 2002) (on file with the Fordham Sports Law Forum).

³ *Benefield*, 214 F. Supp. 2d at 1214.

⁴ Plaintiff's Complaint ¶ 25.

⁵ *Id.* ¶¶ 25–26.

⁶ *Id.* ¶ 34. This out of control behavior included illicit sexual activity. *Id.*

eagerly to develop.⁷ As a result, UAB is the defendant in a \$40 million lawsuit⁸ that is now on appeal in the United States Court of Appeals for the Eleventh Circuit.⁹ Benefield contends that UAB violated Title IX of the Education Amendments of 1972¹⁰ (hereinafter "Title IX"), due to its alleged "deliberate indifference to sexual harassment,"¹¹ which Benefield asserts, "was [sic] so severe, pervasive, and objectively offensive that it [sic] deprived [her] of access to educational opportunities or benefits provided by UAB."¹²

UAB is not alone. The trial of Alison Jennings's Title IX lawsuit against Oklahoma State University (hereinafter "Oklahoma State") is scheduled for February of 2003.¹³ Jennings claims that she was raped by four Oklahoma State football players during a November 21, 1999, party.¹⁴ Like Benefield, Jennings asserted that Oklahoma State is liable under Title IX for failing to provide Jennings with a safe and secure educational environment.¹⁵ Unlike Benefield, Jennings's Title IX claim sought only to alter an internal Oklahoma State policy that allegedly did not require the University to investigate and/or report misconduct committed by athletes, but did impose such an obligation when there were disciplinary incidents involving other students.¹⁶ According to Jennings's attorney, Oklahoma State "should have known that this contradictory policy would leave athletes to their own

⁷ *Id.* ¶¶ 27–28, 38–43.

⁸ *Id.* ¶ 65; see also Wendell Barnhouse, *Football Should Be Least of UAB's Worries*, FORT WORTH STAR TELEGRAM (Tex.), July 24, 2002, at 9.

⁹ Appellant's Brief to the U.S. Court of Appeals for the Eleventh Circuit, *Benefield* (on file with the Fordham Sports Law Forum).

¹⁰ 20 U.S.C. §§ 1681–1688 (2000).

¹¹ Plaintiff's Complaint ¶ 57.

¹² *Benefield*, 214 F. Supp. 2d at 1215 (alteration in original).

¹³ Telephone Interview with Tamara L.F. Gowens, Senior Associate Attorney, Hammons & Associates (Dec. 6, 2002) [hereinafter Gowens Interview]. Hammons & Associates is representing Alison Jennings in her lawsuit against Oklahoma State.

¹⁴ *Id.* The accused Oklahoma State football players were Marcellus Rivers, J.B. Flowers, Evan Howell, and Alvin Porter. *Id.* See also Kelly Kurt, *Stillwater Mayor Says Woman's Claims Against Police Unfounded*, DAILY ARDMOREITE (Okla.), Aug. 1, 2001, http://www.ardmoreite.com/stories/080201/spo_stillwater.shtml; Laura Vecsey, *One Family's Fight Against the System*, SEATTLE POST-INTELLIGENCER, Aug. 3, 2001, at D1.

¹⁵ Gowens Interview, *supra* note 13; see also Kurt, *supra* note 14.

¹⁶ Gowens Interview, *supra* note 13.

discretion. . . . Athletes are afforded a special status on campus because of their high profile.”¹⁷

Which collegiate athletic powerhouses might be added to this list in the months to come? The University of Colorado at Boulder (hereinafter “University of Colorado”) is already one, having been notified in the summer of 2002 by the attorneys of an alleged sexual assault victim that she intends to sue the University of Colorado for more than \$1 million. The plaintiff is alleging that the University of Colorado failed to protect her from being the victim of a gang rape at the football team’s annual recruiting party.¹⁸ The University of Notre Dame (hereinafter “Notre Dame”) might be next, as it has had at least seven former football players accused of sexual assault and/or rape within the last five years.¹⁹ Or, perhaps it will be Indiana University, where in December of 2001, a member of the Hoosier football team was charged with pulling a student into a bathroom at a party and attempting to rape her.²⁰ It could be any number of universities, including the University of Mississippi, Iowa State University, Arizona State University, or the University of Georgia, all of which have been forced to deal with allegations of sexual assault by at least one member of their respective football teams.²¹

The nexus for the lawsuits against UAB, Oklahoma State, and the University of Colorado is a 1999 decision by the United States Supreme Court in *Davis v. Monroe County Board of Education*.²² For better or worse, this decision has made universities, particularly those Division I schools garnering the most media attention, more vulnerable to Title IX litigation. In a narrow 5-4 decision, the Supreme Court held that a federally funded

¹⁷ Telephone Interview with Mark E. Hammons, President, Hammons & Associates (Dec. 9, 2002) [hereinafter Hammons Interview]. Mark Hammons is Alison Jennings’s attorney.

¹⁸ Ryan Morgan, *CU Faces Title IX Suit in Sex Case Woman Reported at Dec. Party*, DENVER POST, Oct. 21, 2002, at B-01.

¹⁹ David Haugh, *Red Flags Raised on ND Campus*, SOUTH BEND TRIB., Apr. 21, 2002, at C1.

²⁰ Christopher Flores, *When Athletes Are Accused*, CHRON. HIGHER EDUC., Apr. 19, 2002, at 39.

²¹ *See Id.*

²² *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

educational institution may be liable for damages under Title IX in instances where the institution is deliberately indifferent to student-on-student sexual harassment²³ such that the victim is deprived of opportunities or benefits provided by the institution.²⁴

Davis exposes universities and colleges to Title IX litigation not just for gender inequities, but for permitting sexual discrimination, specifically sexual assault and harassment, to go undeterred on campus. According to Kathy Redmond, founder of the Colorado-based National Coalition Against Violent Athletes, and a victim herself of repeated sexual assaults by former University of Nebraska (hereinafter “Nebraska”) lineman Christian Peter, “The lawyers are out there. . . . They just don’t know a lot about this law yet. But the colleges have deep pockets and they are not granted immunity.”²⁵

Schools with Division I athletic programs are primary targets of this type of litigation because these universities are wedded to athletics, particularly football and basketball, due to the money a successful program can bring into a school. The Orange Bowl, for example, awards \$13.6 million to each participant’s conference, and the Rose Bowl awards \$14.1 million.²⁶ Millions in additional revenues are earned by Division I universities from television contracts, pre-season games, and gate receipts. These funds can assist in the building of new academic facilities, the granting of scholarships, and the enhancement of academic programs.²⁷ Perhaps of greater importance to schools is the publicity a big-time sports program can generate.²⁸ For example, as a result of their

²³ *Id.* at 644.

²⁴ *Id.* at 650.

²⁵ Bruce Feldman, *Legal Defense*, ESPN: The Magazine, May 30, 2002, http://espn.go.com/magazine/feldman_20020530.html.

²⁶ See Darren Rovell, *Notre Dame’s Pot of Gold Really a BCS Bowl*, ESPN, at <http://sports.espn.go.com/espn/print?id=1470760&type=story> (Dec. 4, 2002) (noting that revenues generated by a conference’s participation in a bowl game are split equally among conference members).

²⁷ See ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF NCAA’S AMATEUR MYTH 1* (1998); ANDREW S. ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG TIME COLLEGE SPORTS* (1999).

²⁸ See GERDY, *supra* note 1, at 49 (Gerdy also questions whether the exposure received by universities from athletics is necessarily good for the university, as in many cases,

surprise success in football during the 1980s, Boston College saw a significant rise in the number of applicants, a phenomenon academics have since dubbed the “Flutie Factor,” in honor of the Heisman Trophy winner responsible for the resurgence of Boston College football.²⁹

The downside to a university’s investment in its athletic teams is the perception that the school will protect the student-athlete more than it will other students, which is the theory at the heart of the Allison Jennings case.³⁰ Moreover, because of the high profiles afforded to football players on campus, it is difficult for their actions to go unnoticed by campus officials. This is especially true for coaches and athletic administrators, who have greater knowledge of the players’ activities and character traits, including any proclivity toward sexual assault or violence. Accordingly, universities that choose to stand idly by while sexual misconduct is being committed on their campuses must defend their inaction, which victims may challenge as being deliberately indifferent.

This Article seeks to combine a legal analysis of the *Davis* holding with elements from the fields of social science and public policy, examining the impact of *Davis* on colleges and universities that sponsor high-profile athletic teams.³¹ This Article focuses on college football programs: (1) in light of allegations of a

there is significant negative press surrounding the success or failures of a program, including the ramifications of heightened scrutiny.).

²⁹ See MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 60–61 (2000). Applications to Boston College not only rose during the Doug Flutie era, but surged the year following the school’s upset of Number One-ranked Notre Dame in 1993, though it dropped after a gambling scandal plagued the football team. In reality, Boston College’s admissions numbers were driven by the fact it became a “hot school” during the 1980s. “Nevertheless, in all of the commentary on the Flutie Factor, writers have overlooked a concurrent factor at Boston College and most other schools experiencing the Flutie phenomenon—an increase in the party atmosphere at the school.” *Id.* at 60.

³⁰ See *supra* notes 13–17 and accompanying text.

³¹ While the correlation between sexual assault and the National Football League [NFL] or National Basketball Association [NBA] is also a topic of great intrigue and importance, this Article does not explore this issue as the NFL and NBA are not “recipients” for Title IX purposes. Hence, *Davis* has no bearing on these leagues.

correlation between football's violent nature and sexual assault,³² and (2) because the three pending Title IX lawsuits against Division I universities all involve football players. Moreover, with the exception of some basketball players, football players earn the highest profile among members of the student body at most Division I universities.

The issues examined in this Article, including the influence of money on college athletics, the propensity of athletes to commit violent acts, the development of Title IX and its own sexual harassment jurisprudence, and the role of college administrations in deterring sexual assault on campus, have all been subjects of lengthy studies, books, and articles. This Article examines each issue not in a vacuum, but as part of a coherent analysis, and agrees with studies concluding that football does not necessarily cause a player to be violent off the field.³³ Rather, the link between football and sexual assault is caused by the player's individual upbringing and personality traits.³⁴ Nonetheless, the sheer number of sexual assaults involving football players, as well as the publicity wrought from such incidents, creates an issue of enormous significance for college administrators.

Part I will provide an overview of Title IX, which, contrary to public perception, is broader in scope than just promoting gender equity in athletics. It will then examine the relevant case law concerning a private right of action in instances of peer-on-peer harassment, including the Supreme Court's most recent decision in *Davis*. Part II will shift from a focus on the law to one on the social sciences by assessing research and opinions on the issue of whether college athletes, specifically those competing in the highest profile and perhaps most violent sport: football, have a higher propensity to commit sexual assault. Part III provides an examination of the challenges confronting colleges and universities

³² See Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 169 (1998); Richard M. Southall, *Good Start, the Bad, and Much Better: Three NCAA Intercollegiate Athletic Department Policy Responses to Criminal Behavior by College Athletes*, 11 J. LEGAL ASPECTS SPORT 269, 270 (2001).

³³ See Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 61 (1998); Southall, *supra* note 32.

³⁴ See Davis & Parker, *supra* note 33, at 62.

as a result of *Davis*. The author recommends a coordinated, independent response to allegations of sexual assault that is consistently applied to all students at the college or university, as well as pre-emptive measures like in-depth background checks of football recruits. Only by taking aggressive steps to manage the problem of sexual assault on campus, particularly in instances where a member of an athletic team is involved, can a university or college insulate itself from post-*Davis* Title IX litigation.

I. EQUITY IN *ALL* ASPECTS OF EDUCATION: AN ANALYSIS OF TITLE IX

Title IX has become an emotionally charged subject as a result of the law's fatal effect on a number of high-profile male athletic teams at major universities.³⁵ Among other things, Title IX has been applied to ensure that no student—male or female—shall be excluded or denied the opportunity of participating in any athletic endeavor based on sex or gender at an institution that receives federal funds.³⁶

Although arguably at the expense of certain male athletic teams, Title IX has profoundly affected women's athletics. According to the National Collegiate Athletic Association (NCAA), by "1978, the number of female high school student-athletes had grown from 300,000 to over 2 million."³⁷ Increases in college participation rates have been equally noticeable.³⁸ In 1971,

³⁵ See Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809 (1996); Robert C. Farrell, *Title IX or College Football*, 32 HOUS. L. REV. 993 (1995); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647 (1995); Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to College Athletics*, 72 DENV. U. L. REV. 57 (1994); Jeff Jacobs, *Latest Title IX Sport: Hardball*, HARTFORD COURANT (Conn.), Dec. 20, 2002, at C1.

³⁶ Department of Education [DOE] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.41 (2002) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.").

³⁷ NAT'L COLLEGIATE ATHLETIC ASS'N [NCAA], *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX AND GENDER EQUITY IN ATHLETICS FOR COLLEGES AND UNIVERSITIES I-1* (3d ed. 1997), http://www.ncaa.org/library/general/achieving_gender_equity.

³⁸ See *id.* at I-1-2.

there were only 32,000 females playing NCAA sports; by 1997–98, that figure rose to 135,000.³⁹

According to Dr. Elizabeth Alden, the “focus of [Title IX] is to make sure that women and girls are provided an equal opportunity in athletics. . . . Gender equity in athletics has been the central focus of the law over the past thirty years because that is where the inequities [in education] were so blatant.”⁴⁰ Although Dr. Alden’s statement echoed a popular sentiment, this is not a complete depiction of Title IX. To the surprise of many, there is a well-established body of case law concerning sexual harassment and Title IX. Notwithstanding the current debate surrounding President Bush’s Commission on Athletic Opportunity, which is reforming Title IX,⁴¹ the law goes well-beyond fostering gender equity in college athletics. Title IX’s goal is simple: to protect students at educational institutions that receive⁴² federal funds from sex discrimination.⁴³

Title IX was enacted in 1972 as part of the civil rights legislation first promulgated during the 1960s.⁴⁴ In passing Title IX, Congress sought to address the void in civil rights legislation concerning federal education programs,⁴⁵ and thus, deter the use of “federal resources to support discriminatory practices”⁴⁶ and “provide individual citizens effective protection against those practices.”⁴⁷ Title IX provides that: “No person in the United

³⁹ *Id.*

⁴⁰ Telephone Interview with Dr. Elizabeth Alden, President, Alden & Associates Collegiate Athletics Consulting (Dec. 20, 2002).

⁴¹ See W.H. Stickney, Jr., *Title IX Changes Would Tip Scales: Education Secretary Weighs Reforms*, HOUSTON CHRON., Feb. 1, 2003, <http://www.chron.com/cs/CDA/story. hts/sports/1761326>.

⁴² The United States Supreme Court has interpreted the term “receive” broadly, holding in *Grove City College v. Bell*, 465 U.S. 555, 569–70 (1984), that, although Grove City College did not receive financial assistance directly from a federal entity, Title IX applied to it because a number of its students received federal loans. By virtue of accepting tuition from students in receipt of federal aid, therefore, it was necessary for Grove City College to comply with the provisions of Title IX. *Id.*

⁴³ 20 U.S.C. § 1681(a) (2000).

⁴⁴ Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis*, 1995 ANN. SURV. AM. L. 255, 262.

⁴⁵ See 118 CONG. REC. 5803 (1972).

⁴⁶ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

⁴⁷ *Id.*

States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”⁴⁸

Thus, to establish a *prima facie* cause of action under Title IX, a plaintiff must prove that: (1) the educational program received federal financial assistance; (2) the individual was excluded from participating in, denied the benefits of or subjected to discrimination in an educational program; and (3) the exclusion was on the basis of sex.⁴⁹ Because virtually every educational institution receives some sort of federal financial assistance,⁵⁰ Title IX casts a wide net, covering not just colleges and universities, but elementary and secondary schools. It also applies to school districts, including educational or extra-curricular programs or activities under school supervision, even those not conducted on school premises.⁵¹

While Title IX’s goals are clear, its sexual harassment jurisprudence has been slow to develop and is still evolving.⁵² Nonetheless, the framework under which an individual can recover under Title IX is much clearer following *Davis*, where the Supreme Court held that an educational institution could be liable for damages brought by a private citizen in instances of peer-on-peer sexual harassment.⁵³ Only by analyzing *Davis*’s lineage can the significance of *Davis* be understood.

⁴⁸ 20 U.S.C. § 1681(a).

⁴⁹ See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev’d*, 526 U.S. 629 (1999).

⁵⁰ VALERIE M. BONNETTE, *TITLE IX BASICS*, 1 (1994), *reprinted in* NCAA ACHIEVING GENDER EQUITY (1997), http://www.ncaa.org/library/general/achieving_gender_equality/title_ix_basics.pdf.

⁵¹ See 20 U.S.C. § 1681(c) (1990) (“For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school or any institution of vocational, professional, or higher education.”).

⁵² See *Davis & Parker*, *supra* note 33.

⁵³ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

A. Cannon and Franklin: Establishing the Framework for Davis

The landscape of Title IX litigation was forever altered by *Cannon v. University of Chicago*.⁵⁴ There, the U.S. Supreme Court first recognized a private right of action in Title IX.⁵⁵ In *Cannon*, a female student alleged that she was denied admission to medical school as a result of her gender.⁵⁶ Using Title VI as its model, the Supreme Court ruled that Title IX's legislative history supports the existence of a private right of action inasmuch as the critical language in Title VI had already recognized a private remedy.⁵⁷ Accordingly, if the legislators had aimed to limit the ability of private litigants to sue educational institutions or programs under Title IX, they would have articulated such a provision in the original bill itself or as an amendment.⁵⁸

Cannon, however, only permitted equitable and injunctive relief. In *Franklin v. Gwinnett County Public Schools*,⁵⁹ the Supreme Court expanded Title IX to allow a private litigant to seek monetary damages.⁶⁰ There, a female student alleged that intentional sexual harassment and abuse by a male teacher made the school environment hostile.⁶¹ As in *Cannon*, the Court looked to Title VI jurisprudence for guidance. Because courts had permitted compensatory damages for claims of intentional discrimination under Title VI, the Supreme Court held that the same was true under Title IX, which was equally silent regarding available remedies.⁶² "Absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."⁶³

⁵⁴ 441 U.S. 677 (1979).

⁵⁵ *Id.*

⁵⁶ *Id.* at 680.

⁵⁷ *Id.* at 696, 702.

⁵⁸ *Id.* at 702.

⁵⁹ 503 U.S. 60 (1992).

⁶⁰ *Id.*

⁶¹ *Id.* at 76.

⁶² *Id.* at 71.

⁶³ *Id.* at 70–71.

B. Gebser: Creating the Standard by Which Recipients Are on Notice

Despite the historic impact of *Cannon* and *Franklin* on an individual's ability to garner relief under Title IX, it was not until the Supreme Court's 1998 decision in *Gebser v. Lago Vista Independent School District*⁶⁴ that there was a clear articulation of the standard by which schools or educational programs would be held liable for sexual harassment.⁶⁵ The *Gebser* Court held that the response of the educational institution must "amount to deliberate indifference" for there to be discrimination under Title IX.⁶⁶

Alida Star Gebser was an eighth-grade student at a middle school in Lago Vista, Texas.⁶⁷ Upon joining a high school book discussion group, she met Frank Waldrop, a teacher at Lago Vista's high school.⁶⁸ The two began a sexual relationship the following year when Gebser was a student in Waldrop's English class.⁶⁹ They continued their sexual relationship into Gebser's sophomore year of high school.⁷⁰ Their relationship stopped when a police officer discovered Waldrop and Gebser having sex.⁷¹ Waldrop was arrested and terminated from his employment soon thereafter.⁷² Prior to Waldrop's arrest, he had been reprimanded for making sexually explicit and offensive remarks to students.⁷³ However, the school had not been notified of Waldrop's sexual encounters with Gebser or any other student.⁷⁴ The Court held that the Lago Vista School District's lack of actual knowledge about Waldrop's sexual improprieties was the most significant factor in its decision to find for the defendant: "[W]e conclude that it would

⁶⁴ 524 U.S. 274 (1998).

⁶⁵ Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POL'Y & L. 575, 587 (2000).

⁶⁶ *Gebser*, 524 U.S. at 290.

⁶⁷ *Id.*

⁶⁸ *Id.* at 277.

⁶⁹ *Id.* at 278.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, i.e., without actual notice to a school district official."⁷⁵

Under *Gebser*, even if the school or program receives notice, it will only be subject to Title IX liability if it affirmatively abstains from addressing the alleged misconduct:

The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions.⁷⁶

Gebser created a high hurdle for subsequent Title IX plaintiffs: deliberate indifference.⁷⁷ Therefore, to succeed in a Title IX suit, it is not enough for the plaintiff to demonstrate that the school or education program was on notice of the sexual misconduct. In addition, the plaintiff has the daunting obstacle of demonstrating that the school pursued a policy of deliberate indifference.⁷⁸ According to Justice Sandra Day O'Connor, the author of the opinion, "No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system."⁷⁹ Nonetheless, Justice O'Connor stated that the real issue "is whether the independent misconduct of a teacher is attributable to the school district that

⁷⁵ *Id.* at 285. The significance of having the federal funding recipient on notice of its potential liability under Title IX was discussed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

⁷⁶ *Gebser*, 524 U.S. at 290–91.

⁷⁷ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (discussing the *Gebser* standard).

⁷⁸ *Gebser*, 524 U.S. at 290–91.

⁷⁹ *Id.* at 292.

employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner.”⁸⁰

The *Gebser* decision begs the question as to how an institution avoids liability. What steps does it have to take to avoid being declared deliberately indifferent? According to the OCR, “Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard.”⁸¹

Davis expounded on the issues raised in *Cannon*, *Franklin*, and *Gebser*, creating a coherent analysis of the scope of Title IX sexual harassment liability. Moreover, *Davis* expanded the scope of Title IX liability by extending the private cause of action to include student-on-student, or peer, harassment. In so doing, the Supreme Court created a new avenue for suing educational institutions, holding that qualified educational institutions can be liable under Title IX for their “deliberate indifference” to known acts of harassment by a student at that institution that are so pervasive, and objectively offensive, that they denied the victim’s access to educational opportunities guaranteed by the university.⁸²

C. *New Realm of Title IX Litigation in the Wake of Davis*

The U.S. Supreme Court’s decision in *Davis v. Monroe County* is particularly significant for plaintiffs’ attorneys who have a new vessel to explore the well-traveled waters of Title IX litigation. As a result of *Davis*, there has been a plethora of Title IX lawsuits against universities, three of which involve allegations of deliberate indifference to sexual misconduct by members of each university’s football team.⁸³

⁸⁰ *Id.*

⁸¹ DOE OFFICE OF CIVIL RIGHTS [OCR], REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <http://www.ed.gov/offices/OCR/shguide>.

⁸² *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 630 (1999).

⁸³ *See supra* Part I.

LaShonda Davis was a fifth-grade student at Hubbard Elementary School in Monroe County, Georgia, when the harassment began.⁸⁴ In contrast to *Gebser*, the Monroe County Board of Education (hereinafter “Monroe County Board”) was made aware of Davis’s complaints of sexual harassment.⁸⁵ According to Davis, one of her classmates had attempted to touch Davis’s breasts and genital area on a number of occasions.⁸⁶ The male student also made vulgar statements to Davis.⁸⁷ Davis’s teacher contacted the school’s principal, but he failed to follow up with any disciplinary action against Davis’s classmate.⁸⁸ Over the course of the next few months, the offending student’s vulgar behavior continued, including an incident where the student rubbed his body against Davis in a sexually suggestive manner, finally culminating in charges against the fifth-grader for sexual battery.⁸⁹

Davis alleged that she could not concentrate on her studies and that her grades suffered as a result of her being subject to this form of harassment.⁹⁰ Davis had even become so distraught over the offending student’s advances that she had written a suicide note.⁹¹ According to Davis, the Monroe County Board was liable for her damages as a result of their actual notice of the sexual harassment and their deliberate indifference to it.⁹² Davis alleged that at one point, she and other female students formed a group to discuss the student’s actions with the principal, but were denied access.⁹³

Obviously, for an education institution to be deliberately indifferent to sexual harassment, a workable definition of what constitutes harassment is imperative. While this task has proven difficult, the Department of Education’s Office of Civil Rights (OCR), the administrative body responsible for enforcing Title IX,

⁸⁴ *Davis*, 526 U.S. at 633.

⁸⁵ *Id.* at 633–34.

⁸⁶ *Id.* at 633.

⁸⁷ *Id.*

⁸⁸ *Id.* at 634–35.

⁸⁹ *Id.* at 634.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 636.

⁹³ *Id.* at 635.

has provided guidance.⁹⁴ According to the OCR's 2001 Revised Sexual Harassment Guidance:⁹⁵

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program.⁹⁶

In the past, two central forms of sexual harassment have been identified: *quid pro quo* and hostile environment.⁹⁷ The OCR has since moved away from such a distinction, espousing one standard: "[W]hether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex."⁹⁸

In *Davis*, the central issue was whether a recipient of federal funding may be liable for monetary damages in instances where it has been negligent in responding to student-on-student harassment, as opposed to teacher-on-student harassment,⁹⁹ as was the case in *Gebser*¹⁰⁰ and *Franklin*.¹⁰¹ As such, it served as an important piece in Title IX's ever-evolving sexual harassment puzzle.

The Court's analysis primarily relied on the language of Title IX, and ultimately concluded that the

statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless

⁹⁴ 20 U.S.C. § 1681, 1682 (1990); *see* 34 C.F.R. § 106.1.

⁹⁵ OCR, *supra* note 81.

⁹⁶ *Id.* § II.

⁹⁷ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998).

⁹⁸ OCR, *supra* note 81, § V(A).

⁹⁹ *Id.* at 639.

¹⁰⁰ 524 U.S. 274 (1998).

¹⁰¹ 503 U.S. 60 (1992).

its deliberate indifference “subjects” its students to harassment. That is, the deliberate indifference must, at a minimum, “cause [students] to undergo” harassment or “make them liable or vulnerable” to it.¹⁰²

Thus, Title IX’s private cause of action extends to situations not only where the harasser is a teacher or school official, but also where the victim and perpetrator of the harassment are students in the educational entity.¹⁰³ Writing for the Court, Justice O’Connor considered

whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.¹⁰⁴

According to the Supreme Court, while liability under Title IX is indeed clearest in situations when an agent of the recipient is involved, this is not the exclusive scenario.¹⁰⁵ A recipient exposes itself to Title IX liability under “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to ‘expose’ its students to harassment or ‘cause’ them to undergo it ‘under’ the recipient’s programs.”¹⁰⁶ The final component of the analysis in a Title IX sexual harassment suit is thus one of control.

In the case of LaShonda Davis, the misconduct occurred during school hours and exclusively on the property of Hubbard Elementary School, which was overseen by the Monroe County Board.¹⁰⁷ There was no doubt that an administrator of the Monroe

¹⁰² *Davis*, 526 U.S. at 644 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966) (defining “subject” as “to cause to undergo the action of something specified; expose” or “to make liable or vulnerable; lay open; expose”)).

¹⁰³ *Id.* at 643–44, 653–54.

¹⁰⁴ *Id.* at 643.

¹⁰⁵ *Id.* at 643–44, 653–54.

¹⁰⁶ *Id.* at 645.

¹⁰⁷ *Id.* at 633–34.

County Board could have taken active measures to ensure that Davis was no longer the victim of sexual harassment. Accordingly, the Court held that it was the responsibility of the district court to determine whether the Monroe County Board did in fact act with deliberate indifference towards Davis and her allegations of harassment.¹⁰⁸

The Court noted “that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.”¹⁰⁹ According to the majority’s opinion, school officials must “merely respond to known peer harassment in a manner that is not clearly unreasonable.”¹¹⁰ As long as the recipient’s approach to the issue of sexual harassment is made with reason and caution, and the problem has been addressed in some way, the recipient is likely to be protected from Title IX liability.¹¹¹

In granting recipients flexibility to respond to sexual misconduct, the Court responded to the concerns of opponents of the decision, who attacked it as fiscally oppressive to recipients with limited budgets.¹¹² According to the dissent in *Davis*, the majority’s standard will expose schools, universities, colleges, and educational programs to a flood of litigation.¹¹³ School districts with paltry budgets will use their valuable and limited resources to implement anti-Title IX measures.¹¹⁴

The cost of defending against peer sexual harassment suits alone could overwhelm many school districts, particularly since the majority’s liability standards will allow almost any plaintiff to get to summary judgment, if not to a jury. In addition, there are no damages caps on the judicially

¹⁰⁸ *Id.* at 649, 653–54.

¹⁰⁹ *Id.* at 648.

¹¹⁰ *Id.* at 649.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 680 (5-4 decision) (Kennedy, J., dissenting). Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas joined Justice Kennedy’s dissenting opinion.

¹¹⁴ *Id.* (Kennedy, J., dissenting).

implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts.¹¹⁵

The overall impact of *Davis* on school districts and universities has yet to be seen. At least on the university level, much will be learned from the outcomes in the University of Colorado, Oklahoma State, and UAB lawsuits. A verdict in favor of any of the three plaintiffs in those actions could put more universities and their policies towards sexual harassment on trial. Indeed, the holding in *Davis* should at least make universities and colleges, particularly those with high-profile Division I programs, aware of their exposure to Title IX liability. Administrators at these institutions must proactively reexamine their policies on sexual harassment and ask themselves whether they truly know the players who represent their football programs, both on and off the field.

II. MONSTERS OR SIMPLY MISUNDERSTOOD? THE LINK BETWEEN FOOTBALL AND SEXUAL ASSAULT ON CAMPUS

The debate over the propensity of male athletes, specifically college football players, to commit sexual assault has received enormous attention, not only from the media, but also from those in the academic community.¹¹⁶ Like no other sport, football evokes school, city, and state pride, and has become entrenched as the most popular sport in the United States.¹¹⁷ Nonetheless, as the sport's popularity has grown, so has the scrutiny of the sport's personalities. Thus, every rape, robbery, drunk driving incident, and act of domestic abuse committed by a football player, whether it be a Division I third-stringer or National Football League superstar, receives media coverage, the intensity of which depends on the player's notoriety.

¹¹⁵ *Id.* (Kennedy, J., dissenting).

¹¹⁶ Southall, *supra* note 32, at 276–78.

¹¹⁷ Andrei S. Markovits and Steven L. Hellerman, *Soccer in America: A Story of Marginalization*, 13 U. MIAMI ENT. & SPORTS L. REV. 225, 232 (1996).

Many contend that there is a correlation between one's participation in the sport and his propensity to commit criminal activity, particularly crimes of a violent nature.¹¹⁸ Arguing that universities must allow a "thug mentality" to permeate their football teams for them to be successful, sports journalist Dan Le Batard observed:

It is always a little uncomfortable seeing the street get this close to the library. . . . Go to the highest levels of football and what you'll find in every huddle are a lot of stories about jailed relatives, dead friends and paths littered with more trouble than light.¹¹⁹

While the opinion that there is at least a correlation between football and the commission of violent crimes is widely espoused, the rationales behind such theories vary significantly.

In their own study of this issue, Carol Bohner and Andrea Parrot concluded that athletes, especially those competing in the more aggressive team sports such as football, lacrosse, and hockey, are particularly prone to commit sexual assault.¹²⁰ Although they lack significant empirical research to support their analysis, Bohner and Parrot contend that a potent mix of alcohol, arrogance, and ignorance, as well as an inherent propensity towards violence, makes the male athlete a particularly dangerous creature.¹²¹

Athletes are most likely to sexually assault after a game, when they are out either celebrating a win or drowning their sorrows after a loss. Drinking parties are frequently part of the post-game ritual, with female fans helping the athletes celebrate or commiserating with them. The likelihood of a sexual assault is greatest at this point if a female "groupie" appears to be "throwing herself" at an athlete with the intent of being seen with him or because

¹¹⁸ See, e.g., JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN (1997).

¹¹⁹ Dan Le Batard, *While Clarett Lost a Dear Friend, Ohio State Lost Some Perspective*, MIAMI HERALD, Jan. 1, 2003, at 1D, http://www.miami.com/mld/miamiherald/sports/columnists/dan_le_batard/4852075/4852075.htm.

¹²⁰ Carol Bohner & Andrea Parrot, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 22-23 (1993).

¹²¹ *Id.*

she wants to be his friend. The athlete may be unable to distinguish between her desire for friendship and his perception that she is throwing herself at him because she wants sex. Further, he may believe that this is what he deserves as a result of his "star" status.¹²²

Under this line of thought, male student-athletes participating in the more violent are unable to separate themselves from the aggressive and hostile nature of the contests in which they immerse themselves.¹²³

Dr. Earl Smith, Rubin Professor of American Ethnic Studies of Sociology at Wake Forest University, subscribes in part to this theory:

Football is a violent sport. It is not anything like you see or hear on television. When you are down there on the field, you can hear it and feel it. You can hear and feel the hits and what the players say to each other. . . . When these football players leave that football field, that stadium, that locker room, they are still carrying with them the mindset that they have to be tough. If I'm playing against guys who are trying to crush me, it's hard for me to turn it off when I put on the khakis and go back to the dorm.¹²⁴

Still others contend that the alleged causation between football and sexual assault is due to the player's perception of his own invincibility. Alan Klein, a professor of psychology at the University of Arkansas, argues that "the kid going to [a top football school] has been recruited by 80 other schools and has a sense of entitlement . . . and included in that is the view of women as always at one's beck and call."¹²⁵ Similarly, Jay Coakley, a

¹²² *Id.*

¹²³ See Bill Brubaker, *Violence in Football Extends off Fields*, WASH. POST, Nov. 13, 1994, at A1 (citing Edward Gondolf, professor of sociology, Indiana University of Pennsylvania).

¹²⁴ Telephone Interview with Dr. Earl Smith, Rubin Professor of American Ethnic Studies of Sociology, Wake Forest University (Dec. 16, 2002) [hereinafter Dr. Smith Interview].

¹²⁵ Maryann Hudson, *From Box Score to the Police Blotter*, L.A. TIMES, Dec. 27, 1995, at A1 (alteration in original) (quoting Alan Klein, professor of psychology, University of Arkansas).

sociologist at the University of Colorado at Colorado Springs believes there has “been a growing sense of hubris among high-profile athletes. . . . When that happens, the social controls that exist in the rest of the community don’t apply to them directly, and they don’t feel it [sic] should.”¹²⁶

Arguments supporting the theory that playing football automatically makes one more prone to commit sexual assault are mistaken. In fact, there is no inherent causal link between an individual’s participation in any form of athletic competition, including football, and the propensity to commit sexual assault. The problem is more complicated and has to do more with upbringing and social influences than anything else.

According to Dr. William Parham, a sports psychologist at the University of California, Los Angeles (UCLA), that a player commits sexual assault or engages in other violent misconduct often suggests that there are other personal challenges that need to be addressed:

The perpetuation of sexual assault is not the result of the perpetrator succumbing to a mysterious force, a sudden urge, or merely acting on a whim. It is a very deliberate, premeditated act of violence that reflects the assailant’s demented need to experience personal control. The perpetuation of sexual violence is not a phenomenon that can be studied in isolation. It is understood most accurately when its study is viewed within the multiple contexts (e.g., familial, social, greater environmental, intrapersonal) that it occurs.¹²⁷

This is essentially the same viewpoint subscribed to by Jeff Benedict, whose seminal work, *Public Heroes, Private Felons*, has contributed greatly to the debate on this topic.¹²⁸ Benedict concludes that even before a football player takes his first snap in

¹²⁶ Edward Wong, *There’s No Stopping Athletes’ Misbehavior*, N.Y. TIMES, Dec. 23, 2001, § 8, at 1 (quoting Jay Coakley, professor of sociology, University of Colorado at Colorado Springs).

¹²⁷ Telephone Interview with Dr. William Parham, sports psychologist, UCLA (Nov. 27, 2002) [hereinafter Dr. Parham Interview].

¹²⁸ BENEDICT, *supra* note 118.

college or the pros, his propensity to commit violent acts outside the game of football can be predicted; those ultimately charged with sexual assault usually have established a criminal record at an early age and have a history of deviant but legally permissible sexual behavior.¹²⁹ American society's espousal of the athlete, in addition to the sports world's somewhat selfish desire to reform athletes with deep-seated issues, only exacerbates the growing problem. "[T]here has been an altruistic tendency to project college and professional sports as an opportunity for young men who would otherwise be destined for crime and despair. Yet these are the players who are disproportionately responsible for the litany of sexual assault and domestic abuse charges filed against athletes."¹³⁰

Dr. Earl Smith of Wake Forest University contends that Benedict's assertions are largely correct and were unfairly criticized as "racist" when first introduced in 1997.¹³¹ Benedict found that most athlete-offenders were African American. This fact is not a result of any inherent trait, but rather because many come from poor urban areas and are introduced to violence at a young age.¹³² According to Benedict, the result is a propensity towards deviant behavior, which is often overlooked because of their athletic talents:

The fact that so many athlete-offenders are black is not a function of race, but rather a result of the rising recruitment of poorly prepared young men, the majority of whom are black, whose social backgrounds are rife with problems. . . . It is unrealistic to expect that poorly prepared young men from urban areas will suddenly abandon their ways after receiving an athletic scholarship and arriving at an elite college campus. On the contrary, the enticements that accompany big-time athletics can be acutely problematic for young men from deprived backgrounds. There should be little hesitation in addressing squarely the glaring problem of ill-prepared

¹²⁹ *Id.* at xvii.

¹³⁰ *Id.*

¹³¹ Dr. Smith Interview, *supra* note 124.

¹³² See BENEDICT, *supra* note 118, at xvi.

young black men being brought to college campuses to play sports, only to find themselves arrested for rape, battery, and other crimes.¹³³

For Dr. Smith, an African American, it is impossible not to look at race as a primary factor in explaining the link between football players and sexual assault: “You look at the research. You look at the numbers. [Those accused of sexual assault] are disproportionately African Americans who come from poor backgrounds.”¹³⁴

Universities are recruiting more and more players “from bad areas where violence, rape, sexual assault and murder are part of their everyday lives.”¹³⁵ Former Nebraska head coach Tom Osborne illustrated this point while explaining his theory of recruiting in the wake of Nebraska’s second straight national championship in 1995: “[W]e’ll take a kid who comes from a no-parent family. And we’ll take a kid out of a tough neighborhood.”¹³⁶ Nebraska’s athletic director, Bill Byrne, added, “You don’t win football games with choirboys. You’ve got to be tough to play.”¹³⁷ According to sports columnist Dan Le Batard:

You aren’t good in a sport this savage simply because of athletic gifts. Given two players of similar skill, a coach will always take the one with more difficulty in his past because, at the height of competition, you need the guy on your side for whom hunger isn’t merely an athletic cliché but rather something very real that once growled in his stomach. Poorer kids tend to be tougher kids. Generally speaking, they want in a way that kids from affluence don’t or can’t.¹³⁸

That the suits against UAB, the University of Colorado, and Oklahoma State involve members of the schools’ football teams

¹³³ *Id.* at xvi–xvii.

¹³⁴ Dr. Smith Interview, *supra* note 124.

¹³⁵ *Id.*

¹³⁶ Lee Barfknecht & James Allen Flannery, *NU Football Endures Off-Field Scrutiny*, OMAHA WORLD-HERALD, Feb. 4, 1995, at 39.

¹³⁷ *Id.*

¹³⁸ Le Batard, *supra* note 119.

should be significant for administrators at Division I academic institutions. "I think the whole issue [of rape allegations against collegiate football players] is fairly sobering, if not horrifying. . . . I think whenever you have alleged issues of this nature, it warrants lots of introspection,"¹³⁹ said Kevin White, athletic director of Notre Dame, whose own football program is under increased scrutiny in light of recent allegations that four former members of the football team raped a student at an off-campus party.¹⁴⁰ According to accounts of the incident, the rape occurred at an off-campus house on March 28, 2002.¹⁴¹ The victim had met the players at a bar earlier in the evening and went to the house after being informed that there was a party there.¹⁴² The police report indicates that the players were "laughing and joking" after their attack on the victim.¹⁴³ For Notre Dame, the alleged rape tested its policy of holding student-athletes to the same high moral standards as the rest of the student body.¹⁴⁴ Nonetheless, following the University's investigation of the incident, the decision for Notre Dame was simple: expel the alleged perpetrators regardless of whether the criminal charges went forward.¹⁴⁵

The accounts of the University of Colorado, Oklahoma State, and UAB incidents are no less disturbing. The University of Colorado litigation stems from a 1997 recruiting party that was apparently a tradition on the school's campus. After consuming alcohol and passing out in a Boulder, Colorado hotel suite, a seventeen-year old high school student was allegedly raped by a University of Colorado football recruit.¹⁴⁶ The alleged victim had

¹³⁹ David Haugh, *Graham Omission Doesn't 'Ad' Up*, SOUTH BEND TRIB. (Ind.), Apr. 25, 2002, at B1 (quoting University of Notre Dame's athletic director, Kevin White).

¹⁴⁰ *Id.*

¹⁴¹ See Haugh, *supra* note 19.

¹⁴² Margaret Fosmoe & David Haugh, *ND Expels All Four Rape Students*, SOUTH BEND TRIB. (Ind.), May 4, 2002, at A1.

¹⁴³ See Haugh, *supra* note 19.

¹⁴⁴ *Id.* ("Notre Dame was one of four schools recognized in 2000 for its Student Development program, aimed to round out the lives of Irish student-athletes. Sixty-nine percent of those student-athletes perform some type of community service.").

¹⁴⁵ Fosmoe & Haugh, *supra* note 142.

¹⁴⁶ Mike Freeman, *Using Sex to Sell Recruits*, MILWAUKEE J. SENTINEL, Nov. 24, 2002, at 1C.

been attending a party for University of Colorado recruits.¹⁴⁷ After an eight-month investigation, the authorities did not file charges against the player because no one could corroborate the victim's account of the incident.¹⁴⁸ Nonetheless, according to District Attorney Mary Keenan, the incident was serious enough that she told the university "in no uncertain terms that if they did not straighten out what happens at these recruiting parties, . . . we would take it very seriously if anything like this occurred again."¹⁴⁹

It is for this reason that there has been so much controversy surrounding the alleged rape of a woman at a December 7, 2001, recruiting party. There, recruits were allegedly given alcohol and marijuana by members of the football team, who then brought the high school students to an off-campus apartment, where four women, four University of Colorado football players, and two recruits proceeded to engage in various sexual acts.¹⁵⁰ Similar to the 1997 incident, one of the alleged victims said that she had passed out after consuming an abundance of alcohol.¹⁵¹ The victim awoke to one of the recruits raping her and another attempting to force the woman to perform oral sex.¹⁵² Despite a recruit's admission that the sexual incident occurred, the prosecutors decided not to file charges, apparently relying on the recruit's argument that the acts were consensual.¹⁵³ The only charges that resulted in a conviction were those against the University of Colorado student-athletes for providing alcoholic beverages to minors.¹⁵⁴

Following the incident, the University of Colorado revised its football recruiting rules and wrote letters to parents of recruits about the behavioral expectations of their sons during campus

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting Colorado District Attorney Mary Keenan).

¹⁵⁰ *Id.*; Owen S. Good, *Four Booked in Wild Welcome for CU Recruits*, ROCKY MOUNTAIN NEWS, May 1, 2002, at 5A.

¹⁵¹ *Id.*

¹⁵² Freeman, *supra* note 146.

¹⁵³ *Id.*; see also Keith Coffman, *CU Players Avoid Rape Charges*, DENVER POST, Apr. 28, 2002, at B-01.

¹⁵⁴ See Freeman, *supra* note 146.

visits.¹⁵⁵ Nonetheless, the players involved in the alleged attack remain on campus, where the ramifications of the incident are still felt.¹⁵⁶ Especially for female students, it is “frightening that it could happen in a place you think you’re safe. . . . It’s one thing having to be worried when you’re walking across campus, but the fact that it happened at her home is scary.”¹⁵⁷

It is clear from these disturbing accounts, as well as those involving players from UAB and Oklahoma State, that universities must be cognizant of the potential threats posed by members of their football teams. If they are not, they might find themselves sued under Title IX for acting with deliberate indifference towards sexual harassment. Perhaps more importantly, administrators who ignore the issue of sexual assault by athletes will be sending a signal that by virtue of athletic prowess, certain students deserve more rights and more leeway than others. In doing so, the very mission of the university—to assist in the personal and intellectual growth of all students, athletes and non-athletes alike—will be tarnished, if not destroyed. Consequently, it is of great significance for universities to understand just how they might address allegations of sexual assault involving members of the football team.

III. UPHOLDING THE UNIVERSITY MISSION: A PRESCRIPTION FOR ADDRESSING THE PROBLEM OF ALLEGATIONS OF SEXUAL ASSAULT INVOLVING MEMBERS OF THE FOOTBALL TEAM

Four themes should rule the university’s approach to the issue of sexual assault by members of the football team: education, accountability, independence, and consistency.

¹⁵⁵ Coffman, *supra* note 153 (In response to rape allegations, CU Chancellor Richard Byyny ordered the football program to establish guidelines for campus recruiting trips and required letters to be delivered to recruits and their families explaining the University’s policies.).

¹⁵⁶ *Id.*

¹⁵⁷ See John Ingold et al., *Gang Rape Alleged at CU*, DENVER POST, Dec. 14, 2001, at A-01.

A. Education: A Small but Significant Step in the Right Direction

A critical step to begin complying with the sexual harassment provisions of Title IX is the implementation of a program where football players are educated about the dangers of sexual assault and alerted to the problems associated with sexually aggressive behavior. While such a program alone will not insulate universities from Title IX liability, absent a university-mandated education program on sexual assault, their vulnerability to action is likely to increase significantly.

According to Jeff O'Brien, Director of Northeastern University's Mentors in Violence Prevention Program, education programs have been successful and well-received by players and coaches alike.¹⁵⁸ However, O'Brien contends, that these programs and sessions do not work unless they get support from the football team's coaching staff, who are critical in enforcing the lessons the players learn during the presentation.¹⁵⁹ Unfortunately, "there are instances of coaches making comments that are crude or mocking. . . . This only contradicts rather than reinforces the message."¹⁶⁰ As a result, the lessons can become moot if coaches are not supportive. If the lessons are in fact received without contradictory comments by coaches, educational seminars and programs can at least signal to the team and campus that coaches and the university are concerned about the issue of sexual assault and that it is a problem worth addressing.

While seminars are a first step, they are by no means a cure to sexual assault on campus. Violence prevention expert Jonathan Katz contends, "A lot of coaches and athletic directors look at these presentations as inoculations, [assuming] that if their players sit through a seminar, then they are somehow immunized against committing violence against women."¹⁶¹ However, like Jeff

¹⁵⁸ Telephone Interview with Jeff O'Brien, Program Director, Mentors in Violence Prevention Program, Northeastern University (Dec. 11, 2002) [hereinafter Jeff O'Brien Interview].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Rosalind Bentley, *No Easy Cure for Sexual Violence*, STAR TRIB. (Minn.), Aug. 19, 2001, at 1B (quoting Jonathan Katz, president of Mentors in Violence Prevention Strategies).

Benedict and Dr. Smith, Katz contends that college seminars might be too late for some troubled individuals who harbor frustrations developed during their prior eighteen years: These “kids bring a lifetime of formation of values and ideas about gender roles, and to think that an hour and a half will transform eighteen years of education is naïve.”¹⁶²

Katz is correct. While seminars might be beneficial in terms of signaling to the team and campus that sexual assault prevention is important, they do not guarantee that this problem will be solved. For example, despite attending extensive training sessions and having access to sophisticated support networks designed to address the issue of sexual assault,¹⁶³ four players at the University of Notre Dame were expelled last summer for allegedly raping a student,¹⁶⁴ while two University of Minnesota players were charged with sexually assaulting a nineteen-year-old woman.¹⁶⁵

B. Accountability: Monitoring Potential Problem Athletes

The University of Minnesota and Notre Dame examples necessitate a reexamination of Benedict's theory,¹⁶⁶ which, if correct, essentially makes the need for seminars futile unless part of a comprehensive sexual assault prevention scheme. According to Benedict, Parham, and Smith, the propensity to commit sexual assault is largely derived from one's psychological make-up and social upbringing.¹⁶⁷ Hence, by the time the university gets to even begin addressing the psychological issues of an eighteen-year-old athlete, it is probably too late, as the propensity to rape has already been established within the perpetrator's character. Accordingly, the university is left with few options once the problematic athlete is on campus.

In order to truly reduce their exposure to Title IX liability, universities should consider instituting a policy of simply not

¹⁶² *Id.* (quoting Jonathan Katz).

¹⁶³ *See id.*; e.g., Haugh, *supra* note 20, at C1 (In April of 2001, Notre Dame began conducting a mandatory workshop entitled, “Men Against Violence.”).

¹⁶⁴ *See* Fosmoe & Haugh, *supra* note 142.

¹⁶⁵ *See* Bentley, *supra* note 161, at 1B.

¹⁶⁶ *See supra* text accompanying notes 128–130, 132–133.

¹⁶⁷ *See supra* text accompanying notes 127–135.

admitting potential perpetrators of sexual assault.¹⁶⁸ Under such a policy, those with histories of sexual assault, or other violent character traits, would not be invited on campus. This would contravene a practice among many universities, which, in seeking gridiron glory, have gambled on “problem” athletes for decades. Accordingly, universities like Michigan State, which recently admitted a football player who had pled guilty to sexually assaulting a thirteen-year-old girl while he was in high school,¹⁶⁹ expose themselves to Title IX liability, as there is no way such an individual can be monitored at all times in all places.

Title IX liability may surface under a theory akin to that of negligent hiring. Similarly, under a theory of negligent recruiting,¹⁷⁰ a university that actively recruits a player with a criminal record and/or history of deviant sexual behavior could also be held accountable for its decision. Although the mere presence of the potential perpetrator on campus does not expose a university to Title IX liability, it certainly increases its risk. For the university to be liable under *Davis*, the player would have to actually harass or assault students while enrolled at the university. The plaintiff would then also need to demonstrate that the university acted with deliberate indifference to the individual’s misconduct while he was on campus.¹⁷¹ Under the theory of negligent recruiting, the Title IX plaintiff would likely be able to demonstrate constructive notice, thereby clearing at least one of the three major hurdles for establishing Title IX liability.

The saga of Lawrence Philips is a case where such a theory under Title IX might have been successful. Lawrence Philips’

¹⁶⁸ In instituting such a policy, a university should be mindful of the need for consistency among the entire student body. Hence, such a policy should not be geared towards student-athletes only, but all students. This would force universities to reconsider their admissions policies and application procedures as well as their standards in athletic recruiting.

¹⁶⁹ Michigan State recently admitted Eric Knott, a star high school tight end, who pled guilty to a misdemeanor fourth degree sexual assault. See Drew Sharp, *In Knott Case, Why Has It Taken So Long to Take a Stand?*, DETROIT FREE PRESS, Sept. 8, 2002.

¹⁷⁰ See Gil B. Fried, *Illegal Moves Off-the-Field: University Liability for Illegal Acts of Student-Athletes*, 7 SETON HALL J. SPORTS L. 69, 82–85 (1997) (advocating the theory of negligent recruiting as a separate tort under which universities may be liable, as opposed to one tied to Title IX).

¹⁷¹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

propensity towards violence became well-established during his years at Nebraska, including one incident where he brutally battered his then-girlfriend, Kate McEwen, and dragged her down a flight of stairs.¹⁷² Nevertheless, despite the fact that Philips was a menace to the University of Nebraska campus, head coach Tom Osborne, who now represents the Third Congressional District of Nebraska,¹⁷³ allowed Philips to continue to play for the Cornhuskers.¹⁷⁴ Osborne characterized Philips' history of violence very simply: "It's not as though Lawrence [Philips] is an angry young man all the time and a threat to society. But there are occasions every four to five months where he become[s] a little bit explosive."¹⁷⁵ More than anything, the Lawrence Philips debacle demonstrates the importance of ensuring that university administrators take responsibility for handling issues of sexual assault involving football players. Any other system compromises the university's mission and exacerbates the common perception that athletes are a protected species of student.

C. Independence and Uniformity: Justice for All

Osborne's tenure at Nebraska, particularly during his twilight years from 1993 to 1995, when his team won two national championships, provides perhaps the most heinous example of the dangers associated with a coach's involvement in the investigation of player misconduct. While coach of Nebraska, Osborne essentially had free reign over the discipline of his players, regardless of the egregiousness of the crimes they committed.¹⁷⁶ Osborne's own assessment of Philips' run-in with the law regarding McEwen exemplifies what *Sports Illustrated* ultimately deemed "prairie justice":¹⁷⁷

Lawrence and I have agreed on what happened, and there's no question—I wouldn't call it a beating—but he certainly did inflict some damage to the young lady. . . . It wasn't a

¹⁷² See Joe Lambe, *Phillips Sued for Assault*, KANSAS CITY STAR, Sept. 4, 1996, at D1.

¹⁷³ See 147 CONG. REC. H4 (2001).

¹⁷⁴ See BENEDICT, *supra* note 118, at 128.

¹⁷⁵ See Fried, *supra* note 170, at 83 (quoting Tom Osborne) (alteration in original).

¹⁷⁶ See BENEDICT, *supra* note 118, at 125–48.

¹⁷⁷ See *Prairie Justice*, SPORTS ILLUSTRATED, Jan. 23, 1995, at 13.

difficult decision [to reinstate Phillips] for me to make. . . . It's like going for two points against Miami in '83. It was something I didn't have to think about.¹⁷⁸

However, like Nebraska's two-point conversion attempt,¹⁷⁹ Osborne's handling of the Philips affair also failed. Perhaps even worse than Osborne's lack of thought is that he should not have been responsible for handling Phillips' discipline. Nebraska administrators, and not a member of the football team's coaching staff—even a legendary one—should have been deciding Phillips' fate. By way of contrast, Notre Dame Head Coach Tyrone Willingham referred to rape allegations involving members of his football team as a university matter, and not one to be handled by himself or the team's assistant coaches.¹⁸⁰

A university simply cannot conduct a fair sexual assault investigation involving a football player if the coach of that player acts as judge and jury. Such a method of pursuing the perpetrators of these crimes risks the student body's confidence in the university; many students do not have complete faith that sexual assault investigations will be handled fairly when the cases involve a member of the football team. According to one University of Colorado student, MacKenzie Rhodes, "I think any university is going to cater to people who are bringing in that much money. . . . It would really improve my confidence if [the University of Colorado would] take this seriously."¹⁸¹ Unfortunately, Rhodes' cynicism may be warranted. Dr. Smith was told at one faculty meeting, "You don't know how bad the problem is," in reference to the preferential treatment afforded athletes on his campus.¹⁸²

It is the alleged inconsistencies in Oklahoma State's student discipline policy that prompted Alison Jennings to make a Title IX

¹⁷⁸ *Id.* at 128–29.

¹⁷⁹ Michael Wilbon, *Nebraska Falls 31-30 on Day of Upsets*, WASH. POST, Jan. 2, 1984, at D1 (describing Nebraska's Orange Bowl loss to the University of Miami as a result of failing to complete a two-point conversion in the final minutes of the game).

¹⁸⁰ See Margaret Fosmoe, *University Student Alleges Gang Rape: Police, Notre Dame Investigate Accusation Against Athletes*, SOUTH BEND TRIB. (Ind.), Apr. 10, 2002, at A2.

¹⁸¹ See Ingold, *supra* note 157.

¹⁸² Dr. Smith Interview, *supra* note 124.

claim against Oklahoma State.¹⁸³ In lieu of monetary damages (at least for the Title IX claim), Jennings is asking the court to enjoin Oklahoma State from continuing to provide athletes preferential treatment regarding allegations of misconduct, including sexual assault. According to Jennings's attorney, "There is a separate policy for athletes as opposed to regular students."¹⁸⁴

Mark Hammons contends that with other students, Oklahoma State employees report instances of sexual assault to the university.¹⁸⁵ "This is not so with athletes," states Hammons, who believes that too much discretion is left to the athletic coach, who can discipline the athlete as he sees fit.¹⁸⁶ According to Hammons, there is, at least, an appearance of impropriety due to this inconsistent policy that is not currently memorialized in any public record.¹⁸⁷ Hammons further contends that leaving an athletic coach in charge of disciplining a student athlete is completely irresponsible in light of "the symbiotic relationship between coaches and athletes that isn't found elsewhere. . . . Athletes themselves are critical to the success of the team, and coaches are judged by wins and losses. That is the bottom line."¹⁸⁸ For Hammons, the "loss of a star running back can have a severely adverse impact on the success of a team. Thus, it's in the coach's best interest to protect his players."¹⁸⁹

A consistent student discipline policy is critical to a university wishing to insulate itself from Title IX liability. Hammons is correct in his assertion that universities that provide preferential treatment for athletes create the appearance of impropriety. Through these policies, universities provide tacit approval, and perhaps even deliberate indifference, toward certain misconduct, particularly misconduct that has been committed by an athlete whose physical talents financially contribute to the university. Accordingly, the university is left with no choice but to ensure that

¹⁸³ Hammons Interview, *supra* note 17.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

all members of the student body—whether a member of the football team, band, or drama club—are afforded equal treatment upon being charged with any crime or act of misconduct.

The ramifications of this prescription are distasteful to many who believe that an athlete charged with rape or sexual assault should *automatically* be suspended from athletic competition until resolution of the case. Kathy Redmond of the National Coalition Against Violent Athletes strongly believes

that as soon as an allegation has been made [athletes] should be suspended pending the outcome. If they play until proven innocent, you will see a manipulation of the court system where [universities] will drag it out until the end of his eligibility. These athletes are so important to a small town and an educational institution that the schools will do anything to keep the athlete playing.¹⁹⁰

Likewise, there are recommendations that the NCAA promulgate an eligibility rule addressing only male student-athletes who commit violent acts against women.¹⁹¹ According to one supporter, in such a rule

a male student-athlete is ineligible to play in any intercollegiate athletic competition if he has been charged with a violent act against a woman. If this rule were promulgated, a male student-athlete who committed a violent act against a woman would be ineligible to play, and the university would be sanctioned if it allowed him to play.¹⁹²

This proposed eligibility rule is problematic for a number of reasons, not the least of which is it violates Title IX by discriminating against male student-athletes. Title IX is principally about gender equity, not gender imbalance. By

¹⁹⁰ See Flores, *supra* note 20, at 43 (quoting Kathy Redmond).

¹⁹¹ Deborah Reed, Note, *Where's the Penalty Flag? A Call for the NCAA to Promulgate an Eligibility Rule Revoking a Male Student-Athlete's Eligibility to Participate in Intercollegiate Athletics for Committing Violent Acts Against Women*, 21 WOMEN'S RTS. L. REP. 41, 43 (1999) (discussing a recommendation by the National Consortium for Academics and Sports).

¹⁹² *Id.*

targeting only male student-athletes, the proposed rule would be antithetical to Title IX's mission. Moreover, the proposed rule fails to address the costs incurred by an athlete falsely accused of a crime. Revoking a student-athlete's eligibility based solely on unfounded allegations is contrary to the ideals of the American system of justice, whereby individuals are innocent until proven guilty. The proposed rule reverses this distinctly American concept so as to ensure that all perpetrators of sexual assault are penalized. While the goal of protecting females from sexual assault is indeed noble, one must question at what expense it can be achieved.

The best method of addressing athletes accused of sexual assault is a simple one: treat them like the rest of the student body. To ensure that there is no appearance of impropriety and to guarantee that all charges of sexual assault are handled properly, a university should have an investigative committee comprised of well-trained university officials, students, and/or faculty members who are prepared to handle allegations of sexual assault, regardless of who the perpetrator is. Similar to a judge or member of the jury, if a member of the committee has a conflict of interest, that member should be removed. This policy ensures that football players are treated like regular students—a novel concept among many athletic departments and universities.

CONCLUSION

In the case of college football, it is not necessarily true that for “whom much is given, much is required.”¹⁹³ For a disproportionate number of the eighty-five scholarship athletes who comprise each of the 117 Division I football teams, it is apparently too much to ask that they abide by society's established mores—weak as they may be—and that they possess the same discipline off the field as on the field.

For universities who condone such misconduct, their recklessness, or at least their indifference, may cost them even more than the disgrace engendered by their players' actions. As a

¹⁹³ *Luke* 12:48 (King James).

result of the Supreme Court's 1999 decision in *Davis*, universities may be liable for millions of dollars more wisely spent on better facilities, more scholarships, or new programs.

Sexual assault by college football athletes has become a serious issue. The cases involving Oklahoma State, the University of Colorado, and UAB demonstrate this far too clearly. What is not so readily apparent is the reasons why this epidemic among Division I universities has spread. While theories abound, there is no simple answer. Hence, we are left wondering not only about the fate of a game dear to the hearts of so many, but also about the fate of Title IX as articulated by A. Bartlett Giamatti: to provide *all* students—the star quarterback as well as the academic recruit—with an equal opportunity to learn, mature, and develop into valuable members of society.¹⁹⁴

¹⁹⁴ See Gerdy, *supra* note 1.